Cour Pénale Internationale

International Criminal Court

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

Date: **12 December 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 Application That the Pre-Trial Chamber Disregard as Irrelevant The Submission Filed by the Registry on 5 December 2005

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	

Introduction

1. This submission responds to a request from Pre-Trial Chamber II, during the status conference of 7 December 2005, that the Prosecutor set forth in writing his arguments objecting to the manner in which Registry provided the letter purportedly authored by the LRA (hereinafter "LRA letter") and the *ex parte* communications regarding the letter between the Registry and the Chamber.

2. The OTP continues to share the view, expressed first by Chamber at the status conference, that the recent events are no reason to lose sight of the good and close cooperation and consultations among the OTP, the VWU, and the Registry – all under the oversight of the Chamber – which has resulted thus far in the achievement of one of the most important goals of the Rome Statute. The successful safeguarding of victims, witnesses, and their families to date, after the issuance of the first ICC arrest warrants and in the midst of an ongoing conflict, is an achievement of which the Chamber and each organ of the Court should justifiably be proud.

3. As the Prosecutor expressed at the conference, however, it is also critical that in making sincere attempts to achieve the goals of the Rome Statute, the organs and their representatives comply with the procedures set forth in the Statute, Rules and Regulations. No one could reasonably expect that the operations of the OTP and the Registry, or the administration of the Court, will be perfect. Here, for example, the OTP was mistaken in not sharing the LRA letter with the relevant Registry Units. As the Prosecutor described at the status conference, the OTP corrected the mistake as soon as the Registry made the OTP aware of the problem. This application later became necessary, however, because the Registry permitted a mistake and misunderstanding about the

administration of the Court – one it agrees does *not* implicate the adequacy of *any* victim or witness protection measure – to serve as a justification for failing to comply with the legal framework.

4. The Registrar engaged in two acts which, in the OTP's view, constituted violations of the Statutes, Rules, Regulations, and the Registry's own draft protocols. First, the Registry informally shared information bearing purportedly on staff security with the Pre-Trial Chamber. Second, the Registry filed the LRA letter in the record of the Uganda case. In taking these actions, the Registry improperly disregarded standards establishing: (1) the jurisdiction or competence of the Chamber; and (2) the manner in which information bearing upon the Chamber's responsibilities is furnished to the Chamber.

5. As is also discussed below, these violations are not mere "technical" derelictions. The Registry's filing of the LRA letter with the Chamber, after being told by the Prosecutor that the letter was the OTP's evidence, is a circumstance to which the OTP must object in the strongest terms. Even assuming the letter had been relevant to any matter within the Chamber's competence to decide, the Registry cannot file a party's evidence, over the party's objection, without destroying the Registry's neutrality, the parties' ability to gather evidence, and the willingness of providers to share information with the parties. The Statute and Rules identify the proper sphere of activity of the Pre-Trial Chamber, and the proper channels for the dissemination and receipt of information, particularly to and from the Pre-Trial and Trial Chambers. The legal framework cannot be disregarded without also endangering the appearance of independence of the Chamber, the functioning of the organs, and potentially creating an appearance of impropriety to the outside world.

6. In this instance, it may be that the Pre-Trial Chamber agrees that the information shared informally with the Chamber, and Registry's 5 December 2005 Submission (hereinafter "Registry Submission"), which includes the LRA letter, do not affect the only matter which was arguably within the Chamber's competence to decide here – the adequacy of the measures being taken to protect victims and witnesses. This view would adopt the VWU's assessment, expressed unequivocally at the status conference, that the LRA letter had no impact on the adequacy of victim and witness protection measures. If the Chamber were to accept this view, then there will be no need for the OTP to press its objections to the informal communications between the VWU and the Chamber. Under this view, the OTP would be entitled to request that the LRA letter and the rest of the Registry Submission be rejected, and the LRA letter be returned to the OTP. As a courtesy to the Chamber, however, the OTP has no objection to the Chamber retaining the submission, so long as the submission is ordered sealed subject to a future OTP disclosure obligation.

7. While the OTP disagrees strongly with portions of Mr. Dubuisson's presentation at the last status conference, it does not believe, consistent with the view expressed herein, that administrative problems and miscommunications between the Registry and the OTP are properly discussed as part of the proceedings of this case. The hearing itself demonstrated vividly the OTP's point that the Chamber is improperly being called upon to become the arbiter of an internal ICC administrative dispute. While in a different case, such an administrative dispute might simultaneously involve the Chamber's function of protecting victims and witnesses, here it did not. In this circumstance, the Chamber can no more involve itself in the dispute than it would in establishing or altering the VWU's budget, for example.

