Cour Pénale Internationale

International Criminal Court

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

Date: **14 November 2005**

Original: **English**

PRE-TRIAL CHAMBER II

Before: **Judge Tuiloma Neroni Slade, Presiding Judge**

Judge Fatoumata Dembele Diarra

Judge Mauro Politi

Registrar: **Mr Bruno Cathala**

SITUATION IN UGANDA

Case 01/05

Public Document

Update of Proposed Treatment of All Relevant Documents of the Record and Application for Entry of Reasons for Sealing into Public Record

The Office of the Prosecutor	
Mr. Luis Moreno Ocampo, Prosecutor Mrs. Fatou Bensouda, Deputy Prosecutor Ms. Christine Chung, Senior Trial Lawyer Mr. Eric MacDonald, Trial Lawyer	

The Prosecutor respectfully submits this update of its proposed treatment of all relevant documents of the record of the situation and of the case. The Prosecutor also respectfully requests Pre-Trial Chamber II, once it has determined whether to maintain sealing or redactions, to enter into the public record the reasons for any sealing or redaction of any document of the record of the situation or of the case.

Proposed Treatment of Submissions, Transcripts and Decisions That Are Currently Under Seal

A. Procedural history

1. By Application dated 9 September 2005,[1] the Office of the Prosecutor ("OTP") requested the unsealing of certain documents including warrants of arrest previously issued by this Chamber.

2. In its Decision On The Prosecutor's Application for Unsealing Of The Warrants Of Arrest, dated 13 October 2005 (hereinafter the "Initial Unsealing Decision"), this Pre-Trial Chamber decided to unseal the warrants of arrest, and in the case of a large number of documents to disclose only their existence, and for some other documents also their content but to the limited extent that such content is mentioned in the Initial Unsealing Decision or in other decisions referred to in paragraph 28 of the Initial Unsealing Decision.[2]

---

[1] "Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief," dated 9 September 2005.

[2] See paras. 29 and 30 of the "Decision On The Prosecutor's Application for Unsealing Of The Warrants Of Arrest," dated 13 October 2005.

3. In its Decision to Unseal Further Documents of the Record, dated 2 November 2005 (hereinafter the "Second Unsealing Decision"), the Pre-Trial Chamber further unsealed documents fully or in part. The Pre-Trial Chamber decided to convene a status conference, to be held on 17 November 2005, with a view to considering matters related to the treatment of those documents of the record of the situation and of the case which remain under seal, whether as to their existence or to their content (*See* Second Unsealing Decision, para. 16). The Pre-Trial Chamber also requested the Prosecutor "to submit, prior to the hearing, an update of proposed treatment of all relevant documents of the record of the situation and of the case" (*Id.*, para. 17).

B. Update of proposed treatment of sealed documents

4. The OTP is submitting, in a separate sealed filing, a chart detailing the proposed treatment of any document that: (1) has not yet been treated by the Pre-Trial Chamber in its Initial or Second Unsealing Decisions; or (2) post-dates 14 September 2005 and is currently sealed, whether in whole or in part. The OTP is submitting this chart (hereinafter "Annex A") under seal since the submissions, transcripts, and decisions being referred to are currently under seal and also because the OTP is proposing the continued confidentiality of certain documents (while requesting in all cases that at a minimum the existence of the document be disclosed) based on reasons it specifies in the Annex.

C. Application for Specification in Advance of 17 November 2005 Hearing

5. The OTP respectfully requests that, to aid the OTP in focusing attention and preparation on documents and issues likely to be of interest to the Chamber, the Chamber provide some specification of the documents and/or issues the Chamber is likely to raise at the hearing on 17 November 2005. Because there is a large volume of documents and issues which potentially could be discussed, any further guidance the Chamber may be in a position to provide would greatly facilitate the OTP's ability to be responsive to the Chamber's inquiries, particularly if the Chamber expects to raise issues not yet raised in prior hearings.

Application For Pre-Trial Chamber II To Make Public The Reasons For Any Continued Sealing Or Redaction of All Documents of The Record of The Situation And of The Case

6. The OTP respectfully requests that once the Chamber concludes the process of treating the currently sealed documents, it enter into the public record the reasons for any continued sealing or redactions, to the extent it has not already done so.

7. The OTP notes that to date, this request has not been necessary or appropriate. During the periods in which the sealed warrant application was *sub judice*, and later when warrants of arrest had been issued by the Pre-Trial Chamber but remained sealed, all orders to seal were justified at least in part because the sealed document related to the application for warrants which the Chamber was considering or to sealed warrants of arrest. The OTP requested these orders to seal. It is only now, following

the granting of the application to unseal the arrest warrants, that it has become necessary for the Chamber to undertake the re-examination currently underway: a consideration of whether to unseal further documents and information, now that the warrants of arrest are public. Because sealing and redactions can no longer be justified on the ground of relatedness to sealed warrants of arrest, any continued sealing or redactions must now be supported by new justifications. The OTP therefore requests that the Chamber make public, once the re-examination is completed, the reasons for any continued sealing or redactions.

