

**Cour
Pénale
Internationale**

**International
Criminal
Court**

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

Date: 28 October 2005

Original: English

PRE-TRIAL CHAMBER II

Before: Judge Tuiloma Neroni Slade
Judge Mauro Politi
Judge Fatoumata Dembele Diarra

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

PUBLIC DOCUMENT

DECISION ON THE PROSECUTOR'S POSITION ON THE DECISION OF PRE-TRIAL CHAMBER II TO REDACT FACTUAL DESCRIPTIONS OF CRIMES FROM THE WARRANTS OF ARREST, MOTION FOR RECONSIDERATION, AND MOTION FOR CLARIFICATION

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer
Mr Eric MacDonald, Trial Lawyer

1. **PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”), sitting as the full Chamber pursuant to its decision on the 18th day of May 2005;
2. **HAVING RECEIVED** the “Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification” dated the 18th day of October 2005 (the “Prosecutor’s Position and Motion for Reconsideration and Clarification”); and the Prosecutor’s “Sealed Supplement to Prosecutor’s Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification” (the “Sealed Supplement”);
3. **NOTING** article 21, paragraph 2, of the Statute of the Court (the “Statute”);

I. Procedural History

4. On the 9th day of September 2005 the Chamber received the “Prosecutor’s Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief” (the “Prosecutor’s Application for Unsealing”). In this application, the Prosecutor proposed certain redactions to the warrants of arrest (hereafter “the proposed redactions”).¹ The Prosecutor also requested the Chamber to convene a hearing on measures taken by the Office of the Prosecutor (the “OTP”) and the Victims and Witnesses Unit (the “VWU”) with respect to the protection of victims and witnesses in Uganda.²

¹ See Prosecutor’s Application for Unsealing, para. 14.

² *Ibid.*, para. 24.

5. On the 3rd day and on the 6th day of October 2005, the Chamber held status conferences in order to receive additional information and clarification from the OTP and the VWU on the status of protection of victims and witnesses. At the hearings of the 3rd and 6th day of October 2005, the Chamber heard submissions on the proposed redactions to the warrants of arrest.
6. On the 13th day of October 2005, the Chamber rendered its “Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest” (the “Decision on Unsealing”), and ordered that the warrant of arrest for **Joseph KONY**, issued by the Chamber on the 8th day of July 2005, as amended on the 27th day of September 2005 and the warrants of arrest for **Vincent OTTI**, **Raska LUKWIYA**, **Okot ODHIAMBO** and **Dominic ONGWEN**, issued by the Chamber on the 8th day of July 2005, should be redacted in the manner as attached to that decision.
7. On the same day the Chamber ordered that the five warrants of arrest be made public in redacted form. The Chamber further ordered the unsealing of several other documents, specifying the extent to which these documents and their content be made public.

II. Submissions of the Prosecutor

8. In his Position and Motion for Reconsideration and Clarification, the Prosecutor requests the Chamber “to reconsider its decision to redact from the warrants of arrest the dates, locations, and characteristics of the attacks”.³ The Prosecutor submits that, as a “principle of natural justice”, he was “entitled to

³ See Prosecutor’s Position and Motion for Reconsideration and Clarification, Conclusion, p. 7.

be heard on the issue of the redactions being contemplated by the Chamber, before the redactions were ordered"⁴; and that "if the OTP had been asked about the advisability of redacting the dates, places, and characteristics of the attacks from the warrants of arrest, it would have put forth facts known to it and the VWU that may have borne on the Chamber's determination of the 'necessity' of the redactions as a means of ensuring the security of victims, potential witnesses and their families".⁵ In further support of his request, the Prosecutor contends that the redactions carried by the Chamber "impede the OTP's ability to maximise the potential for garnering international support for the execution of the warrants".⁶

9. The Prosecutor additionally requests "clarification" of a matter identified in the Sealed Supplement which "could", in his view, "aid in the OTP's ongoing efforts to garner international support for the execution of the warrants of arrest".⁷

III. Deliberations by the Chamber

10. Before considering the Prosecutor's motions for reconsideration and clarification, the Chamber wishes to address issues relating to the form of the Prosecutor's Position and Motion for Reconsideration and Clarification.

