

Annex B
Confidential
Ex Parte Prosecutor and Defence

ICC-0204-PT-OTP (Uganda Situation)
/04-T-2-CONF-EXP-EN [16Jun2005 Corrected] 54-113 SZ PT(exT-02-04-2-Conf-Exp-El
16/6/2005 - 10:00 AM

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3 Pre-Trial Chamber II

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5 Situation ICC-02/04 Uganda

6 Procedural matters hearing - Ex parte exclusively destined to the Prosecutor

7 Thursday, 16th June 2005 - Closed session

8 The hearing starts at 10.00 am.

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1 Thursday, 16th June 2005

2 (10.00 am)

3 THE USHER: The International Criminal Court is now in
4 session.

5 JUDGE SLADE: Madam Registrar, will you please call
6 the matter for hearing?

7 THE REGISTRAR: Situation in Uganda, ICC 0204.

8 JUDGE SLADE: Thank you. Madam Prosecutor, kindly announce
9 yourself for the record, and we invite you to introduce
10 your learned colleagues.

11 MRS BENSOU DA: Thank you, Mr President, your Honours.

12 Fatou Bensouda, Deputy Prosecutor, appearing together
13 with Christine Chung, Senior Trial Lawyer,
14 Fabricio Guariglia, Senior Appeals Counsel, and
15 Eric MacDonald, Trial Lawyer.

16 JUDGE SLADE: Thank you very much.

17 MRS BENSOU DA: Mr President, your Honours, for the purpose
18 of these proceedings, Senior Trial Lawyer
19 Christine Chung will be leading.

20 JUDGE SLADE: That is noted, thank you very much.

21 This is the first formal hearing of Pre-Trial
22 Chamber II of the International Criminal Court. It
23 opens an important phase in the judicial functioning of
24 the Chamber. It is an occasion that registers for
25 the Chamber, as no doubt for the Court as a whole,

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1 a moment of considerable significance.

2 By its decision of 9th June 2005, the Chamber has
3 found it necessary to hear the Prosecutor on his request
4 as set out in the Prosecutor's application as amended,
5 namely the request that the Office of the Prosecutor be
6 permitted to transmit to the relevant states parties and
7 states non-parties the warrants of arrest and requests
8 for arrest and surrender that may be issued by
9 the Chamber.

10 In the decision, the Chamber has noted that
11 the Prosecutor's request is based on Rule 176(2) of
12 the Rules of Procedure and Evidence. The Chamber has
13 also noted the substantive reasons submitted by
14 the Prosecutor in support of the request.

15 I mention two other features: first, this is
16 a closed hearing; second, these proceedings are, and
17 will remain, under seal until further order of
18 the Chamber.

19 Now, the decision of 9th June 2005 is clear and is
20 specific. The Chamber seeks clarification and
21 additional details with respect to the Prosecutor's
22 request. This hearing is for that purpose, and confined
23 to that purpose alone, and for none other.

24 Madam Prosecutor, the procedure we propose is for
25 the judges to pose a range of questions, very specific

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1 questions, to which we invite you or your learned
2 colleagues to respond. I will commence such questions,
3 and in time will invite their honours to ask additional
4 or supplemental questions.

5 MRS BENSOUDA: Very well, Mr President.

6 JUDGE SLADE: Let me then turn to the questions. I start
7 with one that is central, namely that the Prosecutor's
8 application at paragraph 592 of the amended application
9 states that the Office of the Prosecutor is the organ of
10 the Court best placed to transmit the request for arrest
11 and surrender to the relevant states parties and
12 non-states parties.

13 The Chamber seeks an explanation or clarification
14 from you, first, as to the legal basis for this
15 statement. Let me say that we note that Rule 176(2) of
16 the rules pursuant to which the Prosecutor's request is
17 made seems to vest the Registrar with the role of
18 transmitting the requests for cooperation emanating from
19 the Chambers.

20 Rule 184 of the rules seems to point in the same
21 direction. That rule, 184, also refers specifically to
22 the Registrar, without mention of the Prosecutor having
23 a role in the context of the surrender of the person
24 sought by the Court. There seem to be other provisions
25 of the same tenor.

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1 As I say, that is the first aspect. The second is:
2 what is the factual and/or practical reason, or reasons,
3 underlying the statement in paragraph 592 of the amended
4 application? Again the Chamber seeks some explanation
5 or clarification.

6 Madam Prosecutor, I invite you to respond.

7 Thank you.

8 MS CHUNG: Thank you, Mr President. We are deeply honoured
9 to appear before the Chamber on this important occasion,
10 and we welcome the questions of the Chamber. We are
11 prepared to address the two areas that your Honour has
12 identified.

13 As to the first question, the legal basis for the
14 request, I propose to discuss the following topics. One
15 is the rule and the relevant statutory provisions; as
16 well, the international practice in this area, and in
17 particular ICTY precedents in which the ICTY Chambers
18 have vested in the Prosecutor the discretion to transmit
19 warrants of arrest to relevant states who may be in
20 a position to cooperate and execute the warrant for
21 arrest.

22 Finally, we will be prepared to discuss in some
23 detail, if the Chamber wishes us to, why we believe that
24 we are, as a pragmatic matter, best situated to transmit
25 the warrant for arrest. In particular, a baseline may

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1 be that it is not our current intention to make
2 the arrest warrants public or to seek their
3 immediate transmission. There are significant security
4 and witness protection issues, and issues related to the
5 timing of the disclosure of the warrant and transmission
6 of the warrant. Much progress has been made on this
7 front, but there are some significant steps that the
8 prosecutor is still undertaking to make sure that
9 the moment is the safest possible one for transmission
10 and disclosure of the warrant.

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 of pragmatic reasons that we are prepared to discuss in
20 some detail, if the Chamber would like us to do so.

21 Let me start with the legal basis for our request.
22 We have cited in our application Rule 176(2).
23 Rule 176(2), as we have examined and looked at the
24 negotiating history of the rule, first of all, on its
25 face, the rule offers two possibilities for requests for

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1 cooperation. It is important to note that the rule is
2 general to all requests for cooperation.
3 For requests for cooperation, there are two possible
4 channels for transmission of the request. One is from
5 the Chambers to Registry, and then to the requested
6 state; one is from the Prosecutor to the requested
7 state. The rule, on its face, says nothing about in
8 which circumstances which channel will be used. There
9 is a reason for that.
10 In the negotiating history of the rule -- and this
11 is covered in a little bit of detail in the Lee
12 Treatise -- essentially there was some thought to
13 correlating the channel to the type of request. In
14 fact, there was a proposal at one point that certain
15 types of request, especially a request for arrest and
16 surrender, should go from the Court to the Registry, and
17 then to the requested state. That proposal was
18 defeated, and ultimately what was decided by
19 the rules-makers was not to specify what type of request
20 went with which channel. So the rule, on its face,
21 leaves open the possibility for either the Prosecutor or
22 the Chamber through the Registry to transmit the
23 request.
24 To make this a little more clear, although the rule
25 by its terms says that requests made by the Chamber will

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1 go through the Registry, and requests made by
2 the Prosecutor will go through the Prosecutor, the rule
3 on its face says nothing about who makes the request in
4 any given circumstance; it just leaves open the channel
5 for one or the other. In order to answer the question
6 of who makes the request, one must go back to
7 the statutory provisions.

