

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original : English

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

Date: 2 April 2007

PRE-TRIAL CHAMBER II

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

Registrar: Mr Bruno Cathala

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*vs. JOSEPH KONY, VINCENT OTTI, RASKA LUKWIYA, OKOT
ODHIAMBO and DOMINIC ONGWEN***

Confidential

Ex Parte, Prosecutor only

**Urgent Application to Obtain Guidance regarding Timing and Manner of
Transmission of Requests for Arrest and Surrender to the Central African
Republic**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer
Mr Eric MacDonald, Trial Lawyer

Preliminary Statement

The Office of the Prosecutor ("OTP") respectfully requests that the Chamber furnish guidance regarding the timing and manner of transmitting the requests for the arrest and surrender of Joseph KONY, Vincent OTTI, Okot ODHIAMBO and Dominic ONGWEN. The OTP and the Registry have conferred about this matter and wish to act in a way consistent with the Chamber's intent and the Decision to Issue Requests for Arrest and Surrender to the Central African Republic, dated 21 March 2007 (hereinafter, "Decision to Transmit Requests to the CAR").¹

Request for Confidential, *Ex parte* Treatment

The OTP respectfully requests that this submission be received as confidential and *ex parte* to the Prosecutor only. This is the same level of confidentiality under which the Chamber issued its Decision to Transmit Requests to the CAR.

Request that Application be Considered on an Urgent Basis

The OTP submits that the Chamber may wish to consider this application on an urgent basis. The Decision to Transmit Requests to the CAR itself noted the OTP's submission that it would avoid any potential ambiguity to transmit the requests for arrest and surrender to the Central African Republic *before* KONY, OTTI, ODHIAMBO, or ONGWEN re-located to that

¹ ICC-02/04-01/05-224-Conf-Exp, 21 March 2007.

State.² Accordingly, to the extent the Chamber wishes the transmission of the Requests be accomplished expeditiously, this application should also be considered urgent.

Consultations with the Registry

The OTP has conferred with the Registry about the matters addressed in this application and has also forwarded a draft of this application for the Registry's review. To afford the Chamber at least some days to consider the application before the upcoming recess, this filing has been submitted before receiving the Registry's comments on the filing itself. The OTP anticipates that the Registry will add any information or updated information it deems warranted.

Procedural Background

1. On 28 February 2007, this Chamber issued the "Order to the Registrar and the Prosecutor for the Submission of Information on the Reported Movement of Persons Whose Arrest is Sought."³ This order requested the Prosecutor and the Registrar to provide, on or before 7 March 2007, information – in particular regarding the reported movement of persons whose arrest is sought into the CAR – which would enable the Chamber to assess the need to take further steps regarding the execution of the warrants.⁴

² See *id.*, p. 4.

³ ICC-02/04-01/05-213-Conf-Exp, 28 February 2007.

⁴ See *id.*, p. 5.

2. On 6 and 7 March 2007, the Registry and the OTP made their respective submissions.⁵
3. On 21 March 2007, this Chamber issued its Decision to Transmit Requests to the CAR. In that Decision, the Chamber issued requests for arrest and surrender of Joseph KONY, Vincent OTTI, Okot ODHIAMBO, and Dominic ONGWEN, to be transmitted by the Registrar to the Central African Republic.⁶ The Decision concluded that the issuance was warranted because there was a reasonable basis to believe that KONY, OTTI, ODHIAMBO, and ONGWEN “may be found”⁷ in the Central African Republic, within the meaning of Art. 89(1) of the Rome Statute, despite the circumstance that neither the Prosecution nor the Registry had confirmed the presence within the Central African Republic of the persons whose arrest is sought. The Chamber relied upon media reports referring to the Central African Republic as the presumed location of persons whose arrest is sought by the Court, as well as information submitted by the OTP and the Registrar, as the basis for this finding.⁸ The Decision noted that the Registry had stated in its submission that members of LRA were reported to be “moving towards the Central

⁵ See “Rapport du Greffier sur les déplacements effectués par les personnes dont l’arrestation est demandée,” ICC-02/04-01/05-217 Conf-Exp, 7 March 2007 ; “Submission of Information on the Reported Movement of Persons whose Arrest Has Been Sought,” ICC-02/04-01/05-218-US-Exp, 7 March 2007.

⁶ Decision to Transmit Requests to the CAR, p. 6.

⁷ See *id.*, p. 4.