8. If the Pre-Trial Chamber considers that the staff security matter was properly called by the Registry to its attention, and believes that the LRA letter was appropriately filed, then the OTP and future parties are entitled to a reasoned decision stating reasons for these rulings. In this eventuality, as expressed at the status conference, it is the OTP's view that the Chamber need complete the record, by describing any communications between the Chamber and the Registry relating to staff security and the letter.

Request for Extension of Page Limit

9. The OTP respectfully requests that the page limit set forth in Regulation 37 be extended. The reason for this request is that the OTP cannot respond fully to the legal and factual issues the Chamber requested the OTP to address, without exceeding the page limitation of 20 pages. The OTP makes this request as part of the application only because the Chamber had requested the OTP to make its application as soon as was possible. The OTP well understands that in the usual circumstance, the application for a page extension should precede the submission itself.

Argument

I.

The LRA Letter Was Not Properly Filed By the Registry

10. There are two respects in which the Registry's filing of the LRA letter, on 5 December 2005, did not comply with the Statute or the Rules. First, as a matter of substance, the LRA letter did not involve any matter within the competence or jurisdiction of the Chamber because, at most, it pertained to staff security, a matter nowhere defined to be "judicial." Even the rule invoked by the Registrar,

Rule 13(2), would instead place the matter within the competency of the Registrar, the President, and the Prosecutor. Second, as a matter of procedure, nothing in the Statute or Rules authorized the Registrar to file with the Chamber a document belonging to the OTP, against the Prosecutor's objection.

A. The LRA Letter Did Not Involve Any Matter Within the Chamber's Competence to Determine And Thus Should Not Have Been Filed

11. The conclusion that the LRA letter pertained to no matter within the jurisdiction of this Chamber is fully supported by the presentation made by the VWU at the last status conference. It is clear that the letter, upon evaluation by the VWU after receipt at the latest by "around November 24," *see* 7 December 2005 Tr. (hereinafter "Tr."), p.28, was deemed *not* to affect the adequacy of victim and witness security measures and therefore not to require any change in the measures already in place. There is now no dispute that the Registrar was aware, at the time he filed the letter, that the letter did *not* affect victim and witness security measures. In this circumstance, Regulation 41 provides no support to the Registrar. First, the regulation authorizes action on the part of the VWU – not the Registrar or the entire Registry. Second, the regulation permits the VWU to draw matters to the attention of the Chamber in the circumstance "where protective or special measures under rules 87 and 88 require consideration." It is now undisputed that the VWU does not believe this condition to have been met.[1]

[1] Regulation 41 could not justify the Registrar to notify the Chamber, even assuming the proposed notification involved a witness and protection matter within the Chamber's jurisdiction. In specifying the VWU as the adviser to the Court, Regulation 41 implements Rules 17 through 19. These rules place in the VWU exclusively the function of protecting the well-being of victims and witnesses, while simultaneously ensuring that the VWU has the "expertise in the unit" available to do so. *See* especially Rule 19. The Registrar has entirely different functions vis-à-vis victims and witnesses, which are specified in Rule 16. The Registrar's functions include duties of notification and representation, and the single power of the Registrar

12. At most, then, the letter bore upon the security of ICC staff. This was plainly the assessment of the Registrar himself when he first informally, and on an *ex parte* basis, notified the Chamber of the letter's existence, on 17 November 2005. *See* Registry Submission (Memorandum from Bruno Cathala to Luis Moreno Ocampo, dated 17 November 2005). The LRA letter on its face does not relate to victim and witness security. It threatens no witness, victim, or family member thereof. It relates that the purported author of the letter has been directed to kill "any white person moving anyhow in this region." No witness or victim fits this category of persons.

13. The Registrar was not entitled to submit the LRA letter to the Chamber based on the rationale that the document was relevant to staff security. No provision of the relevant legal framework grants to the Chamber the authority to decide staff security matters. Indeed, even Rule 13(2), upon which the Registrar relied in his internal memorandum dated 17 November 2005, expressly states that "the internal security of the Court" is a matter for the Registrar, "in consultation with the Presidency and the Prosecutor, as well as the host State."[2]

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related to the implementation of protection measures is to enter into agreements with the territorial State. *See* Rule 16. Rules 16 through 19, read together, establish clearly that the Registrar has no general authority to act on behalf of the VWU, or as VWU's interlocutor with the Chamber. To the contrary, the rules envision – as implemented by Regulation 41 – that the VWU, as the unit with the expertise and the responsibility, will have the direct and exclusive interface with the Chamber on all matters of victim and witness protection, other than the negotiation of protection agreements.

