

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

No.: ICC-02/04

Date: 18 July 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**

**Prosecutor's Application for Leave to Appeal In Part Pre-Trial Chamber's II
Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58**

The Office of the Prosecutor	
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Introduction

The Prosecution respectfully moves for leave to appeal solely the following issue: whether Pre-Trial Chamber II properly denied in its 8 July 2005 Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (hereinafter, the "8 July 2005 Decision") the Prosecution's request to be the organ to transmit the Requests of Arrest and Surrender (hereinafter, the "Requests") upon issuance of Arrest Warrants (hereinafter, the "Warrants") by the Chamber. The Prosecution is not seeking any relief in relation to other aspects of the Chamber's 8 July 2005 Decision.

Procedural history

(a) The Prosecution's request and the Chamber's Decision

1. On 6 May 2005 the Prosecution filed under seal a document entitled "Prosecutor's Application for Warrants of Arrest Under Article 58," later amended and supplemented on 13 and 18 May 2005 (hereinafter, the "Prosecutor's Application"). In that document, the Prosecution requested the Chamber's authorization to transmit under Rule 176(2) the requests for arrest and surrender to which any warrants issued by the Chamber would be attached.¹ As further clarified in the 16 June 2005 hearing convened by the Chamber, "transmission" included the entire process of preparation of the requests for arrest and surrender, as well as subsequent transmission to the relevant States, the Chamber's function at this stage being to determine whether to issue arrest warrants.²
2. By Decision dated 9 June 2005, the Chamber determined to hold a hearing on the request by the Prosecutor to be permitted to transmit requests for arrest and surrender.³ At the hearing, on 16 June 2005, the Chamber heard the OTP on the issues of: (a) the legal reasons that Rule 176(2) supported the Prosecutor's request to transmit requests for arrests and surrender; and (b) the factual or practical

¹ See Prosecutor's Application, paras. 592 *et seq.*

² See Transcript of 16 June 2005 Hearing, English language version ("Tr."), at pp. 61, 63, 64, and 99-102, *inter alia*.

³ See Decision to Hold a Hearing on the Request under Rule 176 Made in the Prosecutor's Application for Warrants of Arrest Under Article 58, dated 9 June 2005.

reasons that the OTP was best situated to transmit requests for arrest and surrender.⁴

3. On 8 July 2005, the Chamber issued Requests for Arrest and Surrender for each of the five persons named in the Amended Warrant Application. In a separate decision, the Chamber determined that the Registrar was the appropriate organ to transmit the requests for arrest and surrender, because the Chamber had, after the 16 June 2005 Hearing, “issued” the Requests and therefore the Requests had been “made by the Chambers” within the meaning of Rule 176(2). The Chamber appeared to conclude that all requests for arrest and surrender would be “issued” and thus “made” by the Chamber. It stated, however, that it did not “exclude the possibility of allocating to the Prosecutor, under specific and compelling circumstances, the transmission of a particular request for cooperation, or warrant of arrest, and the receipt of responses thereto.”
4. The Chamber “noted” the “reasons and concerns submitted by the Prosecutor during the hearing” on 16 June 2005 and determined that those concerns should be addressed through consultation and close cooperation between the Registrar and Prosecutor. Finally, the Chamber agreed that further witness and security protection measures were appropriate, given the circumstances described by the Prosecution during the hearings on 16 June 2005 and 21 June 2005. The Chamber ordered “the Registrar, in consultation and cooperation with the Prosecutor” to take the measures necessary and appropriate to ensure the safety and well-being of victims, potential witnesses, and members of their families.
5. The Prosecution respectfully submits that the 8 July 2005 Decision contains errors of law and procedural errors justifying review by the Appeals Chamber. It further submits that leave to appeal should be granted because the Decision involves “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial,” for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings,” within the terms of Article 82(1)(d).

⁴ Tr. at pp. 57-58.