8 Before I go there, the significance of Rule 176 is
9 that it manages the follow-up procedure. The main
10 significance of Rule 176 is: whoever makes the request
11 in the first instance receives back the information,
12 receives back the responses. So the rule is mainly
13 managing what happens in the aftermath. Here that is
14 a critically important consideration, because for us to
15 put our requests through the Registry will mean that
16 the Registrar will potentially be answering questions or
17 responses back from cooperation partners who are now the
18 OTP's cooperation partners, such as the people that
19 you have read about in our warrant application, defence
20 ministries, the arms of the government that might
21 potentially be involved in helping to execute the arrest
22 warrant. So for us this is not a minimal consideration.

23 In terms of the interaction that will follow the
24 initial request, switching to the pragmatic for
25 a second, it is very important in our view that that be

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1 managed through our channel, and not by introducing
2 other players. Because there may be both
3 confidentiality concerns and concerns about delay and
4 distancing.
5 Now to go from 176, which essentially manages: okay,
6 if you make the request in the first instance, you will
7 be the person receiving the responses. How do we answer
8 the question of who makes the request in the first
9 instance? There, the most relevant statutory provision
10 is Article 89.
11 Article 89 is specific to requests for arrest and
12 surrender. There, the term that is used for who makes
13 the request is the "Court". The term "Court" used
14 throughout part 9 -- and many treatises talk about
15 this -- is always used generically. The idea in part 9,
16 which is about cooperation, was that there was no need
17 to define the particular organs, because
18 the relationship was between the requested state and
19 the Court. Because that was the context that
20 the generic term was used -- and among other places
21 where this is noted is in Lee, in the treatise in Lee,
22 and also in Goran Sluiter's book, which is on
23 cooperation. But this idea that part 9 is generically
24 using the term "Court" is throughout the negotiating
25 history of part 9.

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1 With respect to Article 9 in particular, even if one
2 considered it to be ambiguous -- and our contention
3 would be that it is not, because "the Court" includes
4 the OTP -- but even if your Honours were to consider
5 that term to be ambiguous, if one goes to
6 the negotiating history, it is clear that through
7 the prepcom sessions there was inclusion of
8 the Prosecutor as one of the organs of the Court that
9 could make the requests for arrest and surrender. In
10 fact, throughout much of the prepcom sessions, there was
11 a footnote to the term "the Court" that said that
12 the Prosecutor was obviously included as one of
13 the organs of the Court who could make a request for
14 arrest and surrender.

15 So, in terms of the text of the statute and
16 interpretation of the plain terms of the statute, our
17 argument would be that Rule 176 admits of
18 the possibility of the Prosecutor making the request,
19 and does not designate who makes the initial request.
20 Its main purpose is to manage the aftermath and the
21 interaction of the initial request. Article 89 is clear
22 on its face that "the Court" includes the Prosecutor.
23 But, even if your Honours considered it not to be clear
24 on its face, the negotiating history is very clear that
25 the Prosecutor was supposed to be one of the organs

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1 empowered to send the request.

2 There is also a commentary on the idea that some
3 delegations at Rome felt it very important also, for
4 considerations of efficiency and confidentiality, that
5 the Prosecutor have this power, especially with respect
6 to requests for arrests.

7 Another an important consideration here is that
8 there is a distinction between the arrest warrant and
9 the request for arrest and surrender. There can be no
10 cavil that this Court is the organ, that the Chamber is
11 the organ that issues the warrant for arrest. However,
12 a request for arrest and surrender, especially in
13 a circumstance as we have here, it may be sealed, there
14 may be discretion that needs to be exercised and timing
15 that needs to be considered with respect to the manner
16 of the disclosure and the moment at which the disclosure
17 is optimal. That is essentially, in our view,
18 a prosecutorial function; it can even be considered
19 an investigative function. But that function is
20 separate from the function that the Court plays in
21 issuing the warrant.

22 Do I mean to say by this that there is never
23 a circumstance in which an arrest warrant would go from
24 the Court directly to the Registry? No, I do not. In
25 fact, I can imagine a circumstance in which, if

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1 the discretion considerations are less, the warrant is
2 not sealed. Something more like the procedure in the
3 ICTY called the International Warrant Procedure, which
4 is analogous to a confirmation hearing here that would
5 be in absentia, where the purpose of disseminating
6 the warrant -- there is no secrecy, there is little hope
7 of cooperation bilaterally or multilaterally. It is
8 mainly an issue of, once the warrant is there, issuing
9 the warrant and making it known to the public.

10 In a situation like that, the pragmatic
11 considerations in favour of having the Prosecutor be the
12 party sending the request for arrest and surrender might
13 be greatly lessened. In fact, it might be optimal for
14 the Court to be the organ to be sending, through
15 the Registry, issuing, transmitting and publicising
16 the existence of the warrant.

17 In that circumstance, it seems to us that again
18 the rule admits of the possibility, again the statute
19 admits of the possibility. So our view of the rule and
20 the statute is that it leaves the flexibility.

21 Certainly the negotiators in connection with both the rule
22 and the statute meant to leave open the possibility that
23 the court would have the best means of determining what
24 serves the object and the purpose of the statute. In
25 this instance, for the pragmatic reasons that I am about

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1 to discuss, we believe that we are the best situated.

2 But I also want to make clear to the court that there

3 may be other cases in which I or another prosecutor will

4 appear before you and be absolutely conceding that

5 the more appropriate party is the Registry, from

6 the Chamber.

7 Before I leave the legal argument, are there any

8 further questions from the Chamber on that issue?

9 JUDGE SLADE: Not for the moment, thank you. Please
10 proceed.

11 MS CHUNG: Thank you, Mr President. With respect to

12 the pragmatic considerations, I would like at the outset

13 to clarify one aspect of the paragraph that you read

14 out, Mr President. Because I do notice that in our

15 paragraph 592 we did say that we were looking to

16 transmit the warrant for arrest potentially to more than

17 one state party or non-state party.

