

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

No.: ICC-02/04

Date: 14 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

PUBLIC REDACTED VERSION

**Prosecutor's Motion for Clarification and Urgent Request for Variation of the
Time-Limit Enshrined in Rule 155**

The Office of the Prosecutor	
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Introduction

The Prosecution respectfully requests that Pre-Trial Chamber II clarify certain aspects of its 8 July 2005 Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (hereinafter, the "Decision"), and the Requests for Arrest and Surrender (hereinafter, "Requests") issued on the same date, as specified below. It also requests the Pre-Trial Chamber to vary the time-limit for any application for leave to appeal pertaining to the issues upon which clarification is sought until such time as clarification is provided by the Chamber.¹ In relation to the latter application, it respectfully requests the Chamber to enter a specific decision no later than 1:00 p.m. on 18 July 2005, in order to preserve the Prosecution's rights to seek leave to appeal in relation to those issues, if required.

Request for Sealing

1. Because this submission is related to the Decision, which remains under seal, and *ex parte*, the OTP requests that this submission also be received under seal, and *ex parte*, and that the contents and existence of this motion remain sealed until further order of this Pre-Trial Chamber.

Motion for Clarification

Admissibility of the Motion

2. The Prosecution submits that a Chamber of the Court has the inherent power to entertain a motion for clarification where so doing is required by the need to ensure the proper application of the decision in question and to ensure the

¹ The Prosecution notes that there are other issues of fundamental importance decided by the Chamber in its 8 July 2005 Decision, which do not require any clarification and are accordingly not included in this Motion. In relation to those confined and separate issues, the Prosecution is still considering the appropriate course of action to take.

“efficient administration of justice”.² This position is supported by the existing international criminal practice stemming from the *ad hoc* Tribunals, where motions for clarification are considered despite the lack of a specific provision in their Rules of Procedure and Evidence permitting such a motion.³

3. The Prosecution is seeking clarification only of *specific points* in the Decision and Requests, the content and scope of which are not entirely clear to the Prosecution. It is respectfully submitted that the test to be applied by this Chamber for the purposes of deciding whether to allow this motion is “whether a point raised for clarification is indeed vague in the light of the terms of the Decision”; if the Chamber determines that to be the case, then clarification by the Chamber would naturally follow.⁴
4. The Prosecution further emphasizes that it is seeking clarification in relation to *operative* portions of the Chamber’s Decision and Requests⁵, that is, in relation to critical aspects of the Decision and Requests that, if incorrectly interpreted by those in charge of its execution, may frustrate the very objectives of the same Decision and Requests. It is respectfully submitted that adequate and timely clarification of those aspects by the Chamber will ensure

² See *Barayagwiza and Ngeze v. The Prosecutor*, Case ICTR-99-52-A, ICTR Appeals Chamber, Decision on Ngeze’s Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, allowing a motion for clarification on the basis that clarification by the court in the instant case could “facilitate the efficient administration of justice”.

³ For one of the earliest examples, see *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Decision on Defence Motion to Clarify, 15 January 1999, noting the absence of an explicit provision in the ICTY Rules, but nonetheless entertaining the motion.

⁴ This test was adopted by the ICTY Appeals Chamber in its 23 May 2003 Decision on “Prosecution’s Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadzihasanovic, Alagic and Kubura of 24 January 2003”, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, para. 6.

⁵ See *Prosecutor v. Nikolic*, Case No. IT-94-2-AR73, Decision on Motion Requesting Clarification, 6 August 2003.

that the goals of maximising “the prospects for arrest while minimising the risk of threats or retaliatory attacks against victims and witnesses”, as explained in the Decision⁶, are not jeopardized by an inadvertent misapprehension of the terms of the Chamber’s ruling.