[2] It is not clear that the Registrar properly regarded staff security in the field to be equivalent to the "internal security of the Court" within the meaning of Rule 13(2). The negotiating history of the rule shows that the word "internal" was added to the provision during discussions of the Preparatory Commission. *Compare* Proposed Rule B5.1, Discussion Paper Submitted by the Coordinator Concerning Part 4, PCNIC/1999/SGREP(4)/RT.2/Add.1 (14 December 1999), *with* Rule 25(c), Proposal submitted by Australia, Draft Rules of Procedure and Evidence of the ICC, PCNICC/1999/DP.1 (26 January 1999). It has been noted that "the word `internal' was added to qualify `security' in order to avoid any confusion about the scope of the Registrar's responsibility

That rule acknowledges a line drawn in the Statute between "judicial functions," delegated to the Chambers, *see* Art. 39(2)(a), and "non-judicial aspects of the administration and servicing of the Court," which are entrusted to the Registrar. *See* Art. 43(1). In naming the Registry, Presidency, and Prosecutor as the actors responsible for "the internal security of the Court," the rule clearly envisions that matters of ICC security are non-judicial, rather than judicial.

14. The proposition that staff security is a judicial matter, for consideration by the Chamber, is not legally supportable. As was discussed at the hearing, the Chamber cannot hear matters relating to staff security based on reasoning that staff constitute "others who are at risk on account of testimony given by such witnesses," within the meaning of Article 43(6). Any such expansive reading of the article would be wholly at odds with the negotiating history of the provision, which demonstrates that the negotiators at Rome rejected even the idea that all family members of victims and witnesses were within VWU's mandate to protect.[3] The implication was that even family members should not be entitled to VWU-provided protection, unless they were additionally "at risk on account of

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regarding the security of the Court and to underline that there will be a division of responsibility between the Court itself and the host State." G. Dive, "The Registry" in The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (ed. R. S. Lee) 2001, p. 265.

Even assuming for the sake of argument that the scope of Rule 13(2) is as the Registrar interprets it, however, neither that rule nor any other authorizes the Chamber's intervention in security matters. Indeed, as the commentary just quoted suggests, the administrators of security matters are the organs and/or the host State.

[3] *Compare* Article 44(4), Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One, Draft Statute for the International Criminal Court, A/CONF.183/2/Add.1 (14 April 1998), *with* Article 43(6), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Official Records, Vol. I, Final Documents, UN Doc. A/CONF.183/13(Vol.I), 2002.

the testimony" of witnesses.[4] If this Chamber were to rule that the phrase "on account of" in Article 43(6) is so broad that even ICC staff are to be deemed "at risk on account of" the "testimony" of ICC witnesses, it would be expanding the VWU's mandate beyond the statutory terms and beyond any logical limit.

15. Nor is it correct for Registry to maintain that the Chamber has competence to determine matters relating to staff security because the well-being of the staff of the ICC, and particularly VWU, can *affect* the protection of victims and witnesses. The very concept of jurisdiction would have no limits if courts asserted competence not only over matters over which they are expressly granted jurisdiction, but additionally over issues and disputes *affecting* matters within their jurisdiction. If it were appropriate to say that the Chamber has jurisdiction over all matters affecting the VWU's capability to provide protective measures, the Chamber would also have jurisdiction to determine whether the Assembly of States Parties granted VWU sufficient staff or budget, or whether the Registrar provided VWU with an adequate number of telephones or cars.

16. The appropriate judicial "measures" within the Chamber's jurisdiction to consider and decide, *see* Art. 68(1), do not include VWU budgeting or ICC or VWU staff security. As an example, even assuming here, contrary to the facts, that there had been any threat to staff which affected victim or witness security measures, the Chamber would be powerless either to order ICC staff to the field or not. In such a situation, the Chamber might be forced to consider changing witness and security measures, in response to the VWU's changed capabilities,

[4] D. Tolbert; "Article 43: The Registry," Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed.) 1999, p. 645.

but it could not overrule the staff security decisions taken by the Registry, the host State, the Prosecutor and/or the Presidency.[5]

17. Moreover, it is important that the boundary between judicial and administrative matters be respected because of the need, among other things, to maintain the appearance of impartiality of the Chamber. For the Chamber to appear to take responsibility or demonstrate concern for the safety and well being of ICC staff, when the VWU and OTP agree that there is no implication under Article 68 for victim and witness security, creates an appearance of favoritism. Once the Pre-Trial Chamber is involved in staff security issues, devoid of any connection to a dispute over the adequacy of victim and witness security, there is no logical reason that Chamber would not also involve itself in security for the staff of defence counsel, defence investigators, and victims' representatives.

