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Exhibit

B

**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	
Mr. Luis Moreno Ocampo, Prosecutor Mrs. Fatou Bensouda, Deputy Prosecutor Ms. Christine Chung, Sr. Trial Lawyer Mr. Fabricio Guariglia, Sr. Appeals Counsel	

No.: ICC-02/04

14 July 2005

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

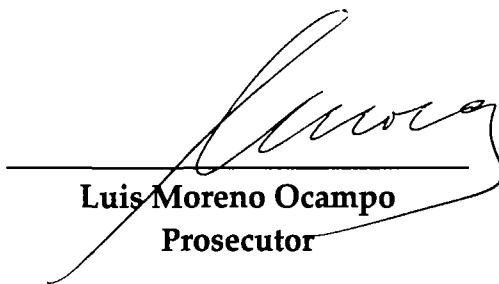
a way as to ensure that justice is done and, particularly, in relation to matters of practice, that the proceedings are fair and expeditious”.

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.

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

No.: ICC-02/04

Date: 18 July 2005

Original: English

PRE-TRIAL CHAMBER II

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

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

**Under seal
Ex Parte, Prosecutor Only**

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

The Office of the Prosecutor	
Mr. Luis Moreno Ocampo, Prosecutor Mrs. Fatou Bensouda, Deputy Prosecutor Ms. Christine Chung, Sr. Trial Lawyer Mr. Fabricio Guariglia, Sr. Appeals Counsel	

No.: ICC-02/04

18 July 2005

Introduction

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

Procedural history

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

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

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

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

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

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

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

⁴ Tr. at pp. 57-58.

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

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

Relief Sought

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

The errors justifying appellate review

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Nothing in the Statute or the Rules vests in the Pre-Trial Chamber the sole authority to “make” or “transmit” the instrument of a request for arrest and surrender, as the Chamber concluded, even accepting that the separate instrument of the warrant of arrest must be issued by the Chamber. In proceeding to prepare the Requests, and in stating that “the necessity for the issuance of a warrant *and for its transmission* must be justified on the basis of circumstances and evidence existing at the time of the [warrant] application,”⁸ the Pre-Trial Chamber appears to have viewed the step of preparing and transmitting the request for arrest and surrender to be a part of deciding whether to issue a warrant of arrest. This view is mistaken.
16. Article 58(5) establishes, contrary to the logic of the Decision, that the issuance of the warrant of arrest is *not* necessarily, or immediately, followed by a request for arrest and surrender prepared by the Pre-Trial Chamber. Article 58(5) states: ‘On the basis of a warrant of arrest, *the Court may* request . . . the arrest and surrender of the person under Part 9.’ This broader and more permissive language regarding the request for cooperation stands in stark contrast to Article 58(1), which specifies that “*the Pre-Trial Chamber shall*” issue a warrant of arrest if the legal standard is satisfied. Article 58(5) also admits the possibility that discretion may

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

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

⁸ 8 July 2005 Decision, page 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ 8 July 2005 Decision, page 4.

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

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

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

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

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

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

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

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

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

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

¹⁶ 8 July 2005 Decision, page 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

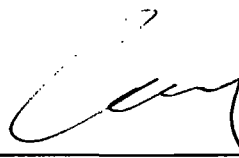
²⁴ See, e.g., *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, decision of 29 May 2003 (*supra* note 21). Contrast with *Prosecutor v. Sefer Halilovic*, IT-01-48-PT, Separate and Concurring Opinion of Judge Iain Bonomy in the Decision on Prosecution Request For Certification For Interlocutory Appeal of Decision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

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

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

Conclusions

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



Luis Moreno Ocampo
Prosecutor

Dated this 18th day of July, 2005

At The Hague, The Netherlands

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

**Cour
Pénale
Internationale**

No.: ICC-02/04

**International
Criminal
Court**

Date: 13 June 2005

Original: English

PRE-TRIAL CHAMBER II

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

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Under seal
Ex Parte, Prosecutor Only

Prosecutor's Application To Disclose to Internal Auditor Certain Information
Relating to the Amended Application for Warrants

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

The Prosecutor respectfully requests that Pre-Trial Chamber II approve the disclosure to the Court's Internal Auditor of certain information relating to the Prosecutor's Amended Application for Warrants of Arrest Under Article 58, dated 18 May 2005 (hereinafter, "Amended Warrant Application"). This disclosure would be for the limited purpose of enabling the Internal Auditor to investigate independently who, if anyone, on the staff of any of the organs the Court disclosed to the French newspaper *Le Monde* that the OTP has requested warrants of arrest naming members of the Lord's Resistance Army.

Request for Sealing

1. Because this submission is related to the Amended Warrant Application, which was submitted 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 application remain sealed until further order of this Pre-Trial Chamber.

Reasons for Request for Authorization of Disclosure

2. This application arises from a story reported in the newspaper *Le Monde*, dated 11 June 2005, and entitled, "Le Procureur de la Cour pénale internationale veut inculper deux chefs rebelles ougandais." The article, which is authored by reporter Stéphanie Maupas, reports that "des sources judiciaires," have revealed that the Chief Prosecutor has sought two warrants of arrest against members of the Lord's Resistance Army. The information that the Prosecutor has sought warrants of arrest is true but non-public. (For the Court's convenience, annexed hereto as Exhibit A is a copy of the recent article from *Le Monde*.)
3. This Pre-Trial Chamber thus far has treated the Prosecutor's Amended Warrant Application (and the prior application), as well as the existence of

the application, as a sealed, *ex parte* matter by, for example, issuing orders “sealed” and “*ex parte*.” The Prosecutor had requested this sealing, in part, because of the grave danger that could be posed to victims and witnesses in Northern Uganda were the existence of the application to be disclosed to the public before either: (1) the security situation in Northern Uganda improved; or (2) additional security measures were implemented. *See* Amended Warrant Application, ¶¶ 8-14.

4. A disclosure by any personnel of any of the organs of the Court will have violated the Court’s internal rules on confidentiality. If the person or persons was aware of the sealed nature of the proceeding, the conduct may have constituted contempt of the court’s confidentiality order as well.
5. It is imperative that the “leak” of case-related and sealed information be investigated to determine the source of the “leak.” Unnamed sources within the ICC have also been cited by reporter Stéphanie Maupas in *Le Monde* articles dated 08 September 2004 and 14 March 2005. (For the Court’s convenience, annexed hereto as Exhibit B are copies of the prior *Le Monde* articles.) The extremely damaging case-related consequences of the most recent leak, which has already led to similar news reports being printed in the Ugandan press, include the following:
 - Increased danger for the population of Northern Uganda. News of the existence of arrest warrants opportunistically could be used by the combatants in Northern Uganda as a justification for increasing the level of violence in the ongoing civil war.
 - Increased danger for victims, witnesses, those living in areas investigated by the OTP, those believed to have provided information to the OTP. Disclosing the

existence of warrants – whether falsely or truthfully – endangers those who may be associated with the OTP investigation because it makes it apparent that the case has reached a new stage of seriousness. For example, despite the extensive security measures already taken by the OTP, in conjunction with VWU, LRA collaborators within IDP camps and towns may be aware of individuals who have cooperated in the investigation. These individuals will be at increased risk of retaliation as a result of the “leak” from this Court, because the implementation of increased security measures has not yet been completed although the work is underway. *See Amended Warrant Application*, ¶ 12. As another example, the *Le Monde* article endangers former residents of Barlonyo Camp for the Internally Displaced. While that camp no longer exists, many of the residents still live in nearby camps, and until better security can be arranged, it is extremely dangerous for residents of the area for media to report: (1) that ICC warrants have been issued; and (2) to name Barlonyo Camp in that connection. Again, the OTP previously has stated that it is attempting to redress this danger, in cooperation with the Government of Uganda. *See Amended Warrant Application*, ¶ 12.

- Risk of loss of cooperation. The OTP has already been contacted, over the weekend, by cooperation partners who had heard of the *Le Monde* story. (These contacts will probably increase because of the stories now being reported in Uganda.) Because of the dissemination of

false information, partners may logically feel that their trust in the Court and the OTP to date has been badly damaged. Explaining that the misunderstanding is a result of an improper "leak," moreover, also cannot be expected to inspire trust.

Put simply, much of the work done thus far in the investigation has been gravely endangered by the "leak." The strategy for disclosing the existence of the warrants *in a manner that best preserves the security of the witnesses* has possibly been damaged irreparably. And obviously, for there to be any incident in which victims or witnesses were attacked or targeted because of a breach of confidentiality on the part of ICC staff would be disastrous. It should not be deemed acceptable for ICC staff to endanger the very people the Court has a mandate to protect.

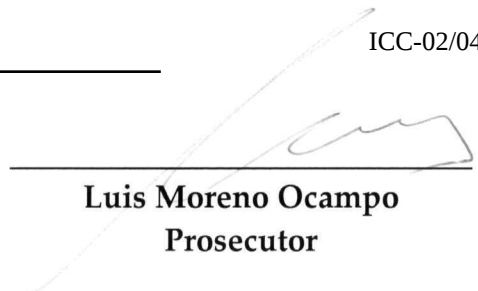
6. An equally important, but separate, consideration is that the reputation and integrity of the Court is gravely undermined when it is reported publicly that staff of the ICC are speaking to news media about matters being deliberated by the Court. Confidentiality is a pillar of any properly functioning judicial system. It may be that as a new institution, the ICC can institute better procedures to ensure that existing confidentiality standards are maintained and that "sealed" matters are treated with utmost secrecy. The need to enforce internal standards is paramount as if the Court is to demonstrate to the public that the Court can effectively protect confidential information – particularly information that, if disclosed, could endanger victims and witnesses – and safeguard the secrecy of court deliberations.
7. The Office of Internal Audit is charged with determining whether the Court's "internal controls, management systems, and practices are

suitably designed and effectively operated.” See Charter for Internal Audit, Section 3.0. For this reason, and without suggesting that this is the exclusive means by which the “leak” could be investigated, the OTP requests authority to disclose to the Internal Auditor sufficient information to enable him to conduct an inquiry into the source or sources of the “leak” to *Le Monde*. Making available to the Internal Auditor this application and the information listed below should be sufficient to enable him to commence an inquiry:

- A chronology of the OTP applications, the titles of those applications;
- A chronology of the prior decisions of the Chamber on this matter, the matters decided, and fact that these decisions were issued *ex parte* and under seal.