(b) The Prosecutor's Motion for Clarification And The Relation Between That Motion and This Application

6. On 14 July 2005, the Prosecution filed a Motion for Clarification, seeking clarification of certain determinations made in the 8 July 2005 Decision as well as variation of the time limit to file an application for leave to appeal in relation to those determinations. The Prosecution separated the issues identified in its Motion for Clarification from the issue of the appropriate organ to transmit the Requests, while recognizing that all of the determinations related in some sense to the timing of transmission, and the conditions under which transmission will occur. The issues identified in the Motion were presented for two reasons: (1) to obtain clarifications necessary to ensure that preparation for transmission of the Requests could proceed unabated; and (2) to determine whether the Chamber rendered decisions, other than the decision that the Registry should transmit the Requests under Rule 176(2), which might warrant appellate review.
7. The decision of the Chamber addressed in this application, unlike the issues addressed in the Motion for Clarification, required no clarification and thus was not included in the Motion. The Prosecution did not believe it appropriate to request a variation of the time-limit to file an application for leave to appeal the determination of who is the organ entitled to transmit the Requests under Rule 176(2), because no clarification was necessary. This application is the result of the decision-making process referenced in footnotes 1 and 27 of the Motion for Clarification.

Relief Sought

8. The Prosecution hereby requests under Rule 155 leave to appeal the Chamber's determination that the Chamber was the competent organ to prepare the Requests and that the Registry is the proper organ to transmit the Requests and Warrants.

The errors justifying appellate review

9. Consistent with the requirements of Article 82(1)(d), Rule 155 and Regulation 65, the Prosecution will succinctly describe what it views to be the errors justifying appellate review. The Prosecution will further develop its arguments in the form

of grounds of appeal under Regulation 64 if and when leave to appeal is granted by the Chamber.

(a) Errors Of Law And Procedural Errors Relating To Decision That the Registry is Appropriate Organ To Transmit Requests

10. The ruling that the Pre-Trial Chamber will prepare, and the Registrar accordingly will transmit, every request for arrest and surrender, absent specific and compelling circumstances, is based upon an important misapprehension of the Rome Statute. It is undeniable that the issuance of arrest warrants, under Article 58(1), signals an important transition point in the investigation. The issuance of warrants of arrest plainly marks the time when the judiciary begins oversight of what will become pre-trial and trial proceedings, if the persons named in the warrant are successfully arrested. The Decision fails adequately to take into account, however, that the act of issuing warrants of arrest does not reduce the need of the organs to seek international cooperation, or the need to retain the flexibility enshrined in Part 9 of the Rome Statute to determine which organ of the Court has the operational capabilities successfully to obtain the requested cooperation, in any given instance.

(1) The Determinations That The Chamber Will Prepare Requests for Arrest and Surrender, And Transmit Them, Absent Specific and Compelling Circumstances For the Prosecution to Transmit the Request, Have No Basis in the Statute or Rules, and Contravene the Object and Purpose of Article 89(1)

11. The 8 July 2005 Decision concluded that the Pre-Trial Chamber will prepare and transmit requests for arrest and surrender, and that the Prosecution may transmit requests for arrest and surrender only upon demonstrating specific and compelling circumstances. For the reasons that follow, the rule that the Pre-Trial Chamber is the only organ which can prepare requests for arrest and surrender has no basis in the Statute and the Rules and indeed is inconsistent with Article 89(1). The “special and compelling circumstances” test likewise is not grounded in the Statute or rules and conflicts with Article 89(1), the clear purpose of which is to permit the organ with the more effective capability to obtain international

cooperation – either the Chamber or the OTP, in any given circumstance – to transmit the request for cooperation.

(A) *The Chamber Mistakenly Determined That It Was The Appropriate Organ to Prepare The Request for Arrest and Surrender*

12. The foundation of the legal errors contained in the 8 July 2005 Decision is the failure of the Decision to separate two events: the event of issuing a warrant under Article 58(1), which undoubtedly can only be undertaken by the Chamber, from the events of preparing and transmitting a request for a warrant of arrest and surrender, which under Article 89 must remain open to either the Chamber or the OTP to accomplish.

13. Three events are contemplated by the Statute and Rules:

- Under Article 58(1), the “issuance” of the warrant by the Chamber, upon determination that there are reasonable grounds to believe crimes within the jurisdiction of the Court have been committed. This step undoubtedly only can be accomplished by the Chamber.
- Under Rule 176(2), the “making” of a request for cooperation. Specifically, Rule 176(2) requires that the organ which “made” the request for cooperation also receive responses to the request. Rule 176(2) contemplates that both the Chamber and the Prosecutor may make requests but does not specify which particular requests shall be “made” by one or the other organ.
- Under Article 89(1), the “transmit[ting]” of a “request for the arrest and surrender,” which shall be done by “the Court.” “The Court,” as the Chamber here accepted, is a generic term encompassing both the Chamber and the OTP.⁵

