

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original : English

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

Date: 9 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
v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO,
RASKA LUKWIYA, DOMINIC ONGWEN**

**PUBLIC
URGENT**

**OPCV Observations on the "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* Counsel for the Defence**

Ms. Michelyne C. St-Laurent

Office of Public Counsel for Victims

Mrs. Paolina Massidda

Introduction

1. On 22 November 2006, Judge Mauro Politi has been designated as Single Judge on Victim's Issues by the Pre-Trial Chamber II¹ seised of the Situation in Uganda² and, consequently, of the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*.
2. On 1st February 2007, the Single Judge rendered the "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", where he requested the Office of Public Counsel for Victims (the "OPCV" or the "Office") "*to provide the Applicants with any support and assistance which may be necessary or appropriate at this stage of the proceedings*".³
3. In compliance with the Decision of 1st February 2007, the Office filed, on 5 February 2007, a "Request to access documents and material" (the "Request"), asking the Single Judge to be granted access to some documents and material contained in the situation and /or case records.⁴
4. On 7 February 2007, the Single Judge issued the "Decision on request to access documents and material", and to hold a hearing *in camera* and *ex parte*" (the "Decision") partly granting the motion⁵.

¹ Document No. ICC-02/04-01/05-130 (Original: English). See also: the "Decision on the Prosecutor's urgent application dated 26 September 2005", 27 September 2005, Document No. ICC-02-04-01-05-27 (Original: English); the "Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005", Document No. ICC-02-04-01-05-53 (Original: English); and the "Decision on the Prosecutor's Application for unsealing of the warrants of arrest", 13 October 2005, Document No. ICC-02-04-01-05-52 (Original: English).

² Situation in Uganda, Situation No. ICC-02/04, Decision assigning the situation in Uganda to Pre-Trial Chamber II (Presidency), 5 July 2004, Document No. ICC-02/04-1 (Original: English).

³ Document No. ICC-02-04-01-05-134 (Original: English). See para. 13.

⁴ Document No. ICC-02-04-01-05-149-Conf-Exp. This motion was filed as "Confidential, *Ex Parte*, OPCV only, Urgent".

⁵ Document No. ICC-02/04-01/05-152 (Original: English). The unredacted version of the decision bears the reference number ICC-02/04-01/05-151-Conf-Exp. This later document being confidential and *ex parte* OPCV only and VPRS, the Office will based its argument in this submission solely on the public and redacted version.

5. In the Decision, the Single Judge, *proprio motu*, also called the Office and the Victims Participation and Reparations Section (the “VPRS”) for an *ex parte* and *in camera* hearing to be held on 12 February 2007 to discuss matters which are partly redacted in the public version of the Decision.
6. On 8 February 2007, the Prosecutor filed his “Application To Attend 12 February 2007 Hearing”⁶ (the “Application”) in which he challenges the confidential and *ex parte* nature of the Request and of the Decision. The Prosecutor further requests to be permitted to attend the hearing to ensure that his interests would not be affected in the course of the decision on the request to access documents and materials.
7. The Office wishes to make the following observations.

A. Legal Basis for the OPCV to File Observations on the Application

8. In the Decision of 1st February 2007, the Single Judge has entrusted the Office to provide support and assistance to the 49 applicants for participation in the Situation in Uganda and in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen*⁷.
9. In the same decision the Single Judge recognised that “*the mandate vested in the OPCV by the Regulations [of the Court] also encompasses forms and methods of assistance to victims which fall short of legal representation*”⁸, particularly emphasising the possibility for the Office to appear before the Chamber in respect of specific issues, in accordance with regulation 81 of the Regulations of the Court.
10. The Office argues that the hearing convened by the Single Judge falls precisely under this possibility and therefore, being a full participant to this procedure,

⁶ Document No. ICC-02/04-01/05-153 (Original: English).

⁷ See Para. 13 and the operative part of the Decision.

⁸ *Idem*.

the OPCV is entitled, at the minimum, to submit observations on the Application to the extent that such observations are limited to the issues raised by the Prosecutor in his motion.

11. Furthermore, the Office argues that by virtue of the Single Judge Decision dated 1st February 2007, the OPCV is under the obligation to provide support and assistance to the 49 applicants in any form it considers necessary and/or appropriate at this stage of the proceedings.
12. The Office considers that the interests of the victims it was requested to assist are to be considered in deciding on the merits of the Application. Granting the Application will affect the position taken by the Office in the interests of the applicants in its Request, the legal validity of such position having been confirmed when the Single Judge rendered the Decision as confidential and *ex parte*.
13. The Prosecutor raised two major issues in his Application, one being the “confidential and *ex parte* OPCV only” nature of the Request and of the Decision; the other being the request to attend the 12 February 2007 hearing.

B. The “confidential and *ex parte* OPCV only” nature of the Request

14. The level of confidentiality of documents or material filed before the Chambers is chosen by the author, taking into consideration the security and safety of persons involved and the need of the proceedings. Only a Chamber may amend such determination.
15. Article 68 of the Rome Statute imposes an obligation upon the Court to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Consequently, particular caution needs to be exercised when deciding to file documents or material which pertain to victims and witnesses issues.

16. The Office is of the view that in its Request there are information which are extremely sensitive with regards to the security and safety of the 49 applicants. Accordingly, it was not safe to disclose the Request neither to the Prosecutor nor to the Defence, without affecting the interests of the applicants. This is particularly true considering the fact that the Single Judge ruled that the OTP shall receive the redacted version of the applications.
17. The Office further notes that under the legal texts of the Court there is no obligation imposing on the participant to file a document or material *ex parte* to inform the other participant(s) of the existence of such document or material.
18. The Office is of the view that the jurisprudence of this Court quoted by the OTP is not relevant to the present situation.
19. First, the decisions quoted relate to the very specific disclosure process between the Prosecutor and the Defence and therefore the interests at stake for both parties are completely different from the ones at stake in the present situation. Secondly, the Appeals Chamber itself ruled that the Chamber has a discretion in determining whether "*applications by participants are kept ex parte or are made inter partes and whether or not to hold proceedings on an ex parte basis*"⁹.
20. The Office also notes that the Prosecutor, while arguing that the nature of the Request and of the Decision was not legally justified, failed to use the proper legal avenue. Therefore, the Office considers these comments to be unwarranted, but will not make any further submissions in this regard.

⁹ Document No. ICC-01/04-01/06-568 (Original English), para. 66

The application to attend the 12 February 2007 Hearing

21. The Office understands the Prosecutor's position, however it maintains that the sensitiveness of the details it would provide to the Chamber does not allow it to support the request, and objects to it, particularly, again, in light of the fact that the Single Judge has ruled that the Prosecutor shall be provided with the redacted version of the applications¹⁰. While making such position, the Office is mindful of the Chamber's duty to ensure that the interests of none of the participants would be affected. And the Office is confident that the Single Judge will exercise his mandate as he has already done when temporarily denying part of the Request.
22. Finally, the Office highlights that the reasons for which the Single Judge granted the confidential and *ex parte* nature of the Request should provide enough grounds to dismiss the Application.

FOR THE FOREGOING REASONS

The OPCV respectfully requests the Single Judge to reject the Application.



Paolina Massidda
Principal Counsel
Office of Public Counsel for Victims

Dated this 9 February 2007

At The Hague, The Netherlands

¹⁰ Document No. ICC-02-04-01-05-134 (Original: English). See operative part of the Decision, p. 19.