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

-
- A horizontal bar chart with 25 rows. Each row consists of a small black circle on the left and a black horizontal bar of varying length extending to the right. The bars represent different values, with some being very long and others very short.

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● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]

5 Now, this broaches the topic of why we believe that
6 we are pragmatically better suited to be the organ that
7 is transmitting the request.

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED] In this

14 situation, where we are not anticipating at this moment
15 disclosing or transmitting the warrant -- and I will get
16 into the reasons in a second -- in this situation, what
17 has been happening is, in the months since we have met,
18 many meetings and many continued contacts have occurred
19 with international partners, including the governments
20 that I have already mentioned, with international

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]

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1 So the moment that we are looking for, there are two
2 parameters. One is better safety for our witnesses and
3 victims. Because there are some steps that we are
4 working on to ensure that, if and when the warrant
5 becomes public and is confirmed to be public, the people
6 who might be at risk will be in the safest possible
7 position.

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 The second moment that we are looking for, in

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1 addition to security, is a moment where we have arranged
2 all the possible support we can for the warrants.
3 Your Honours may have noticed even in yesterday's
4 press review, as a result of a leak that occurred
5 earlier this week, that there was a op-ed piece in the
6 press review yesterday criticising the idea that the ICC
7 was moving forward on arrest warrants. This is exactly
8 the hostility -- the potential hostility to arrest
9 warrants' issuance in this case has always been there.
10 Through the last months we have made a significant
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] but we are not done with
16 our work on that front. In fact, the Prosecutor and
17 representatives from JCCD will continue to have meetings
18 in the next several weeks that are very important
19 and crucial in terms of solidifying support to make the
20 moment for the disclosure of the warrants as optimal as
21 it can be, recognising that there is no perfect moment.

22 So those are the two areas that we are working on

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

12 This war has been going on for 18 years, and there has
13 been no effective capture of any of the people who are
14 named in our arrest warrant application.

15 In order to effectuate the arrest warrants, it is
16 fairly clear to us that there will have to be support

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17 So these are just some of the parameters.

18 In addition to this we have had contacts with the UN.

[REDACTED]

[REDACTED]

[REDACTED] What we have garnered support around

22 is the idea that, if the prosecutions are really against

23 the top membership of the LRA, then amnesty for the

24 remainder of the LRA can proceed, those reconciliation

25 proceedings can go forward, but also justice in the form

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1 of ICC proceedings should go forward.

2 Interestingly, the Op Ed piece that I mentioned in

3 yesterday's press review eventually comes around to this

4 point of view. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22 Our strategy is to make as much progress as

23 we possibly can before we make the warrants public.

24 Because our concern is that once the warrants are

25 transmitted, if they are transmitted, it is very, very difficult to control who

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1 knows about it. We think at that point it is
2 effectively public. So while we initially had
3 a strategy of trying to disclose incrementally to
4 cooperation partners, without disclosing to the public,
5 we have changed to a strategy of trying to do as much as
6 we can, keeping the warrants sealed, if there are
7 warrants, and, at the point in time that we feel we have
8 accomplished as much as we can in that scenario, then to
9 move to unseal and transmit any warrants.

10 I can say more about that, if your Honours would
11 like. Our concern here is just that, now that
12 your Honours are aware of how much work in planning and
13 reaching out to sources it took to put together
14 the evidence for the arrest warrant, no smaller effort
15 has gone into the cooperation effort. In fact, many of

17 we had that provided sources of information for
18 the warrant, those contacts and that support was
19 possible because of the cooperation context that
20 we have.

21 So now we move to an even, in my mind, in some
22 ways, harder part of the case, which is making sure that
23 we can have effective arrest warrants. The evidence in
24 our case exists; it is difficult to get, but it is
25 there. Getting effective support for the arrest

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1 warrants is in some ways a much more difficult task.
2 We are just as involved and have just as many partners
3 on that task as we have had in gathering the evidence.
4 The idea to us that these interactions may in
5 the future be between the Registry and the outside world
6 in the first instance does create a matter of some
7 concern to us, because we have much invested in this and
8 we have made a lot of progress. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

16 Our plan, if your Honours would be amenable to this
17 plan, would be that we would like to appear before you
18 again, at whatever intervals the Chamber sets, to let
19 you know how the witness protection issues are going and
20 how the cooperation and support efforts are going.
21 We are not anticipating that this is going to be
22 a months-long process. In fact, our best hope would be
23 that this can be set in shape in four to five weeks'
24 time. One of our concerns is that we do not think we
25 have months long, because there will inevitably be

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1 further leaks. In the position we are in now, we just
2 want to make sure that we have sufficient witness
3 protection measures in place, that we have garnered
4 the support we can, so that we are not either
5 jeopardising people or further cooperation for our
6 investigative efforts. At that point in time we will be
7 ready to move, in the event that the Court has issued
8 warrants. But that would be our strategy for moving
9 forward.

10 I am realising as I am standing here that I forgot
11 to mention something with respect to the legal argument.

12 We have examples, and I will not belabour this point.

13 In the ICTY, interestingly, they have more recently moved
14 to the model of giving the warrants back to
15 the Prosecutor, have the Prosecutor issue them. Some
16 of the examples of that are Limaj, the Mladic case. Again
17 in the ICTY, there are definitely examples where
18 the Registrars makes the request for the arrest and
19 surrender. But the circumstances in which, by which that
20 decision is made are exactly the circumstances that
21 I have described.

22 In cases where the warrant is sealed and discretion
23 has to be exercised about the timing of the disclosure,
24 those typically go back to the Office of the Prosecutor.
25 In circumstances where it is more like it is not possible

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1 to have bilateral or multilateral cooperation, it is
2 more a matter of publicising the warrant, those have
3 tended to go through the Registrar.

4 If the Court is interested, I would be prepared to
5 submit those examples to the Chamber.

6 JUDGE SLADE: Thank you very much, Ms Chung. At this point
7 I should move to a very much related but slightly
8 different focus, on measures of cooperation.

9 The second question therefore is: with respect to
10 the protection of victims and witnesses, we would like
11 to be informed of the measures of cooperation, if any,
12 between the OTP and Registry, more specifically on that.

13 Does the OTP envisage cooperation with the Registry
14 in the context of the transmission of the request for
15 arrest and surrender? Again, your explanation or
16 clarification specific to this line of cooperation will
17 be welcomed.

18 You were kind enough to be fairly comprehensive and
19 exhaustive in the explanation, but I noted certain gaps
20 in the transcript. I invite you perhaps just to give
21 the transcriber a few moments -- and our friends
22 the interpreters, a little more time to catch up with
23 you. Thank you, Ms. Chung.

24 MS CHUNG: Thank you, Mr President. Yes, it seems that in
25 no matter which jurisdiction I appear, I speak too

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1 quickly.