8. The legal regime of the ICC presumes the public nature of court proceedings and documents. Article 64 (7) of the Statute provides that: "the trial shall be held in public," while permitting that "special circumstances" may justify "that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence."[3]

[3] The Rule reflects the internationally recognised presumption that matters before a court are public unless a justification exists for confidential or secret treatment. The European Court of Human Rights has stated that "By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1) namely a fair trial." *Axen v. Federal Republic of Germany,* No. 8273/78, [1983] ECHR 14, 8 December 1983, at para. 25. The statutes of the *ad hoc* and hybrid tribunals also make mandatory the presumption of openness in international criminal proceedings. See ICTY Statute, Art. 20(4); ICTR Statute, Art. 19(4); SCSL Statute, Art. 17(2).

The OTP is only referring, in the present application, to the rules, case-law and practice of International Tribunals that operate under very similar provisions governing the administration of documents and/or hearings. The applicability of the jurisprudence of international Tribunals is supported by Article 21 of the Rome Statute and its drafting history. In the Report of the International Law Commission on the work of its forty-fifth session (3 May-23 July 1993) it was stated (regarding the equivalent provision to now article 21(1)(b), which at that point read "applicable treaties and the rules and principles of general international law") at page 111 that "[...]it is also understood that the expression 'rules and principles of general international law' includes 'General principles of law', so that the Court can legitimately have recourse to the whole

9. Rule 15 of the Rules of Procedure and Evidence of the ICC provides that documents[4] and information relating to a case are to be available to the public, subject to the exception of non-disclosure where so ordered by a Judge or Chamber. The Rule states: "1. The Registrar shall keep a database containing all the particulars of each case brought before the Court, *subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data.* Information on the database shall be available to the public in the working languages of the Court" (our italics).[5]

---

corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty." The same comments can also be found in the Report of the International Law Commission on the work of its forty-sixth session (2 May-22 July 1994). As one commentator has noted, given the special characteristics of international criminal law (including here both its substantive and procedural dimensions), "one should set great store by national or international judicial decisions. They may prove of crucial importance not only for ascertaining whether a customary rule has evolved, but also as a means for establishing the most appropriate interpretation to be placed on a treaty rule" (A. Cassese, *International Criminal Law*, 2003, p. 37). The OTP notes that this Chamber has resorted to the applicable jurisprudence of other International Tribunals related to a provision in essence identical to the one that the Chamber was interpreting. See "Decision On 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" (ICC-02-04-01/05-20-US), dated 19 August 2005.

[4] Regulation 22 of the Regulations of the Court provides that "the term document shall include any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court."

[5] International courts and the *ad hoc* and hybrid tribunals also have similar rules and regulations providing for the public nature of proceedings and documents. See Rule 33 of the Rules of Court of the ECHR; Article 30(1) of the Rules of Procedure of the Inter-American Court of Human Rights; Rule 36 of the Rules of Procedure and Evidence of the ICTY and ICTR; finally see also Rules 36 and 53 of the Rules of Procedure and Evidence of the SCSL. The presumption of the public nature of documents is also reflected in the Draft Regulations of the Registry of the ICC which provide at Regulation 18 that "documents, material, orders and decisions shall in general be available to the public electronically."

The presumption is not limited to hearings, for as was held by the Trial Chamber in *Prosecutor* v. *Brdanin* "[...] there is a public interest in the workings of courts generally [...] not just in the hearings, but in everything to do with their working – which should only be excluded if good

10. The ICC basic documents also reflect the requirement that when the Chamber finds in the exceptional circumstance that sealing or confidentiality is necessary, reasons for the sealing or confidentiality should be publicly stated. Regulation 20 of the Regulations of the Court, entitled "Public Hearings," provides that "hearings are to be public, unless provided otherwise or so ordered by the Chamber." In addition, the rule directs that "When a Chamber orders that certain hearings be held in closed session, the Chamber shall make public the reasons for such an order.[6] Under the regulation, when the reasons for closure "no longer exist," the Chamber may order the disclosure of all or part of the record of the closed hearing.[7]

---

cause is shown to the contrary [...]." See *Prosecutor* v. *Radoslav Brdanin and Momir Talic*, IT-99-36/1, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

[6] As was stated by the Trial Chamber in *Prosecutor* v. *Issa Hassan Sesa, Morris Kallon and Augustine Gbao* "[A]s a matter of general principle, all documents filed before the Special Court should be public, unless a cogent reason is offered to the contrary." See *Prosecutor* v. *Issa Hassan Sesa, Morris Kallon and Augustine Gbao*, SCSL-04-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, at para. 19; the principle was followed in the same case, see Kallon-Decision On Confidential Motion On Behalf of Morris Kallon, 11 October 2004, at para. 16.