The Chamber may wish to establish a procedure by which the Internal Auditor could seek the disclosure of any additional information deemed necessary by him to enable him to carry out his duties.

8. For all of the foregoing reasons, the OTP respectfully requests that Pre-Trial Chamber II approve the disclosure to the Court’s Internal Auditor of certain information relating to the Amended Warrant Application, to enable him to commence an inquiry into the “leak” reported in *Le Monde*. If this Chamber would find it helpful to convene a hearing on this matter, the OTP will be prepared to answer any further questions.



Luis Moreno Ocampo
Prosecutor

Dated this 13th day of June, 2005

At The Hague, The Netherlands

ANNEX A

Le procureur de la Cour pénale internationale veut inculper deux chefs rebelles ougandais

Le procureur de la Cour pénale internationale (CPI), Luis Moreno Ocampo, a saisi les juges de deux mandats d'arrêt contre des responsables de l'Armée de résistance du Seigneur (ARS) ougandaise, révèlent au "Monde" des sources judiciaires. Ce sont les deux premiers mandats émis par le procureur de l'histoire de la CPI, créée par le traité de Rome en 1998 et en fonction depuis le 1er juillet 2002.

Les mandats dressés à l'encontre des chefs rebelles en lutte contre le pouvoir ougandais depuis 1986 seront officiellement délivrés après examen par les juges des preuves déposées par le parquet à l'appui de sa requête. Cet examen n'est pas soumis à un délai précis.

Le premier visé, le chef du mouvement rebelle Joseph Kony, mène depuis 19 ans, au nom d'une *"mission divine"*, une guerre qui, selon l'ONU, se chiffre à près de 100 000 morts, 1,6 million de déplacés et 25 000 enlèvements d'enfants, utilisés comme soldats ou esclaves sexuels. Le second mandat vise un autre responsable de l'ARS.

NÉGOCIATIONS DE PAIX

Saisi en décembre 2003 par l'Ouganda pour les crimes commis par les rebelles, le procureur avait estimé que les actes *"pourraient constituer des crimes contre l'humanité"*. Le 29 juillet 2004, Luis Moreno Ocampo avait annoncé l'ouverture d'une enquête s'étendant à tous les crimes commis dans le nord de l'Ouganda et non aux seules exactions des rebelles, des organisations non gouvernementales s'étant inquiétées d'une enquête à sens unique à laquelle échapperaient les responsables de crimes commis par l'armée gouvernementale. Elles craignaient une instrumentalisation de la Cour par un chef d'Etat, Yoweri Museveni, parvenu au pouvoir par la force.

Le président Museveni a amplement utilisé la menace que constituent les poursuites engagées par la CPI lors des tentatives de cessez-le-feu engagées avec l'ARS en janvier et février 2005. Mais, à deux reprises, les discussions se sont soldées par un échec. Et, le 21 février, l'une des attaques les plus sanglantes perpétrées par les rebelles, qui visait le camp de déplacés de Barlonyo, dans le nord-est du pays, s'est soldée par un bilan de plus de 200 morts, dont 67 enfants. Le procureur de la CPI avait alors promis de poursuivre *"ceux qui portent la plus grande responsabilité dans les crimes"*.

Yoweri Museveni peut-il vraiment mettre dans la balance un retrait de sa plainte en échange de la paix ? Juridiquement, la voie n'est pas simple. Et politiquement, la route est longue pour un président qui tente de mener à bien une réforme constitutionnelle lui permettant de briguer un nouveau mandat, qui serait favorisé par la chute de M. Kony.

Dans un entretien publié le 9 juin par l'agence IRIN, le président ougandais précisait ses objectifs par rapport à la Cour : *"L'implication de la CPI dans la recherche de Kony est*

très importante, principalement parce que cela nous permet de négocier avec Khartoum"
, capitale du Soudan voisin, où le mouvement rebelle disposerait toujours d'une base
arrière. La coopération de Khartoum pourrait toutefois être compliquée par l'ouverture
par la CPI d'un autre dossier, qui porte sur les crimes de guerre, sans liens avec le drame
ougandais, commis cette fois au Darfour, dans l'ouest du Soudan.

Stéphanie Maupas

Article paru dans l'édition du 12.06.05

ANNEX B

Cinq ans apres sa creation, la Cour penale internationale va ouvrir sa premiere audience a La Haye

LE MONDE | 14.03.05 | 13h14 . Mis jour le 19.03.05 | 12h10

La Haye

de notre correspondante

Le 15 mars, la Cour penale internationale (CPI) ouvrira sa premiere audience a huis clos. Les juges entendront le procureur sur son enquete en Republique democratique du Congo (RDC). Pres de deux ans apres son entree en fonctions, Luis Moreno Ocampo n'a emis aucun mandat d'arret. A l'heure ou la Cour fait debat a New York au sujet du Soudan, son fonctionnement alimente les interrogations.

"Lorsqu'on m'a propose de travailler a la Cour, j'ai beaucoup reflechi. Il me semblait qu'elle avait besoin de juristes, pas de diplomates, avoue le juriste argentin, ancien conseiller ministeriel. En prenant possession de mon bureau, j'ai pense que j'avais ete place la pour mettre en oeuvre un jeu de reles avec une mission simple : vous serez enferme ici pendant plusieurs mois et votre tache consistera a construire la justice globale." Competente depuis le 1^{er} juillet 2002 pour poursuivre les responsables de genocide et crimes contre l'humanite, la Cour penale internationale eprouve des difficultes a trouver ses marques.

Le statut de la Cour a ete adopte en 1998 au terme d'intenses negociations entre diplomates, juristes et militants. La question est aujourd'hui de savoir si elle doit rendre une justice de compromis.

A ce jour, aucun des "invites" du 174 Maanweg a La Haye n'y est venu menottes aux poignets. Les juges ne deambulent pas en robe dans les couloirs de cet immeuble occupe auparavant par la compagnie telefonique neerlandaise. Comme si le batiment de verre avait conserve la memoire de ses anciens locataires, ici, on communique. Des "specialistes" des quatre coins de la planete sont regulierement invites "au dialogue". Prochainement, les diplomates participeront a une reunion "qui sera le cadre d'un echange de renseignements et d'idees sur les strategies directrices du bureau du procureur", lit-on sur le carton d'invitation adresse par le parquet.

En jouant a la frontiere du politique et du judiciaire, le procureur espere obtenir une cooperation maximale des Etats et de la societe civile. Il en a besoin pour legitimer ses decisions. Mais Luis Moreno Ocampo dispose deja d'un "veritable ministere des affaires etrangeres", s'etonne un juriste. En aout 2004, les auditeurs de la Cour s'inquietaient de l'existence d'un bureau appele "division de la cooperation et de la complementarite" et "qui pourrait compliquer les reles". Il forme, avec le departement des enquetes et celui des poursuites, le bureau du procureur. A la tete de cette division, Sylvia Fernandez de Gurmendi, ancienne conseillere de la mission argentine aux Nations unies, guide la strategie du parquet.

En juin et juillet 2004, le procureur decidait d'ouvrir deux enquetes, sur les crimes commis en Republique democratique du Congo (RDC) et au nord de l'Ouganda. Suite a d'actives negociations, le procureur avait ete saisi par les deux chefs d'Etat. Depuis, le parquet n'a mis a

disposition qu'une poignée d'enquêteurs en RDC, un territoire grand comme quatre fois la France, engage depuis huit ans dans une ronde de massacres s'étendant en Ouganda et au Rwanda.

En juillet 2003, Luis Moreno Ocampo jurait de poursuivre les plus hauts responsables. Or, selon des sources internes, le procureur pourrait ne conduire dans le pretoire que *"quelques chefs de milices"*. Les cibles naturelles du procureur, anciens rebelles devenus signataires de la paix - dont Jean-Pierre Bemba, vice-président de la RDC -, participent désormais au processus de transition en cours. L'idéal de paix et les Etats qui le financent conduisent le procureur argentin à quelques vagues-hésitations. Si, en juillet 2003, Luis Moreno Ocampo promettait de s'attaquer au nerf de la guerre en poursuivant pilliers de diamants et trafiquants d'armes, en novembre 2004, au cours d'un entretien, il revisait ses ambitions et pronait les avantages *"d'une politique de poursuite au cas par cas et par étapes"*.