Clarification Sought

(a) Timing for Transmission of the Requests for Arrest and Surrender and the Arrest Warrants

5. During the 16 June 2005 closed session hearing before this Chamber, the Prosecution submitted that its request to be the organ in charge of transmission was due, among other reasons, to the need to ensure that further measures for victim and witness protection were in place prior to any transmission of the Requests and the attached Warrants.⁷ The Chamber has taken account of this concern in its Decision⁸, further noting that the overall security plan being implemented by the OTP, in cooperation with the VWU, is yet to be completed⁹, and has concluded that this concern can be properly addressed by means of “consultation and close cooperation between the Registrar and the Prosecution, in accordance with the terms specified in the Requests...”¹⁰. The Requests, in turn, expressly state that the Chamber considers it “important, for the purposes of the transmission of this Request and of the Warrant, that the Registrar, on the one hand, and the Prosecutor, on the other, act on the basis of the fullest and closest consultation and cooperation”.¹¹ In particular, the Registrar is requested to transmit the

⁶ Decision, p. 7.

⁷ See Transcript at pp. 69 et seq.

⁸ See pp. 7-8 of the Decision.

⁹ See p. 8.

¹⁰ Decision, p. 7.

¹¹ See Request for Arrest and Surrender of Joseph Kony, p. 2.

Requests “in consultation with the Prosecutor”.¹² In addition, Registry has been requested by the Chamber to put in place protective measures, including relocation and measures related to the protection of information, acting, again, “in consultation and cooperation with the Prosecutor”.¹³

6. The Prosecution does not read these portions of the Decision and the Requests as somehow requiring immediate transmission of the Requests and the attached Warrants, despite the acknowledged fact that the protection scheme envisioned by the Prosecution with the assistance of VWU is still incomplete. Rather, the Prosecution interprets Decision and Requests as instructing Prosecution and Registry to complete the security scheme and, always acting in a coordinated fashion, to transmit Requests and Warrants once satisfied that there is system in place capable of minimizing risks of threats or retaliatory attacks against witnesses and victims.¹⁴ This reading, however, is the product of a teleological interpretation of the documents issued by the Chamber and the proceedings leading to them, as well as of the relevant Statutory provisions¹⁵, and does not emerge from any specification by the Chamber of the timing of the transmission.
7. The Prosecution accordingly requests the Chamber to clarify this particular point, in order to avert any potential misunderstanding as to the terms of the Chamber’s ruling. In particular, the Prosecution respectfully requests the Chamber to clarify that the Decision does not require immediate transmission

¹² Ibid., p. 4.

¹³ Ibid., pp. 4-5.

¹⁴ See Decision, p. 7.

¹⁵ Under Art. 58 (5), on the basis of the warrant of arrest the Court “*may* request the provisional arrest or the arrest and surrender of the person under Part 9”, which supports the conclusion that transmission is not automatically required immediately after issuance of the warrants.

of Requests and attached Warrants, but rather transmission once the necessary and appropriate security scheme has been sufficiently implemented, and accordingly the risks for victims and witnesses have been reduced.

8. The Prosecution considers this to be an issue of fundamental importance, to the extent that if the Decision is interpreted as imposing a duty to transmit despite the lack of completion of the contemplated security scheme, the execution is likely to be carried out, in the OTP's view, without appropriately protecting against risks to victims and witnesses. To date, the OTP has stressed to this Chamber that the Government of Uganda has been fully cooperative in the investigation. This cooperation continues. A different matter, however, is whether the confidentiality of the transmission of the Requests, with the attached Warrants, can be maintained once transmission is accomplished. It has been the assessment of the OTP that confidentiality cannot effectively be maintained once the Requests and attached Warrants are transmitted, even assuming that this Chamber orders compliance with confidentiality obligations and the absolute good faith of the Ugandan Government.¹⁶ Among other things, this is because the Ugandan Government necessarily will involve numerous persons and agencies in preparations to execute the warrant. For this reason, the step of imposing obligations of confidentiality in the handling of the relevant documents by the requested State cannot, in the OTP's view, fully or adequately compensate for the lack of a proper system of protection in the field.

¹⁶ This assessment has been shared with the VWU and we have no reason to believe that the VWU disagrees.

