

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 2 May 2006

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Ekaterina Trendafilova

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Public Document

**Prosecutor's Submission of Information on Further Unsealing of Documents of
the Record**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
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In response to the Order of this Pre-Trial Chamber dated 18 April 2006, the Office of the Prosecutor submits an update of its proposed treatment of all documents of the record of the situation and of the case.

Update of Proposed Treatment of Sealed Documents

1. The Office of the Prosecutor is submitting, in a separate sealed and *ex parte* filing, a chart (hereinafter "Annex A") which lists every document of the record of the situation and of the case. Pursuant to the Chamber's Order to the Prosecutor to Provide Information on Further Unsealing of Documents of the Record, dated 18 April 2006 (hereinafter "18 April 2006 Order"), Annex A follows the Court Management Section's numbering system and details the proposed treatment of each document and the reasons for that proposed treatment.
2. Annex B, also being filed under seal and *ex parte*, consists of copies of some of the documents which the OTP has respectfully proposed should be disclosed to the public in redacted form. For the Court's convenience, the "strike-through" markings depict the proposed redactions.
3. The OTP is also submitting as sealed Annex C the text of certain footnotes to this document, because those notes refer this Chamber to material currently classified as sealed or confidential in the case of *The Prosecutor v. Thomas Lubanga*.
4. The OTP has also reviewed its past proposals and has changed the proposed treatment of some documents. In certain cases, the passage of time or a change in circumstances has enabled the OTP to propose further

disclosures. In others, the Chamber's questioning at the 17 November 2005 status conference provided guidance as to ways in which closer parsing might result in further disclosures. The entries regarding any document as to which the proposed treatment has changed have been highlighted in light blue. Annex A, as requested in the 18 April 2006 Order, includes all current proposals and rationales in a single document, and may be viewed to replace the charts previously submitted by the OTP.

5. The OTP has also refined rationales for proposed redactions in many instances to include, for example, statutory references for the redactions.

Additional ICC Precedents

6. The OTP notes that determinations now being made in the case *Prosecutor v. Thomas Lubanga* provide additional precedents relevant to the process of unsealing currently under way in this proceeding. Pre-Trial Chamber I, acting through a single judge, Judge Sylvia Steiner, has also engaged in the process of balancing the public's interest in the proceedings of this Court with the interest in continued confidentiality, in situations where the Statute authorizes such confidentiality.¹

¹ See the following decisions and documents from the proceeding *Prosecutor v. Thomas Lubanga*: Decision Convening an In Camera Meeting (ICC-01/04-01/06-36-US, reclassified as public pursuant to decision ICC-01/04-01/06-42) (convening an *in camera* proceeding for the purpose of, inter alia, discussing "Issues related to the current classification of non-public documents..." in the record of the situation and the case); Decision to unseal and reclassify certain documents in the record of the case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-42) (public); Decision to Unseal and Reclassify Certain Additional Documents in the Record of the Case Against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06 (public); Redacted Version of The Transcripts of The Hearing Held on 2 February 2006 and Certain Materials Presented During That Hearing, ICC-01/04-01/06-48 (public redacted version), and Decision Concerning the Hearing on 2 February 2006 , ICC-01/04-01/06-47 (public redacted version). See *additionally* Sealed Annex C.

7. In re-classifying previously sealed documents to permit public disclosure, Pre-Trial Chamber I has accepted the same rationales which the OTP is advancing in support of its proposed treatments in this case. For example, the Pre-Trial Chamber has redacted material which describes the modalities and methods of witness and victim protection measures, under the authority of Art. 68(1) and the related rules, when the OTP identified information relating to witness and victim protection which, if disclosed, could be used to undermine the effectiveness of those measures.² In addition, in instances when the OTP identified information which, if disclosed, would tend to undermine ongoing international cooperation related to arrest efforts, Pre-Trial Chamber I has redacted that material under the authority of Art. 57(3)(c).³

8. Further research into the caselaw from the ICTY, ICTR and the SCSL has failed to reveal any published decision in which a chamber has overruled redactions proposed by the OTP to prevent public disclosure under either of the rationales identified above, before the appearance of any defendant. This circumstance in international criminal practice may be a reflection of a measure of deference afforded to the OTP on these matters, given its field experience with respect to witness and victim protection and the responsibility it bears for ensuring ongoing international cooperation, particularly before arrest is accomplished.⁴

² See Sealed Annex C.

³ See Sealed Annex C.