14. The Chamber committed legal error in concluding that because it takes the first step of issuing the warrant, it necessarily takes the second of “*making*” a request

⁵ 8 July 2005 Decision, page 4. As was discussed at the 16 June 2005 hearing, the fact that the term “the Court” was intended in Article 89(1) to encompass either the Chamber or the OTP is established, among other things, by the generic use of the term “the Court” throughout Part 9 and drafts of Article 89(1) which contained, in earlier versions, footnotes making explicit that “the term ‘Court’ is understood to include its constituent organs, including the Prosecutor . . .” See Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13 (4 February 1998), page 101, footnote 173; see also Report of the Preparatory Committee on the Establishment of An International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998), page 131, footnote 2.

for cooperation.⁶ The two documents are distinct: the warrant of arrest is a judicial instrument which confirms that there are reasonable grounds to conclude that crimes within jurisdiction of the Court have been committed, while the request for arrest and surrender is a means of obtaining international cooperation. Here, the Chamber pre-emptively “made” the request for arrest and surrender, without having been requested to take that step. By “making” the request in this fashion, the Chamber also wrongly predetermined the next step, that the Registry must “transmit” the request, because the request had been “made” by Chambers.⁷

15. Nothing in the Statute or the Rules vests in the Pre-Trial Chamber the sole authority to “make” or “transmit” the instrument of a request for arrest and surrender, as the Chamber concluded, even accepting that the separate instrument of the warrant of arrest must be issued by the Chamber. In proceeding to prepare the Requests, and in stating that “the necessity for the issuance of a warrant *and for its transmission* must be justified on the basis of circumstances and evidence existing at the time of the [warrant] application,”⁸ the Pre-Trial Chamber appears to have viewed the step of preparing and transmitting the request for arrest and surrender to be a part of deciding whether to issue a warrant of arrest. This view is mistaken.

16. Article 58(5) establishes, contrary to the logic of the Decision, that the issuance of the warrant of arrest is *not* necessarily, or immediately, followed by a request for arrest and surrender prepared by the Pre-Trial Chamber. Article 58(5) states: ‘On the basis of a warrant of arrest, *the Court may* request . . . the arrest and surrender of the person under Part 9.’ This broader and more permissive language regarding the request for cooperation stands in stark contrast to Article 58(1), which specifies that “*the Pre-Trial Chamber shall*” issue a warrant of arrest if the legal standard is satisfied. Article 58(5) also admits the possibility that discretion may

⁶ Other than the fact that it had also issued the Warrants, there is no explanation in the 8 July 2005 Decision of why the Chamber determined that it was the appropriate organ to “issue” requests for arrest and surrender, a step that it equated with “making” Requests within the meaning of Rule 176(2). 8 July 2005 Decision, page 5.

⁷ 8 July 2005 Decision, page 5 (finding that Requests “issued by the Chamber” were “made by the Chambers” within the meaning of rule 176, sub-rule 2, of the Rules”).

⁸ 8 July 2005 Decision, page 7.

be exercised in determining when the request for arrest and surrender may be transmitted, and therefore that the need for transmission need not fully be determined from information in the application for warrants, as the Chamber had determined.

17. There is therefore no legal support for the rule apparently adopted by the Pre-Trial Chamber: that the Chamber should automatically “make” a request for cooperation – i.e. write or draft the request – and thereby also direct the Registry to transmit the request, simply because the Pre-Trial Chamber was requested by the Prosecution to issue a warrant or order or decision relevant to the request for cooperation. Under the Chamber’s reasoning, for example, the Prosecution would be deprived of the ability to determine the timing and manner of transmission even of more obviously investigative steps as seeking cooperation in support of a search and seizure, based on the rationale that because the issuance of a court order was an intermediate step requested by the Prosecutor to support the investigation, the Chamber necessarily “makes” the request for cooperation. This reasoning is difficult to reconcile with Article 57(3)(a), which provides that the Pre-Trial Chamber may, “at the request of the Prosecutor, issue such orders and warrants as may be required *for the purposes of the investigation*,” and therefore clearly envisions that the issuance of an order or warrant is a judicial act taken in support of the broader investigation. The rule imposed by the Chamber erroneously and automatically disconnects the request for cooperation from the organ in which the cooperation request originated, in this instance the Prosecution, and the organ which may have the better operational capability to prepare the request and obtain the requested cooperation.⁹

⁹ As was discussed at the 16 June 2005 hearing, under the view that the organ seeking the cooperation should be seen as the “maker” of the request for Rule 176(2) purposes, requests for cooperation which arise from the duties and powers of the Chamber enumerated in the Statute – to seek cooperation on behalf of the defense or victims; to enforce requests for cooperation in the event of non-compliance, or to require under Article 64(6)(b) the attendance of witnesses and the production of documents at court proceedings, or to seek cooperation relating to sentencing, to give some examples – are the ones more likely to be made and transmitted by Chambers. See Tr. at pp. 101, 107.