(b) Request for Clarification of Decision That “Registrar, in Cooperation and Consultation with the Prosecutor” Take Protection And Non-Disclosure Measures As May Be Necessary or Appropriate

9. A second matter as to which the Prosecution seeks clarification are the determinations contained in the Requests that specify that the “Registrar, in consultation and cooperation with the Prosecutor” take necessary and appropriate protection measures, as well as any other measures which may be necessary or appropriate to prevent the disclosure or identity or whereabouts of victims, potential witnesses and members of their families.¹⁷
10. As was described to the Chamber at the hearings on 16 June 2005 and 21 June 2005, the VWU and the OTP have been working collaboratively throughout the investigation phase and have reached agreements relating to, among other things, the interim security assessment currently underway and the implementation of security measures in anticipation of disclosure of any arrest warrants. The reason for the request for clarification is to determine whether the Pre-Trial Chamber intends its determinations to *change* the consultation and cooperation process by which the VWU and OTP had planned to implement the “overall plan for the security of witnesses and victims in the field.” This plan, as the Chamber noted, is “is still ongoing, and is yet to be completed.”¹⁸

¹⁷ The exact text of the relevant decisions are that “the Registrar, in consultation and cooperation with the Prosecutor, . . . take any measures, including relocation and measures related to the protection of information, as may be necessary or appropriate to ensure the safety or physical or psychological well-being of any victims potential witnesses and members of their families, in particular of those mentioned in the Prosecutor’s application, pursuant to articles 68 and 87, paragraph 4, of the Statute,” see Request for Arrest and Surrender of Joseph Kony, pp. 4-5; and that “the Registrar, in consultation and cooperation with the Prosecutor, . . . take any other measures which may be necessary and appropriate to prevent the disclosure of the identity or victims, potential witnesses, and members of their families, in particular those mentioned in the Prosecutor’s application,” see Request for Arrest and Surrender of Joseph Kony, p. 5.

¹⁸ See Decision, p. 8.

11. If the response is “yes,” and the Chamber’s decisions are meant to change the consultation and cooperation process already adopted by the VWU and the OTP, the implementation of the “overall plan” for security may be significantly delayed. A critical point of clarification is whether the Chamber intends to limit to VWU *alone* the ability to “take any measures, including relocation, . . . as may be necessary or appropriate to ensure the . . . well-being of any victims, potential witnesses and members of their families,” *or* whether it is permissible for the VWU and the OTP, *upon agreement*, to allocate responsibilities among themselves, as is presently done.
12. The question of the division of victim- and witness-protection responsibilities during the investigation phase is a difficult and delicate one which has resulted in many constructive discussions between the VWU and the OTP over the course of the past year.

[REDACTED]

Also, consistent with the manner in which both parties have interpreted their statutory obligations, the VWU and OTP have reached agreements and jointly adopted practices based on such additional factors as: (1) which organ possesses information enabling the risk assessment or implement of measures; (2) experience gained jointly in the field; (3) the availability of resources; and (4) which practice best

[REDACTED]

preserves the VWU's abilities to apply consistent criteria in protecting both prosecution and defence witnesses.

13.

[REDACTED]

[REDACTED]

This

division of labour, in the VWU's view, best preserves its impartiality vis-à-vis potential prosecution witnesses. Moreover, the VWU believes that this process establishes an even-handed system that can be equally applied to potential defence and prosecution witnesses alike.

14.