2 I will answer the first question first, which is
3 about victims and witnesses. Our cooperation with
4 the Registry and the VWU has played an enormous role in
5 the measures that we have taken to date, and they will
6 continue to play a role in this last stage.

7 For each of our witnesses thus far, I can describe
8 a little bit of the process. We reviewed each of
9 the areas in which we conduct interviews, we assessed
10 each of the witnesses, we had a protocol with the
11 Registry in which we agreed on different factors that
12 would lead to an evaluation of witness risk. Only
13 witnesses which were cleared according to that jointly
14 prepared protocol were then interviewed.

15 Registry has accompanied us, the Victims and
16 Witnesses Unit, on all of the missions that were aimed
17 at assessing the security risks in the areas. They were
18 involved in all of the trips that involved setting up
19 a response system in case any witness had a problem.

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 I could say a lot more about this, but they have been
24 very, very involved so far, and the cooperation that we
25 have received from them has been excellent. I would

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1 hope that they would say the same about us.

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]

11 We are already on two missions; there are teams in
12 the field at present. The Registry has been invited to
13 go along on these and other missions in the near future.

14 Here the issue is: can the UPDF arrange better

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]

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● [REDACTED]
● [REDACTED]
● [REDACTED] So again

4 we will be working hand in hand to ensure the witness
5 protection.

6 There are other aspects of witness protection that
7 also have to be arranged. [REDACTED]

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED] But

17 these are the steps that we are trying to take, in a way
18 that is coordinated with what the next legal steps in
19 this proceeding may be.

20 One thing that we have mentioned in the warrant
21 application is potential relocation for some of
22 the witnesses, even in advance of the unsealing of any
23 warrant. [REDACTED]

● [REDACTED]
● [REDACTED]

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● [REDACTED]
● [REDACTED] -- but we will

3 be doing assessments of some of the victims and witnesses deemed to

4 be at the highest risk. [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED] Again, I cannot make any

16 hundred percent assurances to the court, but we will be in

17 a better position to tell the Court where we are on

18 those issues in a few weeks' time, because we are

19 planning to have a series of missions in the next two or

20 three weeks to address these issues.

21 On issue of coordination with the Registry about

22 the transmission of the warrant, obviously the Registry

23 will be informed of just -- we have an agreement already

24 with the Registry, certainly with the VWU, with respect

25 to any significant developments on the warrant. They

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1 are informed of what the potential witness' and victim's
2 implications are. With respect to the Registrar and
3 transmission, certainly we would let them know. If
4 your Honours were to decide that we were the appropriate
5 organ to transmit, we would coordinate it with them.
6 I do not think there would be any issue of -- we would
7 not be keeping secret from the Registry the steps that
8 we are taking on that front.

9 I failed to address the question of Rule 184.
10 Rule 184, we think, is addressed to the specific
11 situation where the surrender is about to occur.
12 Obviously, in that circumstance, that news should go
13 back to the Registry, because that is a step in
14 preparing the Court for the receipt of the bodies. We
15 think that is a different situation from sending
16 the initial request for cooperation.

17 JUDGE SLADE: Again thank you for that. At this point,
18 I will invite Judge Politi to put to the prosecution
19 additional questions. Judge Politi, please?

20 JUDGE POLITI: Thank you, Mr President. Thank you,
21 Madam Prosecutor.

22 Madam Prosecutor, as the President of the Chamber,
23 has said before, in your amended application of
24 18th May 2005, and in particular at paragraphs 592-593,
25 you stated the reasons why in your opinion the OTP is

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1 the organ of the Court best placed to transmit
2 the request for arrest and surrender to the relevant
3 states parties and states which are not parties to
4 the statute. You explained some of these reasons.
5 Now, these reasons also include the fact that
6 the OTP has completed agreements for cooperation under
7 Article 54(3)(d), with the view of ensuring full
8 cooperation with the Prosecution and with the Court as
9 a whole. So, accordingly, the OTP itself seems to
10 envisage that all the organs of the Court are meant to
11 benefit from such cooperation agreements, and is
12 therefore including the Registry.

13 Can you please elaborate on the importance of this
14 aspect, and also on the point of if, and to what extent,
15 these agreements for cooperation will benefit all
16 the organs of the Court, including the Registry?

17 Thank you.

18 MS CHUNG: Thank you, your Honour. We do believe that, if
19 the Chamber were to grant the prosecution the ability to
20 transmit the warrants or the requests for arrest and
21 surrender, it would in the end benefit the Court,
22 including the Registry and the Presidency, the Court as
23 a whole.

24 The agreements for cooperation are a very good
25 example. The agreement for cooperation that we have

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1 with the Government of Uganda for example, which was

● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]
● [REDACTED]

8 Again, we think that we are the best organ in

9 the first instance to capitalise on that agreement.

10 We have contacts with all the people who negotiated that

11 agreement with us and we have contacts now with all

12 the people in the military who are in a position to

13 effectuate that agreement.

14 Will that benefit the Court as a whole? We think

15 so. Maybe in a more attenuated sense than your Honour

16 is implying or took our words to mean. And I am sorry

17 if we created a misunderstanding in that way. But in

18 our view there is a distinction. There is a short-term

19 interaction, which we think is probably best handled by

20 us. But will the Registry be involved in the fruits of

21 that? If the arrest is properly effectuated, yes, they

22 will be the ones to receive the news that the person has

23 been taken and to make all the arrangements for

24 the person to be brought here. This is a more maybe

25 distant effect than being immediately involved in

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1 the interaction.

2 For all reasons that I have mentioned, I think that

3 that is a progression of events that best effectuates

4 the objects of the statute, which in this instance would

5 be, in the event that the Court issues arrest warrants,

6 to make sure that they are effectively served and

7 executed.

8 Also of course, in terms of the Registry, these

9 longer-term effects are very concrete. The Registry

10 will be involved in a much greater way in terms of

11 victims and witnesses, bringing them to Court, bringing

12 them to the procedures. So even with respect to

13 the Registry itself, even though the short-term

14 interaction may be less, the whole purpose is to make it

15 so that the Registry and the rest of the Court have

16 the ability to carry out their functions in a way that

17 serves the statute.

18 JUDGE POLITI: Thank you for the answer. My next question

19 touches again upon the issue of timing, which I realise

20 you already referred to, mentioning the elements of

21 security and support as key elements for timing.

22 Can you please elaborate a little more on these

23 elements; and maybe if you can clarify what kind of

24 timing is envisaged at this stage by the OTP for the

25 transmission of the request, if and when the arrest

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1 warrant is issued? How does this relate to
2 the purported urgency of the execution of the arrest
3 warrants, if and when they are issued? Thanks.
4 MS CHUNG: I am sorry your Honour, I just want to make sure
5 that I have the question clear. May I have a moment?
6 (Pause).