18. The OTP is not contending that there is *no* circumstance in which a matter relating to staff security would properly be brought to the Chamber's attention. In the future there may be some threat to staff security sufficiently grave that it is the judgment of the VWU, or the OTP, or the VWU and the OTP jointly, that it is appropriate for the Chamber to consider additional or altered victim and witness security measures. In such a situation, Regulation 41 would properly be invoked. Either the VWU, or the VWU and the OTP jointly, by means of a proper court filing, would bring the matter to the Chamber's attention, as a means of ensuring that the Chamber was fully informed about a matter over

[5] For example, if it was the shared assessment of the Registrar, the Presidency, the Prosecutor, and the host State that conditions were too dangerous to permit staff travel, there would be no authority for the Chamber to usurp the administrative functions of the other organs and/or the host State by overruling that assessment.

which it does properly have jurisdiction – the consideration of victim and witness security measures.[6]

19. The hypothetical situation however, is not this case. In this instance, the condition which appropriately triggers the notice to, and the involvement of, the Pre-Trial Chamber, was never reached, because the VWU and the OTP agreed, before the Registry filed the letter, that there was no threat to staff, posed by the LRA letter, that affected victim and witness security measures. In this circumstance, as was revealed at the status conference itself, the filing of the LRA letter did nothing other than to render the Pre-Trial Chamber the arbiter of a purely internal, administrative dispute.

20. The LRA letter was simply not relevant to any dispute within the Court's jurisdiction to decide, given the VWU's assessment that the letter did not affect victim and witness security measures.[7] For this reason, among the others set forth in the next section, it should not have been filed by the Registrar.

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[6] Even in this hypothetical situation, two conditions would apply. First, if either the VWU or the OTP elected to notify the Chamber singly, it should do so by means of a formal filing, not an *ex parte* contact with the Chamber. *See* Section II below. Additionally, it remains the case that the Chamber would not be able to issue directives about staff security. It would be informed solely for a *judicial* purpose: to consider changes to victim and witness protection measures.

[7] The Registry also has relied upon the Chamber's decisions of 8 July 2005 and 13 October 2005, and its comments and questions at the hearings of 3 October 2005 and 6 October 2005, as authorization for it submission of the LRA letter. This reliance is misplaced for a number of reasons. First, the prior comments and decisions of the Chamber related to developments and information concerning victim and witness security, not staff security. Second, the prior comments and decisions could not expand the jurisdiction or competence set forth in the Rome Statute in any event. Third, the prior decisions clearly request "the Prosecutor, in consultation with the Registrar and the VWU, to inform the Chamber" periodically, and thus furnish no justification for the Registrar to submit any information unilaterally. Fourth, the comments at the hearings in October 2005 related to the [REDACTED] In this instance, the VWU had already concluded, at the

B. Even Assuming the LRA Letter was Relevant, The Registrar Was Without Authority to File It

21. As the Prosecutor also stated at the status conference, even assuming that the LRA letter was relevant to any matter within the Court's jurisdiction to decide, the Registry did not have the legal power to file the document.

1. The Registry Cannot File Any Document On Its Own Initiative

22. The most basic principle in support of this argument is that *nothing* in the Statute, Rules or Regulations authorizes the Registrar to file documents in the proceedings, other than documents which others (the participants or the Chamber) authorize him to file.

23. The Rome Statute denominates the Registrar as the "principal administrative officer of the Court," and limits the competence of the Registry to "non-judicial aspects of the administration and servicing of the Court." *See* Art. 43(1). As an administrative office, the Registry is the "*channel* of communication." *See* Rule 13(1). Documents filed by the parties thus are not forwarded directly through Chambers, but through the "channel" of the Registry. The Chambers likewise communicates its orders to the parties and participants through the "channel" of the Registry. The Registrar keeps the "database containing all of the particulars of each case brought before the Court." *See* Rule 15.

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time Registry submitted the LRA letter, that the letter had no implications for victim and witness security measures.

24. None of these provisions, or any relied upon by the Registrar, authorize the Registry to be the *source* of filings with the Court, as opposed to the channel. The Registry's reliance on Rule 121(10) is exemplary of the misunderstanding which taints its entire argument. Rule 121(10) states that the Registry "shall create and maintain a full and accurate record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to this rule." The remainder of the rule predictably refers to the interchange among the parties and between the parties and the Court: among other things, "evidence disclosed between" the Prosecutor and the accused person(s), lists of evidence filed with the Chamber by the Prosecutor and the accused person(s), parties' requests that the Chamber adjourn confirmation hearings. *Nothing* in Rule 121(10) authorizes the Registrar to make filings on his own initiative.

25. The Registry thus is charged by the Statute and the Rules to build the filing system for judicial matters, rather than to create or supplement its contents. As the Prosecutor noted at the status conference, in relation to the record, the Registrar serves as the referee. The referee is by definition not a player. In addition, when the referee breaks his role and plays in the game, he cannot expect that any of the parties will continue to regard him as neutral.

