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No.: ICC-02/04-01/05  
Date: 28 October 2008

**PRE-TRIAL CHAMBER II**

**Before:** Judge Hans-Peter Kaul  
Judge Mauro Politi  
Judge Ekaterina Trendafilova

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

**Request for conditional stay of proceedings**

**Source:** Jens Dieckmann, Counsel for the Defence

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

**The Office of the Prosecutor**

Mr. Louis Moreno Ocampo

Ms. Fatou Bensouda

**Counsel for the Defence**

Mr. Jens Dieckmann

**Legal Representatives of Victims**

**Legal Representatives of 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 the Republic of  
Uganda

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. OUTLINE OF THE PROCEDURE

1. On 5 July 2004, the Presidency assigned the situation in Uganda to Pre-Trial Chamber II.<sup>1</sup>
2. On 8 July 2005, as amended on 27 September 2005, Pre-Trial Chamber II issued warrants of arrest for Joseph KONY<sup>2</sup>, Vincent OTTI,<sup>3</sup> Okot ODHIAMBO,<sup>4</sup> and Dominic ONGWEN<sup>5</sup> (the "Warrants"), in *the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongzven* ("the Case").
3. On 13 July 2006, the Appeals Chamber accepted "that the Pre-Trial Chamber may on its own motion address admissibility."<sup>6</sup>
4. On 17 September 2008, the Single Judge of Pre-Trial Chamber II ("Single Judge") appointed Mr. Michiel Pestman as *Ad Hoc* Counsel for the Defence, entrusted with representing and protecting the interests of the Defence within the context and for the purposes of the proceedings on the Applications in the Situation and the Case, pursuant to rule 89 of the Rules".<sup>7</sup>
5. On 24 September 2008, in both the Situation and the Case, Mr. Pestman filed a Request for leave to appeal the Decisions on legal representation, appointment of counsel for the defence, criteria for redactions of applications for participation, and submission of observation on applications for participation

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<sup>1</sup> ICC-02/04-1.

<sup>2</sup> ICC-02/04-01/05-53.

<sup>3</sup> ICC-02/04-01/05-54.

<sup>4</sup> ICC-02/04-01/05-56.

<sup>5</sup> ICC-02/04-01/05-57.

<sup>6</sup> ICC 01/04-169 (reclassified as public pursuant to Decision ICC-01/04-538-PUB-Exp), paragraph 52.

<sup>7</sup> ICC-02/04-154 and ICC-02/04-01/05-154.

and a Request that the appeal have suspensive effect in accordance with Article 82(3) of the Statute (“Request of 24 September 2008”).<sup>8</sup> This request was rejected by the Single Judge on 7 October 2008.<sup>9</sup>

6. On 20 October 2008, Mr. Pestman filed “Submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07”.<sup>10</sup>
7. On 21 October 2008, in its decision initiating proceedings under Article 19 of the Statute, requesting observations and appointing counsel for the Defence (“Decision of 21 October 2008”), Pre-Trial Chamber II appointed the undersigning Counsel as Counsel for the Defence (“Counsel”), “within the context and for the purposes of the present proceedings”<sup>11</sup>. In the Decision of 21 October 2008, the Chamber decided to initiate proceedings under Article 19 (1) of the Statute and ordered the Registrar to inform the Republic of Uganda and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, of the initiation of the present proceedings. Further, the Chamber invited the Republic of Uganda, the Prosecutor, the Counsel and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008.
8. On 28 October 2008, Counsel requested the Presidency to review and clarify the mandate of Counsel. Additionally, Counsel requested an order for a stay/suspension of this procedure.

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<sup>8</sup> I CC-02/04-01/05-313.

<sup>9</sup> ICC-02/04-01/05-316.

<sup>10</sup> ICC-02/04-01/05-318.

<sup>11</sup> ICC-02/04-01/05-320.

## II. APPLICABLE LAW

9. Article 57 (3) of the Rome Statute of the ICC provides that

“[u]pon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence”;

10. Article 68 (3) addresses the issue of victim participation in proceedings before the court, and states that:

“[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and Impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”.

11. Regarding the assignment of legal assistance, Rule 21 (3) of the Rules of Procedure and Evidence provides:

“A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency shall be final. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances”.

12. Regulation 76 (1) of the Regulations of the Court states regarding the appointment of defence counsel:

“A Chamber, following consultation with the Registrar, may appoint counsel in the circumstances specified in the Statute and the Rules or where the interests of justice so require.”

13. Regulation 24 (1) reads:

“The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber”.