⁸ See *id.*

African Republic and Chad,"⁹ and that the OTP had referred in its submission to:

"the LRA's demonstrated ability to quickly relocate, the proximity of the Garamba Park to the CAR, and to the fact that LRA forces continue to move far from Ri-Kwangba where they were to gather under the terms of the recently expired Cessation of Hostilities Agreement."¹⁰

4. The Decision to Transmit Requests to the CAR ordered that "this decision, the requests for arrest and surrender and all documents relating thereto be classified as confidential, *ex parte*, Prosecutor only, under further order by the Chamber."¹¹ This determination was founded upon the consideration of "the need to preserve confidentiality concerning reported movements of persons whose arrest is sought in order to support arrest efforts."¹²
5. The French language translations of the requests for arrest and surrender to the Central African Republic were made available last Tuesday, 27 March 2007.¹³

⁹ See *id.*, p. 3.

¹⁰ See *id.*, p. 4.

¹¹ See *id.*, p. 6.

¹² See *id.*, p. 5.

¹³ See ICC-02/04-01/05-225-Conf-Exp-tFR to ICC-02/04-01/05-228-Conf-Exp-tFR.

Application regarding Timing and Manner of Transmission of Warrants to the CAR

6. The OTP seeks to inform the Chamber of further matters relating to the transmission of the requests for arrest and surrender to the Central African Republic and to seek the Chamber's guidance upon a manner of proceeding.

A. *Timing*

7. The requests for arrest and surrender which were transmitted to Uganda and the Democratic Republic of Congo in September 2005 were transmitted in a period of three days, by personal service within those States;¹⁴ and the requests for arrest and surrender transmitted to the Sudan, at the beginning of October 2005, in a matter of six days, by personal service to the Sudanese Ambassador in The Hague.¹⁵
8. The Registry has planned that the Registrar will personally deliver the requests for arrest and surrender naming KONY, OTTI, ODHIAMBO and ONGWEN to the Central African Republic on or about Thursday, 19

¹⁴ See "Registration in the Record of the Memorandum of Service regarding the Transmission to the Republic of Uganda of the Requests for Arrest and Surrender in accordance with the Decision on the Prosecutor's Urgent Application dated 26 September 2006," ICC-02/04-01/05-48, 7 October 2005; "Versement au dossier par le Greffier du procès-verbal de transmission à la République démocratique du Congo des demandes d'arrestation et de remise conformément à la Décision relative à la demande urgente du Procureur datée du 26 Septembre 2005," ICC-02/04-01/05-47, 7 October 2005.

¹⁵ See "Registration in the Record of the Memorandum of Service regarding the Transmission to the Republic of Sudan of the Requests for Arrest and Surrender in accordance with the Decision on the Prosecutor's Urgent Application dated 26 September 2006," ICC-02/04-01/05-49, 7 October 2005.

April 2007. One issue upon which the OTP seeks the Chamber's guidance is whether this timing is acceptable to the Chamber. The Decision to Transmit Requests to the CAR was based in part on the desirability of clarifying the cooperation obligations of the Central African Republic, to that State, before more LRA members move into the State. For this reason, and to avoid contravening the Chamber's intent, if that intent was for more rapid transmission, the OTP seeks the Chamber's approval of transmission on or about 19 April 2007, or its direction to accomplish transmission on an earlier date.¹⁶

B. Confidentiality

9. The Registry intends to carry out the transmission to the Central African Republic on a confidential basis. The Decision to Transmit Requests to the CAR appears to contemplate confidential transmission because the decision, requests for arrest and surrender and all documents relating thereto remain confidential.¹⁷
10. The OTP respectfully requests authorization, immediately upon the completion of transmission, for the Registry and the OTP to make public the fact of the completed transmission.¹⁸ The OTP therefore also jointly

¹⁶ If the Chamber were to order transmission to take place before 19 April 2007, it would likely be necessary for transmission to be made either at an embassy in Europe or by means other than personal service. Such arrangements can be explored, but the OTP believes that in this instance, the most secure transmission can be made personally in Bangui.

¹⁷ See Decision to Transmit Requests to the CAR, p. 6.

¹⁸ If it is approved that the Registrar may deliver the requests personally on or about 19 April 2007, it is foreseen that the publicizing of the transmission would take place on that same trip, so as to maximize the impact of the public announcement. An analogy to this

requests that the Chamber consider ordering that the Decision to Transmit Requests to the CAR (with redactions, if the Chamber deems it appropriate) and the requests for arrest and surrender naming KONY, OTTI, ODHIAMBO and ONGWEN (not including the annexed warrants) may be reclassified as Public once transmission is accomplished.¹⁹ If the Chamber found this manner of proceeding to be acceptable, the Chamber could either order in advance that re-classification be authorized upon completion of the transmission, to the satisfaction of the Registry and the OTP, or order re-classification to take place upon notification of the completed transmission to the Chamber.