18. The rule that the Chamber automatically should prepare a request for arrest and surrender, when issuing a warrant of arrest, also cannot be reconciled with Article 89(1). Article 89(1) equally authorizes either organ to seek the cooperative measure of requesting arrest, in any given instance. Given the clear purpose and object of Article 89(1), which is to obtain the arrest of any persons named in warrants, the provision should be interpreted in a manner which maximizes the potential for a successful arrest.¹⁰ Rule 176(2) similarly permits flexibility in any given case, because it says nothing about which organ should “make” any particular request. There are undoubtedly circumstances in which the Pre-Trial Chamber will be best situated to prepare and transmit, via the Registry, a request for arrest and surrender, including when the persons named in the warrant are already in custody or when interactive cooperation efforts will not be fruitful and therefore general publication of the warrants of arrest is the sole avenue of obtaining support for arrest. If a successful arrest effort depends upon the seeking and obtaining of international cooperation through interaction with states and organizations, however, the purpose of Article 89(1) can only be fulfilled if the Court considers, in each case, which organ has the operational capability to obtain the needed cooperation. The rule adopted in the 8 July 2005 Decision does not come near to retaining this flexibility. Rather than requiring the Chamber to consider each organ’s capabilities and limitations, in any given case, it mechanically assigns to the Chamber the task of preparing the request for arrest and surrender and therefore, through operation of Rule 176(2), the transmission of that same request by the Registry.

19. Proof that the 8 July 2005 Decision is wrongly reasoned is provided by an internal inconsistency in the logic of the Decision. If the Chamber were correct that every warrant of arrest is automatically followed by a request for arrest and surrender “made” by the Chamber, then the Registrar, under Rule 176(2), would be mandated to transmit *every* request for arrest and surrender. The Rule states clearly that requests for cooperation “made” by the Chamber “shall” be

¹⁰ Under standard principles of treaty interpretation, made applicable here through Article 21(b) of the Rome Statute, terms of a treaty should be interpreted “in their context and in the light of [the treaty’s] object and purpose.” See Vienna Convention on the Law of Treaties, Article 31.

transmitted by the Registrar; there is no discretion in determining who transmits the request once it is made. The Chamber, however, inconsistently admits in its Decision of the “possibility” that “the Chamber, in the exercise of its functions under the Statute,” will “allocat[e] to the Prosecutor, under specific and compelling circumstances, the transmission of a particular request for cooperation, or warrant of arrest.” Under the Chamber’s own logic, this possibility could only exist if it is *ultra vires*, because it violates the plain terms of Rule 176(2).

20. The internal inconsistency reinforces the argument that the 8 July 2005 Decision is wrong in concluding that the Chamber must prepare the request for arrest and surrender. Because Article 89(1) equally authorizes the Prosecutor *or* the Registry to transmit requests for arrest and surrender, the term “made” in Rule 176(2) likewise must be interpreted to permit the Prosecutor, as well as the Chamber, to “make” requests for arrest and surrender. Rule 176(2) and Article 89(1) can only be harmonized in this manner. The Chamber’s conclusion that the Chamber must “make” every request for arrest and surrender is inconsistent with the Statute and Rule.

(B) *The “Special and Compelling” Circumstances Test Imposed By The Chamber is So Restrictive as to Contravene the Object and Purpose of Article 89(1)*

21. As has just been described, the “special and compelling circumstances” standard established by the 8 July 2005 Decision is a judicial creation not only without basis in, but contrary to, the Statute and Rules. The Chamber compounded the error by finding that the standard was not met, even in the circumstances presented in this case. The 8 July 2005 Decision establishes that the “special and compelling circumstances” standard is so restrictive as to contravene the purpose and objective of Article 89(1).
22. The 8 July 2005 Decision accepts, as the OTP argued, that the provision in Article 89(1) identifying “the Court” as the transmitting party encompasses both the

