

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original : **English**

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

Date: **22 March 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***

[PUBLIC REDACTED VERSION]

**Prosecution's Request that the Warrant of Arrest for Raska LUKWIYA Be
Withdrawn and Rendered Without Effect Because of His Death**

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("OTP") respectfully requests the Pre-Trial Chamber to order that the warrant of arrest issued for Raska LUKWIYA be withdrawn and rendered without effect because of the changed circumstance of LUKWIYA's death.

Reason for Filing of Public Redacted Version

An unredacted version of this application is being filed under seal. The reason that this submission is being made publicly only in redacted form is that certain information contained herein is currently under seal and available to the Prosecutor only. The OTP respectfully submits, however, that most of the information which has been redacted from the public version of this application is not entitled to confidential treatment under the Statute or the Rules.

The sole exceptions are the redacted portions of paragraphs 10 and 16. The portions of paragraphs 10 and 16 which have been redacted from the public version of this submission relate to information which, if disclosed at present, could impair further or ongoing investigations. *See* Rule 81(2).

Procedural Background

1. On 8 July 2005, this Chamber issued warrants of arrest, under seal, naming Joseph KONY, Vincent OTTI, Raska LUKWIYA, Okot

ODHIAMBO, and Dominic ONGWEN, and specifying charges of crimes against humanity and war crimes.¹

2. On 27 September 2005, following an urgent application by the OTP, the Chamber issued, under seal, and for transmission by the Registrar to the Governments of Uganda, the DRC, and the Sudan, requests for arrest and surrender.² Annexed to these Requests for Arrest and Surrender, when transmitted by the Registrar on a confidential basis, were the warrants issued on 8 July 2005 naming OTTI, LUKWIYA, ODHIAMBO, and ONGWEN, and an amended warrant of arrest naming KONY.³ The 27 September 2005 Decision also authorized the OTP to notify international governmental organizations and appropriate government authorities of the existence of the warrants of arrest and the identities of

¹ See "Decision on the Prosecutor's Application for Warrants of Arrest under Article 58," ICC-02/04-01/05-1, 8 July 2005; "Warrant of Arrest for Joseph Kony," ICC-02/04-01/05-2-US-Exp, 8 July 2005; "Warrant of Arrest for Vincent Otti," ICC-02/04-01/05-4-US-Exp, 8 July 2005; "Warrant of Arrest for Raska Lukwiya," ICC-02/04-01/05-6-US-Exp, 8 July 2005; "Warrant of Arrest for Okot Odhiambo," ICC-02/04-01/05-8-US-Exp, 8 July 2005; "Warrant of Arrest For Dominic Ongwen," ICC-02/04-01/05-10-US-Exp, 8 July 2005. Also on 8 July 2005, the Chamber issued corresponding Requests for Arrest and Surrender addressed solely to Uganda. See ICC-02/04-01/05-12-US-Exp to ICC-02/04-01/05-16-US-Exp, 8 July 2005.

² See "Decision on the Prosecutor's Urgent Application Dated 26 September 2005," ICC-02/04-01/05-27, 27 September 2005 (hereinafter "27 September 2005 Decision"). For the Requests for Arrest and Surrender addressed to the DRC, see ICC-02/04-01/05-30-US-Exp to ICC-02/04-01/05-34-US-Exp, 27 September 2005. For the Requests for Arrest and Surrender addressed to the Sudan, see ICC-02/04-01/05-35-US-Exp to ICC-02/04-01/05-39-US-Exp, 27 September 2005. The warrant naming Joseph Kony and the Request for Arrest and Surrender naming Kony addressed to the Government of Uganda were amended, also on 27 September 2005, at the request of the OTP. See 27 September 2005 Decision, p. 5.

³ See 27 September 2005 Decision, p. 5.

those named within the warrants, if the OTP deemed the notification necessary to ensure successful execution of the warrants of arrest.⁴

3. On 13 October 2005, the Chamber ordered the unsealing of the existence of the Requests for Arrest and Surrender and redacted versions of the warrants of arrest.⁵
4. On 14 August 2006, the OTP notified the Chamber that the Government of Uganda had reported the killing of Raska LUKWIYA during a gun fight which took place on 12 August 2006 between the Uganda People's Defence Force ("UPDF") and the LRA in northern Uganda.⁶ The OTP stated that the Ugandan Government was confirming the identification of the body believed to be that of LUKWIYA, and that the OTP would aid in this effort, if requested to do so.⁷ On 15 August 2006, it was reported in the Ugandan media that the LRA delegation attending the negotiations in Juba to end the conflict in Northern Uganda had commenced three days of mourning for their deceased commander, Raska LUKWIYA.⁸

⁴ See *id.*, p. 4.