7 Your Honour, in terms of the security and support,
8 one thing that I would say in elaboration of
9 the security point is that we have to remember that,
10 because it is an ongoing conflict situation, judging
11 even when is an opportune time in terms of
12 the operations of the LRA is very important.
13 Your Honours are well aware at this point, because
14 of the arrest warrant application, that our sources of
15 information on this are very good. We have contacts
16 with the military, we have contacts with intercept
17 information, we can know where the LRA is operating and
18 in what ways, we have contacts with our witnesses, who
19 tell us about the attacks that are happening in their
20 areas. We are in touch with the UN and all the security

21 [REDACTED]

22 [REDACTED]

23 Right now, unfortunately, there are attacks around
24 the Gulu area. Lira is relatively safe. Even in terms
25 of receiving information and making an evaluation of when

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1 is an optimal time from a security standpoint, that is
2 the kind of advantage we have in terms of receiving and
3 assessing the information.

4 The witness protection elements I have already
5 mentioned. If I had five hours, I could give you many,
6 many examples of the different things we are doing. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

15 Security is tied to -- I do not mean to present them
16 as different matters. Security and support are also
17 interrelated. Because, for example, if we can garner
18 better support for the warrants through the contacts
19 that I have mentioned, also potentially through
20 a different communication strategy -- one thing that
21 your Honours know is that to date we have been very
22 reluctant to engage with the media about the ICC
23 investigation. [REDACTED]

[REDACTED]
[REDACTED]

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● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

13 A large part of our problem in northern Uganda is that

14 there is a lot of misconceptions about what the ICC is

15 doing: that we were going to prosecute child soldiers.

16 So getting the correct information out there, maybe at

17 a higher and louder level than we have been doing, is one

18 option that we are exploring to maybe also increase

19 the security situation. So those two things are

20 interrelated.

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

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● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

● [REDACTED]

19 So these are the different components of

20 the security and the support.

21 In terms of the timing and the urgency, one part of

22 the explanation was in the warrant application. We did

23 not submit the application on an emergency basis. Our

24 concern in getting the warrant to the Court was this:

25 we have always operated in this case under the danger

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1 that one of our targets might be captured. If this
2 person, whoever it was, was captured, and there was no
3 proceedings going to get us on the road to having
4 a warrant, that would have left us in a very vulnerable
5 position, [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] but it would create
9 an enormous political complication that could be avoided
10 if we were ready with our warrant application naming
11 the people that we wished to name and particularly, as
12 your Honours now know, the highest leadership of
13 the LRA.

14 So the urgency for us was in getting an application
15 to the Chamber to have this state of preparedness. Now,
16 we did not make an emergency application because, so
17 long as nobody was captured, it was not an emergency
18 situation. But even if someone who was in the names we
19 named in the application had been captured two weeks
20 ago, I do believe that at that point we would have been
21 coming to the Chamber and saying: could your Honours now
22 consider this as an emergency request?

23 So I understand, and I think it is an open issue for
24 this Chamber, now that we have made it more clear to
25 your Honours what our preferred strategy is -- let me

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1 emphasise again that we are seeking no emergency measure
2 at this point, and it will be entirely in the Chamber's
3 discretion, as it always is, when and whether to issue
4 the warrants, in the light of the information we have
5 given you. Obviously the Chamber might make different
6 moves from those it would have taken had it not known
7 the information we had given, so that is one reason I am
8 very happy to have this opportunity to be here. But
9 I do want it to be clear to the Court what the context
10 was.

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 JUDGE POLITI: Thank you, madam. I have one last question
19 again on the coordination of timing, which is mentioned
20 in your application also in connection with the need to
21 maximise the prospects for arrest, and you already
22 alluded to this point in your submission.
23 What I am asking now is to elaborate briefly
24 on the point of whether the cooperation between the OTP
25 and national authorities regarding these matters, in

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1 other words the execution of arrest warrants, is
2 specifically addressed in one or more cooperation
3 agreements?

4 The second point: if such coordination is addressing
5 the text, who would have the last word in case of
6 disagreement between the OTP and the national
7 authorities? In other words, if and to what extent
8 the OTP might be forced to accept the timing imposed by
9 the national authorities.

10 The last point: if no specific provision is made in
11 these agreements, what would be the scenario if one or
12 more of such national authorities refused to coordinate
13 with OTP? Thank you.

14 MS CHUNG: Judge Politi, in terms of the cooperation
15 agreement, I cannot recall, standing here, if
16 the cooperation agreement expressly mentions arrest
17 possibilities and arrest execution. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] But

24 if your Honour would allow me, I could look at
25 the agreement and send a follow-on application to

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1 the Court.

2 I think, though, the broader answer to the Court's
3 questions is this, and I want this context to be clear
4 because I am speaking in part on behalf of a state
5 party. The cooperation thus far on all of these fronts
6 has been excellent. There is no lack of will in terms
7 of sitting down in consultations and trying to figure
8 out a way to get this accomplished. Every RFA that
9 we have sent so far has been responded to positively.
10 We have no reason at this point to believe that it is
11 going to be any different with respect to arrest
12 efforts.

13 In terms of timing, there is not a problem on that
14 front yet either. I do not know if there will be.
15 Obviously then it may be that we will make cooperation
16 requests, and if they do not occur in the way they are
17 supposed to occur, it is the job of this Chamber to
18 enforce those requests. Right now, it is very far in my
19 mind from that being a possibility, just because our
20 track record with the Ugandan Government in terms of
21 cooperation has been very, very good. We have already
22 embarked on the negotiations about what will happen in
23 this next phase, if and when the warrants are issued,
24 and we are not encountering any obstacles so far.
25 In terms of the timing for this Chamber, these

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1 meetings are occurring now; in fact, a set of them will
2 occur next week. Our philosophy is that we have to
3 accomplish as much as we can.

4 The urgency now is that it is, in some senses,
5 a good moment. [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 We are moving quickly to finalise these last pieces
14 of witness and victim security and support with our

15 [REDACTED]

16 those pieces fall together, which we hope will be in the
17 next four or five weeks, we are hoping that the good
18 news will be that we will be back in the Chamber asking
19 for an unsealing of any warrants.

20 I am not a seer, I cannot guarantee that that will
21 be the case, but that is our aim now. There is nothing
22 on the horizon in terms of any hesitancy on the part of
23 the GoU to believe that that is not a viable plan.

24 The issues on the GoU side, many of them are
25 coordination issues, getting the taskforce together,

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1 getting forward movement in terms of implementation. So
2 far there has been no indication of a lack of will.

