



Original : English

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

Date: 9 March 2006

PRE-TRIAL CHAMBER II

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

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

PUBLIC REDACTED VERSION

**DECISION ON THE 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

Ms Fatou Bensouda, Deputy Prosecutor

Ms Christine Chung, Senior Trial Lawyer

Mr Eric MacDonald, Trial Lawyer

PRE-TRIAL CHAMBER II (the “Chamber”) of the International Criminal Court (the “Court”), being seized of the “Prosecutor’s Application that the Pre-Trial Chamber disregard as irrelevant the submission filed by the Registry on 5 December 2005” dated the 12th day of December 2005 (the “Prosecutor’s Application”)¹;

Having considered the written and oral submissions of the Prosecutor,

HEREBY RENDERS ITS DECISION.

I. Procedural history

1. On the 25th day of November 2005 the Chamber rendered its “Decision to convene a status conference on matters related to safety and security in Uganda”, scheduled for the 7th day of December 2005, and requested the attendance of the Prosecutor, the Registrar and the Victims and Witnesses Unit (the “VWU”) in order to remain “fully informed of the current security situation in Uganda with a view to exercising its functions and powers under articles 57 and 68 of the Statute”².
2. On the 30th day of November 2005 the Prosecutor submitted an “Application for clarification of matter in relation to 7 December 2005 status conference” and requested to be informed whether there was “any information, relating to victim or witness security, or staff security, not mentioned in the 25 November 2005

¹ “Prosecutor’s Application that the Pre-Trial Chamber disregard as irrelevant the submission filed by the Registry on 5 December 2005”, dated 12 December 2005 (ICC-02/04-01/05-73-US-Exp), (hereinafter *Prosecutor’s Application*).

² See the Chamber’s “Decision to convene a status conference on matters related to safety and security in Uganda”, dated 25 November 2005 (ICC-02/04-01/05-64), para. 14.

Decision of which the Chamber has been made aware” and which was not reflected in the record.³

3. On the 5th day of December 2005 the Prosecutor submitted further an “Application for Pre-Trial Chamber II to supplement the record with a description of informal communications between Registry and the Chamber”⁴, together with a “Sealed Annex” to this Application.⁵ The Office of the Prosecutor (“OTP”) requested that Pre-Trial Chamber II supplement the record with: (a) a description of the “informal communications” regarding security matters between the Registry and the Chamber, and in particular a description of “*ex parte* communications from the Registry to the Pre-Trial Chamber regarding the substance of matters currently being adjudicated by the Court”; and (b) any instruction provided by the Chamber to the Registry on security matters, “or relating to any other matter under adjudication”⁶. The Prosecutor based his request on rule 15 of the Rules of Procedure and Evidence of the Court (the “Rules”), requiring the Registrar to keep a database containing “all the particulars of each case” brought before the Court. He submitted in this respect that the maintenance of an accurate and public record serves several objectives, including transparency and the ability of future victims’ representatives and defence counsel to review a record that accurately reflects the adjudication of any matters bearing upon their interests. In addition, the Prosecutor claimed a violation of his “right to be heard”, given that he “was not made aware of the Registrar’s

³ See the Prosecutor’s “Application for clarification of matter in relation to 7 December 2005 status conference”, dated 30 November 2005 (ICC-02/04-01/05-66), p. 2.

⁴ Prosecutor’s “Application for Pre-Trial Chamber II to supplement the record with a description of informal communications between Registry and the Chamber”, dated 5 December 2005 (ICC-02/04-01/05-69), (hereinafter *Prosecutor’s application to supplement the record*).

⁵ “Sealed Annex to Prosecutor’s Application to supplement the record”, dated 5 December 2005 (ICC-02/04-01/05-69-Anx-US-Exp).

⁶ See the *Prosecutor’s application to supplement the record*, paras. 1-3.

informal, *ex parte* communication until after the communication had been accomplished", this preventing him from raising any objection thereto.⁷

4. On the 5th day of December 2005 the Registrar, by way of the "Submission by the Registrar [REDACTED]

filed in the record of the proceedings documents considered "to have an impact on the capability of ICC staff, including the VWU, to operate in northern Uganda", namely, the letter [REDACTED] by the Operations Security Officer of the Office of the Prosecutor (ref: OTP/OSU/05/29) (the "OTP letter") and the letter [REDACTED] allegedly from the Lord's Resistance Army (the "LRA letter"), [REDACTED] "threatening to kill any white person moving any how in this region" (collectively, the "Submission by the Registrar").