The requirement stems from several sources. The identification of reasons ensures, as already discussed, that the Chamber has found the need for confidentiality to be proportional to the end sought, such that the ordinarily public nature of proceedings is not unnecessarily infringed. In addition, a statement of reasons ensures that the decision of the Chamber is sufficiently specific to permit appellate review. See *Hirvisaari* v. *Finland*, No. 49684/99, [2001] ECHR 559, 27 September 2001, at para. 30. Finally, there is the general obligation of the Chamber to provide a "reasoned decision" as to any litigated matter. *Ibid;* see also *Prosecutor* v. *Anto Furundzija*, IT-95-17/1-A (Appeals Chamber), 21 July 2000, at para. 69.

[7] Generally, protective measures may only be entered following a judicial determination that the need for the measure outweighs the presumption of openness and that the measure is the least restrictive that adequately addresses the risk. The Trial Chamber in *Prosecutor v. Milosevic* stated that "the Trial Chamber will, for example, only order closed session under Rule 79 in circumstances where it is shown that the risk to the witness is sufficiently founded and that no other less restrictive protective measure can adequately deal with that risk." See *Prosecutor* v. *Slobodan Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, at para. 5. The requirement of a statement of

11. Sealed Annex A makes clear that the OTP is requesting confidentiality in numerous cases. In each case where the OTP has requested continued sealing or redaction, the OTP has also identified a specific basis for the sealing: 1) the information describes or refers to victim and witness protection measures, which if made public, could be rendered less effective (*i.e.*, Articles 68(1) and 57(3)(c)); 2) public disclosure of the information could jeopardise ongoing investigations or cooperation in ongoing investigations (*i.e.*, Article 54(3)(f) and Rule 81(2))[8]; or 3) the information was furnished in confidence and cannot be publicly disclosed without the consent of the provider (*i.e.*, Article 54(3)(e) and Rule 82(1)).[9] For the Chamber's convenience, the OTP has included in the separate, sealed filing, a chart (hereinafter "Annex B") in which is identified each of the rationales advanced by the OTP for any continued sealing or redactions it has requested from the Chamber, with respect to all

---

reasons supporting closure or sealing, as set forth in Regulation 20, has also consistently been acknowledged and complied with in the other international criminal tribunals. See *Prosecutor* v. *Slobodan Milosevic*, IT-02-54-T, Decision on Prosecution Motions to Call Additional Witnesses and for Order for Protective Measures, 21 June 2002; see also *Prosecutor* v. *Dario Kordic and Mario Cerkez*, IT-95-14/2, Order for a Closed Session, 9 January 1999; see also *Prosecutor* v. *Samuel Hinga Norman*, SCSL-2003-08-PT, Decision on the Prosecutor's Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 23 May 2003; see also *Prosecutor* v. *Alfred Musema*, ICTR-96-13-T, Decision on the Prosecutor's Motion for Witness Protection, 20 November 1998.

[8] See similar Rule 66(c) of the Rules of Procedure and Evidence of the ICTY and ICTR as applied in *Prosecutor* v. *Ferdinand Nahimana, Hassan Ngeze and Jean Bosco Barayagwiza*, ICTR-99-52-I, Decision on the Prosecutor's Application for Continued Temporary Redaction of One Portion of the Transcripts of a Witness X Pursuant to Rule 66 (c) of the Rules of Procedure and Evidence, 6 February 2002, where the Trial Chamber ordered the continued temporary redaction of one portion of the transcript of a witness statement on the basis that disclosure would be prejudicial to an ongoing and crucial investigation.

[9] See *Prosecutor* v. *Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, SCSL-04-14-T, Decision on Prosecution Application for a Closed Session for Witness TF-218, 15 June 2005, where the Trial Chamber heard a witness in closed session since he had sensitive and confidential information which he allegedly obtained in the course of the performance of his official functions.

submissions, transcripts, or decisions that have been any part of this proceeding to date.

CONCLUSION

12. The Prosecutor respectfully submits the update requested by the Pre Trial Chamber II in the Second Unsealing Decision and respectfully requests Pre-Trial Chamber II, once it has completed considering the treatment of documents, to make public the underlying reasons for any continued sealing or redaction of documents of the record of the situation and of the case.

Luis Moreno Ocampo
Prosecutor

Dated this 14th day of November, 2005

At The Hague, The Netherlands