26. No part of the foregoing analysis is changed by the fact that the VWU acts as an advisor to the Court and the OTP. *See* Art. 68(4). The VWU does, as the Chamber mentioned at the status conference, have the ability to make a direct communication with the Chamber, see Tr., p.5, because it may "advise" the Prosecutor and the Court on victim and witness protection measures. *See* Art. 68(4). The filing of the LRA letter, however, was not accomplished by the VWU, which was logical since the VWU had already concluded that the LRA letter

required no change in victim and witness protection measures. In addition, nothing in Art. 68(4) or Regulation 41, which provide for VWU to "advise" the Court, or "draw[] [a] matter" regarding special or protective measures to the Chamber's attention, *see* Regulation 41, authorizes the filing of a document which belonged to the OTP. *See* discussion *infra* in next subsection.

27. As the OTP stated at the status conference, the only procedural pathway in the Statutes, Rules and Regulations for the Chamber to obtain the LRA letter, even assuming its relevance to a matter within the Chamber's jurisdiction, was for the Chamber to request the document from the OTP. Only Regulation 48 specifically addresses "specific or additional *documents*" in the "possession" of the OTP which the Chamber may obtain on the condition that the obtaining of the document is "necessary" to the functions and responsibilities set forth in Article 57(3)(c) to "provide for the protection and privacy of victims and witnesses." Regulation 48 provides that the documents in the possession of the Prosecutor may be requested of "the Prosecutor," not any other entity.

2. The Registry Cannot File Documents the Parties Furnish to The Registry For Administrative Purposes

28. The Registry, moreover, cannot furnish to the Chamber documents which belong to the OTP and were furnished to the Registry solely for the purpose of enabling the Registry to perform one of its administrative or servicing functions. Most fundamentally, such a use or forwarding of the document is simply unauthorized. Here, the Prosecutor provided the LRA letter to the Registry in response to the Registrar's written memorandum, dated 17 November 2005, about staff security. Later, on 5 December 2005, the Prosecutor made clear to Mr.

Dubuisson that Mr. Dubuisson was not authorized to file the letter. Mr. Dubuisson filed the letter with the Chamber hours later.

29. If the Registry is contending that it is free to file any document that is provided to it by the possessor of the document, so long as *the Registrar* deems the document relevant to a matter within the Chamber's competence, *see* Registry Submission, the contention is insupportable as a matter of law, as already discussed, and also as a matter of logic. Such a position makes the Registrar, rather than the Chamber, the arbiter of relevance. It also destroys the Registrar's neutrality and undermines his own ability to carry out his administrative functions. If the Registrar believes it within his authority to release to the Chamber the documents of the parties – even against the authorization of the relevant party – then there is no reason that the parties would agree to share documents and information with him, even for the purpose of performing administrative functions.

30. To take an example, the Draft Regulations of the Registry envision requiring participants to "submit to the court officer the electronic version of the evidence they intend to use" at hearings "at least one full working day before the scheduled hearing." Draft Regulations of the Registry, Regulation 62(2). The participants' willingness to comply with this regulation, however, will rationally depend upon the Registrar's actions in conducting himself neutrally, in accordance with the Statute and Rules. The Registry appears to acknowledge the need to maintain neutrality, because its draft regulations provide that any evidence submitted by the participants under draft Regulation 62(2) will only be released to the Chamber after the Chamber has ruled the evidence to be admissible. *See* Draft Regulation 63(1). If, however, the Registrar's conduct does

not comport with the strict neutrality which is reflected in its own proposed regulations, the parties' willingness to treat the Registrar as the "channel of communications" will undoubtedly be compromised.[8]

31. The proposition that the Registry is free to share with the Chamber information entrusted to the Registry for the performance of its administrative functions also threatens the proper functioning of the Chamber. The Prosecutor stressed at the 7 December status conference that the Chamber retains the authority to ask for documents and information possessed by the Prosecutor and necessary to the Chamber's function of providing for the protection and privacy of victims and witnesses, under Article 57(3)(c). It is nonetheless important for *the Chamber* to make the determination of relevance, after having provided the owner of the document an opportunity to raise any objections. If, in contrast, the Registrar is the entity which determines which of the parties' documents the Chamber will see and not see, then the parties will – as happened here – be deprived of rights of objection granted by the Statute. And the Chamber will potentially be exposed to information which could improperly affect – or be seen by others improperly to affect – the Chamber's views of the accused persons or the LRA, without the existence of a sound reason, based in the Statute, for the Chamber to have been exposed to the information in the first place.