5. The Submission by the Registrar and the manner in which the Chamber was informed about the LRA letter prior to such submission were considered at the status conference convened by the Chamber on the 7th day of December 2005.
6. During the status conference, the Pre-Trial Chamber requested that the Prosecutor set forth in writing his arguments objecting to the Submission by the Registrar and the "*ex parte*" communications regarding the LRA letter between the Registry and the Chamber. In response to this request, on the 12th day of December 2005 the OTP submitted the Prosecutor's Application.

⁷ See the *Prosecutor's application to supplement the record*, para. 6.

⁸ "Submission by the Registrar [REDACTED] dated 5 December 2005 (ICC-02/04-01/05-70-Conf).

II. Submissions of the Prosecutor

7. The Prosecutor's objections to the Submission by the Registrar can be subsumed into two broad categories: first, as a matter of substance, the Prosecutor claims that the LRA letter "did not involve any matter within the competence or jurisdiction of the Chamber"⁹; and second, as a matter of procedure, the Prosecutor submits that nothing in the Statute of the Court (the "Statute") or the Rules authorised the Registrar to file a document "belonging to the OTP, against the Prosecutor's objection"¹⁰.

The letter falls outside the scope of the Chamber's jurisdiction and competence

8. As a matter of substance, the Prosecutor requests that the Chamber disregard the Submission by the Registrar on the basis that it involves a "purely internal, administrative dispute"¹¹ and does not concern any matter within the competence or jurisdiction of the Chamber. The Prosecutor maintains that the LRA letter "threatens no witness, victim, or family member thereof"¹² and therefore does not require the Chamber to exercise its functions relating to the protection of victims and witnesses.
9. Further, the Prosecutor argues that "at most, [the LRA letter] pertained to staff security, a matter nowhere defined to be 'judicial'"¹³. The Prosecutor also rejects the proposition that the Chamber has competence to determine matters relating

⁹ See the *Prosecutor's Application*, para. 10.

¹⁰ *Ibid.*

¹¹ See the *Prosecutor's Application*, para. 19.

¹² See the *Prosecutor's Application*, para. 12.

¹³ See the *Prosecutor's Application*, para. 10.

to staff security based on a nexus between the safety of ICC staff, particularly those in the VWU, and the responsibility of these staff members to ensure the safety and protection of victims and witnesses.

The Registrar lacked authority to file the documents

10. As a matter of procedure, the Prosecutor contends that, regardless of their possible relevance to any matter within the Chamber's jurisdiction, the Registrar lacked authority to file the documents at issue on the basis of three grounds:

- i. The Registrar lacks general authority to file documents in the proceedings on his own motion. The Prosecutor maintains that the Registry is a "channel of communication" through which documents can be filed by the parties to the Chamber and through which the Chamber communicates its orders to the parties and participants. The Prosecutor insists that the Registrar's role is one of maintaining or 'building' an accurate record of the proceedings, rather than creating or supplementing its contents and that "the only procedural pathway in the Statute, 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"¹⁴;
- ii. More specifically, the Registry is not authorised to file in the record of the proceedings documents furnished to the Registry for administrative purposes. The Prosecutor maintains that the documents were entrusted to the Registry "solely for the purpose of enabling the Registry to perform one of its administrative or servicing functions"¹⁵ and the provision of such documents to the Chamber incorrectly places the Registrar in the position

¹⁴ See the *Prosecutor's Application*, para. 27.

¹⁵ See the *Prosecutor's Application*, para. 28.

of “arbiter of relevance” and further “destroys the Registrar’s neutrality and undermines his own ability to carry out his administrative functions”¹⁶;

- iii. Finally, documents constituting the OTP’s confidential evidence cannot be filed by the Registry without the OTP’s authorisation. The Prosecutor contends that the LRA letter has “plain evidentiary value” and “was registered as evidence as soon as it was brought back to OTP headquarters from the field”¹⁷. The Prosecutor also claims that the LRA letter was received in confidence, with assurances to the provider that his identity would be protected by the OTP. The Prosecutor submits that both the confidential and the evidentiary nature of this document were known to the Registrar at the time the documents were filed with the Chamber.