### III. ARGUMENT

#### 1. Request for conditional stay of the Proceedings/Suspensive Effect

14. In accordance with rule 21 (3) of the Rules and Procedure and Evidence, Counsel respectfully requested the Presidency to review the terms of Counsel’s appointment under Regulation 76 and to render clarifications of Counsel’s mandate. At the same time, Counsel requested the Presidency to issue either a conditional stay, or suspension of the proceedings concerning the Pre-Trial Chamber’s request for observations on the admissibility of the case.

15. In the event that the Presidency does not issue a decision before the deadline for filing observations on admissibility, or determines that it does not possess either the power to issue a conditional stay or suspend the proceedings before the Pre-Trial Chamber, Counsel respectfully requests that the Pre-Trial Chamber itself stay or suspend the proceedings, pending the outcome of the Presidency’s review.

16. Counsel observes that the Appeals Chamber has found that the Chambers of the ICC possess the power to order a conditional stay of the proceedings where the circumstances are such that it is not possible to secure the fairness of the proceedings at that point in time.<sup>12</sup> In doing so, the Appeals Chamber

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<sup>12</sup>Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the

cited decisions from the ICTR and ICTY, and in particular, the finding of the ICTY Appeals Chamber in the *Blagojevic* case to the effect that the

“only option open to a Trial Chamber, where the Registrar has refused the assignment of new Counsel, and an accused appeals to it, is to stay the trial until the President has reviewed the decision of the Registrar”.<sup>13</sup>

17. Counsel further notes that the Trial Chamber in the *Lubanga* case suspended its decision concerning victim participation in order not to prejudice the parties pending the Appeals Chamber’s decision as to whether suspension was warranted.<sup>14</sup>

18. It is submitted that a conditional stay or suspension is necessary in the present proceedings in order to firstly ensure that Counsel’s actions (in particular, the filing of observations concerning admissibility) do not irreversibly prejudice the ability of any of the four defendants to exercise their right to effectively challenge the admissibility at a later stage in the proceedings. Secondly, a conditional stay or suspension is necessary to ensure that Counsel is able to perform his functions in a manner that does not violate his obligations under the Code of Professional Conduct for Counsel at the ICC. In this connection, 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. Whilst the Pre-Trial Chamber could, in theory, reconvene the proceedings, this would not protect the defendants from the element of predetermination which they would face in the future. Moreover, such a course of action would not

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application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 21 October 2008, ICC-01/04-01/06-1486

<sup>13</sup> *Prosecutor v Blagojevic*, "Public and Redacted Reasons for the Decision on Appeal by Vidoje Blagojevic to Replace his Defence Team", 7 November 2003, Case No. IT-02-60- AR73 4 at para. 7, cited at footnote 7 of the ICC Appeals Judgment dated 21 October 2008. The Appeals Chamber also cited in the same footnote precedent from the ICTR, in which the Trial Chamber had stayed proceedings in order to resolve issues concerning the assignment of counsel: ICTR, *Prosecutor v Nahimana et al*, "Decision on Ngeze's Motion for a Stay of Proceedings", 4 August 2004, Case No ICTR-99-52-A

<sup>14</sup> Transcript of 13 February 2008, at pages 2- 3.

adequately protect the interests of the present Counsel, who could attract potential disciplinary sanctions as a result of his efforts to comply with the order of the Pre-Trial Chamber.

## 2. Request for alternative relief

19. In the event that the Pre-Trial Chamber refuses to grant the present request for a conditional stay or suspension, Counsel hereby requests the following reliefs, in order to assist him in preparing its requested observations on admissibility.

### *a. Request for access to confidential material*

20. In its decision from 8 July 2005 on the issuance of the arrest warrants, this Pre-Trial Chamber II held that based on the application of the Prosecution,<sup>15</sup> and the hearings with the Prosecutor, the case appeared to be admissible.<sup>16</sup>

21. In accordance with article 57(3)(b) of the Rome Statute, Counsel hereby requests the Pre-Trial Chamber to either lift the *ex parte* classification of several documents, which are related to the abovementioned decision from 8 July 2005 and which are of particular relevance for Counsel's preparation of his observations on admissibility, or to order the disclosure of a redacted version of these documents to Counsel.<sup>17</sup>

22. In its decision from 8 July 2005 on the issuance of the arrest warrants, this Pre-Trial Chamber II held that based on the application of the Prosecution, and the hearings with the Prosecutor, the case appears to be admissible.<sup>18</sup> This decision

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<sup>15</sup> "Prosecutor's application for Warrants of Arrest under Article 58", 6 May 2005, as amended and supplemented by the Prosecutor on 13 May 2005 and on 18 May 2005 (the "Prosecutor's application").

<sup>16</sup> Decision on the Prosecutor's Application For Warrants of Arrest under Article 58, 8 July 2005, ICC-2/04, page 2

<sup>17</sup> See list of documents in para 26.