Voisin de la RDC, l'Ouganda a lui aussi saisi le procureur. Avec l'affaire ougandaise, les opposants à la Cour dénoncent une politique opportuniste. Avant d'ouvrir une enquête, le procureur doit s'assurer que le pays n'a ni la volonté ni les moyens de rendre justice. Or le procureur général de l'Ouganda, Lucian Tihabura, est catégorique : *"Le système judiciaire ougandais est indépendant, impartial et compétent."*

Les Etats-Unis bataillent ferme contre la Cour, de crainte qu'elle ne poursuive leurs ressortissants. Pour Pierre-Richard Prosper, ambassadeur américain pour les crimes de guerre, avec l'affaire ougandaise, *"elle passe outre ses principes"*. A Kampala, selon le quotidien *New Vision*, le président Yoweri Museveni n'hésite plus à proposer un retrait de sa plainte en échange d'un cessez-le-feu pour entamer des négociations avec Joseph Kony, le leader de l'Armée de résistance du Seigneur (ARS), qui a enlevé et enrôlé 20 000 enfants dans ses troupes en dix-huit ans de conflit.

Certains Etats, parmi les plus ardents défenseurs de la Cour, ont initié des débats au Conseil de sécurité pour que le mécanisme de poursuite des criminels de guerre soit arrêté dans le cadre global des négociations de paix. La justice internationale retrouverait alors sa place au sein des Nations unies. Une place qui, dans le cas du Darfour (ouest du Soudan), fait défaut. La commission d'enquête de l'ONU sur les crimes commis dans cette région demande au Conseil de sécurité de saisir la CPI, seul moyen pour le procureur de pouvoir enquêter, puisque Khartoum n'a pas ratifié le statut de la Cour. Mais la nomination du "faucon" John Bolton au poste d'ambassadeur des Etats-Unis aux Nations unies presage un durcissement de la position américaine.

La Cour continue d'inspirer des attentes variées. Les diplomates veulent *"la paix d'abord"*. Les militants estiment qu'il n'y a *"pas de paix sans justice"*. Les victimes attendent réparation. Confronté à ces attentes, le procureur cherche le compromis, comme si la Cour n'avait pas encore coupé le cordon ombilical pour s'affranchir des ambiguïtés de sa création.

Stephanie Maupas

08 septembre 2004

RUBRIQUE: International

LONGUEUR: 1031 mots

TITRE: Cour penale internationale : un premier proces pourrait s'ouvrir en 2005 ; Les Etats parties a la CPI sont reunis, depuis lundi, en assemblee a La Haye pour adopter le budget de la Cour et entendre le bilan d'un an d'activite. Le procureur Luis Moreno Ocampo a ouvert deux enquetes sur les crimes commis en Ouganda et en Republique democratique du Congo (RDC)

AUTEUR: Stephanie Maupas

ORIGINE-DEPECHE: LA HAYE correspondance

TEXTE-ARTICLE:

Les representants des 94 Etats parties au traite de Rome sur la Cour penale internationale (CPI) sont reunis a La Haye, depuis lundi 6 septembre, pour leur troisieme assemblee annuelle. La juridiction internationale chargee de juger les responsables de genocide, de crimes contre l'humanite et de crimes de guerre doit convaincre ces diplomates de lui accorder un budget de 70 millions d'euros pour l'annee 2005. Un budget avec lequel le procureur Luis Moreno Ocampo espere, entre autres, mener a bien deux enquetes sur les crimes commis depuis juillet 2002 en Republique democratique du Congo (RDC) et en Ouganda. Il a indique, lundi, qu'un premier proces devant la CPI pourrait s'ouvrir debut 2005.

« La Cour ne saurait etre trop couteuse, et surtout pas quand la communaute internationale est prete a depenser 1 000 milliards de dollars par an pour des armes », a lance le prince Zeid, president de l'assemblee des Etats parties. Le prince jordanien a invite les representants des pays membres a « faire correspondre » les ressources financieres de la Cour a leur « engagement politique ».

Le secretaire general de la Federation internationale des droits de l'homme (FIDH), Sidiki Kaba, estime que « derriere des questions techniques, les Etats tentent de paralyser l'activite de la Cour ». « Mais cette Cour porte en son sein une contradiction profonde, ajoute-t-il : elle a ete creee par les Etats, elle est financee par eux, mais elle doit s'en affranchir. Et les Etats sentent que cette etape est enclenchee. »

La Coalition des ONG pour la CPI - un regroupement international d'associations, qui a fortement contribue a la creation de la Cour - bataille en coulisse pour defendre les droits des victimes. Pour la premiere fois dans l'histoire de la justice internationale, les reglements de la CPI accordent aux victimes le droit d'etre representees au proces ainsi que diverses dispositions de protection et d'indemnisation. Ces droits sont menaces, estime la Coalition, par le fait que le projet de budget ne prevoit pas des bureaux charges de la protection des temoins dans les pays concerns.

STRATEGIE FRAGILE

Depuis son entree en fonctions, en juin 2003, le procureur a ouvert deux enquetes

et, avec quelques tâtonnements, dessine une stratégie encore fragile. « Si les accusés sont arrêtés, nous prévoyons de commencer un premier procès au début de 2005 », a promis Luis Moreno Ocampo. Mais « nous n'avons ni police, ni armée, et on attend de nous que nous accomplissions notre mission de façon rapide, économique et exemplaire », a-t-il lancé à l'assemblée.

Les deux affaires en cours portent sur les crimes commis dans le nord de l'Ouganda et ceux perpétrés en République démocratique du Congo (RDC, ex-Zaïre). Au risque de s'éloigner du cadre judiciaire et de paraître par trop politique, M. Moreno Ocampo a mené une diplomatie active pour obtenir une saisine directe par les deux États africains. Il estime que cette procédure devra favoriser la coopération entre les États concernés et la Cour. Mais, à ce jour, Kinshasa tarde à signer un accord formel de coopération avec le parquet.

Luis Moreno Ocampo compte « cibler ceux qui portent la plus grande responsabilité pour les crimes commis actuellement en RDC ». Parmi ces cibles supposées pourrait se trouver Jean-Pierre Bemba, qui est aussi l'un des vice-présidents de l'actuel gouvernement de transition. « Le mouvement qu'il dirige est associé, dans l'opinion publique, à des faits de cannibalisme commis dans le pays et M. Bemba pouvait difficilement s'opposer à la décision du procureur d'ouvrir une enquête sans ternir plus encore son image », estime un observateur. Mais sa participation au processus de paix en cours rend la tâche du procureur plus ardue. « Pour les bourreaux, négocier la paix est un fantastique moyen d'échapper à la justice », commente un membre de la Coalition des ONG.

M. Moreno Ocampo aurait déjà rencontré les réticences des États qui ont « investi argent et efforts diplomatiques » dans le processus de paix en RDC et qui craignent des interférences, alors que se profile l'échéance électorale de juillet 2005. Selon une source au parquet, le procureur pourrait donc, dans un premier temps, « jouer la prudence » et commencer par inculper des personnalités « de faible envergure ».

« JUSTE EQUILIBRE »

Dans le cas de l'Ouganda, le procureur espère renforcer son autorité en bouclant l'affaire des 2005. D'autant que Kampala pourrait conduire certains procès sur son propre sol. « L'Ouganda a choisi de ne pas poursuivre lui-même les principaux responsables et de partager la tâche avec le procureur de la CPI, explique Darryl Robinson, l'un des conseillers juridiques du procureur ; pour des raisons de sécurité, il est dans l'intérêt du pays et de la société ougandaise que les poursuites soient indépendantes du pouvoir. »

Sur le terrain, Kampala a récemment marqué des points, sans attendre la CPI. Kenneth Banya, la tête pensante du mouvement rebelle, qui se recommande des Dix Commandements, a été arrêté en juillet. Mais la principale cible, Joseph Kony, serait toujours au sud du Soudan ou son « armée » continue de s'adonner aux pires massacres. Constituée d'enfants enrôlés de force au cours de dix-huit années de guerre, elle se dilate lentement. L'amnistie est au bout du chemin pour les rebelles qui acceptent de se rendre : 10 000 d'entre eux l'ont fait en quatre ans.

Beaucoup s'interrogent sur les motivations qui ont poussé les présidents de RDC, Joseph Kabila, et d'Ouganda, Yoweri Museveni, à saisir la Cour. « Nous devons trouver le juste équilibre entre notre action judiciaire et le contexte plus général dans lequel les crimes s'inscrivent », dit le procureur adjoint chargé des enquêtes, Serge

Brammertz. Bref, quels que soient les objectifs politiques des gouvernants, ils n'enlèvent rien à la gravité des crimes commis.

Un membre de la Cour affirme cependant que le procureur Ocampo a, lui, une vision plus large de son mandat à la CPI, qu'il voit comme un moyen de « concourir à la paix ». « Mais la CPI n'est pas une seconde ONU », retorque un juriste. Cette dernière dispose d'ailleurs du pouvoir de suspendre une enquête si elle menace un processus de paix en cours.

DATE-CHARGEMENT: 8 septembre 2004

1 International Criminal Court

2

3 Pre-Trial Chamber II

4

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,

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

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.

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

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 Secondly, as we discussed in our prior meeting with
12 the Pre-Trial Chamber in February, a critical issue here
13 in terms of the timing and the disclosure of the warrant
14 is garnering international support for the warrant, so
15 that there is not hostility to the warrant, so as to
16 minimise any possibility that states could offer safe
17 haven to any defendants or persons who are named by this
18 Court in the warrants. So there are a significant number
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

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

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

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.

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

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

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

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.

18 As your Honours are aware, there are only two

19 potentially executing parties here: the Sudanese and

20 the Ugandans. Since the time that we submitted our

21 application, through meetings and consultations, we have

22 actually changed somewhat what would be our preferred

23 strategy for transmitting the warrant.