⁵ See "Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest," ICC-02/04-01/05-52, 13 October 2005, p. 7-8. The requests were later reclassified as public, see ICC-02/04-01/05-135, 2 February 2007, p. 9-10.

⁶ See "Submission of Information Regarding Raska Lukwiya," ICC-02/04-01/05-97, 14 August 2006.

⁷ See *id.*, para. 3.

⁸ See "LRA Mourns Lukwiya," *The New Vision*, 15 August 2006 (available at <http://allafrica.com/stories/200608160053.html>).

5. On 28 August 2006, the OTP informed the Chamber that the Government of Uganda had notified the Registry of its request that the OTP provide assistance in conducting DNA tests on samples from the body believed to be that of Raska LUKWIYA.⁹ The OTP informed the Chamber that the process of rendering assistance was underway and that it would notify the Chamber of additional information bearing upon Court proceedings.¹⁰
6. On 15 September 2006, this Chamber issued the "Order to the Registrar and the Prosecutor for the Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda."¹¹
7. On 6 October 2006, the OTP filed its "Submission of Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda" (hereinafter "6 October 2006 Submission").¹² The OTP stated that earlier in the same week, it had received the results of DNA testing performed at the Netherlands Forensic Institute on samples taken from the body believed to be that of Raska LUKWIYA. The OTP reported that the testing had confirmed that the person killed in the fight with the UPDF was Raska LUKWIYA, that the results of the DNA testing had been communicated to the Government of Uganda, and that the OTP

⁹ See "Notification that Government of Uganda Has Requested the Office of the Prosecutor to Provide Assistance in Conducting DNA Tests on the Alleged Body of Raska LUKWIYA," ICC-02/04-01/05-106-US-Exp, 28 August 2006, p. 2.

¹⁰ See *id.*, para. 3.

¹¹ ICC-02/04-01/05-111, 15 September 2006.

¹² ICC-02/04-01/05-116Corr2, 6 October 2006.

expected that the Government of Uganda would soon be notifying the Registry of its inability to execute the Request for Arrest and Surrender naming LUKWIYA.¹³

8. On 2 November 2006, the Registry filed “Informations sur le décès de Raska Lukwiya.”¹⁴ In that filing, the Registry informed the Chamber that the Government of Uganda had reported the death of LUKWIYA and the means by which the death had been verified.¹⁵ The Registry stated that it had requested the Government of Uganda, on a number of occasions after learning of LUKWIYA’s death, and most recently at the beginning of October 2006, to provide a death certificate but that no such certification had yet been conveyed.¹⁶ Annexed to the 2 November 2006 filing was a letter dated 30 October 2006 from the Solicitor General of Uganda, Mr. L. Tibaruha, stating that the Government of Uganda, through DNA testing, identification of the body [REDACTED] former LRA members, and confirmation of the death from the LRA command itself, had confirmed LUKWIYA’s death. The Registry also forwarded to this Chamber the Report from the Netherlands Forensic Institute, dated 5 October 2006, which described the results of the DNA testing.¹⁷

¹³ See *id.*, para. 9.

¹⁴ ICC-02/04-01/05-126-US and ICC-02/04-01/05-126-US-Anx, 2 November 2006.

¹⁵ See “Informations sur le décès de Raska Lukwiya,” ICC-02/04-01/05-126-US, 2 November 2006, p. 2.

¹⁶ See *id.*

¹⁷ See the Annex of “Informations sur le décès de Raska Lukwiya,” ICC-02/04-01/05-126-US-Anx, 2 November 2006.

9. On 23 November 2006, in a speech in The Hague on the Occasion of the Fifth Session of the Assembly of States Parties, Ambassador Mirjam Blaak, the head of the Uganda delegation, informed the Assembly that on 12 August 2006, the UPDF had engaged an LRA unit “believed to be under the command of Raska Lukwiya,” and that “[w]ith the assistance of the ICC we have established that it was indeed Lukwiya who was killed in the ensuing clash.”¹⁸

10. [REDACTED]

¹⁸ See “Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda,” ICC-02/04-01/05-132-AnxA, 8 December 2006, p. 4.

