

**Cour
Pénale
Internationale**
**International
Criminal
Court**

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

Date: 14 September
2005

Original: English

PRE-TRIAL CHAMBER II

Before: Judge Tuiloma Neroni Slade, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Mauro Politi

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

**Under seal
Ex Parte, Prosecutor Only**

**Application Proposing Treatment of Submissions, Transcripts, and Decisions
Which Are Currently Sealed, In the Event That Warrants of Arrest Are Unsealed**

The Office of the Prosecutor	
Mr. Luis Moreno Ocampo, Prosecutor Mrs. Fatou Bensouda, Deputy Prosecutor Ms. Christine Chung, Senior Trial Lawyer Mr. Eric MacDonald, Trial Lawyer Mr. Ibrahim Yillah, Associate Trial Lawyer	

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

14 September 2005

The Prosecutor respectfully submits for the consideration of Pre-Trial Chamber II proposed treatments of submissions, transcripts, and decisions that are currently under seal because of their relation to the now-sealed warrants of arrest. By application dated 9 September 2005, the OTP requested the unsealing of the warrants of arrest previously issued by this Chamber on 8 July 2005. In anticipation of the future unsealing of the warrants of arrest, the OTP has considered whether there are grounds to maintain the sealed nature of any OTP submissions, hearing transcripts, or decisions of the Chamber that are currently sealed, assuming that the warrants are unsealed and that the Chamber accordingly considers the unsealing of other portions of the court record. This application sets forth, for the Chamber's aid and consideration, the results of the OTP review, and the OTP's requests with respect to continued sealing or redactions.

Request for Sealing of This Application

1. Because this submission is related to the currently sealed warrants of arrest, the OTP requests that this submission also be received under seal, and *ex parte*, and that the contents and existence of this application remain sealed while the application is *sub judice*. If and when the warrants of arrest are ordered unsealed, the OTP respectfully submits that it would be appropriate to unseal this application as well, while redacting the last column of Exhibit A, and the documents which constitute Exhibit B.

**Application for Continued Sealing and/or Redactions of Submissions,
Transcript, and Decisions, In The Event of Unsealing of the Warrants of Arrest**

2. If and when the warrants of arrest are unsealed, upon order of this Chamber, the primary justification for the initial sealing of many other submissions, transcripts, and decisions – namely, their relation to sealed warrants of arrest – will no longer be applicable. Also, there is obviously a presumption that matters before the Chamber, as in any court, are public unless a justification exists for confidential treatment.
3. With this in mind, the OTP has undertaken to review the submissions, transcripts and decisions which have been maintained by the Registry as the record thus far of the situation and case, to determine whether it is appropriate to request continued sealing of any documents or portions of documents now sealed because of the sealing of the warrants of arrest. Particular attention has been paid to the issue of whether there is information relating to the application for warrants of arrest which should remain protected to ensure the physical or psychological well-being of victims, potential witnesses, and their families. *See, e.g.,* Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, page 9 (directing that measures related to the protection of information be taken in accordance with Article 68 and Article 87(4) in connection with the transmission of requests for arrest and surrender).
4. As a result of this review, the OTP submits for the Chamber's review a proposed treatment of the submissions, transcripts and decisions which are currently under seal. A chart summarizing the proposed treatment of each

document currently under seal is annexed hereto as Exhibit A. The chart identifies:

- Each submission, transcript, or decision, listed in chronological order by date of the document or hearing, and identified by the number assigned by the Registry;
 - The index in which the document is maintained by Registry, and the document number;
 - The treatment of the document submitted for the Chamber's consideration (continued sealing, unsealing, or unsealing with redactions);
 - A specification of any proposed redactions; and
 - The reasons for the proposed treatment and/or redactions to content.
5. Exhibit B consists of copies of the documents identified in Exhibit A (other than the warrants of arrest) which the OTP proposes should be unsealed in redacted form. The copies show, through use of a "strike-through" editing function, the redactions being proposed by the OTP, while permitting the Chamber to see what text the OTP is proposing to redact.
6. As Exhibit A reveals, the OTP respectfully submits that certain matters considered and determined by the Chamber appear fully appropriate for unsealing, once the existence and content of the warrants of arrest become public. These include, for example, the chronology of the proceedings thus far, the Court's decisions relating to the issuance of warrants of arrest and the proper organ to transmit the warrants of arrest, and submissions made by the

OTP relating to the issue of transmission. As to these matters, there is no justification apparent to the OTP for continued sealing.

