

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

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

Date: 18 October 2005

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PRE-TRIAL CHAMBER II

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

Registrar: Mr Bruno Cathala

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**Prosecutor's Position on the Decision of Pre-Trial Chamber II To
Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for
Reconsideration, and Motion for Clarification**

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

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Introduction

The Prosecution respectfully submits this: (1) position on the Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, dated 13 October 2005 (hereinafter the "Unsealing Decision"), insofar as the Chamber ruled that the warrants of arrest should be redacted of the dates and places of the crimes committed, and the characteristics of those crimes, *sua sponte* and without providing the OTP or the VWU an opportunity to be heard; (2) motion for reconsideration of the redactions; and (3) motion for clarification of another matter relating to the warrants of arrest.

The OTP's Position on the Chamber's Decision To Redact the Dates, Places and Characteristics of the Crimes From the Warrants of Arrest, And Its Motion for Reconsideration

1. In the view of the OTP, the proceedings thus far have been historic in establishing, among other things, that the coordination process between the VWU and the OTP, and the ongoing interaction between the Chamber and representatives of the Registry and the OTP, can successfully be carried out so as to fulfil the obligations the Rome Statute imposes on each organ to protect victims, witnesses, and their families. The OTP is additionally gratified that the Chamber has endorsed the joint assessment of the OTP and the VWU that the protective measures necessary and appropriate for unsealing of the warrants of arrest to occur have been implemented.
2. There is an issue about which the OTP has concerns, in the wake of the issuance of the Unsealing Decision. As the Chamber is aware, and is implied in the Unsealing Decision itself, *see* Unsealing Decision, Paras. 20-23, neither the OTP nor the VWU requested the redactions of the dates, places and

characteristics of the attacks ordered by the named persons. The subsequent decision to implement these redactions raises two issues.

3. First, the OTP respectfully submits that it was entitled to be heard on the issue of the redactions being contemplated by the Chamber, before the redactions were ordered. The Chamber's authority to order a measure does not relieve it of the "the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made." See *Prosecutor v. Jelusic*, Judgement on Appeal, 5 July 2001, para. 27. The OTP, as "a party whose rights [could have been] affected by the decision to be made," see *id.*, was entitled to notice of the issue and an opportunity to be heard. This principle of natural justice is logically only strengthened by the importance of the issue presented here – the safety of victims and witnesses – and the ability of the OTP and the VWU to offer to the Chamber information gleaned in the field.
4. Second, this procedural right is not a mere formality, as the *Jelusic* precedent establishes. See *Prosecutor v. Jelusic*, Judgement on Appeal, 5 July 2001, para. 29, (granting prosecutor's ground of appeal because of failure of trial chamber to grant opportunity to be heard); *Prosecutor v. Galic*, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, paras. 10, 13-15 (declining leave to appeal, but ordering new trial chamber to reconsider issue relating to admissibility of evidence, because old Trial Chamber had erred in denying the prosecution "the opportunity to explain its position"). "The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber." See *Prosecutor v. Jelusic*, Judgement on Appeal, 5 July 2001, para. 27. In this

proceeding, if the OTP had been asked about the advisability of redacting the dates, places, and characteristics of the attacks from the warrants of arrest, it would have put forth facts known to it and the VWU that may have borne on the Chamber's determination of the "necessity" of the redactions as a means of ensuring the security of victims, potential witnesses and their families. *See* Unsealing Decision, paras. 22 & 23.

5. Because the OTP did not previously have the opportunity to put forth these facts, it does so in a separate submission also being filed today, albeit under seal because it describes aspects of victim and witness protection measures. The sealed submission is entitled, "Scaled Supplement to Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes From the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification."
6. It is respectfully submitted that another factor weighing in favour of reconsideration of the Chamber's decision is the importance of preserving the principle of transparent and public proceedings, except insofar as there are compelling reasons for confidentiality, supported in the record. In the caselaw of the *ad hoc* and hybrid tribunals, the OTP is aware of no prior precedent for the unsealing warrants of arrest, or indictments, against an individual or individuals, without the simultaneous unsealing of the "concise statement of facts" underlying the charges against the named individual or individuals.¹ To the contrary, it would appear that the other tribunals have

¹ The phrase "concise statement of facts" is a term of art which refers to "the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, in detail." *See Prosecutor v. Kupreskic et al.*, Appeal Judgment, 23 October 2001, para.

considered it a better practice for the OTP and the VWU to implement victim and witness protection measures sufficient to support public disclosure of the dates, locations, and characteristics of the crimes, *before any* disclosure of even the existence of warrants. This practice was indeed followed in this case by the OTP and the VWU, as part of the overall protection plan found satisfactory by the Chamber to “provide[] the necessary and adequate protective measures for all concerned at this stage.” Unsealing Decision, para. 20.