3 JUDGE POLITI: Thank you.

4 JUDGE SLADE: Thank you very much. At this point I will
5 invite Judge Diarra to put further questions on behalf
6 of the Chamber.

7 JUDGE DIARRA: Thank you, Mr President. Madam Prosecutor,
8 through the replies that you have given to my
9 colleagues, several of my concerns have been taken up.
10 However, I would like to ask you, with regard to the
11 draft arrest warrant which was submitted to the Chamber,
12 it envisaged the request for arrest and surrender being
13 addressed to all state parties to the statute as well as
14 to those state non-parties having entered into
15 an agreement with the Court.

16 I would like to know, given the demands of
17 confidentiality, if that is really desirable for all
18 the states parties and the non-states parties to receive
19 this arrest warrant?

20 Secondly, just to add to this question, I would like
21 to ask if you have agreements with a number of these
22 countries? Thank you.

23 MS CHUNG: Your Honour, in response to the first question,
24 which is about to whom any requests for arrest and
25 surrender should be addressed. The only proper parties

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1 under Article 89 for requests for arrest and surrender
2 would be a state -- I cannot remember the exact wording,
3 but a state on which the named persons are actually in
4 existence, where they could be arrested. So the only
5 possible states parties to receive a request for arrests
6 and surrender under Article 89 are the Sudanese and
7 the Ugandans.

8 As to other requests for cooperation, it may not be
9 a request for arrest and surrender specifically but some
10 other form of cooperation, it is possible that other
11 states parties will be involved. As for the requests
12 for arrest and surrender, I think the only potential
13 parties are the Ugandans and the Sudanese .

14 This also raises another issue, which I have seen in
15 the ICTY case law, which is: to whom the warrant should
16 be addressed. Because in our system they are separate
17 instruments. The warrant comes out under Article 58.

18 The request for arrest and surrender is a different
19 instrument, that comes out under Article 89. And under
20 Article 91, it says that the requests for arrest and
21 surrender will contain in the warrant information about
22 the named persons and whatever other supporting
23 documentation the requesting state may require.

24 So that separation of the warrant and the request,
25 it does create some issues about to whom each of those

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1 instruments should be addressed. What I have seen in
2 the ICTY orders that I have reviewed is that sometimes
3 the judges seem to prefer to address the warrant to
4 the broadest possible number of receivers of the request
5 for cooperation, because then they do not have to
6 rewrite the warrant again and again. In our situation,
7 maybe there is no problem, because there is only one
8 state party and one non-state party who could
9 potentially execute the warrant.

10 So certainly under the strategies that I have
11 outlined, the only addressee would be the Ugandans. But
12 the only other person who could possibly be an addressee
13 is the Sudanese.

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 I am informed by my JCCD colleague that I misspoke.
22 I have the answer to the question about what
23 the cooperation agreement with the Ugandans says on
24 arrest warrants. It does not mention arrest warrants
25 specifically, but it does say that they will comply with

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1 our request in whatever context. So obviously -- as
2 I mentioned, we included some categories of cooperation
3 that clearly apply to the arrest scenario. So our
4 expectation in terms of enforcement would be that they
5 continue to have an obligation to comply under
6 their agreement.

7 Also the agreement is broader than I represented it
8 to be. It is actually a court-wide agreement. So this
9 is a scenario where everyone was involved in signing up
10 to this agreement. It is just that we have been doing
11 most of the effectuating of it.

12 JUDGE DIARRA: Madam Prosecutor, we also have the feeling
13 that measures on the part of the Court, particularly
14 Rules 184 and 177(2), Regulation 111, Article 91(4) and
15 Article 87, do not give us a lot of room for manoeuvre
16 when it comes to who should transmit the request for
17 the arrest warrant and the request for arrest and
18 surrender. When our President mentioned in his question
19 that there was the Rule 176, you recognised that
20 the Rule 184 did not give you any role within
21 the surrender, and I do not want to come back to that.

22 But, on the other hand, I would allow myself to go
23 back to the Rule 176, given the reading that you have
24 made of it in response to the question from our
25 President. This rule is in fact very clear. It says

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1 that the requests emanating from the Chamber are
2 transmitted to the states by the Registrar, and that
3 those coming from the Prosecutor shall be transmitted by
4 the Prosecutor himself.

5 Do you not consider that an arrest warrant is
6 a request that comes from the Chamber?

7 MS CHUNG: Your Honour, the warrant comes from the Chamber,
8 but the rule is ambiguous as to where the request comes
9 from, in the case of a request for arrest and surrender.

10 The warrant clearly comes from the Chamber, but the rule
11 does not establish any -- essentially the system that
12 your Honour is proposing is that a request, even if it
13 originates from the Prosecutor, because the Court's
14 intervention was necessary at some step along the line,
15 that is what makes it a request of the Chamber. That
16 connection, in our mind -- first of all, that is not
17 a result that is dictated by the rule. The rule does
18 not say if it is an order that comes from the Court then
19 that order, or that warrant or request for cooperation
20 associated with that order, must also come from
21 the Court and through the Registry.

22 That is why I raised the issue of Article 89.

23 Because in the context of arrest and surrender, it is
24 very clear in the drafting history that the Prosecutor
25 is supposed to be included there. If that is true, that

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1 the statute drafters envisioned that the Prosecutor would
2 be at least one of the organs of the Court empowered to
3 transmit a request for arrest and surrender, as opposed
4 to the arrest warrant, then the rule can do no less.
5 The rule cannot limit an ability or an organ that was
6 named in the article.

7 So when Article 89 says "the Court", and
8 the drafting history makes clear that "the Court" was
9 meant to include the Prosecutor, it is true that in
10 a different context, such as the actual effectuation of
11 surrender, that is a place where the Registrar will have
12 to be involved, and should be involved. We will have no
13 role in that; that comes back to the Registrar. But in
14 terms of a request for arrest and surrender, that is
15 the type of cooperation which under Article 54(3)(c) can
16 be requested by the Prosecutor.

17 In fact, part 9 does not really define who does
18 what. You have to go back to who had the original power
19 to authorise. So this leads to the question of: things
20 that are considered investigative or prosecutorial,
21 requests that originate from the prosecution, even if
22 they are approved by the Court, in a situation like
23 this, where there is more prosecution steps involved,
24 assessing the security, making sure that the support is
25 there, where the prosecution is making a discretionary

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1 call about when the request should be sought, that is
2 essentially prosecutorial activity.