7. When the OTP has proposed that the Chamber consider continuing to seal documents, or to unseal documents in redacted form, the reason for the continued sealing or for the redaction falls into one of the following categories: (1) continued confidentiality for the purpose of protecting victims and/or potential witnesses and/or their families; (2) continued confidentiality because disclosure would reveal information furnished or an agreement made in confidence; (3) continued confidentiality because disclosure would reveal strategy relating to execution of warrants, including ongoing cooperation efforts; (4) continued confidentiality of operational matters internal to the Court.¹ In these instances, there is both an affirmative rationale for continued sealing or redaction and no impairment of the rights of the accused or a fair and impartial trial, since arrests have not yet been effected and no disclosure obligations have yet been triggered.
8. With respect to the proposed continued sealing or redaction of matters potentially affecting victim and witness protection, consideration was given to the following factors:
9. On the one hand, the public is entitled to know, and the organs of the Court have a strong interest in demonstrating, the efforts made thus far to observe statutory duties to protect the well-being of victims, potential witnesses and their families. For this reason, generally the OTP has proposed unsealing of

¹ These matters were discussed during the hearings of 16 June 2005 (transcript pages 79 and 80), and 21 June 2005 (transcript pages 143, 145, 146).

information relating to the objectives of victim and witness protection and general steps taken to satisfy those objectives. In addition, it has been proposed to unseal references to security concerns that are already generally well known, as well as the steps taken by the OTP and the VWU to address those concerns, in broad terms.

10. On the other hand, disclosing operational details regarding protection measures obviously threatens to undermine the effectiveness of those measures. To describe protection measures can simultaneously suggest means of breaching those measures. For this reason, under the authority of Article 68, the OTP has generally requested redaction of, for example, descriptions of the operational aspects of protective measures, and descriptions of protection concerns or measures taken with respect to particular witnesses, victims, or locations.
11. A similar balancing was undertaken with respect to references to cooperation efforts related to future execution of the warrants of arrest. The OTP openly shared much information about ongoing cooperation efforts with the Chamber, particularly during the hearing conducted on 16 June 2005 and to a lesser extent at the hearing conducted on 21 June 2005. These discussions were necessitated at least in part because the Chamber had determined to convene a hearing on the issue of the appropriate organ to transmit any requests for arrest and surrender. The Chamber also inquired specifically about the factual and practical reasons the OTP believed it was best placed to transmit any requests for arrest and surrender. *See* 16 June 2005 Tr., pages 57 to 58. In supporting its request to be the organ transmitting any requests, and responding to the Chambers' inquiries, the OTP necessarily provided

information about the interactions the OTP had already had at that time with states and organizations, the status of consultations with those entities, OTP assessments of those consultations, and planned future cooperation efforts. Much of this information pertained to next steps in the ongoing investigation, including objectives, such as arrest and surrender, which have yet to be attained. All of the information was shared in hearings which were ordered in advance to be sealed.

12. In contemplating the potential unsealing of such information, it seems appropriate to disclose information which describes in general terms efforts made thus far related to obtain international cooperation, while taking care to maintain the sealing of information: (1) furnished with confidentiality restrictions; and (2) which because it pertains to ongoing consultations relating to arrest, could impair arrest efforts if disclosed prematurely. For this reason, although the OTP has not requested wholesale sealing or redaction of all references to cooperation, it has also proposed continued sealing or redaction of descriptions of consultations when the information is sufficiently sensitive that disclosure would likely impair cooperation in the upcoming stages of this proceeding.
13. The OTP is aware that amendments may also be made by Registry to the transcripts of the 16 June 2005 and 21 June 2005 hearings. At the end of July, with the aim of avoiding the necessity of making an application to the Chamber, the OTP had submitted for the Registry's review a list of proposed amendments to the English and French transcripts of the hearings, having discovered substantive inaccuracies in translation and transcription. Of necessity, this application relies on the transcripts previously furnished, but it

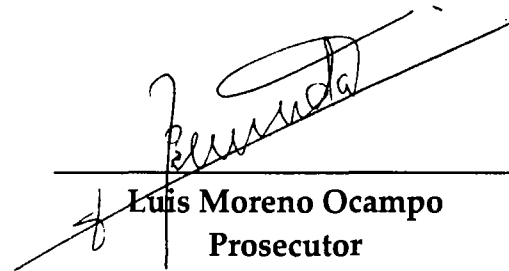
may be that further review will be conducted by the OTP if and when Registry makes amendments to the transcripts. The OTP is aware that the Registry is currently considering amendments.

14. The treatments proposed in Chart A, when proposed to protect victims, potential witnesses, and their families, have been based on the ongoing consultations with the VWU. In addition, a week before making this application, the OTP shared with the VWU Chart A and the pertinent underlying documents. The OTP will notify the Chamber promptly of any comments furnished by the VWU.

CONCLUSION

15. For all of the above explained reasons, the Prosecution respectfully: (1) submits for the consideration of Pre-Trial Chamber II proposed treatments of submissions, transcripts, and decisions that are currently under seal, once the now-sealed warrants of arrest become unsealed; and (2) requests the continued sealing and/or redaction of certain information now under seal, even assuming that the Pre-Trial Chamber determines to unseal the warrants of arrest. The OTP also respectfully requests that before the Pre-Trial Chamber proceeds to unseal and make public any submissions, transcripts and decisions, the OTP be afforded notice of the Chamber's preferred treatment of those documents, to the extent the Chamber prefers a treatment different than that proposed herein, in order that it may submit any further requests. Finally, the OTP respectfully requests that when the Registry has completed French translations of the versions of the documents ordered

unsealed in redacted form, the OTP be afforded the opportunity to review the translations before they are unsealed and made public.



Luis Moreno Ocampo
Prosecutor

Dated this 14th day of September, 2005

At The Hague, The Netherlands