24 We believe that the better way to move now would be,

25 in the event that there are issuances of any warrants,

1 that they should go to the Ugandans. At this point we
2 would say, probably to the Ugandans exclusively, as the
3 executing party. The reason for this is that we believe
4 that our ability right now to negotiate with
5 the Sudanese is less than the ability of the Ugandans to
6 negotiate with the Sudanese directly. The Ugandans at
7 present are operating in southern Sudan, where at least
8 some of the named persons in our application are. They
9 are doing this through a cooperation agreement with the
10 Sudanese that allows them to carry out military
11 operations in southern Sudan.
12 So the cooperation between the Government of Uganda
13 and the Government of Sudan right now about possible LRA
14 apprehension or operations against the LRA, that
15 cooperation is quite good between those two parties.
16 The ability that we have to negotiate with
17 the Sudanese now is somewhat diminished, especially in
18 light of events since the last time that we met with
19 the Pre-Trial Chamber. So I do not think that I need to
20 elaborate too much on that.
21 One change that we have had is that, in the last
22 month or so since we submitted the application, through
23 further conversations with the Government of Uganda,
24 we have come to realise that a better strategy may be
25 not to transmit to the Sudanese from the Court, but to

1 let the Ugandans, once they receive the transmission,
2 once they are aware of the existence of the warrants, to
3 use their connections in Sudan to try to muster support
4 for effective arrest operations.

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.

8 When we met with your Honours in February to give
9 you some broad outlines of how the cooperation was
10 working in this case -- and I remember receiving
11 questions from your Honours about the level of
12 cooperation -- we began to explain the complexity of
13 the cooperation scenario that we have. 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

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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 To be specific about that, one of the main concerns
9 we have is that the areas named in the warrant
10 application are protected. Because if the warrant
11 becomes public, because of the rules of this Court,
12 the concise statement of facts that is required to be in
13 the warrant, in our view, probably includes at least
14 a statement of where the crimes occurred. Those places
15 will then possibly be at risk of retaliation.

16 So perhaps the most primary step in terms of
17 preparing for the warrant disclosure and the warrant
18 transmission, in our mind, is arranging through the
19 Ugandan Government better security for these areas.
20 This was a very fundamental thing in the ICTY, where you
21 called on the forces there to make sure that there was
22 better protection in the areas that were at issue in the
23 litigation. But for us that is very, very hard, that is
24 harder to arrange. We are in the process of doing that.
25 The second moment that we are looking for, in

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 amount of progress, through meetings with [REDACTED]
12 [REDACTED] through continued meetings with
13 [REDACTED] and continued meetings with the
14 government. We are very, very close, we think, to being
15 at a moment that is optimal, 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 now, security and support for the warrant. The partners
24 that we have there, which we began to introduce to
25 your Honours at the last meeting, they include

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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
17 from the other countries. It may be in the form of
18 logistical support, in terms of equipment or training or
19 personnel, and it will certainly be in the form of
20 advice to the Ugandans on how best and in what manner to
21 carry out these operations.

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17 So these are just some of the parameters.
18 In addition to this we have had contacts with the UN.
19 The UN has in the past issued statements that are not
20 particularly friendly to the idea of warrants issued
21 from this Court. 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

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]

5 [REDACTED]

6 [REDACTED]

1 [REDACTED]

1 [REDACTED]

1 [REDACTED]

1 [REDACTED]

14 [REDACTED]

15 As I say, the meetings that are pressing that -- it

16 has been an incremental process. When the warrants

17 seemed further away, we could make a certain amount of

18 progress with these cooperation partners. Now that it

19 seems apparent to them that the warrants are closer,

20 they are taking the idea more seriously, and we are

21 making more progress.

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

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
16 [REDACTED] many of the government contacts that
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

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. There were months in
9 the past year when I myself thought that the idea of
10 trying to get the community to accept the idea of arrest
11 warrants from the ICC was going to be extremely
12 difficult. I think it has moved in a much better
13 direction, in large part because of efforts that the
14 Prosecutor and our JCC division have made. We are
15 nearly there.
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

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

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

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 There is [REDACTED] and the Registry

21 and we did that jointly. In assessing that system,

22 the Registry has been involved in all the missions.

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

1 hope that they would say the same about us.

2 For this next phase, what we have explained to them,
3 and it does follow from the legal principles: if and
4 when a warrant becomes public, as I explained, the piece
5 of information that becomes potentially dangerous, in
6 our minds, are the places. So with the Registry we are
7 now about to set out and assess what are better ways to
8 protect these camps and the school that are identified
9 in our warrant application, and are there other places
10 that are at risk?

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
15 protection, without leaving other areas unprotected? In
16 some of the camps, as your Honours are aware from the arrest
17 warrant application, it is not UPDF forces, it is local
18 defence militia or other forces. So again we will be
19 talking to camp leaders, military leaders and the UPDF
20 to try to arrange this type of protection.

21 The VWU, to be absolutely fair to them, I know that
22 they have some very, very difficult staffing problems,
23 and they have tried to hire at a higher rate and have
24 not been able to do so, so they are always fighting to
25 have people available to go with us. That is

1 a constraint that they operate under. But we have
2 informed them that these are our plans, and they are
3 arranging, I think, to have somebody go along. 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]

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1 [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]

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1 [REDACTED]
2 [REDACTED] - but we will
3 be doing assessments of some of the victims and witnesses deemed to
4 be at the highest risk. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 [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

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

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

1 with the Government of Uganda for example, which was



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

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

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 
22 
23 Right now, unfortunately, there are attacks around
24 the Gulu area. Lira is relatively safe. Even in terms
25 of receiveing information and making an evaluation of when

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. In
7 large categories, it is camp and location security,
8 reassessment on an individual witness basis. And in
9 between are the witnesses who we think are potentially
10 endangered even by disclosure of any arrest warrant, if
11 and when an arrest warrant is issued, simply by virtue
12 of the type of information that would be required to be
13 in the arrest warrant. Those are in large groups the
14 security aspects.

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. But it may be that as a result of more
24 recent events and the feeling in the community that
25 we are at least closer to arrest warrants, even if we may not

1 have requested them yet and the Court may not have
2 issued them yet. It may be that we will be changing
3 the communication strategy to try to publicise the idea
4 of arrest warrants from the ICC not being against
5 the peace, they can work together with the peace,
6 they can be part of a comprehensive strategy of bringing
7 the violence in Uganda to an end, and that disabling
8 the leadership may be a good part of doing this.
9 Nobody can say that that is something that people
10 will accept. I doubt it will every be accepted
11 one hundred per cent. But that kind of strategy too
12 could succeed in bringing down the security risk.
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.

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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

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, because there is a high danger in Uganda that
6 this person could be amnestied domestically. Our view
7 would be that that does not have an effect on
8 a potential prosecution here, 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

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 One of the reasons that we operated very feverishly in
12 a difficult context was that we did not want to be in
13 a position where potentially some of our targets were
14 captured, and then amnestied, and then charged in this
15 court. That would have been a very bad dilemma to
16 be in. So, if there was any urgency in bringing
17 the application to your Honours, that was the urgency.
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

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. I do know that
18 provisions like the one I mentioned before, about
19 protecting the camps and protecting the locations
20 identified by the OTP, those are provisions that were
21 envisaged the arrest scenario. So we added them, in
22 the view that some day in the arrest scenario it might
23 be necessary to request this type of cooperation. But
24 if your Honour would allow me, I could look at
25 the agreement and send a follow-on application to

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

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. We finally have support from the [REDACTED]
6 [REDACTED] about at least being accepting of
7 the idea of a strategy of warrants together with peace,
8 and we do not want to lose this moment. If the peace
9 negotiations re-open in the way that they were opened at
10 the end of last year, there may be pieces of the support
11 scenario that are in place that will fall out of place
12 again. So we have every incentive right now.
13 We are moving quickly to finalise these last pieces
14 of witness and victim security and support with our
15 [REDACTED] Once
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,

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

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

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 We had informed your Honours in February that
15 we were trying to get an agreement with the Sudanese.
16 That was never signed; it remains unsigned. We have
17 cooperation agreements with the UN, so there are things
18 like that, but there are no specific bilateral
19 agreements with other states parties that might impact
20 on this arrest scenario.
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

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

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

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

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

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.

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
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

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

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

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

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

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"

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

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

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

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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1 International Criminal Court

2 Pre-Trial Chamber II

3 Situation ICC-02/04 Uganda

4 Procedural matters hearing - *Ex parte* exclusively destined to the Prosecutor

5 Tuesday, 21st June 2005 – Closed session

6 The hearing starts at 10.00 am.

7 The Presiding Judge: Madam Registrar, please call the matter for hearing.

8 The Registrar: The situation in Uganda, ICC-02/04.

9 The Presiding Judge: Thank you. Madam Prosecutor, you have become a

10 standing feature in these proceedings but, I suppose for the record, could you

11 kindly announce yourself and your learned colleagues?

12 Ms Chung: Yes, Mr President. I am Christine Chung, I am the Senior Trial

13 Attorney. With me is Fabricio Guariglia, who is the Senior Appeals Counsel.

14 Sitting at the extreme left of me is Anneliek Hendriks, who is an Assistant Trial

15 Attorney.

16 The Presiding Judge: Thank you very much. This is a formal

17 and closed hearing of Pre-trial Chamber II of

18 the International Criminal Court on matters concerning

19 the protection of victims and witnesses.