Chamber, via the Registry, and the OTP.¹¹ The Chamber determined that in this instance the Registrar is the appropriate transmitting party, and thus should transmit the request for arrest and surrender and receive the responses, information and documents from requested States. The rule of law established by the Decision is accordingly that Rule 176(2) authorizes the Registrar to transmit requests for arrest and surrender, even when:

- As a result of an ongoing conflict, there is significant hostility to ICC intervention and specifically to the issuance of arrest warrants;
- The OTP exclusively has developed the set of contacts and trust necessary to build support for the execution of the warrants and to reduce hostility to those warrants¹²;
- The OTP exclusively has negotiated cooperation agreements and developed contacts with departments, ministries, and agencies of governments regarding the support needed for arrest efforts¹³; and
- Further victim and witness protection measures are necessary, and the OTP has exclusive access to confidential security information and superior knowledge of the needs of those who provided information during the investigation.

23. The object and purpose of Article 89, and the Rome Statute generally, is plainly to leave sufficient flexibility as to which organ is entrusted with the transmitting of the cooperation request to maximize the potential of obtaining the successful arrest and surrender of any persons named in arrest warrants. For the Chamber to establish a standard which prevents the Prosecution from being the organ of “the Court” to transmit the request for arrest and surrender, even when the OTP has all of the above-mentioned capabilities to obtain arrests effectively and without

¹¹ 8 July 2005 Decision, page 4.

¹² In this case, and as was stated at the 16 June 2005 Hearing, namely the Government of Uganda, the Government of Sudan, the donor countries, the United Nations, the African Union, and other international organizations, local civic and religious leaders. Tr. 68, 70, 72-73, 88-89, 94.

¹³ In this case, and as was stated at the 16 June 2005 Hearing, namely the Government of Uganda and its ministries, the Government of Sudan, the United Nations, and the donor countries. Tr. 61, 67, 69, 70-74, 83-84, 86, 88-89, 93-94, 96-98.

undermining the remaining investigation and prosecution, contravenes, rather than serves, the object and purpose of Article 89(1).¹⁴

24. In addition, the damaging consequences of shifting the responsibility for transmitting the Requests, and receiving responses to those Requests, to the Registrar from the Prosecution can only superficially be redressed by requiring the Registrar to consult with the Prosecution. The Prosecution has exclusive powers to make cooperation agreements, under Article 54(3)(d), and to receive confidential information, under Article 54(3)(e), which the Registry does not possess. These statutory restrictions mean that the consultation process envisioned by the Decision can never be complete. The Prosecution also exclusively possesses investigative abilities which are essential to ensuring the success of arrest efforts.

25. Even assuming, moreover, that perfect consultation between the organs of the Court were even possible, the Decision necessarily introduces unnecessary delay and uncertainty, in requiring the Registry to initiate and develop cooperation relationships which the OTP has maintained since January 2004.¹⁵

26. There are strong reasons, based in the Statute, to limit to the Prosecution the judgments related to the timing and manner of transmitting requests for arrest and surrender, in cases in which the Prosecution has the advantages in seeking cooperation outlined above. The Decision fully acknowledges that a determination must still be made regarding when, and in what manner, there can be “proper coordination with relevant entities and State authorities” to “maximize

¹⁴ The 8 July 2005 Decision can also be seen as creating a legal presumption which has no basis in the Statute. Although the 8 July 2005 Decision states that “under specific and compelling circumstances” the Chamber might “allocate” to the Prosecutor the transmission of requests for arrest and surrender, see 8 July 2005 Decision at 6, it is difficult to imagine how the presumption of transmission by the Registry could ever be overcome, if not in this case.

¹⁵ Commentators on Rule 176(2) have expressed concerns in this vein. See Frederick Harhoff and Phakiso Mochochoko, “International Cooperation and Judicial Assistance,” in Roy S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), at p. 641 (“While some delegations at the Rome Conference preferred the Registrar to be responsible for all communications with the outside, other expressed strong views in Rome that the Office of the Prosecutor should be given its own authority to receive and transmit information on crimes under its investigation, as transmission of all communications exclusively through the Registry could constitute interference in the Prosecutor’s work and was likely to cause delays. This latter view prevailed in the end”).