32. There is no equality of information, or free information sharing, between the Registry and the Chamber, as the Registrar at times appears to assume. Tr., p.32. The Registry and the Chamber perform different functions, and the Statute

[8] Similarly, VPRS has received investigative information from the OTP, for the purpose of executing VPRS functions, based on guidelines pursuant to which the Registry has acknowledged that the OTP's information will, "as a general rule, be provided under strict conditions of confidentiality to VPRS, which may include specific handling conditions, if required."

protects the impartiality of the Chamber by setting jurisdictional boundaries and specifying procedural means of obtaining case-related, or judicial, information. The Registry's broad interpretation of its authority, if correct, would render meaningless this statutory scheme and the protections embedded in the Statute for the Chamber and for the proper functioning of the organs.

3. The Registry Cannot File Evidence Furnished to the OTP in Confidentiality

33. The arguments thus far are not dependent on the LRA letter having had evidentiary value, or having been furnished to the OTP in confidence. These characteristics of the letter, however, make the unlawfulness of the Registry's action in filing the letter even more serious.

34. The facts are not disputed by the Registry, but in light of the Chamber's request for clarification, Tr., p.35, the OTP will address the underlying circumstances. First, the LRA letter has plain evidentiary value. If it is established to have come from the LRA, then it could be used at the confirmation hearing or trial to support contentions that, among other things, the LRA targets civilian populations, or that LRA attacks upon civilians are widespread and systematic. Also, as the Chamber is already aware, [REDACTED]

The document is being treated within the OTP as evidence, and was registered as evidence as soon as it was brought back to OTP headquarters from the field.

35. Second, the letter was furnished in confidence, on 28 October 2005, with a request from the provider of the letter that the provider's identity, in particular, be protected, and that the document not be disseminated by the OTP for this

reason.

[REDACTED]

36. The LRA letter therefore was evidentiary material, received and maintained by the OTP as evidence, in addition to being a "document" of the OTP, within the meaning of Regulation 48. The OTP also had given assurances to the provider that it would protect the identity of the provider, as the OTP is empowered to do under Art. 54(3)(f). In these circumstances, in particular, there is no credible argument that the Registrar was authorized to file the document. Rule 13(1) prohibits the Registrar from providing any "channel" of communication which "prejudices" the OTP's authority to "receive, obtain, and provide information and to establish channels of communication for this purpose." The draft Registry Regulations quoted above are just one example of the Registrar's own view that Rule 13(1) reserves to the parties and the Chamber, not the Registrar, the provision of evidence to the Chamber. In addition, it obviously prejudices the OTP's power to receive information and potentially to provide it to the Court, *see* Rule 13(1), if the Registrar disregards confidentiality restrictions requested by the provider, thus endangering the provider's cooperation with the OTP.

37. Importantly, Mr. Dubuisson conceded at the hearing that he "fully agreed" that "it is not up to the Registry to submit evidence which in this case

belongs to the Prosecutor . . . ." *See* Tr., p.32.[9] The Registry also appears to concede that if the document was confidential, he was not authorized to file it. *See id., see also* Registry Submission, p. 3. The Registry's legal authority for filing the document, then, relies upon the limited argument that the filing of the LRA letter was proper because the OTP, when it *first* forwarded the document to the Registry on 17 November 2005, neglected to state that the document was potential evidence and had been furnished in confidence. Tr., p.32; Registry Submission, p. 3 (noting that the letter was initially transmitted by the OTP to the Registry "without specification as to its level of confidentiality)." The Registry does not deny, however, that before filing the letter, it had been made aware, twice, that the letter was confidential. Tr., p.12, 17; Tr., p. 32. It also does not deny that the Prosecutor himself told Mr. Dubuisson, mere hours before Mr. Dubuisson filed the letter, that the letter was evidence. Tr., p.12, 16-17 (the Prosecutor's Statements) Tr., p.29 (Mr. Dubuisson's Statement).

38. The Registry's strained and narrow justification is incorrect. The letter did not lose its character as evidence because the OTP forwarded it once to the Registrar, for the purpose of performing his administrative function of assessing staff security, without noting its evidentiary character on that single occasion. Nor did the provider of the letter lose the protections the OTP granted the provider, simply because the Registrar was not informed of the confidentiality of the letter, in his judgment, sufficiently early.[10] The operative fact is that the

[9] This concession of the limited nature of the Registry's authority cannot easily be reconciled, however, with Mr. Dubuisson's statement that he was "quite amused" when the Prosecutor instructed him that the Registry had no authority to file the LRA letter. Tr., p.29.