20 By its decision dated 17th June 2005, the Chamber

21 has found it necessary to hear the Prosecutor on these

22 important and rather serious matters; they are concerns

23 raised in the Prosecutor's application for warrants of

24 arrest, as that application has been amended; they have

25 been raised also in the Prosecutor's subsequent

1 application dated 13th June 2005.
2 This morning, the Chamber seeks clarification and
3 additional details with respect to the arrangements for
4 the protection of victims and witnesses. This hearing
5 is for that purpose, and confined to that purpose alone.
6 Madam Prosecutor, as we did for the hearing last
7 week, the procedure we propose is for the judges to pose
8 a range of specific questions to which we will invite
9 the Prosecution to respond. I will, as I did last week,
10 commence such questions and I will, in time, invite
11 their Honours to ask additional and supplemental
12 questions.

13 Questions by The Presiding Judge

14 Let me now turn to the questions. In
15 the application of 13th June 2005, the Prosecutor has
16 drawn attention to extremely damaging case-related
17 consequences, to increase danger for the population of
18 Northern Uganda, to increase danger for
19 victims/witnesses, those living in areas investigated by
20 the Office of the Prosecutor and those believed to have
21 provided information to the Office of the Prosecutor.
22 You have also, in the application of 13th June, as
23 you did in the hearing last week, drawn attention to
24 the security measures taken by the Office of
25 the Prosecutor in conjunction with the Victims and

1 Witnesses Unit, described in the application as
2 extensive security measures, being measures which are
3 ongoing and not yet completed.
4 The Chamber would appreciate knowing and seeking
5 your clarification as to the following, in particular:
6 (1) the overall plan by the Office of the Prosecutor
7 regarding these security measures;
8 (2) what specific measures are already in place;
9 and, if they differ in type and scope, what is being
10 done with respect to victims, what is being done with
11 respect to witnesses, and perhaps what is being done
12 with respect to the general civilian communities, as
13 those of the former Barlonyo Camp for instance;
14 (3) if specific measures are not yet completed, as
15 the Prosecution has stated, what exactly are
16 the outstanding measures, if you are able to inform
17 the Chamber;
18 (4) in all these, what might be the timeframe that
19 the Prosecution has in mind or plans to put in place for
20 all these security measures.
21 It sounds lengthy, but I think you realise it is
22 a central question and rather interrelated. May
23 I invite you now to address the Chamber? Thank you.
24 Ms Chung: Mr President, I hope that the Court will lend me
25 some leeway to discuss this answer at length. This is

1 a topic area which has been of almost constant concern
2 to the Office of the Prosecutor and the subject of
3 constant interaction between the Office of
4 the Prosecutor and the Victims and Witnesses Unit, in
5 the ten months since we have been operating in Uganda.
6 There is some background that I am happy to share with
7 the Court, so that the Court's understanding of
8 the underlying problem will hopefully be enhanced.
9 The aim in these last ten months -- our first
10 missions were last August. One of the most difficult
11 aspects of operating in Northern Uganda has been
12 carefully calibrating disclosures and our profile so
13 that we do not endanger the safety of victims and
14 witnesses. At the very beginning, we were advised by
15 many groups in Northern Uganda how important it was for
16 us to remain at a low profile, and not to let
17 the disclosures come out in such a way that there would
18 be hostility towards the ICC intervention and also the
19 possibility of increased hostility towards anyone
20 cooperating with the ICC investigation.
21 For this reason, probably thousands of decisions
22 have been made in the last ten months, including things
23 as minute as whether or not to open the field office, in
24 the initial stages, whether or not to have a sign on
25 the door that says ICC, that would make it obvious that

1 people were coming to see us.
2 We have struggled to find appropriate places to
3 interview witnesses. I spoke to a team in Gulu
4 yesterday, and one of the places that we have been using
5 for interviews that we have used maybe only three times
6 we have decided is too unsafe now to use, because we do
7 not want people to be seen coming in and out with us
8 repeatedly.
9 So everything that we do, everything that we have
10 done in the past ten months has been really aimed at
11 keeping the disclosures and the profile at
12 an appropriate level to safeguard witness safety.
13 I could probably for hours describe examples of the ways
14 in which we have done that.
15 This is one of the reasons that we were concerned by
16 the leak that occurred in the media last week. Because
17 in this carefully calibrated exercise, which really is
18 like building a house out of matchsticks, it is so
19 difficult to have an incident that increases our profile
20 and makes it seem as though the case is really further
21 along than it is. Because it is not the case that
22 we have warrants of arrest, and there was an implication
23 in the *Le Monde* article that we did. There was a little
24 confusion in the article about who issues the warrants
25 of arrest, but clearly the implication was there. And

1 very damaging for us was that it was reprinted in
2 Northern Uganda in that fashion, as if the case has now
3 gone to the next stage. So not only to have the profile
4 increased but to have it increased falsely creates
5 exactly that situation that we were trying to avoid,
6 which is to have the disclosures and the profile running
7 ahead of the witness protection measures.

8 We always knew that the phases would be preparedness
9 for the warrant application and a desire to get that
10 warrant application to this Chamber as quickly as
11 possible, for the reasons that I discussed last
12 Thursday, namely the possibility that one or another of
13 our targets might be captured. In that situation, for
14 us not to be prepared to proceed, from our side,
15 we believe that would have been disastrous. We also
16 knew that we would not be quite ready with all the
17 witness protection measures that would have to be in
18 place for the warrants issued by the Court, if warrants
19 are issued by this Court, to become public.

20 So we always saw this as a phased exercise.

21 The fact that this disclosure came in the middle of
22 those two phases does create in our minds exactly
23 the dangers and risks that we spoke of in our
24 application. These are exactly -- in drafting that
25 application, those concerns are the same concerns that

1 have been with us for the past ten months.

2 So when we look forward in this exercise, what I can
3 describe for the Court are exactly the questions that
4 you raised, Mr President, in terms of the security
5 measures.

6 The overall plan I have already been addressing
7 somewhat. This was the overall plan. In this short
8 period, when we are getting ready to disclose
9 the existence of any warrants issued by this Court, our
10 aim is essentially to undertake three tasks. One is
11 support for execution of the warrants. I will not
12 discuss that today; I discussed that last Thursday. It
13 is, though, important to remember that piece, because
14 the piece of support for execution of the warrants and
15 the second piece of arranging the witness security are
16 really two steps that should be completed in tandem.
17 That is what the Office of the Prosecutor is trying to
18 do in these next few weeks.

19 Specifically on the topic of witness protection,
20 though, victim and witness protection, I can describe
21 the steps that we are taking and we have taken in order
22 to ensure victim and witness protection thus far.

23 First of all, in terms of measures that are already
24 in place, and I will discuss it -- I guess what I will
25 do is give a first answer, the answer that I believe is

1 appropriate, and obviously if there are follow-up
2 questions, I will endeavour to answer those.
3 Together with the Victims and Witnesses Unit, we
4 established a protocol, after doing some initial
5 missions in Uganda. What was decided was that there are
6 essentially two parts to this. There are assessments of
7 the individuals' situations. So with respect to
8 witnesses -- let me take witnesses first because that is
9 a more cabined group.

10 There are individualised assessments performed for
11 every witness to assess the risk that would be brought
12 on by interviewing this person. Then there is also
13 a response mechanism in place, 

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17  so if there is any difficulty that the witness
18 encounters, if they are threatened by somebody or they
19 believe that they are in danger for some reason,

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24 is arrangement also for this person to get to a safe
25 place, either by himself or herself or with his or her

1 family.

2 So let me discuss those two areas. In terms of

3 the individualised assessments, with VWU [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] generally Lira and the more

11 southern areas are safer, and the northern areas are

12 less safe. Camps are less safe than towns. In

13 the towns there is more cohesiveness, there is usually

14 police and Army around; some of the camps are less

15 protected than that. So this is painting in rather

16 broad strokes, [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] So all of that

24 information is taken and put into an assessment of how

25 risky it may be to try to meet with this person.

1 Contacts with the person, initial contacts with
2 the person, again are made in accordance with
3 the protocol that was developed by VWU. We eliminate
4 many people right at the level of just using
5 the information that is available to us without meeting
6 the person.

7 So for example, with respect to the Pajule incident,
8 we have met with almost nobody from inside the camp.
9 The camp is too far north, we do not believe the camp is
10 very secure, and we have not liked the idea of
11 contacting anyone inside the camp to try to bring them
12 out, other than somebody who has a very good
13 pre-existing excuse or reason to come outside of the
14 camp. So it is only if we can use that excuse or
15 reason. If it is a person who regularly has business in
16 Gulu and can tell other people, "Listen, I'm just going
17 to Gulu, the way I usually do," then we might try to
18 make contact with that person. But there are probably
19 hundreds of witnesses that we will not interview with
20 respect to Pajule because we do not believe it is safe
21 enough even to approach them.

22 In a place like the Lwala School , it has been
23 somewhat easier, because the girls tend to live in areas
24 that are more safe, they have more stable family
25 arrangements. Some of the girls that we have

1 interviewed are even in school now in Jinja or Kampala,
2 so they are very far south. So place to place it can
3 make differences. We have made judgments, keeping it to
4 a very, very limited pool of those we judge to be
5 the most safe under the protocols that we have
6 established with the VWU.
7 Once we have done this weeding process and
8 determined which people are the safest and still have
9 good information -- sometimes we forego what is the
10 prospect of great information for the sake of safety --
11 then we make initial contacts, again in accordance with
12 the protocol developed with VWU, in whatever manner we
13 deem to be the most safe [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 In many of our incidences we revealed in the warrant
18 application, the police had done a prior investigation.
19 So they already have had contact with a pool of
20 witnesses. Essentially they help us to pick the ones in
21 the safest position, that they can contact again without
22 raising suspicions within the community. So there are
23 the very few that come out and meet with us, and only
24 for the period of time that we deem to be safe.
25 When the person initially meets with us, we sit down

1 and do a security assessment [REDACTED]

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11 [REDACTED] but if there is any concern about safety, we

12 address that concern before we move on to the next

13 stage.

