

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/04-01/05
Date: 8 February 2007

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Single Judge

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR

***vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT
ODHIAMBO and DOMINIC ONGWEN***

URGENT

Public Document

Prosecution's Application To Attend 12 February 2007 Hearing

The Office of the Prosecutor

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

Ad Hoc Defence Counsel

Ms Michelyn C. St-Laurent

Preliminary Statement

The Office of the Prosecutor ("OTP") respectfully requests that it be permitted to attend the hearing scheduled to take place on 12 February 2007.

Procedural Background

1. Yesterday, at 17:03 hours, the OTP and ad hoc defence counsel were notified that the Single Judge had issued a decision entitled "Decision on 'Request to access documents and material', and to hold a hearing *in camera* and *ex parte*."¹ The OTP and *ad hoc* defence counsel received only a redacted version of the Single Judge's decision.²
2. The redacted decision recounts that the Office of Public Counsel for Victims ("OPCV") had filed, two days previously, an application on an *ex parte* and confidential basis which requested access to: (1) the index of the records of the situation and of the case; and (2) unredacted versions of the arrests warrants in the case. As described in the redacted decision, the OPCV also requested that the Chamber identify and order the disclosure to it of any confidential or under seal document and/or material which the Chamber determined to be necessary to disclose to the OPCV.³

¹ ICC-02/04-01/05-152 (public redacted).

² *See id.*

³ *See id.*, page 2.

3. The OTP and *ad hoc* defence counsel were not notified of the OPCV filing, either by OPCV or after filing by the Single Judge, and have not to date been provided with any copy, even in redacted form.

4. The decision of yesterday's date granted the OPCV's request for unredacted versions of the warrants of arrest.⁴ The redacted decision denied the other requests, but the Single Judge simultaneously scheduled an *ex parte* and in camera hearing to take place on 12 February 2007, attended solely by the OPCV, to discuss "in what way and to what extent access by the OPCV to documents or material other than public included in the record of the situation and/or of the case would be instrumental to the tasks entrusted to the Office by the Decision at this stage."⁵

5. It is a matter of the record of the case that to the extent material remains sealed or has been publicly disclosed in public form, even following a series of decisions to unseal previously sealed information, the continued non-disclosure is as a result of requests made often jointly by the OTP and the VWU to protect the interests of victims and witnesses, under Art. 68(1), or by the OTP to protect the ongoing investigation, under Rule 81(2).

⁴ See *id.*, page 5.

⁵ See *id.*, page 6.

Application to Attend the 12 February 2007 Hearing

6. It is respectfully submitted that the OTP should be permitted to attend the hearing scheduled for the 12 February 2007, because OTP interests are implicated and there has been no reasoned explanation for its exclusion.

7. Thus far both the OTP and *ad hoc* defense counsel have been deprived of any opportunity to be heard with respect either to the matters already determined by the decision or to those which will be discussed at the upcoming hearing. Neither the OTP nor *ad hoc* defence counsel was notified of the OPCV filing of 5 February 2007 until after the decision was already rendered. The decision itself, other than noting in a footnote that the OPCV Request was made on a confidential and *ex parte* basis,⁶ contains no explanation of why the Single Judge accepted the filing without making known to the parties any part of the content of the Request, nor even the fact of the filing, when the Request was submitted. The Appeals Chamber of this Court, in the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", has: (1) was made aware of the practice Pre-Trial Chamber I to inform the participants of "the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application" (2) expressed that it had no objection to this practice; and (3)

⁶ See *id.*, n.2.

ruled even that in exceptional cases when such notification is not given the application must be determined “on its own specific facts and consistently with internationally recognized human rights standards”⁷

8. There is no description in the decision of yesterday’s date, even in general terms, of what aspect of the OPCV request necessitated its sealing (either from the OTP or *ad hoc* defence counsel), nor what provisions of the Statute or rules the OPCV invoked to justify the *ex parte* confidential filing. Nor is there any reasoned decision as to whether measures less extensive than non-disclosure of the request of the OPCV, *in toto*, and non-disclosure even of the fact of the request, have been considered by the Single Judge. As was re-called to the Single Judge’s attention in a filing by the OTP earlier this week,⁸ the Appeals Chamber also recently has stressed the need for reasoned and sufficient decisionmaking by the Pre-Trial Chambers, based in the facts, in the context of ordering non-disclosure to the parties.⁹

⁷ See Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence” (public document), ICC-01/04-01/06-568, 13 October 2006, paras. 66-67.