3 There are many, many instances where the Prosecutor
4 will not be involved, where it is clearly the court
5 issuing the request. For example, any requests that
6 originate from the defence, any requests that originate
7 from victims' help, from the victims. Article 64.6,
8 which talks about when at trial the Chamber may request
9 documents or witnesses, those are clearly requests that
10 originate in the Chambers, or originate from somewhere
11 other than the Prosecutor, and therefore we will never
12 be involved in the transmission. It will go straight
13 from Chambers to the Registrar and then out to
14 the cooperating party. Enforcement is another area that
15 will be exclusively the Chamber's, all sentencing
16 matters.

17 Rule 176 does not really define, it does not go
18 category by category like this. But even if you were to
19 go category by category, Article 89 suggests that in
20 terms of the category of arrest and surrender, the fact
21 that the Court intervenes to issue the warrant does not
22 mean that it is necessarily the Registry who is
23 transmitting the requests for the arrest and surrender.
24 They are two separate events.

25 I think the ICTY model is very interesting, because

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1 their rules are even more restrictive than ours.

2 I think the relevant rules are 55, 59, 61(d). If those
3 rules are read in sequence, it admits of almost no
4 possibility for the Prosecutor to ever be involved in
5 transmitting any requests for cooperation associated
6 with the arrest warrant.

7 In practice, though, what has happened at the ICTY
8 is, because of all the pragmatic considerations, and
9 I think a recognition that these functions -- it really
10 is a recognition that these functions are essentially
11 prosecutorial. That is why, despite the harsh language
12 of the rules, which would seem to say the Prosecutor can
13 never be involved, the ICTY has actually moved to
14 a practice of the court writing orders that admit of
15 the Prosecutor's discretion to receive back the warrant.

16 So I do not think that Rule 176 -- really, the word
17 is "made": requests made by the Court will go through
18 the Registry; requests made by the Prosecutor. First of
19 all, here the request is a different thing from
20 the warrant. And I do not think the rule really sets
21 forward who makes which request in which instance. For
22 that you have to go back to Article 89.

23 If you read the Lee Treatise, they talk about
24 the history of 176, and they say essentially it was just
25 meant to establish the channels for the follow-up.

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1 The drafters did not want to get into the debate about
2 in which category of items the person would be making
3 the request, so they purposively left it vague. I think
4 that that is exactly the vagueness that leads us back to
5 the statute.

6 It is not a position that we are saying we are
7 the only ones. In fact we can imagine many
8 circumstances in which we will never be involved. In
9 this particular case of arrest and surrender, a request
10 for arrest and surrender, we think that the rules and
11 the statute give us also the power to make the request.

12 JUDGE DIARRA: During the answer that you gave us, you spoke
13 yourself about cooperation with the NGOs. But Rule 177,
14 which goes into assistance by the Court for the NGOs, it
15 refers to the Registrar, and it does not give you
16 a particular role.

17 Do you nevertheless consider that, for example,(To continue in the same vein,)
18 Regulation 111 confers to the Registrar the task of attaching a copy of
19 any relevant decisions of the Court relating to admissibility.

20 So in your attempts to carry out an arrest warrant, when
21 you are going to be confronted with an obstacle with
22 regard to admissibility, you are going to feel obliged
23 to get the approval of the Registrar. How do you intend
24 to manage this issue of getting involved with a party

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25 with regard to finding the different solutions?

1 MS CHUNG: Your Honour, with respect to Regulation 111, let
2 me start with the small point. Regulation 111 is
3 addressed to a specific circumstance of a pending
4 admissibility challenge in the Court. In that
5 circumstance, certainly we agree with Regulation 111.
6 That is an example, like the other examples I was
7 giving, of where the Chamber would have the interaction
8 through the Registry and we would not be involved. That
9 is a circumstance where, because there is a pending
10 proceeding before the Court, the interaction between the
11 Court and the requested state party makes absolute
12 sense. There is no discretionary function to be played,
13 or prosecutorial functions to be played in that interim,
14 in that space.

15 But this is a very different circumstance where, in
16 initially requesting the cooperation in support of the
17 arrest warrant and the request for arrest and surrender,
18 we think that is a very different circumstance where
19 there are prosecutorial and even investigative functions
20 to be played. That is why this request falls more under
21 the rubric of Article 54(3)(c), where the Prosecutor is
22 empowered to make requests in support of its competence
23 and its functions.

24 So, again, it is a place where I do not think
25 the rule -- and I would call your Honours' attention to

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1 both the informal expert paper of this Court, which is
2 on the Court's website, which explicitly says that 176(2) is
3 meant to admit of the possibility that the Prosecutor
4 would be making the request for arrest and surrender.
5 It says so in, I think, a sentence or two. Also in
6 the Lee Treatise, chapter 13, it talks about 176(2) and
7 it describes that:

8 "The negotiators paid very little attention to
9 identifying the particular organs of the Court which
10 will be responsible for communications with the outside
11 world."

12 It describes how:

13 "While some delegations at the Rome
14 conference preferred the Registrar to be responsible for
15 all communications with the outside, others expressed
16 strong views in Rome that the Office of the Prosecutor
17 should be given its own authority to receive and
18 transmit information on crimes under its
19 investigation ..." --

20 JUDGE DIARRA: Please, could you start again? Could you
21 start reading at a normal speed, please?

22 MS CHUNG: I was reading from the Lee Treatise at chapter
23 13:

24 "While some delegations at the Rome conference
25 preferred the Registrar to be responsible for all

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1 communications with the outside ... [this is
2 specifically about Rule 176] others expressed strong
3 views in Rome that the Office of the Prosecutor should
4 be given its own authority to receive and transmit
5 information on crimes under its investigation, as
6 transmission of all communications exclusively through
7 the Registry could constitute interference in
8 the Prosecutor's work and was likely to cause delays."

9 This view prevailed in the end. As I discussed
10 earlier, there was a prior negotiating history of
11 Rule 176(2) which specifically proposed separating out
12 arrests and surrenders. This proposal was made by
13 the Italians, but it was defeated. We think even in
14 the context of Rule 176(2) the Prosecutor has
15 the ability to transmit these requests, even if
16 the Chamber has unchallenged authority to
17 issue the arrest warrant.

18 JUDGE DIARRA: Thank you very much. Mr President, I have
19 finished my questions.

20 JUDGE SLADE: Thank you very much.

21 Ms Chung, Rule 176 of course deals with two things:
22 transmission of the request and it deals also with
23 the information, the receipt of information, and for
24 that information to be relayed to the Chamber.

25 So far you have dwelt on the transmission. Is it

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1 always the case in this situation, in this particular
2 request of the prosecution, that the OTP remains
3 the relevant and the most appropriate for information to
4 be transmitted back to the Chamber?

5 If your answer to that is the one that I expect you
6 to give, is that answer affected at the stage that the
7 proceedings are open to and joined by other
8 participants? Could you please explain?