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23 [REDACTED] So those are the measures that

24 are in place now.

25 One thing that I should add, of which your Honour is

1 already aware: from the beginning of the investigation,
2 our policy has been to minimise the number of victim
3 witnesses, because we knew it would be very, very
4 difficult to meet victim witnesses without exposing them
5 to risk. In this investigation, the need for that
6 testimony -- there is always a need for victim witness
7 testimony, but we were able to make many of the links to
8 the targets and to flash out the events in the attacks
9 without resorting to victim witnesses. In terms of
10 percentage of the overall witnesses, the victim
11 witnesses are not at this stage a very high percentage,
12 and we intend to keep that way, if we can, because we
13 are lucky enough to have other forms of evidence that
14 help us to fill in the accounts without them.
15 In terms of where we are now, what I can represent
16 to the Court is that we are proud of our record, we have
17 been there now for ten months and not had any incident
18 which could even remotely be attributed back to the ICC
19 intervention. We have spoken now, sometimes in
20 follow-up interviews, with the witnesses; we continue to
21 ask them whether or not they have any security concerns;
22 
23  So there is routine follow-up, and

1 so far there is no incident that we can attribute back
2 to our investigation.
3 So in terms of how it has gone thus far, we are
4 obviously somewhat lucky, but we feel that much of
5 the work that has gone into the planning and much of
6 the diligence that we put into the planning with VWU at
7 the beginning of the process has really paid dividends,
8 and we are seeing the fruits of that labour now.
9 Our plans for moving forward are as follows. As
10 I began to explain to the Chamber last week, once
11 the places that are at issue in the charges become
12 known, we do have a concern that those places will be
13 vulnerable. And this implicates both victims and
14 witnesses, because clearly anybody who lives in any of
15 those areas are victims of the very attacks that the OTP
16 is now investigating.

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10 One of our plans for this three- or four-week period
11 that I was identifying for the Court last week is to
12 complete this round of interviewing, in essence to do
13 a full security assessment again, an interim security
14 assessment, based on re-interviewing solely on the topic
15 of security. So right now we have three teams in Uganda
16 who are re-interviewing camp leaders and witnesses that
17 we have considered from the beginning to be in
18 a somewhat enhanced security risk situation. They will
19 be talking to the UPDF about the capability and
20 feasibility of protecting victims and witnesses in
21 an enhanced manner, and we will be speaking again to
22 our police contact and to some local militia contacts.
23 So this again is not an easy process, but we
24 anticipate at least five or six teams of two spreading
25 out in the areas in which we have interviewed before and

1 obtaining the information to enable us to complete this
2 interim security risk assessment. The plan for putting
3 together the security assessment has been formulated
4 together with VWU.

5 As I mentioned last week, VWU members have been
6 invited to go on these missions as well, and I think
7 that they will make, at least some of them -- I was not
8 here in the past couple of days, so I do not know what
9 precise arrangements were made by VWU, but they are well
10 aware of the planned missions and of the invitation for
11 them to attend any or all of these.

12 The need for an up-to-date assessment is critical.
13 On a day-to-day basis we have information about new
14 attacks, where they are and what kinds of attacks
15 they are. Is the LRA now attacking camps looking for
16 food? Is their main priority weapons? How big are
17 the groups that are attacking the different places and
18 where are they operating? This is one set of
19 information. We will then have the inputs and
20 the opinions of the people whom we are obliged to
21 protect, and then we will have the information from
22 those who can possibly provide protection.

23 When we have all those pieces of information
24 together, then we will be in a position to come to some
25 judgment on our own about where we are in terms of

1 implementing the final security measures, in preparation
2 for disclosure of the warrants, obviously together with
3 VWU. An important component of that is, as I mentioned
4 last week, coming back to the Chamber and reporting to
5 the Chamber. Because, obviously, what we will be doing
6 is making a request to the Chamber, possibly at that
7 point, to disclose the existence of any warrants that
8 exist at that time.

9 So this was the overall plan and these are the steps
10 that are being taken now. We knew that there would be
11 this interim phase, and we have always hoped that it
12 could go quickly, but obviously there are some factors
13 that are beyond our control.

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23 In terms of the leak -- and I only mention this
24 because I know that our application is somewhat of
25 an impetus for this hearing today -- I want to reassure

1 the Court that thus far in these missions we have not
2 found anything that we could attribute back to the leak.
3 Despite our concerns about increased risk and danger,
4 there is no threat or concrete occurrence out in
5 the field that we have come across to attribute back to
6 the leak.

7 I think the bad consequence of the leak is that now,
8 in our contacts with the local leaders and the donor
9 countries, as I mentioned last week, the international
10 community, there seems to be more of a feeling,
11 an assumption that there have been warrants issued by
12 this Court, which of course is a serious matter. There
13 have not been. The fact that the community, and even
14 the local community, now is getting somewhat cynical
15 about what the ICC is saying versus what it is doing is
16 a real concern. The integrity of the Court is very much
17 at issue here.

18 The idea is that, through publication in the media
19 of the news that there are warrants of arrest, now
20 the community is thinking: maybe the ICC is doing one
21 thing and saying another. That is a matter of grave
22 concern to us, and it makes -- especially for a new
23 institution, I think it could create a situation where,
24 in Uganda, where there is already plenty of criticism of
25 the ICC intervention and plenty of anticipation of how

1 trustworthy will this institution be, it does not make
2 any of our jobs easier to have this kind of occurrence
3 that leads people to believe that maybe there is a gap
4 between what is really happening at the ICC and what
5 the ICC is showing to the outside world.
6 I want to address directly this issue of
7 the difference in type and scope for victims and
8 witnesses. With respect to victims, I mentioned one
9 component, which is the camp protection. Another
10 concern that we have for victims, though, is: will
11 making some camps or areas more safe make other camps or
12 areas less safe? This is something that we are going to
13 engage the UPDF in and also camp leaders. They can tell
14 us: if we pull platoons from other camps to protect your
15 camp, will that make the neighbouring camp, your sister
16 camp, less safe?
17 So this is another matter that we are assessing
18 because victims, in a broad sense, means everybody who
19 is there. So we want to make sure that we are not
20 creating a situation that is overall worse, even though
21 it may protect the areas in which we have the highest
22 investigative interest. It should obviously not be
23 the aim of the OTP or VWU to make some victims safer at
24 the expense of others.
25 Another big component here, in terms of victims more

1 broadly, is the idea of -- this is where the support
2 factor comes back in. Because if we can continue to
3 bring popular opinion, and especially the opinions of
4 the local leadership, to be more supportive of the idea
5 of ICC intervention, it helps to make the entire
6 situation there a little more safe and to decrease
7 the hostility to the warrants. This is the idea that we
8 mentioned last week about helping to spread
9 the information that enables people to conclude that
10 an ICC intervention is not necessarily at odds with
11 peace efforts, and in fact may enhance peace efforts.
12 This sounds very esoteric when you talk about it
13 this way, but I would like to remind the court that over
14 the past months, one of the huge efforts has been to
15 bring the acholi leadership here to the court, to bring
16 the leadership of other tribes in Northern Uganda here
17 to the Court, and we believe we have made significant
18 progress in enhancing their understanding of why it
19 would be beneficial for the two parties here to work
20 together or at least to acknowledge that each has
21 different mandates, and to respect those mandates.
22 This is a measure that is related to victim
23 security, because if the local community leaders are
24 less hostile to our intervention, it helps to make the
25 people who cooperate with us more safe, it helps to make

1 the people who potentially would be at risk of being
2 considered to be cooperating with the ICC more safe.
3 As your Honours know from the warrant application,
4 it is not -- there are two dangers. One is that,
5 through collaborators or otherwise, individuals who
6 cooperate with the ICC will become known to the LRA.
7 But another concern is that camps will be associated, in
8 the LRA's mind, with allegiance to the government or
9 allegiance to the ICC. Something like that can be taken
10 very easily by the LRA as an excuse to attack that
11 community or that camp.
12 So the idea of support for the warrant through the
13 local community leaders and also, as I mentioned last
14 week, probably a different message, maybe even though
15 the media coming from the Prosecutor, that does more to
16 put forward this idea of a comprehensive strategy for
17 integrating an ICC effort on the front of justice with
18 the peace efforts and the peace negotiations such as
19 they are -- right now there are no active peace
20 negotiations, so our task is a bit easier -- those are
21 the ways, although they sound like broad concepts, those
22 are probably the most promising ways to ensure
23 the safety of the victim community, as opposed to the
24 witness community. Because we have to do something
25 broader with respect to the population of Northern

1 Uganda.

2 I think that completes what I would say as a first

3 presentation, unless there are any questions from

4 the judges. I am sorry to have gone on for so long.

5 The Presiding Judge: No, no, thank you very much. In

6 line with that first question, we know of at least five

7 camps and one school from the application, but it

8 does seem to be a particularly weighty burden on the OTP

9 and the Victims and Witnesses Unit of the Court to have

10 the safety and security of witnesses in these locations.

11 I just wanted to ask: are there other security

12 measures that are being employed at the same time,

13 perhaps by the United Nations, by the Red Cross,

14 High Commissioner for Refugees, that are parallel and

15 supportive of the ICC's own efforts through the OTP and

16 the Victims and Witnesses Unit, please?