On the form of the Prosecutor's Position and Motion for Reconsideration and Clarification

⁴ *Ibid.*, para. 3

⁵ *Ibid.*, para. 4.

⁶ *Ibid.*, para. 7.

⁷ *Ibid.*, para. 10.

11. The Chamber notes that the Prosecutor presents his submissions in three different formats, namely (1) a “position”, (2) a motion for reconsideration, and (3) a motion for clarification. In the opening paragraphs of his application, the Prosecutor addresses the Chamber by way of a “position” on the Chamber’s Decision on Unsealing, which is referred to as the “OTP’s Position on the Chamber’s Decision to Redact the Dates, Places and Characteristics of the Crimes From the Warrants of Arrest”.⁸
12. This Chamber further notes that in March 2005 before Pre-Trial Chamber I, the Prosecutor made a similar submission when presenting the “Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference”⁹, and that Pre-Trial Chamber I in its decision dated the 9th day of March 2005 declined “to consider the submissions made in the Prosecutor’s Position”, stating that “there [was] no procedural basis for the filing of the Prosecutor’s position”.¹⁰
13. The Chamber wishes to point out in this context that neither the Statute, nor the Rules of Procedure and Evidence (the “Rules”) allow participants to communicate “positions” on Chamber decisions to the Chamber and to have them filed as part of the official record of proceedings. Participants in proceedings before the Court must comply with the procedures provided for in the Statute and the Rules when making submissions to the Chamber. They cannot freely choose the form in which they present their views to the Chamber. Compliance with procedural requirements is necessary, in order to

⁸ *Ibid.*, para. 1.

⁹ See Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, 8 March 2005.

¹⁰ See Pre-Trial Chamber I, Decision on the Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, 9 March 2005, p. 3.

preserve the integrity and transparency of Court proceedings. A “position” is not a procedural remedy under the Statute. If the Prosecutor wishes to make submissions to the Chamber, which shall be part of the official Court record, such submissions must be presented in the form of a proper judicial motion.

14. The Chamber also notes that regulation 23 of the Regulations of the Court (the “Regulations”) stipulates specific requirements for the content of documents. Regulation 23, sub-regulation 1 (d) specifies that “any document filed with the Court shall, as far as practicable, state ... [a]ll relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied on”. The Chamber requires the Prosecutor to comply with this regulation and to clearly set out the legal basis of his submissions in accordance with article 21 of the Statute in all future filings.
15. Further, the Chamber observes that the Prosecutor relies on the case law of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) in his Position and Motion for Reconsideration and Clarification. Regulation 23, sub-regulation 3 of the Regulations specifies that “a participant shall file, with each document, copies of any authorities relied upon or, if appropriate, internet links”. The Chamber requires the Prosecutor to comply with this regulation in the context of all future filings.

On the Prosecutor’s motion for reconsideration

16. As set out above, there is no basis in the Statute, the Rules or the Regulations for a participant in the proceedings before the Court to submit a “position” aimed at instigating amendment or review of a Chamber’s decision.

Moreover, the Prosecutor's submissions make it clear that the elements substantiating such a "position" are in fact arguments put forward in support of the Prosecutor's motion for reconsideration.

