

**Cour
Pénale
Internationale**

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

**International
Criminal
Court**

Date: 18 October 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

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

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Introduction

The Prosecution respectfully submits this sealed supplement to the application being filed concurrently as a public document. The accompanying document is entitled "Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification."

Request for Sealing

1. The OTP respectfully requests that this submission be sealed because it either: (1) recounts information which remains under seal; (2) describes or recounts victim or witness protection measures which would be undermined by public description; or (3) describes or recounts an evaluation or assessment of potential victim or witness protection measures which, if public, could undermine the protection of victims, witnesses, or their families.

The OTP's Position On The Chamber's Decision to Redact the Dates, Places and Characteristics of the Crimes from the Warrants of Arrest, And Its Motion for Reconsideration

2. In determining to redact the dates, places, and characteristics of the crimes from the warrants of arrest, the Chamber seems to have concluded – entirely understandably – that redacting even more information than the OTP and the VWU had requested might afford enhanced protections to victims and witnesses in Northern Uganda. *See* Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest, dated 13 October 2005 (hereinafter the "Unsealing Decision"), paras. 20-23.

3. As is stated in the accompanying public submission, the OTP respectfully submits that the OTP and the VWU should have been heard on this issue, before the Chamber rendered a decision. Even setting aside the legal issue of the opportunity to be heard, the OTP and VWU possess “professional knowledge of the field” to which the Chamber, by its nature, lacks access. *See* 6 October 2005 Hearing Transcript, pages 103-04 (comment of Presiding Judge). The transcripts of the 3 October 2005 and 6 October 2005 hearings support the proposition that the OTP was not asked about the potential protective measure of redacting the dates, places, and characteristics of the crimes committed by the named persons. The OTP also stated clearly during each of those hearings that it was *not* seeking the redactions subsequently ordered by the Chamber.¹

4. If the OTP had been afforded notice that the Chamber was considering redacting the dates, locations, and characteristics of the attacks, it would have provided facts which the Chamber might have viewed as relevant to its decision-making process. Most significantly, the OTP would have expressed the view that the redactions ordered in the Unsealing Decision undermine the effectiveness of the overall security plan, rather than enhancing them. This evaluation would have been accompanied by the following facts.

¹ At the hearing on 3 October 2005, the Presiding Judge asked whether the OTP was “fairly satisfied that these are all the redactions that are required at this point?” The OTP responded, “Yes, your Honor. *See* 3 October 2005 Hearing Transcript, page 80. On 6 October 2005, the OTP was asked by Judge Politi whether “there [is] any other change that would be requested by the OTP in [respect of redactions to the warrant of arrest]?” The OTP answered, “Judge Politi, no. Those are the only redactions we are requesting and we have no further requests.” *See* 6 October 2005 Hearing Transcript, page 114.

5. First, the OTP would have made the Chamber aware that it had also carefully considered the matter of the extent of the redactions it planned to request from the Chamber. It consulted extensively with the VWU about the specific issue of whether the dates, locations, and characteristics of the attacks should
[REDACTED]

After weighing all of the information, and considering the issue thoroughly, the OTP and the Government of Uganda independently came to the same conclusion: that redactions of the dates, locations and characteristics of the attacks should not be requested from the Chamber. The issue was then discussed with the VWU and the Registry. Again, agreement was reached that the redactions should not be requested.

6. Second, the OTP could have described the substantive reasons that it concluded, based largely on information from the field, that redacting of the dates, locations and characteristics of the attacks would be less safe than openly and clearly identifying the attack sites were the following:
 - Clearly stating that there were [REDACTED] attack sites identified in the warrants of arrest was deemed safer overall for all of the victims of the conflict, even if concealing [REDACTED] sites might marginally and temporarily increase the safety of the residents living at those sites.
[REDACTED]

[REDACTED]

The OTP concluded that naming ^[REDACTED] attack locations clearly
[REDACTED]

reduced the likelihood that the LRA would consider attacking one or another of the hundreds of other places it has previously attacked, based on a mistaken belief that the ICC had investigated at one or more of those locations, and/or that potential witnesses resided in those locations.

- As the OTP stated at the 6 October 2005 hearing, the possibility of leaks about the existence of the warrants heightened this concern about mistaken speculation on the part of the LRA. *See* 6 October 2005 Hearing Transcript, page 108.

[REDACTED]

The scenario the OTP wished to avoid was described at the 6 October 2005 hearing conducted after the existence of the warrants of arrest had indeed been leaked. The OTP stated:

[REDACTED]

The OTP opined: "Right now, the lack of clarity is really impairing . . . it is a deadly combination of half-information." *See id.*

- The OTP also reasoned that redacting the dates and locations of the attacks would be an ineffective protection measure in any event, because concealing the attacks at the focus of the ICC investigation would be

futile. The risk that the attack sites will become known arises from the underlying investigation, *not* the warrants of arrest. Despite any efforts by the Court to conceal the attack sites, it is inevitable that those same sites will become known, over time.