17 Ms Chung: Mr President, the main security that is provided

18 in these camps is provided by the UPDF. We have

19 received cooperation

20 of the type that I am about to specify.

21 They have very good security information.

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6 They also help us to maintain a database of where
7 the LRA activity is at any given moment. But in terms
8 of actually providing personnel or measures, there is
9 nothing there that we think covers our needs.
10 I did forget to mention one thing with respect to
11 our planning on a going-forward basis, although I did
12 raise it with the Chamber last week; it is part of
13 the interim risk assessment that we are doing. We will
14 be assessing whether or not any of the witnesses need to
15 be moved

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23 So again we will
24 talk to each one individually, and we will have a better
25 idea when the missions are completed, if relocations

1 are necessary, how onerous those relocations will be.
2 The Presiding Judge: Thank you. Now, the second and last
3 question I want to ask relates to the proposed redacted
4 version of the Prosecutor's application.
5 Amongst the papers annexed is an Exhibit B, which is
6 a list of witnesses and victims whose names have been
7 expunged from the application, for security and
8 protection reasons. I may be wrong, but it does not
9 appear very clear what the OTP intends to do with this
10 list or what the intention is.
11 At the time of transmission of the records, is this
12 list to go forward as part of the documentation to be
13 submitted to Uganda and the authorities of Uganda, for
14 instance? Could you just clarify that, the list of
15 witnesses and victims, please?
16 Ms Chung: Mr President, that list was, in the first
17 instance, mainly for the Chamber's use. This whole idea
18 of the redacted version of the application has become
19 somewhat less critical. Our initial idea was that we
20 would perhaps need to disclose the application as part
21 of the request for cooperation to the Sudanese. We do
22 not think the Ugandans would ever require us to give
23 them the application, as opposed to the warrants, if and
24 when any warrants are issued. They are a state party,
25 they would be obligated to comply with warrants in any

1 event, so we never envisioned that the application would
2 have to go to the Ugandans.
3 Our concern was more that if we asked the Sudanese
4 to cooperate -- of course, it would not be binding, but
5 if we made such a request and they treated the request
6 as something like a request for extradition, then their
7 domestic laws might require them to have something like
8 the application, something to justify the charges. So
9 we prepared the redacted warrant application in
10 anticipation of that event. At least that would be
11 the first event that in our minds might have occurred to
12 trigger the disclosure of a warrant application.
13 Obviously if the warrant application did become public,
14 we would want that to happen only in this redacted form.
15 As I explained last week, our preference at this
16 point -- and this is maybe a good example of how quickly
17 things move. We had negotiations with the Sudanese in
18 the past, but of late they have not been very fruitful,
19 so our view is, rather than taking the risk of having to
20 disclose the application to them, we have spoken more
21 with the Ugandan Government, and they feel in a better
22 position to negotiate with the Sudanese. So we do not
23 anticipate at this point making a direct request to the
24 Sudanese Government, and that may obviate the need to
25 have any warrant application disclosed to any party from

1 whom we request cooperation.
2 However, the next event would be, if there is
3 anybody arrested, the usual practice would be that at
4 that point, yes, the application would become public, at
5 least to the defendant, maybe even to the world. In
6 that situation, we would still like the names of
7 the witnesses and the victims to be redacted.
8 So there is still a point in time, maybe later down
9 the road, later in the chronology, when this redacted
10 version will become relevant. But it was our idea that,
11 even when that became public, the answer key or
12 the lists would remain with the Court.
13 The Presiding Judge: Thank you for that clarification. May
14 I now invite his Honour Judge Politi to ask you further
15 questions. Judge Politi, please.
16 Questions by Judge Politi
17 Judge Politi: Thank you, Mr President.
18 Madam Prosecutor, the OTP application mentions in
19 particular the risk for former residents of the Barlonyo
20 Camp for the internally displaced who now live in nearby
21 camps. It is said in the application that this risk has
22 increased as a result of recent events and will remain
23 as such until better security can be arranged.
24 Could you please clarify two aspects: which special
25 security measures are already in place or are planned to

1 be set up with regard specifically to former residents
2 of the Barlonyo Camp; and, second, whether there is any
3 other reason, aside from the content of the article in
4 the press to which you have already alluded, why
5 the former residents of Barlonyo are to be considered at
6 a greater risk than other victims and witnesses?

7 Thank you.

8 Ms Chung: Judge Politi, Barlonyo Camp poses a special
9 challenge, because in the aftermath of the attack there
10 which is the subject of the warrant application,
11 the camp was essentially abandoned, everybody fled to
12 neighbouring camps.

13 Our concern with the leak is that -- and I should be
14 very specific -- it is not that the article in Le Monde
15 mentioned Barlonyo as a place in which we had interest;
16 it did not. It was merely an associational problem. It
17 mentioned our investigation and the arrest warrants, and
18 then it mentioned Barlonyo, actually giving the wrong
19 date for the attack: it put it in this year.

20 As we said in our application, our concern there is
21 that the joining of those two ideas does create
22 an increased risk and danger for the former residents of
23 Barlonyo, in the sense that if Barlonyo is associated in
24 the minds of the LRA with our investigation in a way
25 that is encouraged by this article, then the type of

1 retaliatory attack that happened at Pagak Camp, the risk
2 of that is increased.

3 That was by way of example. We are not meaning to
4 suggest -- I would not put the former residents of
5 Barlonyo camp on a higher hierarchy of risk than
6 the residents of Pagak Camp. It is not that we are
7 meaning to say that Barlonyo is a different level of
8 security risk than the other places that are mentioned
9 in our warrant application. Our concern was that,
10 because that was the one place that was associated with
11 our investigation in the Le Monde article, other people
12 could draw that conclusion.

13 It may be that that concern is overstated. Barlonyo
14 is by far, as your Honour is aware, the largest attack
15 in Uganda in the time period that we are studying, so it
16 does not take a great leap of imagination for someone to
17 figure out that we would have an interest there. In
18 fact, it was reported in the media last summer, when we
19 first began the investigation, that investigators from
20 the OTP had been there, a fact which again was not true.
21 But it has been associated with the OTP investigation in
22 the past, and it may continue to be, regardless of what
23 disclosures are made, because the idea that Barlonyo
24 would be one of our interests is not a hard one to
25 figure out, given how significant it is.

1 In Barlonyo, as with the other camps, we are going
2 to revisit witnesses that we feel are in a less safe
3 position. With respect to the victims, we are going to
4 talk again with the former camp leaders to figure out
5 where they have been dispersed to and again examine what
6 options there are for getting better protection for
7 them, in the event that there is some -- to guard
8 against the possibility of there being any retaliatory
9 strike against the former residents of Barlonyo.

10 The good news about the Barlonyo situation is that
11 that is in a safer area. Lira is in a better position,
12 certainly now, than Gulu is. So the geography is one of
13 the huge factors, being in a place where the LRA is not
14 operating is better. Obviously, through the intercepts
15 and the other information about where the LRA are
16 conducting attacks currently, we will know if they begin
17 to move in that direction.

18 So those are the steps that we are taking. As we
19 continue to monitor Lira, as opposed to the other areas,
20 we will be interviewing the witnesses and camp leaders
21 again and looking at what measures potentially could be
22 put in place in that area on a more camp-wide basis to
23 protect the victims of the former Barlonyo Camp.

24 Judge Politi: Thank you. My second question relates to
25 issues of cooperation with the Victims and Witnesses

1 Unit and, more generally, with the Registry. I must say
2 that you have touched upon some of these aspects in your
3 previous intervention. You discussed the protocol, as
4 you have elaborated, with the Victims and Witnesses
5 Unit, and you are following in your actions aimed at
6 protecting victims and witnesses, and you have discussed
7 also the cooperation in the framework of the ongoing
8 security assessment. Now, are there any other aspects
9 that you would like to highlight, on the cooperation of
10 the Victims and Witnesses Unit and, more generally, with
11 the Registry?

12 During the hearing of 16th June before this
13 Pre-trial Chamber, the OTP mentioned the fact that
14 you were about to set up and assess, together with
15 the Registry, what are better ways to protect the camps
16 and the school that are identified in the warrant
17 application. Maybe, as I said, you already partially
18 discussed this, but if you could elaborate on it, we
19 would greatly appreciate that.

20 In the same hearing, the OTP noted also some
21 concerns that the Prosecution may have in relation to
22 what was described as some very difficult staffing
23 problems that the Victims and Witnesses Unit is
24 experiencing.

25 So can you explain to the Court these other aspects,

1 if any, of the cooperation that you would like to
2 highlight, or any concern that you have about this
3 cooperation? Thanks.

4 Ms Chung: I have highlighted to the Chamber in the past
5 really what I view to be the excellent cooperation
6 between the Registry, the VWU and OTP in this situation,
7 which is not to denigrate the cooperation in the other
8 situations.

9 In Uganda, the challenges of operating and of
10 protecting witnesses and victims have been great, but
11 not insurmountable, nor close to insurmountable. So,
12 unlike in the Congo, where sometimes we cannot go there,
13 in Uganda, usually we can go, but the challenge is to
14 plan properly and put in place proper measures so we can
15 operate safely and not create risks for victims and
16 witnesses.