[REDACTED]

In these

cases, the VWU and the OTP envision assessing the situation together and translating the assessment into an action plan

[REDACTED]

15. In these circumstances were it to be the Chamber's view that the language of its decisions requires the Registrar to be the *only* organ capable of "tak[ing]" protective measures such as those described, one consequence is that it will undoubtedly take longer to implement the "overall plan" upon which the Prosecution and the VWU have agreed thus far.²⁰ This delay will occur because it will be necessary for the VWU to take responsibility for steps it previously had agreed that the Prosecution could perform. The Prosecution does not believe that the Chamber intended by its latest decisions to change the result of any prior consultations on the part of the OTP and the VWU, in part because the Chamber has not received any in-depth information of the process of consultation and cooperation between the VWU and the OTP. Clarification to ensure that the current form of cooperation between the VWU and the OTP does not transgress any intention of the Chamber, however, would be helpful.
16. The Prosecution notes that the wording used by this Chamber in the Requests For Arrest and Surrender potentially presents the legal question of whether the Statute grants to the Registrar or the Prosecution the primary responsibility of taking measures necessary and appropriate at this stage for victim and witness protection and to prevent disclosure of information which might place victims and witnesses at risk. The Prosecution was not requested to, and did not, give representations or argument to the Chamber relating to this issue before arrest warrants were issued. It is arguable that under Article 68(4) and other provisions of the Statute and Rules, during the investigative

²⁰ Another consequence is that practices adopted on the part of the VWU to protect its own ability to deal with potential defense and prosecution witnesses even-handedly may be disrupted.

stage the VWU acts as an advisor to the Court and the Prosecutor, but does not have the primary responsibility.²¹

17. In any event, the OTP believes that it is entirely appropriate to defer potentially more complicated and time-consuming questions about the division of labour and responsibilities between the Registrar and the OTP on witness and victim protection issues, in favour of determining whether the “consultation and cooperation” process already undertaken by the OTP and the VWU satisfies the requirements set out in this Chamber’s latest rulings. For this reason, the Prosecution seeks clarification of whether the requirement for the Registrar to act “in consultation and cooperation with the Prosecutor” is satisfied when the VWU implements security measures itself and also agrees that it is appropriate and consistent with its mandate for the OTP to implement others, *or instead* the requirement is meant to make the Registrar the sole and exclusive organ for implementing security measures at this stage. If the Chamber would find it helpful to convene a hearing, either to receive more information about the ongoing consultation and cooperation process or the steps remaining in the implementation of the “overall plan” and the division of tasks as anticipated by the VWU and the OTP anticipate, the OTP will be prepared to answer any further questions.

(c) Request For Clarification of Decisions that Registrar “Provide and Handle” Information Relating to the Prosecutor’s Application In a Protective Manner and

²¹ Because the OTP was not heard on the question of the respective roles of Registry and the OTP, as established by the Statute and Rules relating to victim and witness protection, the OTP may find it appropriate at some later date to address the issue, as well as the issue of the scope and applicability of Article 87(4).

In Consultation and Cooperation With the Prosecutor,” Take Measures to Prevent The Disclosure of Victim and Witness Information

18. The OTP also respectfully requests clarification of the extent to which the Chamber has delegated to the Registrar and the OTP the determinations of measures necessary and appropriate to prevent the disclosure of the identity or whereabouts of victims, potential witnesses and members of their families.²² The OTP understands the Chamber to remain the arbiter of whether measures proposed by the Registry and the OTP to limit the dissemination of information are appropriate and sufficiently protective of the rights of the accused and a fair and impartial trial. Clarification of this matter, however, would be helpful.
19. Measures likely to be taken to protect victim- and witness-related information include, for example, the redaction of documents created by the Court, such as the Warrants themselves, and documents filed with the Court, such as the Amended Application for Warrants. Pursuant to this Chamber’s decisions and determinations of 8 July 2005, the Registry and the OTP already anticipate exchanging views upon redactions and other measures which may be appropriate to protect the safety and well-being of victims, potential witnesses, and their families. The OTP believes, and we understand Registry

²² The exact text of the relevant decisions are that “the Registrar, . . . provide and handle any information relating to the Prosecutor’s application, this Request and subsequent proceedings in a manner that protects the safety or physical or psychological well-being of any victims potential witnesses and their families, in particular those mentioned in the Prosecutor’s application, in accordance with articles 68 and 87, paragraph 4, of the statute,” see Request for Arrest and Surrender of Joseph Kony, p. 4; and that “the Registrar, in consultation and cooperation with the Prosecutor, . . . take any other measures which may be necessary and appropriate to prevent the disclosure of the identity or victims, potential witnesses, and members of their families, in particular those mentioned in the Prosecutor’s application,” see Request for Arrest and Surrender of Joseph Kony, p. 5.

to agree, that certain supplemental redactions of court documents should precede transmission of any Request.

