

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/05
Date: 13 November 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*v. JOSEPH KONY, VINCENT OTTI, OKOT ODHLAMBO, DOMINIC ONGWEN***

Public document

Decision on the Defence Request for leave to appeal the 31 October 2008 Decision

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Mr Jens Dieckmann

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

The Government of Uganda

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

The Judges of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”);

1. **NOTING** the “Decision assigning the situation in Uganda” to Pre-Trial Chamber II issued by the Presidency on 5 July 2004¹;
2. **NOTING** the “Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence” dated 21 October 2008, whereby the Chamber decided to initiate proceedings under article 19(1) of the Statute (the “Proceedings”), appointed Mr Jens Dieckmann as counsel for the Defence within the context and for the purposes of such Proceedings and invited the Republic of Uganda, the Prosecutor, the counsel for the Defence (the “Defence”) and victims having already communicated with the Court with respect to the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (the “Case”), or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008;²
3. **NOTING** the “Decision on Defence Counsel’s ‘Request for conditional stay of proceedings’” dated 31 October 2008 (the “31 October 2008 Decision”), whereby the Chamber *inter alia* rejected the “Request for conditional stay of proceedings”³ by the Defence (the “Request to the Chamber”) and extended the time limit for the Republic of Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case to submit observations in the Proceedings until 18 November 2008⁴;
4. **NOTING** the “Request for review of Counsel’s appointment by the Registrar in accordance with Pre-Trial Chamber’s Decision of 21 October 2008 and request

¹ ICC-02/04-1.

² ICC-02/04-01/05-320.

³ ICC-02/04-01/05-325.

⁴ ICC-02/04-01/05-328.

for conditional stay/suspension of the proceedings” dated 28 October 2008 (the “Defence’s Application to the Presidency”)⁵, whereby the Defence *inter alia* requested the Presidency to review his appointment under rule 21(3) of the Rules of Procedure and Evidence (the “Rules”) and to order that the Proceedings be suspended pending the decision of the Presidency;

5. **NOTING** the “Request for leave to appeal the Decision on Defence Counsel’s ‘Request for conditional stay of proceedings’ from 31 October 2008” dated 9 November 2008⁶, whereby the Defence seeks leave to appeal the 31 October 2008 Decision as regards the following alleged issues, which in its view affect the fairness and the expeditiousness of the proceedings:

- i. “whether the Chamber incorrectly determined that there was no legal basis for suspending the proceedings pending the Presidency’s review of Counsel’s Request for Review” under rule 21 (3) of the Rules of Procedure and Evidence (the “Rules”); and
- ii. “whether the Chamber erred by finding that a conditional stay of the proceedings concerning admissibility was neither required nor appropriate at this stage of the proceedings”;

6. **NOTING** the “Decision on 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 11 November 2008 (the “Presidency’s Decision”)⁷, whereby the Presidency dismissed the Defence’s Application to the Presidency on the basis of reasons to be given shortly;

⁵ ICC-02/04-01/05-326.

⁶ ICC-02/04-01/05-339.

⁷ ICC-02/04-01/05-344.

7. **NOTING** article 82(1) (d) of the Statute of the Court (the “Statute”), rule 155(1) and 155 (2) of the Rules;
8. **CONSIDERING** that article 82(1)(d) of the Statute restricts the possibility of leave to appeal to decisions “that involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings”;
9. **CONSIDERING** that in its decision on interlocutory appeals dated 19 August 2005 the Chamber held that, when dealing with an application for leave to appeal, it must be guided by three principles: (a) the restrictive character of the remedy provided for in article 82(1)(d) of the Statute; (b) the need for the applicant to satisfy the Chamber as to the existence of the requirements enshrined in this provision; and (c) the irrelevance or non-necessity for the Chamber to address arguments relating to the merits or substance of the appeal;⁸
10. **CONSIDERING** further the judgment, dated 13 July 2006, in which the Appeals Chamber stated that the object of the remedy provided for in article 82(1)(d) of the Statute is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”(the “13 July 2006 Decision”);⁹
11. **NOTING** that, in the 13 July 2006 Decision, the Appeals Chamber stated that “only an ‘issue’ may form the subject-matter of an appealable decision” and defined an issue as an “identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or

⁸ ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, paragraph 15.

⁹ ICC-01/04-168, paragraph 19.

conflicting opinion”, also clarifying that “an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”;¹⁰

12. **NOTING** that, in his “Request to the Chamber”, the Defence petitioned for a stay of the Proceedings “pending the outcome of the Presidency’s review”¹¹, arguing that “the remedy provided by rule 21(3) would be rendered ineffective if the proceedings in which the counsel has been designated to participate were completed before the Presidency had completed the review”¹²;
13. **CONSIDERING** that, accordingly, the requested stay was instrumental in avoiding that steps taken in the Proceedings might be rendered ineffective as a result of the review by the Presidency;
14. **CONSIDERING** that, in light of the Presidency’s Decision, there is no longer a need to determine either “whether the Chamber incorrectly determined that there was no legal basis for suspending the proceedings pending the Presidency’s review of Counsel’s Request for Review” under rule 21 (3) of the Rules or “whether the Chamber erred by finding that a conditional stay of the proceedings concerning admissibility was neither required nor appropriate” at that stage of the proceedings;
15. **CONSIDERING** that, accordingly, neither of the subject-matters raised by the Defence require any longer a decision for their resolution and therefore do not qualify as an “issue” within the meaning of article 82(1)(d) of the Statute as construed by the 13 July 2006 Decision;

¹⁰ *Ibid.*, paragraph 9.

¹¹ ICC-02/04-01/05-325, paragraph 27(i).

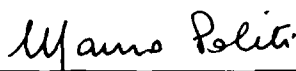
¹² ICC-02/04-01/05-325, paragraph 18.

16. **CONSIDERING** that failure by the Defence to identify an appealable issue *per se* exempts the Chamber from the need to assess the other requirements under article 82(1)(d) of the Statute¹³;

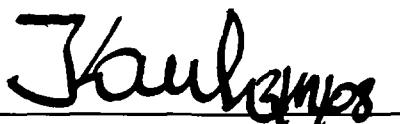
FOR THESE REASONS, THE CHAMBER HEREBY

REJECTS the Defence request for leave to appeal the 31 October 2008 Decision.

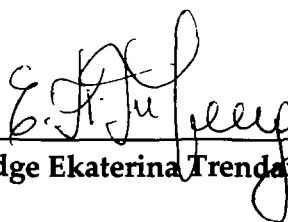
Done in both English and French, the English version being authoritative.



Judge Mauro Politi
Presiding Judge



Judge Hans-Peter Kaul



Judge Ekaterina Trendafilova

Dated this Thursday 13 November 2008

At The Hague, The Netherlands.

¹³ ICC-02/04-01/05-90, para. 38; ICC-01/04-135-tEN, paras. 28, 61.