17. The Prosecutor purports to have been denied an opportunity to provide his views as to the redactions of the warrants of arrest prior to the redactions being ordered by the Chamber and therefore asks the Chamber to "reconsider" the issue of redactions in the light of the information and remarks contained in the submissions dated the 18th day of October 2005. In submitting such a motion, the Prosecutor relies exclusively on decisions in which the ICTY and the ICTR had entertained reconsideration, apparently on the assumption that such decisions are of relevance in proceedings before this Court. Therefore, the Chamber considers it necessary and appropriate to determine (i) whether a "motion for reconsideration" is provided for in the Court's procedural framework and (ii) if not so provided, whether the admissibility of such motion might be inferred from the case law of the *ad hoc* tribunals.
18. The instruments governing the Court's procedure make no provision for such a broad remedy as an unqualified "motion for reconsideration". Review of decisions by the Court is only allowed under specific circumstances, explicitly provided in the Statute and the Rules. Suffice it to mention here article 15, paragraph 5, of the Statute, allowing the Prosecutor to request the Pre-Trial Chamber to review its denial of authorisation of the investigation, based on new facts or evidence regarding the same situation; article 19, paragraph 10, of the Statute, allowing the Prosecutor to request a review of a decision of inadmissibility of a case when satisfied "that new facts have arisen which negate the basis on which the case had been previously found inadmissible";

article 61, paragraph 8, of the Statute, allowing the Prosecutor to request the Chamber to confirm a charge which had originally not been confirmed, based upon additional evidence; rule 118, sub-rule 2, of the Rules, allowing the person concerned or the Prosecutor to request the Pre-Trial Chamber to review its ruling on the release or detention of such person; rule 125, sub-rule 3, of the Rules, allowing the Prosecutor to request the Chamber to review its decision not to hold a hearing on the confirmation of the charges in the absence of the person concerned; rule 135, sub-rule 4, of the Rules, allowing the prosecution and the defence to request a review of the determination that the accused is unfit to stand trial. Outside such specific instances, the only remedy of a general nature is the interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1 (d) of the Statute (on which see *infra*, sub paragraph 20).

19. As to the relevance of the case law of the *ad hoc* tribunals, the matter must be assessed against the provisions governing the law applicable before the Court. Article 21, paragraph 1, of the Statute mandates the Court to apply its Statute, Elements of Crimes and Rules of Procedure and Evidence “in the first place” and only “in the second place” and “where appropriate”, “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”. Accordingly, the rules and practice of other jurisdictions, whether national or international, are not as such “applicable law” before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the Court’s procedural framework remedies other than those enshrined in the Statute.

20. As stated, outside the specific instances where the Statute and the Rules vest the right to seek review in one or more of the participants, the only remedy of a general nature is an interlocutory appeal against decisions other than final decisions, as set forth in article 82, paragraph 1 (d) of the Statute. In its “Decision on [the] Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58”, dated the 19th day of August 2005, this Chamber outlined the principles underlying this provision. It was pointed out that, within the Court’s system, interlocutory appeals were meant as a restrictive remedy, as such admissible only under the limited and very specific circumstances stipulated in article 82, paragraph 1 (d), of the Statute¹¹, within a five-day time-limit and subject to the need for the appeal to be authorised by the Chamber having issued the decision (rule 155, sub-rule 1, of the Rules).
21. As made apparent by the title and content of his submissions dated the 18th day of October 2005, the Prosecutor chose not to avail himself of the remedy set forth under article 82, paragraph 1 (d), of the Statute, but instead to present his submissions in a different form. As stated above, this different form, whether presented under the heading of “position” or as a “motion for reconsideration”, has no legal basis in the Court’s procedural framework. The need for a participant to raise its concerns regarding a Chamber’s decision “in accordance with the procedural mechanism provided for” in the Statute, the Rules and the Regulations, ie in accordance with article 82, paragraph 1 (d), of the Statute, has been highlighted in Pre-Trial Chamber I’s decision dated the 9th day of March 2005.¹² On that occasion, Pre-Trial Chamber I held that a

¹¹ See Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58, 19 August 2005, para. 16.

¹² Pre-Trial Chamber I, Decision on the Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference, p. 2.

participant's failure to avail itself of the proper procedural mechanism in compliance with all relevant rules would be tantamount to that participant waiving its right to have its concerns regarding a given decision considered by the Chamber¹³. Such a result cannot be prevented by a mere statement by the participants claiming that no waiver was intended.