the prospects for arrest while minimizing the risk of threats or retaliatory attacks.”¹⁶ Interactions with a host of States, ministries of the Ugandan Government, and organizations will be necessary to make this determination. In addition, efforts to support the arrest and implement the accompanying protective measures will have strong investigative aspects. Given these circumstances, the determination acknowledged by the Chamber to be necessary may more properly reside with the Prosecution, at this stage. As discussed in the Motion for Clarification, the Registry thus far, for reasons of maintaining its ability to serve the defense and prosecution even-handedly, has limited its role in such matters as witness protection, in the investigative stage. Increasing the Registry’s current role in assessing and addressing the risk from threats and retaliation related to the transmitting of warrants of arrest therefore can undermine the independence which the Registry must maintain to fulfill obligations imposed by the Statute upon the Registry in pre-trial and trial stages. Similarly, it arguably is beneficial for the Chamber to maintain a distance from cooperation matters in the circumstances presented, unless and until enforcement of cooperation becomes necessary.¹⁷

27. The system of cooperation established in Rome depends for its success solely on cooperation and interaction between the most appropriate organ of the Court to make any given request and the states and organizations who respond to that request. Article 89(1), consistent with the rest of Part 9, permits the transmitting organ to be either the Chambers, via the Registry, or the Prosecutor, depending on which organ is best situated to ensure successful arrest and prosecution. The “special and compelling” circumstances standard super-imposes a restriction, or presumption, which cannot be reconciled with this statutory scheme.

¹⁶ 8 July 2005 Decision, page 7.

¹⁷ The 8 July 2005 Decision both criticizes the notion that the Prosecution would exercise such “discretion,” but simultaneously acknowledges that such a judgment as to the timing and manner of transmission must be made, to preserve cooperation and protect victims and witnesses.

The Decision is appealable within the terms of Article 82(1)(d) of the Statute

28. Article 82(1)(d) provides that leave to appeal should be granted in the case of a decision involving “an issue that would significantly affect the fair and expeditious conduct of the proceedings [...] and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.”¹⁸

29. Both limbs of the test enshrined in Article 82(1)(d) are amply satisfied in this case. In determining the different responsibilities and functions for the purposes of preparing and transmitting requests for arrest and surrender, the Chamber made errors of law and procedural errors, specified above. Those errors affect the fair and expeditious outcome of the proceedings and require “immediate resolution by the Appeals Chamber,” within the terms of Article 82(1)(d).

(a) The decision involves issues significantly affecting the fair and expeditious conduct of the proceedings

30. Even considered in isolation, the preparation and transmission of any request for arrest and surrender is a crucial and extremely sensitive step in the process of investigation. Likewise, ensuring effective coordination in support of efforts to arrest is critical to securing the presence of the person named in the warrant. The possibility of success or failure in the arrest effort alone establishes that the issue at bar is “bound to affect the proceedings or the outcome.”¹⁹ Equally important is that the timing and manner in which the request for arrest and surrender is made not disrupt or undermine protective measures or the ongoing cooperation of States and organizations. This case demonstrates in concrete terms how delay during the transmission process, a breach of trust by any member of the Court, the mishandling of information provided confidentially to the Court or of a cooperation relationship, could potentially undermine an extremely precarious

¹⁸ By “proceedings” the Prosecution is primarily referring here to the proceedings that have taken place before the Chamber pertaining to the instant issues, leading to, and including, the Chamber’s 8 July 2005 Decision. These proceedings extend their effects to the transmission of Requests and Warrants as well as to the aftermath of such transmission, and may also affect any future potential proceedings (confirmation hearing and trial), the prospects of which may be frustrated if transmission of Requests and Warrants is made in an inefficient or inadequate fashion.

¹⁹ See Roth and Henzelin, *The Appeal Procedure of the ICC*, in Cassese *et al*, eds: *The Rome Statute of the International Criminal Court - A Commentary* (2002), page 1549.

security situation and/or damage the network of cooperation which thus far has strongly supported the ongoing investigation. Negative consequences to either security or cooperation obviously will substantially affect the Court's ability to carry on trial or pre-trial proceedings in the future. It is accordingly the very outcome of these proceedings which may be at stake in the instant case.²⁰

31. The 8 July 2005 Decision also substantially affects the fair and expeditious conduct of proceedings because the reasoning of the Decision, as explained above, is not limited to requests for arrests and surrender. The rule established by the Decision is that even requests for cooperation sought in support of the investigation must be prepared by the Chamber and transmitted by the Registrar, absent specific and compelling circumstances, in any case where the Prosecutor sought a warrant or order for the purpose of the investigation. This rule substantially alters the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber as set forth in Parts 5 and 9 and thus potentially substantially affects this proceeding – and all proceedings – before this Court.