9 MS CHUNG: Mr President, we do believe that we remain
10 the relevant and the most appropriate means of
11 channelling the information back.

12 In terms of what happens when the proceedings are
13 open, I think again it depends on what type of request
14 is made. I may be misunderstanding the question, but in
15 any given application of Rule 176(2), I do not think it
16 is a relevant application of either a type of request or
17 the fact that at some point along the line the Chamber
18 may have been involved. Sometimes the second factor
19 will be dispositive. If it is a defence request for
20 a witness to be produced, then obviously that
21 goes directly. But I do not think that there is ever
22 a mechanical rule. I think that was the intention of
23 the drafters. They essentially avoided the question.

24 We have the benefit in this particular circumstance.

25 In the context of Article 89, when you look at -- this

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1 is in December of 1997, and we can submit a copy to
2 the Court. It is one of the prepcom works describing
3 the changes that have already been adopted. In this
4 draft it says:
5 "The Court shall transmit the warrant to any state
6 where the person may be located, along with the request
7 for the arrest."

8 And then there is a footnote that says:

9 "The term 'Court' is understood to include its
10 constituent organs, including the Prosecutor, as defined
11 in Article 5."

12 And then at the Zutphen conference in
13 the Netherlands, the footnote was dropped. But it is
14 clear at that point, through the negotiating history
15 that goes back two years, that the Prosecutor was always
16 meant to be included in a request for arrest and
17 surrender.

18 To be concrete about the ICTY jurisprudence and
19 the practice that is developed, the most pertinent rule
20 is rule 55(d):

21 "Subject to any Order of a judge or Chamber,
22 the Registrar may transmit a certified copy of a warrant
23 of arrest to the person or authorities to which it is
24 addressed, including the national authorities of a state
25 in whose territory or under whose jurisdiction

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1 the accused resides."

2 So that is a rule that is even more specific to

3 arrest and surrender, and more specific in denominating

4 the Registrar than ours. But the type of order that has

5 been issued under this rule -- and I am reading from the

6 Limaj order, the confirmation of the indictment --

7 THE REGISTRAR: Your Honours, if I may. When you are

8 reading, if you provide us with a copy, we can provide

9 a copy also to the interpreters, which will help. To

10 view the document on your screens, you just press

11 "Visualise 1" on the panel, which is the second key on

12 the right side.

13 JUDGE DIARRA: Madam Prosecutor Bensouda, can we count on

14 you to pull the gown of your colleague when you note

15 that she is going far too fast with regard to the words

16 appearing on the screen in the transcript? That is

17 an experience of collaboration of the Prosecutor of

18 the ICTY, because she gets taken up with what she is

19 saying, so she cannot follow the writing. You can

20 follow the writing and see the difficulty, so it is

21 really up to you to pull on her gown a bit.

22 MS CHUNG: Your Honours, we have many examples of this, but

23 we can look at two examples. The first is from

24 the Limaj case, as I mentioned. This is

25 the confirmation of the indictment. In the "Order"

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1 section, you will see that in the first paragraph it
2 says:
3 "Copies of the arrest warrants for the accused
4 persons, addressed to the Prosecutor, the UN mission in
5 Kosovo, to the NATO Kosovo force, and to the competent
6 authorities of any state member of the United Nations,
7 shall be transmitted to the Prosecutor, who may, in her
8 discretion, transmit them to UNMIK/KFOR, and/or said
9 authorities for the search and apprehension of
10 the accused persons."

11 I also handed to the Court usher a second example,
12 which is from the Prosecutor v Mladic case -- I assure
13 the court that these are public documents now, they were
14 sealed at the time but they are now public. Citing the
15 relevant rules, this is a different judge of a different
16 Chamber:

17 "Copies of the arrest warrant attached should be
18 transmitted to the Prosecutor, who may transmit them to
19 the international stabilisation force and/or to
20 the competent authorities of any Member State of
21 the United Nations."

22 If you look through the ICTY judgment -- and we have
23 done what we can on the website -- you see that the rule
24 is very restrictive. But because of the pragmatic need
25 for flexibility and discretion, the judges have taken

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1 the "subject to order of the Court" language in Rule 55
2 and expanded it to write the orders so they give
3 the Prosecutor the discretion.

4 It would be very paradoxical if we had less ability
5 than at the ICTY to exercise the same discretion.
6 Because in fact our cooperation situation is much more
7 complicated. We do not have chapter 7. In the ICTY in
8 fact the warrant was the request for arrest and
9 surrender, and it often directly was addressed to
10 the answering state parties. It would go back to
11 the Prosecutor, but there was no separation really of
12 requests for arrest and surrender and the warrant, and
13 there was less of a need. Typically it was more of
14 a classic warrant situation, where you give it to
15 a policeman to execute. That is not our situation, we
16 do not have a constable or a policeman. We have to get
17 cooperation at times from multiple parties.

18 So this issue of timing and sealing and disclosure
19 is exactly the issue that makes it more a prosecutorial
20 function. We think, looking at the history of the ICTY
21 orders, it led to pressure on the judges to adopt
22 this policy. They have the discretion under the rule,
23 but they did use that power to say: okay, we are now
24 going to order specifically that the Prosecutor have
25 the ability to transmit these warrants. I do not think

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1 it would take a lot of deep digging or insight to say
2 that it is for precisely those types of reasons that
3 we are asking this Chamber to grant us the same
4 authority.

5 JUDGE SLADE: Thank you. I refer to Article 58(3)(a).
6 The question is: since the making of the Prosecutor's
7 application and amended application, has there been any
8 development relating to the information that will be
9 required under that Article?

10 MS CHUNG: The information has been developed a bit.
11 The problem that we have, Mr President, is that it is
12 not so clear how reliable the information is. For
13 example, I can tell your Honours that we have a little
14 more information about height and weight, but it is very
15 hard to know if it is going to be that helpful in
16 identifying someone. We are still looking for
17 photographs; we think that would be the most helpful.
18 But if we obtain any additional information, we will
19 submit it as a potential amendment.

20 JUDGE SLADE: Thank you.

21 THE REGISTRAR: Your Honour, for the record, the two
22 documents which have been shown and discussed will be
23 put in the record file as annex 1 and 2, and they
23 correspond to the passages shown in the transcript on
24 page 109.

25 JUDGE SLADE: Thank you, Madam Registrar. Madam Prosecutor

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1 and colleagues, that ends the questioning from
2 the Chamber. Allow me to thank you on behalf of
3 the Chamber for your responses to the questions.
4 The hearing is at an end and will now adjourn.
5 (11.35 am)

6 The hearing is adjourned at 11.35 am

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Ex parte exclusively destined to the Prosecutor

Procedural matters

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