[REDACTED]

**Request that the Warrant of Arrest for Raska LUKWIYA Be Withdrawn
and Rendered without Effect because of his Death**

11. The Prosecution respectfully requests the Pre-Trial Chamber to order that the warrant of arrest issued for Raska LUKWIYA be withdrawn and rendered without effect because of the changed circumstance of LUKWIYA's death. The Prosecution relies on Article 58(4), which states: "The warrant of arrest shall remain in effect *until otherwise ordered by the Court*" (emphasis added). It also notes the observation of the Appeals Chamber that "[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it."²¹ It is axiomatic that the death of a person named in a warrant or in an indictment terminates the criminal proceedings relating to that individual.²²

²¹ See "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal," ICC-01/04-168, 13 July 2006, para. 20.

²² See e.g. *Prosecutor v. Slobodan Milosevic*, Case no. IT-02-54, "Order Terminating Proceedings," 14 March 2006, (terminating proceedings based on coroner's report); *Prosecutor v. Milan Kovacevic*, Case no. IT-97-24, "Order Terminating Proceedings Against Minal Kovacevic," 24 August 1998, (terminating proceedings based on physician's report of death of the accused); *Prosecutor v. Dragan Gagovic, et al.*, Case no. IT-96-23, "Order Granting Leave to Withdraw Indictment," 30 July 1999, (granting leave to withdraw the indictment in light of entry from "Register of Deaths" recording death of the accused); *Prosecutor v. Goran Borovnica*, Case no. IT-95-3, "Order Granting Leave to Withdraw the Indictment Without Prejudice," 21 April 2005, (although death certificate was contradicted by some information suggesting a possibility that the accused was alive, leave to withdraw the indictment without prejudice was granted); *Prosecutor v. Sam Bockarie*, Case no. SCSL-2003-04-PT, "Withdrawal of Indictment," 8 December 2003, (endorsing withdrawal of indictment based on death certificate and statement of reasons presented by the Prosecutor).

12. The Prosecution has delayed making this request because the Registry has been anticipating, since at least October 2006, that the Government of Uganda will provide a death certificate naming Raska LUKWIYA.²³
13. Given the passage of eight months since LUKWIYA's death was reported, however, the OTP is constrained to request a determination from the Chamber under Art. 58(4) as to whether the warrant naming Raska LUKWIYA should remain in effect. LUKWIYA's death has now long been publicly reported, and the confirmation of that death through DNA testing and other means, such as the concession of LUKWIYA's death by the LRA itself, is also information within the public domain.
14. The OTP respectfully submits that the lack of a death certificate, as such, should not prevent the warrant of arrest from being rendered ineffective. There is no requirement in the Statute, Rules, or Regulations that the death of an accused or an individual named in a warrant be certified by the specific means of a death certificate.²⁴ Here, the Government of Uganda notified the Registry, by letter dated 30 October 2006, that the results of the DNA testing "coupled with the identification of the body by [REDACTED] and former LRA as well as the confirmation from the LRA command itself, certify that Raska Lukwiya

²³ See ICC-02/04-01/05-126-US, 2 November 2006, p. 2. It seems that a formal request was made by the Registry on 5 March 2007. See "Rapport du Greffier sur les déplacements effectués par les personnes dont l'arrestation est demandée", ICC-02/04-01/05-217 Conf-Exp, 6 March 2007, p. 5.

²⁴ See *supra* authorities cited in note 22, which establish that a death certificate has been regarded as sufficient, but not necessary, proof of death.

was killed.”²⁵ The Government of Uganda has also formally communicated to the Court that “it is no longer able to effectuate the arrest of Lukwiya due to his death.”²⁶ The willingness of the Government of Uganda to attempt to provide a death certificate is commendable, as it has undertaken, in effect, to undertake upon request of the Registry the unusual step of issuing a death certificate for a member of an opposing armed group who was killed during combat. The delay in furnishing the certificate, however, should not prolong the process of invalidating the warrant, in the absence of any reasonable doubt as to LUKWIYA’s death.²⁷

15. The reason to avoid delaying further the invalidation of the warrant of arrest naming LUKWIYA is that failure to withdraw the warrant: (1) unfairly imposes Part 9 obligations upon the States Parties who received the request for arrest and surrender but have no prospect of executing it; and (2) threatens to create mistake and/or confusion among entities and organizations who may have undertaken to render cooperation and aid in support of arrest efforts.²⁸ The reliance of the ICC on cooperation from States and inter-governmental organizations and other entities to support

²⁵ See the Annex of “Informations sur le décès de Raska Lukwiya,” ICC-02/04-01/05-126-US-Anx, 2 November 2006, p. 2.

