

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/04-01/05

Date: 3 March 2009

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR V. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO,
AND DOMINIC ONGWEN**

Confidential *ex parte* reserved to the Registry

Reasons provided in conformity with the Presidency's "Order concerning Observations of the Registrar of 10 November 2008 in the Application of Mr Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of the Pre-Trial Chamber II of 21 October 2008"

Source : Registrar

Document to be notified in accordance with regulation 31 of the *Regulations of the Court*:

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier D. Preira

Defence Support Section

Mr Esteban Peralta Losilla, Chief

THE REGISTRAR of the International Criminal Court ("the Court"), in conformity with the order of the Presidency dated 27 February 2009¹ is pleased to provide the following observations.

I. BACKGROUND

1. On 21 October 2008, Pre-Trial Chamber II, seized of the case of the *Prosecutor v Joseph Kony et al.*,² delivered a decision initiating proceedings on its own motion under Article 19.1 of the Statute on the admissibility of the case, and pursuant to Regulation 76(1) of the *Regulations of the Court* appointed Mr. Jens Dieckmann (the "Applicant"), a person included in the Court's List of Counsel, as "counsel for the Defence, within the context and for the purposes of the present proceedings" ("Chamber's Appointment");
2. On the same date, by a letter referenced DSS/2008/271, annexed to the present observations, the Registrar executed the aforementioned decision confirming the Applicant's appointment as "counsel for the defence within the context and for the purposes of the proceedings on the admissibility of the case, pursuant to Article 19 (1) of the Rome Statute", and informed him of a series of administrative matters arising from the appointment;
3. On 28 October 2008, the Applicant filed his "[r]equest for review of Counsel's appointment by the Registrar in accordance with Pre Trial Chamber's Decision of 21 October 2008 and request for conditional stay/suspension of the proceedings" before the Presidency;
4. On 7 November 2008, the Presidency ordered the Registrar to "describe the

¹ *Prosecutor v Kony et al*, Case/filing no. ICC-02/04-01/05-373, "Order concerning the Observations of the Registrar of 10 November 2008 in the Application of Mr Jens Dieckmann of 28 October 2008 for judicial review of his appointment by the Registrar as defence counsel, in accordance with the decision of Pre-Trial Chamber II of 21 October 2008", dated 27 February 2009

² *Prosecutor v Kony et al*, Case/filing no. ICC-02/04-01/05-320, "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", dated 21 October 2008.

consultative role played by [her] in the instant appointment, in accordance with regulation 76(1) of the Regulations of the Court, by 4 pm, on 10 November 2008"³;

5. On 10 November 2008, the Registrar furnished the Requested Observations with the classification of "Confidential *ex parte* only available to the Registry" to the Presidency for review and consideration⁴ ("Observations");
6. On 27 February 2009, the Presidency ordered the Registrar to "[...] indicate, and to provide reasons for, what information, if any, contained within the Observations she submits should be kept confidential by 4pm on 4 March 2009"⁵ ("Requested Observations").

II. REASONS FOR THE CLASSIFICATION OF THE REQUESTED OBSERVATIONS

7. The Requested Observations contained herein by their *raison-d'être* and substance will explore reasons and justifications upon which the Registrar made the decision to classify and file the Observations as "Confidential *ex parte*", and as a consequence and of necessity, oblige that the Requested Observations equally be given the same classification until a final decision is rendered by the Presidency on the question of the reclassification of the Observations;

III. REASONS FOR THE CLASSIFICATION OF THE OBSERVATIONS AND INFORMATION TO BE KEPT CONFIDENTIAL

8. In accordance with the Presidency's Order dated 27 February 2009, and Regulation 23 bis 4 of the *Regulations of the Court*, the Registrar submits that two primary reasons governed her decision to classify the Observations dated 10 November 2008 as confidential;

³ *Ibid*

⁴ *Prosecutor v. Kony et al.*, Case/filing no. ICC-02/04-01/05-341-Conf-Exp, "Observations of the Registrar in accordance with the Presidency's "Order concerning the Application of Mr. Jens Dieckmann of 28 October 2008 for judicial review of the decision of Pre-Trial Chamber II of 21 October 2008 and the conditional stay/suspension of the proceedings" dated 7 November 2008", 10 November 2008