⁴ In *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Decision on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the U.S.A. and the OTP, 2 May 2005, at para. 22, the Trial Chamber discusses that "it is imperative not only in preserving the integrity of the administration of criminal justice in international law but also to ensure the confidence of the international community in mechanisms set up to ensure accountability for war crimes against

Request for *in camera* Proceedings

9. The OTP respectfully requests that if the Chamber, after its consideration of the treatments proposed by the OTP, is disinclined to grant the requests relating to any document, the Chamber order an *in camera* proceeding. The *in camera* procedure currently being used by Pre-Trial Chamber I would afford Pre-Trial Chamber II the opportunity to consider unsealing on a document-by-document basis and, if necessary, to further question the OTP about potential reasons for disclosure or redaction on a line-by-line basis.⁵ The reason for this request is that the OTP has found it difficult, given the volume of filings, decisions and transcripts now at issue in this proceeding, to convey fully in one chart the reasons and context which the Chamber might potentially deem relevant to its determinations on re-classification and disclosure. In addition, the OTP concurs in Judge Politi's comments at the 17 November 2005 conference that questions and answers specific to a document were helpful in ensuring that all relevant information and criteria was explored.⁶ Finally, the procedure of *in camera* proceedings during which document-by-document review is undertaken would afford the OTP the notice to which

humanity, that the Office of the Prosecutor enjoys an unfettered functional and investigative discretion, subject only to recognized and accepted judicial controls in respect of the functions conferred on it by the Statute of the Special Court." Based in part on this reasoning, the Trial Chamber in the *Sesay* case declined to order disclosures requested by the defense for information relating to the OTP's seeking of cooperation and assistance from U.S. government and its agencies. The rationale would apply even more strongly to public disclosure.

⁵ See Sealed Annex C.

⁶ See Sealed Annex C.

it is entitled should the Chamber determine to overrule confidentiality requested by the OTP.⁷

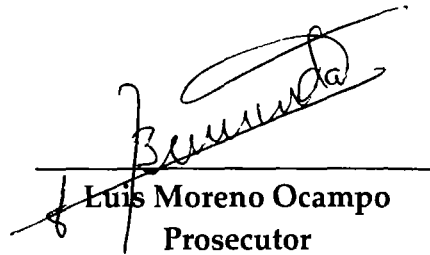
10. Also, in the event that the Chamber is inclined to further inquire about any OTP-proposed treatment relating to victim and witness protection, an *in camera* proceeding might afford the Victim and Witness Unit the opportunity to present its views.⁸
11. Finally, the OTP reiterates that it stands ready to provide legal memoranda in the event that the Chamber has further questions about its authority to order the proposed treatments.

⁷ The OTP notes that if the Chamber were to order the public disclosure of information over the OTP's objection, the order should be suspended until after any application for leave to appeal was considered, submitted and decided. See Art. 82(3). The entitlement to the suspensive effect arises from the circumstance that absent suspension, the very information that would be the subject of the appeal would be disclosed and any appeal rendered moot. For examples in the caselaw of the international tribunals, see *Prosecutor v. Simic et al.*, IT-95-9, Decision and Scheduling Order, 8 November 2000 (order from Appeals Chamber suspending effect of decision of Trial Chamber decision ordering states to disclose information relating to arrest and transfer); *Prosecutor v. Blaskic*, IT-95-14, Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for a Stay of Trial Chamber's Order of 30 January 1998, Decision of 26 February 1998 (decision of Appeals Chamber to suspend execution of Trial Chamber order that Republic of Croatia produce documents). Relevant municipal caselaw includes *RJR Mac Donald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R 311, 329-330 (Supreme Court of Canada) (appeals court "must have jurisdiction to enjoin conduct on the part of a party in reliance on the [impugned] judgment which, if carried out, would tend to negate or diminish the effect of the judgment of [the appeals court]"); *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. U.S. Court of Appeals 1979) (appellate court orders stay pending appeal of trial court's order that Federal Bureau of Investigation disclose investigative information to the public, based on reasoning that "once the documents are surrendered pursuant to the lower court's order, confidentiality will be lost for all time").

⁸ See Sealed Annex C.

CONCLUSION

12. The Prosecutor respectfully submits an update of its proposed treatment of all documents of the record of the situation and of the case and respectfully requests the convening of *in camera* proceedings, in the event that the Chamber, after considering this submission, is disinclined to grant OTP's requests relating to the proposed treatment of any document.



Luis Moreno Ocampo
Prosecutor

Dated this 2nd day of May 2006
At The Hague, The Netherlands

List of Cited Authorities

1. SCSL, *Prosecutor v Sesay et al*, SCSL-04-15-T, Decision on Sesay Motion seeking Disclosure of the Relationship Between Governmental Agencies of the U.S.A and the OTP, 2 May 2005
2. ICTY, *Prosecutor v. Simic et al.*, IT-95-9, Decision and Scheduling Order, 8 November 2000
<http://www.un.org/icty/simic/appeal/decision-e/01108JA314063.htm>
3. ICTY, *Prosecutor v. Blaskic*, IT-95-14, Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for a Stay of Trial Chamber's Order of 30 January 1998, Decision of 26 February 1998
<http://www.un.org/icty/blaskic/appeal/decision-e/80226SD3.htm>
4. Canada, *RJR Mac Donald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311, 329-330 (Supreme Court of Canada) 3 March 1994
http://www.lexum.umontreal.ca/csc-scc/en/pub/1994/vol1/html/1994scr1_0311.html
5. United States, *Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. U.S. Court of Appeals 1979) 20 February 1979