11. The reason for this request is that in the OTP's view, it would better serve the objective of supporting arrest efforts for the transmission to the Central African Republic to be publicized, once the Central African Republic itself receives the first notice of its obligations. First, the OTP respectfully submits that there is no longer reason for the decision to transmit the requests, the fact of the transmission, or the requests themselves, to remain confidential. The movements of the LRA and the

proposed procedure is the procedure that was used by Pre-Trial Chamber I in publicizing the warrant naming Thomas Lubanga Dyilo; once the surrender was accomplished, and Lubanga within European airspace, Pre-Trial Chamber I ordered the warrant to be unsealed as the plane was in flight, see "Decision to Unseal the Warrant of Arrest against Mr Thomas Lubanga Dyilo and Related Documents," ICC-01/04-01/06-37, 17 March 2006.

¹⁹ The prior submissions made by the Registry and the OTP on this matter also appear to contain little, if any, information which could not be publicly disclosed, once transmission were completed. If the Chamber wished also to issue public versions of those filings, the OTP and the Registry could be ordered to propose public redacted versions, or a conference could be held for the OTP and the Registry to give views orally. The warrants annexed to the requests have never been unsealed, but public redacted versions have already been made available. *see* ICC-02/04-01/05-53 to ICC-02/04-01/05-57, 13 October 2005.

persons whose arrests are sought, at this time, are widely and publicly reported. The information previously submitted by the OTP and Registry regarding movements of the LRA and its leaders is also already known. Second, the matter of apprehending the persons whose arrest is sought is manifestly a regional and international issue. International organizations also are continuously assessing their obligations.²⁰ It will enhance arrest efforts for each of the relevant States, and organizations, to have immediate and accurate knowledge of identity of the States and entities who have been found to bear cooperation obligations and the extent of those obligations.²¹ Indeed a misunderstanding on the part of any State or organization about the existence of obligations on the part of the other could undermine potential cooperation in support of arrest and surrender.

12. Public awareness that requests for arrest and surrender are being transmitted to the Central African Republic also will enhance arrest efforts by, among other things, keeping cooperation obligations and the compliance with those obligations, in the public eye. Finally, to the

²⁰ A prior filing by the OTP addressed statements made by the then-UN Secretary General, Kofi Annan, regarding the mandates of UNMIS and MONUC in relation to efforts to effectuate the ICC warrants of arrest, *see* "Submission of Information on the Status of the Warrants of Arrest in the Situation in Uganda," ICC-02/04-01/05-116-Corr2, 6 October 2006, para. 19. The OTP and the Registry would also wish immediately to notify the Government of Sudan, the Government of Southern Sudan, the Government of Uganda, and the Government of the DRC.

²¹ Publicizing the transmission of the warrants of arrest also would make it possible for States and organizations outside the region, and relevant to potential support of the requests for arrest and surrender, to know of the cooperation obligations imposed by the Court. In the case of the Central African Republic, for example, the OTP believes that it is desirable that France be made aware of the transmission.

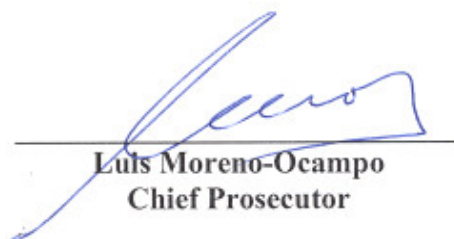
extent that one purpose of the transmission is to deter LRA from further movement into the Central African Republic, either to evade arrest or to strengthen LRA's capabilities to perpetrate crimes, this purpose can only be served by publicizing the transmission.

C. *The Relation between Confidentiality and Timing*

13. If the transmission is approved to take place by means of the Registrar's personal delivery, on or about 19 April 2007, the OTP respectfully requests that the Chamber render a decision before that date regarding the timing of any permitted publicizing of the completed transmission. Such a decision would enable the Registry and the OTP to determine the steps needed to publicize the transmission properly, here in The Hague and potentially in the region.
14. In the alternative, the question of *when* to transmit the requests could be decided before determining whether to grant the request of the OTP and the Registry, in effect, to publicize transmission of the requests, upon completed transmission. Transmission on a confidential basis could be carried out as a first step, thus at a minimum putting the Central African Republic on notice of its cooperation obligations as soon as possible. The executed transmission then could be made public if and when the Chamber subsequently reached a decision to publicize the transmission.

Conclusion

For the foregoing reasons, the OTP respectfully seeks: (1) the Chamber's guidance on whether it wishes the transmission to the Central African Republic to occur on or about 19 April 2007 or before that date; and (2) the Chamber's guidance and ruling regarding the request to reclassify as public, upon completed transmission of the requests for arrest and surrender, the Chamber's Decision to Transmit Requests to the CAR (in redacted form, if the Chamber deems it appropriate), and the content of the requests for arrest and surrender (but not the attachment).



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 2nd day of April 2007
At The Hague, The Netherlands