32. Even more fundamentally, the Decision substantially affects proceedings by severely restricting the flexibility the Statute carefully retains in Article 89 and throughout Part 9, by using the term “the Court” to encompass all organs of the Court. It is a foregone observation that this Court relies exclusively on the relationships that it can build with requested States and organizations for the “international cooperation and judicial assistance” which is vital to sustain the Court. In this circumstance, rulings by any Pre-Trial Chamber which significantly curtail the ability or authority of one organ or the other to prepare and transmit requests for cooperation should be closely scrutinized, because they potentially frustrate the objective of Part 9, which is to maximize the ability of the Court to capitalize on expertise and relationships residing within the different organs of the Court in transmitting requests for cooperation.

²⁰ See *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses, *Prosecutor v. Bagosora et al*, 11 September 2003, at para.9 (granting leave to file an interlocutory appeal, on the basis, *inter alia*, that “the outcome of the trial may be at stake”). Both the ICTY and the ICTR have amended their procedural rules governing admission of interlocutory appeals, and currently apply a formula identical to that included in Article 82(1)(d).

33. Finally, the Decision substantially affects proceedings by creating a strong legal presumption which will shift responsibilities of seeking cooperation under Part 9 to the Registry and Chambers, in a manner potentially inconsistent with the operational capabilities of those organs and the need to maintain the independence of each organ of the Court. See discussion *supra* at paragraph 26. The “specific and compelling circumstances” test also increases, beyond the degree Part 9 contemplates, the involvement of the Pre-Trial Chamber in cooperation matters which arguably are prosecutorial or investigative in nature. The question of whether the balance struck by the “specific and compelling circumstances” test is consistent with the mandates and of the organs is sufficiently central to the fair and expeditious conduct of proceedings that the standard warrants appellate review.

(b) Immediate resolution by the Appeals Chamber will materially advance the proceedings

34. It is respectfully submitted that appellate intervention at this stage will “materially advance the proceedings,” since a decision by the Appeals Chamber will either correct any error incurred by the Chamber in its decision, and accordingly avoid the implementation of a defective process of producing and transmitting requests for arrest and surrender, or confirm the correctness of the 8 July 2005 Decision, in which case the Chamber may safely rely on the rule developed in the Decision, as a basis for transmitting the issued Requests, as well as for any requests for arrest and surrender issued in the future. It will also allow the OTP to know in advance the procedure to follow if and when new requests for arrest and surrender are required in the instant investigation, or other investigations.

35. The Prosecution stresses that the Chamber’s Decision, far from presenting a confined point of law, establishes a particular *regime* for requesting the cooperation required for the execution of warrants of arrest, and likely for other requests for cooperation. The Decision presents the issuance of arrest warrants and preparation of requests for arrest and surrender as components of a single sequence of procedural steps conducted by the same organ (the Chamber),

establishes transmission by the Registry as a necessary consequence of this process, and even adopts a test for the purposes of delegation of transmission (and of transmission only) to the OTP: the “specific and compelling circumstances” test. At issue are all of the matters of statutory interpretation presented by the 8 July 2005 Decision, as well as the *system* that will govern the Court’s process for ensuring proper transmission (including production of the relevant requests) and execution of arrest warrants issued by Chambers of this Court.

36. The Prosecution accordingly submits that this application relates to issues of fundamental importance for the entire Court, warranting review and prompt resolution by the Appeals Chamber. The issue of which is the competent organ to prepare and transmit requests for arrest and surrender – and by implication other requests which attach other warrants and orders – is a question which will inevitably arise in future cases, and in other Pre-Trial Chambers. Resolution of this matter by the Appeals Chamber will materially advance not only these proceedings, but all other similar ones before this Court.²¹

37. In addition, due weight must be given to the fact that the Chamber’s Decision is the first to interpret and apply the relevant provisions of the Statute and the Rules pertaining to the production and transmission of requests for arrest and surrender, and the first to determine how broadly or narrowly to interpret the term “the Court” as used throughout Part 9. The Court is a novel institution, much of its law is unsettled, and there is no guidance from the ICC Appeals Chamber on the issues decided by this Chamber in its 8 July 2005 Decision. It is in the interests of