[10] The law is clear that even mistaken or negligent public disclosure of the document itself by the OTP would never deprive the *provider* of the confidentiality protection he sought and obtained. *See, e.g.*, Director of Public Prosecutions v. Kane & Ors, Matter No. 11386/97, 10 September 1997

Registry knew of the confidential and evidentiary nature of the letter before it filed the letter. It thus filed the potential evidence with the Chamber without the OTP's authorization, which it had no power to do.[11]

39. The filing of the LRA letter also demonstrates well the danger created by the Registrar's unauthorized action. After being warned of the document's confidentiality, and without informing itself further, the Registry filed the letter without informing the Chamber of the confidentiality restrictions which applied to the document and were designed to safeguard the well-being of the provider. The title of the Registry's filing exposed the provider's identity explicitly.[12] The potential disruption to cooperation is obvious. As one commentator has noted, if the OTP is deprived of the ability to give and observe the confidentiality assurances it offers to providers, subject only to disclosure orders from the Court, "confidence in the integrity of the Prosecutor's work would be quickly

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(The Supreme Court of New South Wales), p. 6 ("If A makes a confidential communication to B, then A may not only restrain B from divulging or using the confidence, but also may restrain C from divulging or using it if C has acquired it from B, even if he acquired it without notice of any impropriety . . . . In such cases it seems plain that, however innocent the acquisition of the knowledge, what will be restrained is the use or disclosure of it after notice of the impropriety"); In re Von Bulow, 828 F.2d 94, 100 (U.S. 2d Cir. Ct. of Appeals 1987) (absent a client's consent or waiver, the publication of confidential communications by an attorney does not constitute a relinquishment of the privilege by the client). Again, if the Registry's interpretation of the governing law were correct, information providers would be well justified in failing to cooperate with OTP and defence investigators.

[11] If the Registry wishes to observe a different rule – that the evidentiary or confidential nature of documents is waived by failure of the party on one occasion to note that nature – then two consequences would follow: (1) parties will be understandably reluctant to share information with Registry; and (2) providers will be understandably reluctant to entrust the parties with information.

[12] While the document was filed confidentially, the Registry has not marked the document "ex parte," which means that when other parties appear in the case, they will be provided with the document, absent further order from the Chamber.

undermined and the ability of the Prosecutor to prepare and prosecute cases grind to an early halt."[13]

40. In sum, by filing a document which belonged to the OTP and constituted potential evidence, the Registry far exceeded its statutory authority to provide an administrative channel by which the parties file documents. It acted in a fashion which was not only inconsistent with its own proposed protocols, but also endangers the power of the OTP, and by implication other parties, to obtain, receive and provide information, including investigative information.

II.

The Registry is Not Free To Enter Into *Ex Parte* Discussions with the Chamber About Case-Related Matters

41. Even assuming the LRA letter was relevant to any matter within the Chamber's competence to decide, the Registry also was not free to discuss it informally and unilaterally with the Chamber.

42. As already discussed, one reason that the Registry should not have communicated with the Chamber about the LRA letter is that the letter bore only upon staff security, an administrative matter reserved to the Presidency, the Prosecutor, and the Registrar. On this view, the communications memorialized in the internal memorandum authored by the Registrar on 17 November 2005 and also admitted by the Registrar at the 7 December status conference, were simply extra-statutory. They should never have occurred because the Pre-Trial Chamber's jurisdiction is limited to judicial matters, and the Registry wrongly, and in violation of the Statute, attempted to involve the Chamber in a matter

[13] M. Bergsmo and P. Kruger, "Article 54: Duties and powers of the Prosecutor with respect to investigations," Commentary on the Rome Statute of the International Criminal Court (O. Triffterer ed.) 1999, p. 724.

relating only to staff security. Importantly, at the last conference the Registry admitted the violation of the rule initially relied upon by the Registrar – Rule 13(2). Mr. Dubuisson's presentation did not deny the violation of Rule 13(2); instead it attempted to justify the violation.

43. In addition, even if one assumes, as does the Registrar, that the communications were case-related, then Registry, no less than any party, was not free to speak with the Chamber informally.

44. The Registry acknowledges that the Statute and governing legal texts establish a system in which the parties may not communicate with Chambers informally or *ex parte* about case-related matters. The Statute requires the Chamber to maintain the appearance of impartiality as well as actual impartiality. *See* Art. 41(2)(a). Similarly, the judges are prohibited from engaging in any activity which is likely to "affect confidence in their independence." *See* Art. 40(2). The Code of Professional Conduct for Counsel, adopted by the Assembly of States parties two weeks ago, establishes a rule of conduct which protects the independence and impartiality of the Chambers. The Code, which applies to defence counsel, counsel acting for States, *amici curiae*, and counsel and legal representatives for victims and witnesses, *see* Art. 1, states:

> Unless the Judge or the Chamber dealing with a case permits counsel to do so in exceptional circumstances, the latter shall not: (a) Make contact with a judge or Chamber relative to the merits of a particular case other than within the proper context of the proceedings; or (b) Transmit evidence, notes, or documents to a judge or Chamber except through the Registry.