⁸ See ICC-02/04-01/05-150.

⁹ See Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-773 (OA 5), 14 December 2006, para 30; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ICC-01/04-01/06-774 (OA 6), 14 December 2006, para 20.

9. As a result of the non-notification, the OTP (and *ad hoc* defence counsel) were deprived of an opportunity to be heard on the matters determined by the decision. The Chamber's authority to order a measure does not relieve it of the "normal duty of a judicial body first to hear a party whose rights can be affected by a decision to be made." See *Prosecutor v. Jelusic*, ICTY Judgement on Appeal, 5 July 2001, para. 27.¹⁰

10. Here, it is clear that the OTP's rights could have been affected, insofar as the information sought by the OPCV includes information which the OTP has sought to protect, in large part as a means of exercising its statutory obligation to protect the security and well being of victims and witnesses, but also to ensure that the ongoing investigation is not impaired. The OTP is indeed uniquely situated to assess: (1) the potential effect of disclosure which could encompass information relating to victims and witnesses whose circumstances are entirely known to the OTP but not to the Chamber or to the OPCV; (2) potential prejudice to the OTP's ongoing investigation of the disclosure of information, including information furnished solely to the OTP under Art. 54(3)(e). The complexity of the considerations that can come into play when considering disclosing material previously protected under either Art. 68(1) or Rule 81(2) is apparent from the fact that repeated unsealing applications made by the OTP, for the purpose of promoting

¹⁰ The OTP has previously submitted briefing to this Chamber on the principle of judicially provided notice and an opportunity to be heard. See, e.g., 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, ICC-02/04-01/05-58, 18 October 2005, paras. 3-4.

the transparency of these proceedings, have taken well over a year for the Chamber, and for the Single Judge later appointed to manage the unsealing process, to resolve.¹¹

11. The decision of yesterday's date additionally contains no explanation of why the decision has been released to the OTP and the *ad hoc* defence counsel in redacted form. There is also no consideration of whether measures less extensive would have sufficed to meet the need for confidentiality, which is itself not described.
12. With respect to the upcoming hearing, the OTP respectfully submits that it is legally insufficient for the redacted decision to recite, as a basis for continuing the consideration of the OPCV request in an *ex parte* and confidential hearing, that an *inter partes* or public hearing would entail "the disclosure of sensitive and confidential information."¹² In light of the presumption of open proceedings, a generic recital of this nature cannot be deemed to justify the closing of entire hearings and court proceedings without permitting the exception to become the rule.
13. Because the decision of yesterday's date deprived the OTP, as a party in interest, of the opportunity to be heard, without advancing any reason for the non-disclosure of the OPCV's filing to the OTP and/or *ad hoc* defence counsel, the OTP requests: to be afforded an opportunity to be

¹¹ See ICC-02/04-01-05-135, the latest decision responding to unsealing applications first filed in September 2005 and May 2006.

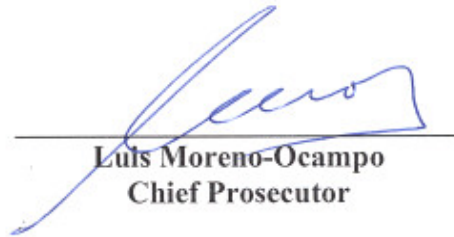
¹² See ICC-02/04-01/05-152 (public redacted), page 5.

heard, at the upcoming hearing, based on any material which ordinarily would be made available to the parties, excepting material deemed through reasoned decisionmaking to be deserving of protection under the Statute and rules.

14. It is important to note that the OTP does not expect to have disagreement with the OPCV about materials that might or might not be relevant to its work. However, the ability of the OTP to ensure that the Chamber, and the OPCV, are aware of any information in the OTP's possession which might bear upon the safety and interests of victims and witnesses – especially in light of the OTP's unique possession of information relating to victims, witnesses, and the current security – is vital to the ability of the OTP and the Court as a whole to serve the common and paramount interest of ensuring adequate protection for victims and witnesses. No interest of a victim or witness should be compromised because of unwarranted, overly broad, or insufficiently explained secrecy among the sections of the Court. The OTP interests which could be affected were it to be deprived of an opportunity to be heard regarding any possible impairment of an ongoing investigation are also far from theoretical.

Conclusion

For all of the foregoing reasons, the OTP respectfully requests to attend the hearing scheduled to take place on 12 February 2007.



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 8th day of February 2007
At The Hague, The Netherlands