⁵ See *supra* note 1, page 3

9. The Registrar respectfully submits that the Observations in question defined an *internal* practice devised and implemented pursuant to Regulation 76.1 of the *Regulations of the Court*, detailing the administrative *modus operandi* in the consultation that took place between the Registry and the relevant Chamber as required by the cited provision. In this regard, the Registrar respectfully refers to pronouncements of the Presidency where its honourable judges confirmed that it is “the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested, including overseeing the scheme of legal assistance by the Court and the determination of matter relating to qualification, appointment or assignment of counsel.”⁶ [emphasis added] The Registrar is of the view that not all internal practices and policies of the Registry (and the Court) need necessarily be made public in every situation and circumstance, including internal practices concerning procedures for the appointment of counsel crafted and put into implementation in accordance with, *inter alia*, Regulation 76 of the *Regulations of the Court*;
10. The Registrar further submits that in view of the fact that Pre-Trial Chamber II was invoked in the procedures in question and in the observations, the Registry deemed it appropriate to classify the document as confidential *ex parte*. The Registrar recalls that the issue to which her observations were sought by the Presidency dealt with the *interlocutory* question of an eventual appointment of counsel by the relevant Chamber – in this case, Pre-Trial Chamber II – and her role in this regard was exclusively limited to pronouncing upon the procedure of consultation as envisaged by Regulation 76.1 of the *Regulations of the Court* as implemented in practice and in the specific case of the appointment of Mr. Jens Dieckmann. The Registrar recalls that the “Registry’s role in the appointment of counsel by Chamber carried out pursuant to Regulation 76 of the Regulations of the Court, beyond the consultative capacity, is one of facilitator and administrator”⁷ and, as such, she can not and

⁶ The Presidency, *Prosecutor v. Thomas Lubanga Dyilo*, Case/filing no. ICC-01/04-01/06-937, 29 June 2007 at para. 16.

⁷ *Supra* note 4 at para. 11.

should not determine *in lieu* of the relevant Chamber whether the information concerning the joint-procedures in place should be rendered publicly available without authorization and involvement of the relevant Chamber. In an abundance of caution, the Registrar favored submitting her Observations on a confidential *ex parte* basis;

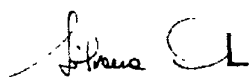
11. The Registrar respectfully submits that, under the circumstances, the act of rendering her Observations as confidential *ex parte* was done with utmost good faith and driven out of a desire to safeguard internal practices of the Registry and the Court from being unnecessarily disseminated and, as such, was not incompatible with the requirements of Article 67.1 of the Statute;
12. Notwithstanding the explanations and factual basis outlined above in support of her decision, should the Presidency still wish to render the Observations public, the Registrar respectfully recommends the following steps and measures to be taken prior to public release:

- (i) The views of Pre-Trial Chamber II on the reclassification of the Observations and the information to be kept confidential ought to be obtained given the Chamber's involvement in the internal procedures delineated in the Observations;
- (ii) Should the document be reclassified as public, the Registrar respectfully requests the following redaction in the public version of her observations:

¶ 10 The Registrar notes, however, that a series of phone calls were made by ~~the Associate Legal Officer assisting the President of Pre-Trial Chamber II~~ to the Chief of the Defence Support Section on 20 October 2008, giving the latter instructions to check the availability of counsel who will be in a position to accept an appointment in the framework of the Situation; the first counsel contacted expressed scheduling difficulties, instructions were then provided by the Chamber to check the Applicant's availability, the latter confirmed his availability. All pertinent communications took place *vis à vis* over the phone ⁸

⁸ *Ibid* at para. 10.

13. The Registrar respectfully submits that in making her decision concerning the classification of the Observations she was, at all material times, guided by the test for sound administrative decision making established by the Presidency;"
14. The Registrar remains at the disposal of the Presidency should further elaborations be required;
15. Done in both English and French, the English version being authoritative.



Silvana Arbia

Registrar

Dated this 3rd Day of March 2009

At The Hague, the Netherlands

[Sceau de la Cour]

⁹ The Presidency has defined the test for judicial review of an administrative decision of the Registrar in numerous decisions, stipulating that "[...] judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached": see decisions of the Presidency, dated 20 December 2005, Case/filing no ICC-Pres-RoC72-02-5 at para 16, and supplemented in its decision of 27 November 2006, Case/filing no ICC-01/04-01/06-731-Conf, at para 24. See also the decision of 10 July 2008, Case/filing no ICC-Pres-RoC72-01-8-10 at para 20.