17 I think that, as I have described, the cooperation
18 at all points between the VWU and OTP has been really
19 excellent. Certainly at the beginning, almost all of
20 the missions were joint missions, we were there with
21 the Registry and security personnel from the Court,
22 I think all the individual assessments of the areas were
23 done jointly. So really at every juncture when we have
24 looked around and decided what to do next, the VWU has
25 been a part of that, and we have only gone forward when

1 we have had an agreed-upon plan. That is not to say
2 that there are not times when there are slight
3 disagreements, but we have always been able to work it
4 out. I think that our record thus far shows that we
5 have done it in a way that we have managed to protect
6 the victims and witnesses. Which is not to say that it
7 is all in our control, but so far it has worked out very
8 well.

9 At this stage, in terms of the interim risk
10 assessment, the parameters of that assessment have been
11 discussed with and formulated in consultation with
12 the VWU. As with all the prior steps, we fully expect
13 to sit down once we have all the information and discuss
14 with them what measures still need to be implemented.

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24 Certainly in terms of the assessment and where
25 we are going next, I expect VWU to be fully involved.

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7 One concern that has been expressed to me that
8 I raised with the Court last week is that they have not
9 been able to hire at the rate that they thought they
10 would be hiring personnel. They are really -- they have
11 to deal with all three situations. The other two
12 situations are much more complicated, in terms of
13 operating safely for the victims and witnesses, so
14 they have a very few number of people. Even when you go
15 planning the missions, sometimes people are not
16 available. So the shortage of staff affects them pretty
17 immediately, when they go and try to get in the field to
18 help OTP and do their share or their part of the work
19 that needs to be done.

20 Judge Politi: Thank you. I have one last set of questions.
21 Following the meeting with this Chamber of last
22 February 8th, the Prosecutor provided the judges with
23 copies of the agreement on the provision of protective
24 measures and security arrangements for witnesses,
25 entered into with the Government of Uganda on

1 December 12th 2004. A number of provisions of this
2 agreement envisage specific forums of cooperation and
3 assistance to be provided either by the Ugandan Police
4 or by the Ugandan Army.

5 So my first request is: we would appreciate
6 a general update on the stage of implementation of this
7 agreement. Then the Court would like to have some
8 clarification on a number of specific aspects that
9 I will list right now:

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3 The Court thinks that these are just some examples
4 of provisions that appear to be especially relevant for
5 the purposes of this meeting. Thank you.

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8 With respect to confidentiality there has not been
9 any issue about the government not maintaining
10 confidentiality. I would temper that a little bit by
11 saying that of course, in order to effectuate these
12 measures, some information has had to be shared, so it
13 always creates a risk. This is one of the reasons that
14 we have tried to be so careful with the warrants.
15 Someone told me once at the very beginning of
16 the investigation that there are no secrets in Northern
17 Uganda, and our experience has been that that is true.
18 It is very hard to do anything without somebody finding
19 out about it, usually somebody who should not know about
20 it.
21 In terms of the government and their cooperation on
22 witness security measures, it has been very good, and it
23 has all been done very discreetly. We have no
24 information whatsoever that suggests that there has been
25 a breach in confidentiality. So I would represent to

1 the Chamber that all of that is going well at this

2 point.

3 I may have missed a question in the middle,

4 Judge Politi.

5 Judge Politi: No, you have not missed any question, I think

6 you replied to all of them. Thank you. Thank you,

7 Mr President.

8 The Presiding Judge: Thank you very much, Judge Politi.

9 That raises a question, the Registrar reminded me,

10 of whether the agreement should be placed in the record.

11 It is a bit of a formality, but I think it is just as

12 well to complete the record if we could. Would you be

13 able to supply a copy for that purpose?

14 Ms Chung: Certainly, Mr President.

15 The Presiding Judge: May I now invite her honour

16 Judge Diarra to put additional questions?

17 Questions by Judge Diarra

18 Judge Diarra (interpretation): Thank you, Mr President.

19 Madam Prosecutor, many of the my concerns have been

20 answered in fact by you in the various explanations and

21 details which you have given, following on from

22 the questions put by my colleagues. Nonetheless,

23 I would like to put a question to you.

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6 Ms Chung

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7 Judge Diarra (interpretation): One last question, Madam Prosecutor. Can we
8 consider today that the privacy and the safety of
9 victims and witnesses is ensured, in other words that
10 the necessary measures have been taken in the wake of
11 the revelations in the press? Do you consider that
12 the risks that these people incurred are covered?

13 Ms Chung: The answer to that, your Honour, is based on
14 the information so far. We do not think that a leak has
15 resulted in any incident in the field. However, we will
16 keep asking. It is somewhat fortunate that we planned
17 these missions and they occurred after the leak.

18 We will keep asking and probing to see if there is any
19 connection.

20 At the time that we submitted our application -- and
21 we continue to have some very, very deep concerns about
22 the leak and also the idea that it may be part of a --
23 more than one incident. That was the reason that we had
24 made the application for there to be some kind of
25 inquiry.

1 We have to say that, in looking at the Court Rules
2 and the Staff Rules and the Auditors' Charter, the Court
3 does not seem to be well equipped to handle a court-wide
4 inquiry. It is almost as if the rules, the Staff Rules,
5 the Court Regulations, assume that there is
6 an infraction that is easily attributable to somebody.
7 There are a lot of measures about disciplinary
8 action against staff members who violate the rules, but
9 almost nothing about how to investigate, if you believe
10 that something like that has occurred but you do not
11 know who might have committed the infraction.
12 So we might be as puzzled as the Chamber on how best
13 to proceed, and we understand that the Chamber has only
14 deferred the question. We do continue to believe that
15 for many reasons, including the culture of the Court and
16 the integrity of the Court and the risk that is created
17 in the field, it is a serious incident which should be
18 inquired into. We understand that certainly
19 the Prosecutor took some initiative in sending the email
20 that he did, but our concern is that it may be viewed as
21 simply an OTP action.
22 The lack of response by the Court to this incident,
23 even if it is a delayed response -- we may know it is
24 a delayed response, or at least that there may be the
25 implementation of some measure later, but in the interim

1 the idea that something like this could happen and maybe
2 not be addressed publicly in a more forceful way does
3 raise some concerns with us.
4 I just wanted to say that as an explanation for why
5 we put in the application and felt it was important to
6 do so quickly. In case there is a risk of
7 misunderstanding, it was not our notion that
8 the connection to this Pre-trial Chamber should ever be
9 revealed, or that the application or even the content of
10 the warrant ever be revealed to the internal auditor.
11 In fact the leak could be investigated as an infraction
12 of the Staff Rules without making any connection back to
13 these proceedings. It would be important for
14 the auditor to know the chronology of the warrant
15 application so that he had the background, but he need
16 not disclose that to anybody, necessarily, he could
17 carry on his own investigation.
18 We have to say, looking at the rules, he does seem
19 to be the best situated person, because the whole reason
20 he was hired was to do court-wide compliance with
21 internal controls. But we understand your Honours have
22 deferred the question and I do not want to press
23 the point, but I wanted at least to have the opportunity
24 to explain why we made the application we did. We do
25 have our worries about the situation and the repeated

1 nature of it, or the seemingly repeated nature of it.
2 Judge Diarra (interpretation): Madam Prosecutor, this concern which you have
3 regarding this point in the procedure, has it pushed to
4 one side in your mind my question, which was whether
5 the necessary measures have been taken today to deal
6 with the risks which certain individuals now are
7 incurring? Have you taken measures to protect their
8 safety and privacy? That in fact was my question, but
9 you spent about 90 per cent of your time dealing with
10 your own procedural concerns.

11 Ms Chung: I am sorry about that. I would like to address
12 that question, obviously it is an important question.
13 We do feel that we have put in place the necessary
14 measures. It is a constant process of reassessment,
15 however, so we never want to fail to be vigilant on
16 that. That is part of the reason that we are devoting
17 the next set of missions -- after many missions in which
18 we half and half did security and then investigation,
19 now we are doing a hundred per cent security, and
20 I think it is important at this moment to do that.
21 So we have a certain amount of pride about what
22 we have accomplished and about the fact that so far
23 nobody seems that have been endangered in any
24 significant way by our investigation, but we also remain
25 cautious. I think that in the next few weeks we will

1 learn much more about how well it is going in the field,
2 if it is going in the field.

3 The Presiding Judge: Forgive me, just to follow that
4 through. Do I understand that, while you are monitoring
5 the situation now, since 11th or 13th June, nothing
6 specific additionally has been put in place? Do we
7 understand that correctly?

8 Ms Chung: Yes, Mr President. I think all the risks that
9 we are dealing with were pre-existing. For us it is
10 against the backdrop of a long course of witness
11 security measures, and we think that it was
12 an unfortunate occurrence. But the good part of it is
13 that, other than the cynicism about what the Court is
14 saying and doing, we do not think that there has been
15 any implication for witness security in terms of any
16 concrete occurrence in the field.

17 The Presiding Judge: Thank you. Just perhaps a final
18 question. The statute seems to assign to the Victims
19 and Witnesses Unit a prime responsibility, if not
20 an initiating responsibility, to provide for protective
21 measures and some sort of security protection.
22 From your cooperation, one would assume that what
23 they are doing is fully known to you, but just for
24 the sake of completeness. To your knowledge is
25 the Victims and Witnesses Unit undertaking any other

1 arrangements different from what you have described to
2 the Chamber?
3 Ms Chung: Mr President, I am not aware of any.
4 The Presiding Judge: Thank you. Your Honours, if there is
5 nothing else, let me, on behalf of the Chamber,
6 thank you for representing the Prosecutor. That
7 concludes our hearing this morning. Thank you very
8 much. The hearing is adjourned, Madam Registrar.
9 The hearing is adjourned at 11.20 am.

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