20. A question remains, however, about the process the Chamber anticipates after the Registry and the OTP complete the “consultation and cooperation” process envisioned by the Chamber. The OTP believes that to be consistent with Articles 68 and 87(4), the Chamber must review and authorize the measures proposed by the Registry, after consultation with the OTP, to alter the form or content of court documents. Determinations, for example, that the proposed measures are not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial,” see Article 68(1), should precede the transmission or dissemination of court documents redacted for victim- or witness-protection purposes.
21. For this reason, the OTP has not interpreted the Decision or the Warrants or Requests to authorize either the Registry or the OTP to act unilaterally to transmit or disseminate court documents which have been redacted or altered in any other fashion. A contrary reading could, among other things, call into question the validity of the delegation made in the Requests of authority vested in “the Court,” by Articles 68 and 87(4), to the Registrar, in consultation with the Prosecutor.
22. Clarification will aid the OTP and Registry in undertaking steps to prepare for transmission of the Requests and attached Warrants. The OTP therefore respectfully requests that the Chamber specify whether measures taken to redact or alter court documents, for the purposes of victim- and witness-protection, should be presented to the Chamber after the Registry and the

OTP have engaged in consultation regarding such measures and prior to transmission or dissemination of any such documents.

Request for Variation of the Time-Limit Prescribed in Rule 155

23. The Prosecution submits that basic considerations of efficiency and judicial economy require that, prior to any application seeking leave to appeal being lodged, any doubts as to the terms and scope of central aspects of a Chamber's decision be clarified by the same Chamber, where possible. This procedure ensures that the issues capable of justifying an application for leave to appeal are narrowed to those in which the affected party effectively considers that the remedy of appellate review is required, if any. Conversely, it minimizes the risks of unnecessary litigation over issues that are not really in dispute, but that are seen as contentious only due to a flawed or incomplete interpretation of the decision. It is in the light of these considerations that the Prosecution requests the Chamber to vary the time-limit prescribed in Rule 155(1) for the purposes of filing any application for leave to appeal in relation to the issues upon which clarification is sought, and to order that the time-limit commence to run upon notification of any decision that the Chamber renders in relation to this Motion for Clarification.
24. The Prosecution is well aware of the fact that the relevant provisions of the Statute and, in particular, the Rules are silent as to the possibility of variation of time-limits in connection to applications for leave to appeal²³. Further, Regulation 35 only contemplates variation of time limits prescribed in the

²³ Rule 150(2) allows for an extension of the time-limit in relation to appeals against convictions, sentences and reparations orders upon a showing of "good cause".

Regulations or ordered by a Chamber. The Prosecution, however, considers this to be a lacuna that may be properly filled by means of an application of Rule 101, a general provision related to all stages of the Court's proceedings. Under Rule 101, a Chamber, in making any order setting time-limits, shall have regard to "the need to facilitate fair and *expeditious* proceedings." It is respectfully submitted that the normative framework built by the Statute, the Rules and the Regulations should not be read as imposing on a party a duty to seek leave to appeal against a decision when the terms of that decision are not entirely clear to that party, and if adequately clarified by the same Chamber that issued the decision may dissuade the party from seeking appellate review, or to forego entirely the right to seek leave to appeal. A regime of this type would only have negative consequences for the Court: unnecessary inflation of appellate litigation to the detriment of expeditious proceedings, or frustration of the parties' legitimate rights to seek appellate review.