²¹ See *Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Bicamumpaka's Request Pursuant To Rule 73 For Certification To Appeal The 1 December 2004 "Decision on The Motion of Bicamumpaka and Mugenzi For Disclosure of Relevant Material", 4 February 2005, at para. 29; *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali's and Nyiramasuhuko's Motions For Certification To Appeal The "Decision on Defence Urgent Motion To Declare Parts of The Evidence Of Witnesses RV And QBZ Inadmissible", 18 March 2004, at para. 26; *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003; *Prosecutor v. Milosevic*, IT-02-54-T, Decision on Prosecution's Application For Certification Under Rule 73 (B) Concerning Rule 70, 29 August 2002 and Decision on Prosecution's Application For Certification Under Rule 73(B) Concerning The Evidence Of An Investigator, 20 June 2002.

the Court as a whole that the Appeals Chamber be given the opportunity to provide such guidance at the earliest possible opportunity.²²

38. An appeal under Article 82 (1) (d) is the only available vehicle in the procedural regime of this Court for such guidance to emerge in relation to the issues underlying this Application. The correct process for the preparation and transmission of requests for arrest and surrender of a suspect is clearly not a matter which may properly be left for final review after a determination of the merits of a case at trial.²³

39. Finally, the Prosecution submits that there is no substantial danger of delay to the overall proceedings if this matter is brought before the Appeals Chamber by means of an appeal under Article 82(1)(d).²⁴ Subject to proper clarification by the Pre-Trial Chamber, implementation of certain critical portions of its Decision, notably completion of the required scheme for the protection of victims and witnesses, may properly commence pending resolution of the matter by the Appeals Chamber.

40. Immediate intervention by the Appeals Chamber will substantially advance²⁵ the current proceedings, settle important legal principles and ensure the establishment

²² On the existence of Appeals Chamber consideration of the issue working against leave to appeal, see *Prosecutor v. Casimir Bizimungu et al*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion For Leave To Appeal From The Trial Chamber's Decision of 3 November 2004, 24 February 2005, at para. 10 and decision of 4 February 2005 (*supra* note 21); *Prosecutor v. Milosevic*, IT-02-54-T, decisions of 29 August 2002 and 20 June 2002 (*supra* note 21).

²³ On availability of ulterior remedies in the form of a final appeal, see *Prosecutor v. Pavle Strugar*, IT-01-42-T, Decision on Defence Motion For Certification, 17 June 2004, at paras. 6-8; *Prosecutor v. Slobodan Milosevic Contempt Proceedings Against Kosta Bulatovic*, IT-02-54-R77.4, Order on Defence Motion Seeking Reconsideration of Order on Contempt Concerning Witness Kosta Bulatovic and Alternatively Motion Requesting Certification, 3 May 2005.

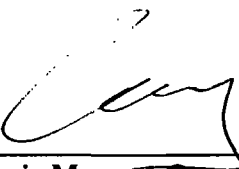
²⁴ See, e.g., *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, decision of 29 May 2003 (*supra* note 21). Contrast with *Prosecutor v. Sefer Halilovic*, IT-01-48-PT, Separate and Concurring Opinion of Judge Iain Bonomy in the Decision on Prosecution Request For Certification For Interlocutory Appeal of Decision on Prosecutor's Motion Seeking Leave To Amend The Indictment", 14 January 2005, at para. 3; and *Prosecutor v. Enver Hadzihasanovic, Amir Kubura*, Case No. IT-01-47-T, Decision on The Request For Certification To Appeal The Decision Rendered Pursuant To Rule 98bis of The Rules, 26 October 2004.

²⁵ The test under Article 82 (1) (d) is whether appellate intervention may "materially advance" the proceedings. "Material" means "important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form" (Black's Law Dictionary, Abridged Sixth Edition, 5th Reprint 1995); "advance" means "to go or move something forward or to develop or improve something" (Cambridge Advanced Learner's Dictionary, available <http://www.dictionary.cambridge.org>),

of a proper general regime for the purposes of preparation and transmission of arrest warrants issued by this Court. It is respectfully submitted that, in light of the issues raised by the Chamber's Decision, and the importance of ensuring proper adjudication of the substantive issues raised by the Chamber's Decision, such intervention is at this stage amply warranted.

Conclusions

41. For the foregoing reasons, the Prosecution respectfully requests the Chamber to grant leave to appeal, in part, the Chamber's 8 July 2005 Decision.



Luis Moreno Ocampo
Prosecutor

Dated this 18th day of July, 2005

At The Hague, The Netherlands

"to go on towards completion or perfection" (Oxford English Dictionary, available at: <http://www.dictionary.oed.com>).