7. The redactions also impede the OTP’s ability to maximize the potential for garnering international support for the execution of the warrants. The position in which the OTP finds itself is, in effect, to seek support for the punishment of crimes and attacks it cannot describe, because of the redactions ordered by the Chamber. The Chamber indeed noted in its Unsealing Decision “the Prosecutor’s submission that keeping the Warrants under seal is impairing the arrest efforts.” *See* Unsealing Decision, para. 16. In determining to unseal the warrants of arrest in only an extensively redacted form, the Chamber only partially addressed the impairment of which the Prosecutor spoke.
8. Consistent with this submission, and the sealed submission, the OTP respectfully requests that the Chamber grant a motion for reconsideration of

89; *see also* *Prosecutor v. Kvočka*, Decision on Defence Preliminary Motions on the Form of the Indictment, para. 1 (indictment must contain certain information, “namely, the identity of the victim, the place and approximate date of the alleged crime and the means to perpetrate it); *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, para. 12 (indictment “must contain information as to the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed”). While the identities of victims have routinely been concealed in unsealed indictments in the *ad hoc* and hybrid tribunals, no such secrecy has been extended to the time and place of the crimes.

its determination, *sua sponte*, to redact the dates, places, and characteristics of the crimes committed by the named persons. The OTP respectfully submits that the legal standard is met, because reconsideration, although a remedy sparingly granted, should occur if there is a "change in circumstances," or "it is realised that the previous decision was erroneous or that it has caused an injustice." See *Prosecutor v. Galic*, Decision on Application by Prosecution for Leave to Appeal, 14 December 2001, para. 13; *Prosecutor v. Bagosora*, Decision on the Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001, para. 25 (granting reconsideration of disclosure order on basis of new circumstances); *Prosecutor v. Pavkovic*, Decision on Prosecutor's Motion for Reconsideration and Corrigendum to 'Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures,'" 29 June 2005 (granting new protective measure after finding concerns voiced by Prosecutor in motion for reconsideration to be well founded).²

The Motion for Clarification

9. The OTP additionally respectfully requests clarification of one additional matter. This Chamber has recognized its inherent power to entertain a motion for clarification. See Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155, dated 18 July 2005, page 3. Exercising this power is appropriate

² Since the OTP did not have the opportunity to present arguments to the Chamber on the issue presented, it brings this material to the Chamber's attention in the form of a request for reconsideration, rather than seeking appellate review of the Chamber's Decision. By following this course of action, the OTP is enabling the Chamber now to receive the factual and legal material that ought to be considered for a proper determination, and to enter a new and fully informed decision. The OTP is not waiving its right to seek appellate review, if necessary, in relation to any future decision made by the Chamber in relation to this matter.

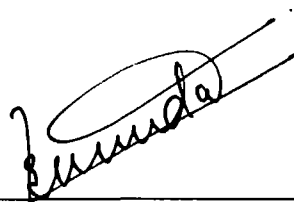
where necessary to ensure the proper application of the decision in question and the “efficient administration of justice.”³

10. Identified in the sealed supplemental is one specific and limited matter which could, if clarified by the Chamber, aid in the OTP’s ongoing efforts to garner international support for the execution of the warrants of arrest. It does not appear from the Chamber’s decisions thus far that the Chamber necessarily intends the information identified in the supplemental submission to remain sealed, but from caution the OTP has not yet disclosed the information. The inability to disclose the information thus far, however, has impeded cooperation efforts, and will continue to do so unless corrected.

Conclusion

For the foregoing reasons, and the reasons stated in the accompanying sealed submission, the Prosecution respectfully requests the Pre-Trial Chamber to: (a) reconsider its decision to redact from the warrants of arrest the dates, locations, and characteristics of the attacks; and (b) provide clarification of the one limited issue identified in the sealed, supplemental submission.

³ 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”); *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).



for: Luis Moreno Ocampo
Prosecutor

Dated this 18th day of October, 2005

At The Hague, The Netherlands