[REDACTED]

Given the futility of trying to conceal the attack sites in the longer term, the OTP and the VWU determined to plan security measures around a single moment when there was public “certainty over where the locations are,” *see id.*, and certainty about the overall security situation.

[REDACTED]

A clear, one-time announcement of the attack sites that are the focus of the investigation permits the OTP, the VWU, [REDACTED] to enhance security and enhance monitoring to the greatest degree at the

[REDACTED]

critical time when those sites become known to the public, and the period immediately following the public disclosure. It also enables the public disclosure of [REDACTED] to be timed to occur when the overall security situation is comparatively favourable.

[REDACTED]

- Finally, the inability of the OTP and the VWU to predict when one of the named persons might be arrested required security planning to proceed on the assumption that the attack sites would become known with the warrants of arrest.

[REDACTED]

³ For this reason, the “unpredictability of the security environment in Uganda,” *see* Unsealing Decision, para. 22, does not weigh solely in favour of the redactions, as the Chamber appears to have concluded.

[REDACTED]

[REDACTED]

7.

[REDACTED]

8.

The best and
broadest form of safety and security for witnesses and victims in northern
Uganda is international support which will contribute to dismantling the

4 [REDACTED]

5 [REDACTED]

⁶ The Prosecutor addressed: "this idea of the comprehensive strategy we have, and it is basically: provide security by the way that basically enforcing the judges' decision, enforcing the arrests. This has to be supported by other measures: reduce the support for the LRA, because that is the big problem." See 6 October 2005 Hearing Transcript, page 102.

LRA entirely, by isolating the LRA from groups or elements from which it may be gaining support or refuge. Transparency about the horrific nature of the crimes committed by the LRA and by LRA leaders is an important means of galvanising this international support.

9. For all of the foregoing reasons, and the reasons stated in the accompanying, public submission, the OTP respectfully requests that this Chamber reconsider its determination to redact from the warrants of arrest the dates, locations, and characteristics of the attacks ordered by the named individuals. There is no information in the record of the proceedings thus far which supports the Chamber's factual determination that the redactions are a "necessity to ensure to the fullest extent possible the safety and protection of victims and witnesses." *See* Unsealing Decision, para. 23. It is the OTP's assessment that, to the contrary, redacting the attack sites from the warrants of arrest impairs the overall security planning: (1) which the Chamber has already found to provide "the necessary and adequate protective measures for all concerned at this stage" *see* Unsealing Decision, para. 20; and (2) which assumed public disclosure of the warrants *without* the extensive redactions ordered in the Unsealing Decision, *see, e.g.*, 3 October 2005 Hearing Transcript, pages 8-9, 15, 80.

The Motion for Clarification

10. The OTP additionally respectfully requests clarification of one matter not expressly addressed by the Unsealing Decision: whether the OTP may publicize that the Court has transmitted the warrants of arrest to the Governments of Uganda, the Sudan, and the Democratic Republic of the Congo. It does not appear from the Chamber's decisions thus far that the

Chamber necessarily intends this information to remain sealed, but none of the terms of the Unsealing Decision seem to authorize public disclosure of the information.⁷ Nor is it clear what legal authority exists for the continued sealing of the fact of the transmission of the warrants, now that the warrants themselves have been unsealed. Indeed, the Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, dated 8 July 2005, refers openly to the prospect of transmission of the warrants of arrest, and this Decision was unsealed by means of the Unsealing Decision.

11. From caution, the OTP has not yet disclosed information about the completion of transmission, but the OTP is hampered in its ability to build support for efforts to assist or encourage the Governments of the Democratic Republic of Congo ("DRC") in the execution of the warrants, if it cannot acknowledge or confirm that warrants were transmitted to those countries.

[REDACTED]

- 12.

If the fact of transmission remains sealed, the concealment may hamper the building of support and even possible advocacy efforts [REDACTED]

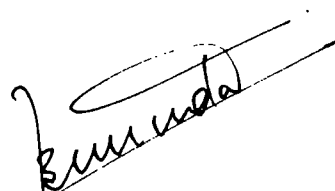
- 13.

⁷ If the Chamber intended to maintain the sealing of the information, the OTP was deprived of an opportunity to be heard on this issue as well, and therefore it seeks reconsideration of the matter.

14. Finally, any misunderstanding about the identity of the requested States, or whether the warrants in fact have been transmitted, would obviously be a grave impediment. Because continued sealing of the fact of transmission of the warrants will continue to hamper, the OTP seeks clarification of whether it may state publicly that the warrants of arrest have been transmitted, and the states to which they have been transmitted.

Conclusion

For the foregoing reasons, the Prosecution respectfully requests the Pre-Trial Chamber to: (a) reconsider its decision to redact from the warrants of arrest the dates, locations, and characteristics of the attacks; and (b) provide clarification of the limited issue regarding transmission.



~~FOR: Luis Moreno Ocampo~~
Prosecutor

Dated this 18th day of October, 2005

At The Hague, The Netherlands

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

18 October 2005