22. More specifically, the Chamber wishes to highlight that to entertain a motion for reconsideration in these specific circumstances would undermine the five-day time-limit set for leave to appeal under rule 155. In its "Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155" dated the 18th day of July 2005 ("Decision on Clarification"), the Chamber has already held that this time-limit is not variable.¹⁴ By raising his concerns in the form of a Position and Motion for Reconsideration and Clarification, the Prosecutor effectively proposes to create an opportunity to review a Chamber decision after the deadline stipulated in rule 155, sub-rule 1 of the Rules. It would seem that the Prosecutor seeks to introduce a procedure, whereby he would first request the Chamber to reconsider its decision, while then reserving his "right to seek appellate review, if necessary, in relation to any future decision made by the Chamber in relation to this matter".¹⁵ To allow such a possibility of review would indeed "render the stipulated time-limit ineffective"¹⁶ and create "procedural uncertainty....contrary to the objective of ensuring fair and expeditious proceedings".¹⁷

¹³ *Ibid.*, at 3.

¹⁴ See Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit enshrined in Rule 155, 18 July 2005, p. 7.

¹⁵ See Prosecutor's Position and Motion for Reconsideration and Clarification, p. 6, footnote 2.

¹⁶ See Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155, p. 7.

¹⁷ *Ibid.*

23. It might be added that allowing the Prosecutor or any other participant in the proceedings to disregard the specific procedural basis of the Statute would inevitably result in defeating the Statute's prescriptive approach towards remedies before the Court and thereby significantly disrupt the procedural mechanism as devised in the Court's constitutive instruments. In the view of the Chamber, such result would not only be contrary to the letter and spirit of the statutory texts, but would also result in weakening the predictability of proceedings before the Court and therefore lead to undesirable practical results.
24. In view of the above, the Chamber will not consider the submissions made in the context of the Prosecutor's motion for reconsideration; this is without prejudice to its functions and powers, in particular under article 57, paragraph 3 (c), of the Statute, taking into account the unpredictability of the security environment in Uganda and the need to ensure to the fullest extent possible the safety and protection of victims and witnesses.

On the Prosecutor's Motion for Clarification

25. The Prosecutor also requests clarification of an additional matter identified in the Prosecutor's Sealed Supplement. The Chamber recalls in this context that in its Decision on Clarification, it held that a procedure for a motion for clarification is not provided for in the Statute, the Rules or the Regulations.¹⁸
26. The Chamber further recalls that in its Decision on Unsealing, it clearly identified which documents were to be unsealed and be made public, including details as to the extent to which such unsealing was to be ordered

¹⁸ See Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155, p. 2.

for each document mentioned. At paragraph 31 of its Decision on Unsealing, the Chamber reserved its decision on the unsealing of other documents until further order by the Chamber. Accordingly, the Chamber will consider submissions contained in the Prosecutor's Position and Motion for Reconsideration and Clarification and the Sealed Supplement in the context of any future decision on the unsealing of documents not already mentioned in the Decision on Unsealing. Until such time, the Chamber recalls the obligation to comply with any order of the Court and to not disclose any information currently under seal.

27. In view of the above, the Chamber will not consider the submissions made in the context of the Prosecutor's motion for clarification.

FOR THESE REASONS,

PRE-TRIAL CHAMBER II HEREBY:

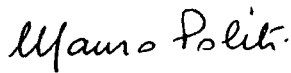
REJECTS the Prosecutor's "Position on the Decision of Pre-Trial Chamber II To Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification";

RESERVES its decision as to the unsealing of other documents not already dealt with explicitly in the Decision on Unsealing.

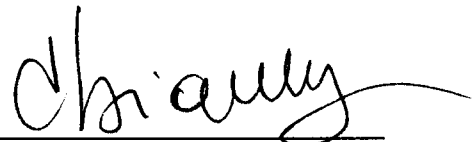
Done in both English and French, the English version being authoritative.



Judge Tuiloma Neroni Slade
Presiding Judge



Judge Mauro Politi



Judge Fatoumata Dembele Diarra

Dated this 28th day of October 2005

At The Hague, The Netherlands

Seal of the Court