The Registrar improperly entered into “ex parte” discussions with the Chamber

11. In addition, the Prosecutor contends that the Registrar wrongly and in violation of the Statute entered into informal and “*ex parte*” discussions with the Chamber concerning the documents. He claims that the Registry, or a member thereof, should not have communicated with the Chamber about the LRA letter since “the letter bore only on staff security, an administrative matter reserved to the Presidency, the Prosecutor and the Registrar”¹⁸. Secondly, the Prosecutor argues that, even assuming that these discussions were case-related, the Registry, no less than any party, was not free to speak with the Chamber informally without compromising the appearance of impartiality and independence of the Chamber required by articles 41, paragraph 2(a) and 40, paragraph 2, of the Statute.

¹⁶ See the *Prosecutor’s Application*, para. 29.

¹⁷ See the *Prosecutor’s Application*, para. 34.

¹⁸ See the *Prosecutor’s Application*, para. 42.

III. The relief sought by the Prosecutor

12. The Prosecutor requests the following relief from the Chamber:

- i. That the Chamber finds that the LRA letter and the communications between the Chamber and the Registry were irrelevant to any matter within the Chamber's jurisdiction and, as a result, that the Chamber disregards the letter and the communications.
- ii. That, while the documents contained in the Submission by the Registrar may "as a matter of courtesy"¹⁹ remain in the record of the proceedings, the Chamber orders the designation of the filing to be changed from "Confidential" to "Confidential, *ex parte*".

IV. Issues for the Chamber's determination

13. Before addressing the submissions made in the Prosecutor's Application, the Chamber will first consider the Prosecutor's request to extend the page limit pursuant to regulation 37 of the Regulations of the Court ("the Regulations").

The Prosecutor's request to extend the page limit pursuant to regulation 37

14. The Prosecutor requests that the page-limit set forth in regulation 37 of the Regulations be extended, claiming that an exhaustive response to the relevant factual and legal issues requires an extension of the 20-page limit. The Prosecutor argues that, whilst being fully aware that "in the usual circumstance" the application for such an extension should be filed prior to the submission itself, his

¹⁹ See the *Prosecutor's Application*, para. 49.

failure to do so was the result of the Chamber's request to submit the application as soon as feasible.²⁰

15. In its decision dated the 19th day of May 2005²¹, this Chamber already clarified that the proper procedure to request an authorisation for the purpose of regulation 37 is that the request is submitted in advance of the application itself. While reiterating this point, the Chamber wishes to add that, from a substantive standpoint, the granting of such authorisation should also be conditional upon the proven existence of "exceptional circumstances" (regulation 37, sub-regulation 2, of the Regulations).

16. Whilst compliance with all of the procedural and substantive requirements set forth by the Statute, the Rules and the Regulations is of essence for the orderly course of proceedings, the Chamber observes that the ultimate purpose of regulation 37 is to enhance the expeditiousness of the proceedings before the Court. Accordingly, under the present circumstances, the Chamber considers that the interest of expeditiousness is better served by retaining the Prosecutor's application as submitted, and by granting the authorisation on an *ex post* basis. At the same time, however, the Chamber wishes to clarify that the relevance of this decision is and should remain confined to the Prosecutor's Application and is without prejudice to any future interpretation by the Chamber of the requirement of "exceptional circumstances" within the meaning of regulation 37, sub-regulation 2, of the Regulations.

17. As regards the submissions of the Prosecutor on the Submission by the Registrar, the Chamber will consider in the following order the two broad categories of issues raised in the Prosecutor's Application:

²⁰ See the *Prosecutor's Application*, para. 9.

²¹ The Chamber's "Decision on the extension of the page limit in relation to an application by the Prosecutor under article 58", dated 19 May 2005 (ICC-02/04-7-US-Exp).