See Art. 23 (entitled "Communications with the Chambers and judges"). The conduct rule clearly prohibits informal contacts with the judges related to the

merits of a case, except in the "exceptional circumstance" and after obtaining pre-authorization for the contact.

45. There is no support for the view that the Registrar is entitled to any rule more generous than this one. At the status conference, the Registry maintained that because it is not a participant, a representative of Registry categorically could not have an *ex parte* communication contact with the Chamber. Tr., p.29. This is simply wrong. A non-participant has no greater right to speak with a Chamber about "the merits of a particular case" than a participant. The objective is to maintain the appearance of impartiality and independence of the Chamber. To effectuate this purpose judges are equally prohibited from discussing the merits of the case with defence counsel, prosecution counsel, taxi drivers, or canteen workers. The danger of appearing to have pre-judged a case-related matter, or inviting taint or pre-judgment, is the same if a judge speaks privately to anyone – party or non-party – about the merits of the case.

46. The Registry's argument mistakenly ignores the question of what topics properly can be discussed among the judges and the Registry. At the status conference, the Registry mistakenly relied upon Art. 43(1) and Rules 15 and 121(10). None of these provisions supports the view that the Registrar can informally contact the Chamber about judicial matters, as opposed to the "non-judicial" matters, *see* Art. 43(1), specified in those provisions. If the Registry wishes to speak to the Chamber about administrative matters, such as the adequacy of the electronic filing system or the translation services, or other services it administers pursuant to the Statute or Rule, it may do so. In addition, it may make these types of communications outside "the proper context of the proceedings," for in discussing such matters the Registrar is "servicing" the

Court, and thereby enabling the decision-making process, rather than attempting to affect or influence the outcomes of judicial decisions.[14]

47. In this connection, it is important to recognize the character of the contact admitted by the Registry. The communication at issue here was *not* intended by Registry as a "neutral" communication relating to the administration of the Court. To the contrary, Registry continues to maintain that the contact was case-related (despite the lack of any connection to victim or witness protection measures). In carrying out the contact, the Registry also was intending criticism one of the parties, the OTP, without consulting with the Prosecutor or hearing his views, as required by the Ruled upon which the Registrar relied. *See* Registry Submission (Memorandum from Bruno Cathala to Luis Moreno Ocampo, dated 17 November 2005). By attempting to justify this communication, then, the Registry seeks adoption of a rule that would permit it to engage in one-sided, case-related communications with the Chamber, without notifying the parties or making the communications part of the "full and accurate proceedings before the

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[14] The ICTY rule referenced briefly by the Registry at the last status conference goes no further. Tr., p.32-33. Rule 33(B) of the ICTY provides that the Registrar, "in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary."

First, even assuming that the ICTY rule carries the implication the Registry gives it, the Assembly of States Parties adopted no analogous provision for the ICC.

Second, the ICTY rule merely grants the Registrar the ability to communicate with the Chambers regarding matters that constitute "the Registrar's functions." Like in the ICC, the Registrar's functions at the ICTY are limited to "the administration and servicing of the Tribunal . . . ." ICTY Rule 33(A).

Third, the ICTY rule plainly imposes an obligation of "notice to the parties" where "necessary." Such notice would be necessary if the administrative matter simultaneously was relevant to a matter within the Chamber's jurisdiction to decide.

trial." *See* Rule 121(10). Such a rule cannot be justified, even under the most basic principles of fairness and transparency.

48. Again, the analogy used by the Prosecutor at the status conference is apt. The Registry cannot claim the status of a neutral referee, by invoking the "rulebook" of the Statute, when its conduct during the game is to kick the ball. When the merits of the proceedings are at issue, the Registrar's communications with the Chamber must be formal and part of the record of the proceedings. It must observe the same rules which apply to the OTP, defence counsel, victims' representatives, the VWU, and counsel for States parties.

III.

The Relief Sought

49. For the foregoing reasons, the OTP requests that the Chamber resolve this application and the applications submitted by the OTP on 30 November 2005 and 5 December 2005 by finding that the LRA letter and the communications between Chamber and the Registry were irrelevant to any matter within the Chamber's jurisdiction, in light of the VWU's representations at the status conference, and therefore that the Chamber has disregarded the letter and the communications. To be strictly consistent with this ruling, the letter should be returned to the OTP and the entire Registry Submission disallowed. The OTP maintains the view expressed at the conference, however, that as a matter of courtesy it is not opposed to the LRA letter, or the remainder of the submission, remaining in the record of the proceedings. To ensure that the letter will not be automatically made available to future parties, absent a disclosure obligation, the OTP respectfully requests that the Chamber order the designation of the Registry's filing to be changed from merely "Confidential," to "Confidential, Ex Parte."

Luis Moreno Ocampo
Prosecutor

Dated this 12th day of December, 2005

At The Hague, The Netherlands

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