25. The Prosecution further submits that "the absence of a rule does not prevent the court from exercising its inherent power to regulate its procedure".²⁴ By requesting an extensive application of Rule 101, the Prosecution is merely inviting the Chamber to exercise its inherent authority²⁵ to ensure fair and expeditious proceedings.²⁶

²⁴ ICTY Appeals Chamber (Pre-Appeal Judge), *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & 23/1-A, Decision on Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages And, If Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 3 September 2001, footnote 2.

²⁵ For an example of the exercise of inherent authority in relation to extensions of time, see Supreme Court of Canada, [1986] 1 S.C.R. 549, *Societe des Acadiens du Nouveau-Brunswick Inc. and the Association des conseillers scolaires francophones du Nouveau-Brunswick (Appellants) and Association of Parents for Fairness in Education, Grand Falls District 50 Branch (Respondent)*: "The decision to extend time for leave to appeal is clearly discretionary and predates the enactment of the Rules of the Court" (p. 602). See also ICTY Appeals Chamber, *Prosecutor v. Delalic et al*, Order on Esad Landzo, 15 September 1999, noting the Chamber's inherent power, deriving from its judicial function, "to control its proceedings in such

26. Alternatively, the Prosecution submits that the Chamber could also properly conclude that any decision rendered in connection to this motion would be a fresh one, albeit supplementing the prior 8 July 2005 Decision, accordingly affording a new opportunity to seek leave to appeal within the five-day time limit enshrined in Rule 155(2). Due to the inextricable connection between both decisions, though, any application for leave to appeal related to the second decision would necessarily refer to the relevant matters decided by the Chamber in its first decision (the 8 July 2005 Decision).
27. Finally, and due to the proximity of the time-limit to file any application for leave to appeal (Monday 18 July 2005 by 16:00 hours), the Prosecution respectfully requests the Chamber to enter a separate decision only on this request for a variation of the time-limit under Rule 155(2), and to do so before Monday 18 July 2005 at 1:00 p.m., thereby allowing the Prosecution to file any application for leave to appeal, if required, within the time-limit. The Prosecution acknowledges and regrets the time constraints under which it is requesting the Chamber to act, and does further realize that Friday 14 July 2005 is a Court holiday. The short time-limit imposed by Rule 155, however, does not enable the Prosecution to follow any other course of action at this stage.²⁷

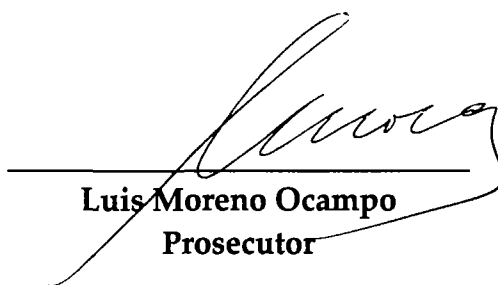
a way as to ensure that justice is done and, particularly, in relation to matters of practice, that the proceedings are fair and expeditious”.

²⁶ The Prosecution further notes that the lacuna described can lead to a number of unfair results, if not corrected by way of judicial interpretation. For instance, if a party has not been properly notified of a decision, that party, once aware of its existence, would not be in a position to seek an extension of time to file an application for leave to appeal, despite being in a position to make a conclusive showing of “good cause” (to use the terms of Rule 150 (2)).

²⁷ In the event the Chamber is unable to render by Monday 18 July a decision solely on the issue of the requested variation of the time-limit, the Prosecution may file on that day an application for leave to appeal which addresses issues also raised in this application. Were the Prosecution to do this, however, the

Conclusion

For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to (a) provide clarification of the relevant issues highlighted in this Motion for Clarification, and (b) vary the time-limit to file any application for leave to appeal in connection to those issues in the manner specified in the Request for Variation of the Time Limit contained in this document. If the Chamber would find it helpful to convene a hearing on any of the matters raised in this Motion, the OTP will be prepared to answer any further questions.



Luis Moreno Ocampo
Prosecutor

Dated this 14th day of July, 2005

At The Hague, The Netherlands

application would be filed solely to preserve the Prosecution's ability to appeal and would be subject to withdrawal in the event that relevant clarifications were later issued by this Chamber.