²⁶ See *id.*

²⁷ The Registry may be better placed to address the issue, but OTP believes, based on information it has obtained from the Solicitor General, that there may yet be some delay in obtaining any death certificate. It seems that it may be necessary for intermediate steps to be taken by different agencies of the Ugandan Government.

²⁸ The OTP did inform certain governmental authorities and relevant inter-governmental organizations of the existence of the warrants of arrest and the names of the five persons named in the warrants of arrest, pursuant to the authorization granted by the 27 September 2005 Decision.

arrest efforts makes it particularly important that the ICC be transparent and accurate in identifying persons who are the subject of valid warrants.

16. [REDACTED]

The OTP respectfully submits that the most appropriate legal means of ensuring that the cooperation obligations are properly understood – including by the States which have already received the request seeking the arrest and surrender of LUKWIYA – would be to withdraw the warrant naming LUKWIYA in light of his death.

17. A recent notification from INTERPOL also provides an example of the manner in which lack of clarity about the status of the warrants of arrest could threaten to jeopardize cooperation. INTERPOL is an intergovernmental organisation with 186 member countries, and its objective is to facilitate cooperation between national and international police and law enforcement authorities. INTERPOL had undertaken to disseminate information about the Uganda warrants to members of INTERPOL, through their public website and by other means, and as a

result had been of great assistance in publicizing those warrants.²⁹ INTERPOL recently informed the OTP, however, that it has removed the INTERPOL “Red Notice” regarding LUKWIYA from its website. Prior to doing this, INTERPOL had informed the OTP that it would be compelled unilaterally to cancel the Interpol “Red Notice” naming LUKWIYA, despite the lack of any formal termination of the ICC proceedings relating to LUKWIYA. INTERPOL logically viewed the cancellation to be necessary because of longstanding and undisputed public reports that LUKWIYA is dead and INTERPOL guidelines which prohibit a “Red Notice” from seeking the arrest of a deceased person.

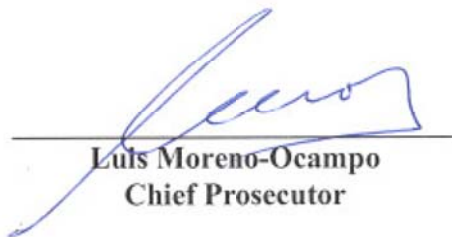
Conclusion

For the foregoing reasons, the OTP respectfully requests the Pre-Trial Chamber to withdraw the warrant of arrest issued for Raska LUKWIYA and therefore to render it without effect, because of the changed circumstance of LUKWIYA’s death.³⁰ The OTP also respectfully requests that the Chamber consider making public the information redacted from the public version of

²⁹ See, e.g., “Interpol Push for Uganda Arrests,” BBC, 2 June 2006 (available at <http://news.bbc.co.uk/2/hi/africa/5039620.stm>); “Interpol joins hunt for Uganda’s LRA Rebels,” Reuters, 2 June 2006 (available at http://www.redorbit.com/news/international/524080/interpol_joins_hunt_for_ugandas_lra_rebels/index.html).

³⁰ Although the OTP sees no realistic prospect that the facts currently known will change, if the Chamber deemed it prudent, it could also order a withdrawal of the warrant without prejudice to reinstatement. This step would enable the record of the proceedings accurately to reflect the current state of knowledge, while affording the Government of Uganda additional time to furnish a death certificate.

this submission, with the exception of the information redacted in paragraphs 10 and 16 above, and the corresponding footnotes.³¹



Luis Moreno-Ocampo
Chief Prosecutor

Dated this 22nd day of March 2007
At The Hague, The Netherlands

³¹

[REDACTED]