<sup>18</sup> Decision on the Prosecutor's Application For Warrants of Arrest under Article 58, 8 July 2005, ICC-2/04, page 2



made reference to the following document: "Prosecutor's application for Warrants of Arrest under Article 58" dated the 6th day of May 2005, as amended and supplemented by the Prosecutor on the 13th day of May 2005 and on the 18th day of May 2005 (the "Prosecutor's application").

*b. Response to observations of the OTP and the victims*

23. Further, Counsel respectfully requests the Pre-Trial Chamber to confirm the defence's entitlement under Regulation 24(1) of the Regulations of the Court to file a response to the observations of the Prosecution and those of the victims for the following reasons.
24. In its decision of 7 October 2008, the Single Judge of this Pre-Trial Chamber held that "one of the fundamental aspects of fairness as construed by the Chamber, as well as by international human rights bodies, concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour".<sup>19</sup> In reality, the ability of the defence to influence the outcome of the proceedings would be denuded of all meaning if the defence were forced to exercise its right to be heard by pre-empting arguments which hypothetically could be raised by the other participants.
25. In light of the fact that Counsel for the defence has not received any disclosure from the Prosecution up to now and is completely unfamiliar with the Prosecutor's case file, it is therefore difficult for Counsel to anticipate the potential line of arguments that may be raised by the Prosecution in its observations. During the 3 weeks Counsel requests with this filing he intends *inter alia* to contact the Prosecution in order to ask for further disclosure.

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<sup>19</sup> Decision on the Defence Request for leave to appeal dated 24 September 2008 and extension of time-limit for submission of observations on applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07, ICC-02/04-01/05-316, p. 7.

26. As regards the participation of victims, article 68(3) stipulates that such participation shall not be prejudicial to the rights of the defence. In the current context, their participation would be highly prejudicial if the defence were not provided with the opportunity to comment on the grounds raised in their observations.

#### IV. RELIEF SOUGHT

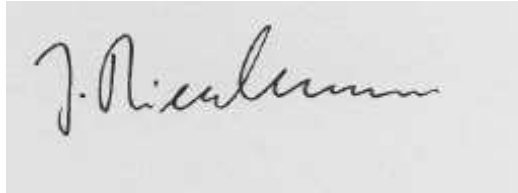
27. In view of the above, Counsel respectfully requests

- (1) that the Pre-Trial Chamber stays or suspends the proceedings concerning admissibility, pending the outcome of the Presidency's review; or
- (2) in the event that the Pre-Trial Chamber denies the instant request, Counsel hereby requests the Pre-Trial Chamber
  - (a) either to lift the *ex parte* classification of the following documents, which are relevant to Counsel's preparation of his observations on admissibility, or to order the disclosure of a redacted version to Counsel of the following documents and/or other material:
    - (i) Prosecutor's Submission of Proposed Forms of Warrants of Arrest and Notification of Amendment to Application for Warrants of Arrest Under Article 58, 13 May 2005;
    - (ii) Prosecutor's Proposed Redacted Version of Amended Application for Warrants of Arrest Under Article 58, 18 May 2005;

- (iii) Prosecutor's Amended Application for Warrants of Arrest Under Article 58, 18 May 2005;
  - (iv) Decision of the Chamber to hold a hearing on the protection of victims and witnesses in connection with the Prosecutor's application for warrants of arrest and the Prosecutor's application, 13 June 2005;
  - (v) Transcript of the hearing held on 16 June 2005;
  - (vi) Transcript of the hearing held on 21 June 2005;
  - (vii) Prosecutor's Application for Unsealing of Warrants of Arrest Issued on 8 July 2005, and Other Related Relief, 9 September 2005;
  - (viii) Status conference held in closed session on 3 October 2005, including the transcript of the status conference held on 3 October 2005;
  - (ix) (ix) Status conference held in closed session on 6 October 2005, including the transcript of the status conference held on 6 October 2005 ;
  - (x) Transcript of the hearing of 13th day of January 2006 concerning the investigation in the Situation in Uganda in relation to the application of Article 53 (as referred to in ICC-02/04-01/05-72), and
- (b) further to confirm Counsel's entitlement to file a response to the observations of the Prosecution and those of the victims; and

- (c) requests the Honourable Pre-Trial Chamber to order that the initial deadline of three weeks will commence to run from whichever is the later of the dates on which
- (i) counsel is provided with the above-requested documents; or
  - (ii) the Chamber lifts the suspension or conditional stay of the proceedings.

Respectfully submitted.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'J. Dieckmann' written in a cursive style.

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Counsel for the Defence, Mr. Jens Dieckmann

Dated this 28 October 2008

At The Hague, The Netherlands