- A. As a matter of procedure, whether the Registrar had the authority to file documents with the Chamber against the objections of the Prosecutor; and
- B. As a matter of substance, whether the Submission by the Registrar involved a matter within the competence or jurisdiction of the Chamber.

18. The determination of these issues will require an in-depth analysis both of the role of the Pre-Trial Chamber and of the duties and powers of the other participants and actors, including in particular the Registrar, within the context of proceedings before the Court.

A. Whether the Registrar had the authority to file documents with the Chamber against the objections of the Prosecutor

The uniqueness of the role of the Pre-Trial Chamber and its proprio motu powers

19. It has been repeatedly highlighted in legal writing that the Pre-Trial Chamber constitutes one of the most significant features of the procedural system enshrined in the Statute.²² The uniqueness of the role of the Pre-Trial Chamber can be appreciated not only *vis-à-vis* other international criminal jurisdictions, but also in respect of the different existing legal traditions. While not reproducing the typical features of a *juge d'instruction* as known in some civil law systems, the Pre-Trial Chamber is nonetheless vested with important and autonomous functions, many of which can and must be exercised during the investigation phase and even at the stage of a "situation", that is, prior to and irrespective of the request

²² See C. Kress, *The Procedural Law of The International Criminal Court in Outline: Anatomy of a Unique Compromise*, *Journal of International Criminal Justice*, Vol. 1 (2003), p. 606: "The interplay between the Prosecutor and the Pre-Trial Chamber at the early stages of the proceedings constitutes one of the most striking examples of the uniqueness of the ICC procedural law".

for an arrest warrant or a summons to appear by the Prosecutor or the determination of the issue thereof by the Pre-Trial Chamber.²³

20. Even more significantly, many of these powers are to be exercised by the Pre-Trial Chamber on a *proprio motu* basis. Article 57, paragraph 3, of the Statute lists some of the functions and powers of the Pre-Trial Chamber. For the purposes of this decision, the crucial provision is article 57, paragraph 3(c), of the Statute, pursuant to which “[w]here necessary, [the Pre-Trial Chamber may] provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information”. A literal and systematic reading of this provision, when compared to sub-paragraphs a) and b) of the same paragraph, makes it clear that all the powers enshrined in sub-paragraph c) are to be exercised by the Pre-Trial Chamber on an autonomous and independent basis, that is, irrespective of the existence of a specific request from any of the participants in the proceedings. While measures under article 57, paragraph 3(a), are provided by the Chamber “[a]t the request of the Prosecutor” and requests under article 57, paragraph 3(b) are to be issued “upon the request of a person who has been arrested or has appeared pursuant to a summons”, any measures required for the purposes listed under article 57, paragraph 3(c), of the Statute are to be provided by the Pre-Trial Chamber “[w]here necessary”²⁴. Thus, the Statute makes clear that in the assessment of the necessity of the measures, as well as in the identification of the measures which may be adequate and appropriate to meet such necessity, the Chamber is autonomous and may act on

²³ See Pre-Trial Chamber I’s “Decision to Convene a Status Conference”, dated 17 February 2005 (ICC-01/04-9).

²⁴ See F. Guariglia, Article 57, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 750: the expression “where necessary” “could be read to suggest that the Chamber may apply at least some of these measures *ex officio*”, in particular when it comes to measures “pertaining to the protection and privacy of the victims and witnesses”.

its own motion²⁵. Rules 87 and 88 of the Rules confirm the power of the Pre-Trial Chamber to order on its own motion any measures which may be required to protect victims, witnesses and other persons at risk, as well as any other special measures which may facilitate the testimony of a particular person.

21. For the purposes of the present decision, the relevance of this framework appears twofold: on the one hand, the prerogatives of the Prosecutor in purely investigative matters are preserved, subject to the other powers of the Chamber, in particular those provided for in article 56, paragraph 3, of the Statute²⁶. On the other hand, however, the Chamber is vested with powers of its own when it comes to issues which go beyond the purely investigative sphere, such as, typically, the matter of the protection of victims and witnesses. It is precisely this type of function vested in the Pre-Trial Chamber which has prompted some commentators to refer to its role as one including “attention to the victims and assistance to the defence”²⁷. With specific regard to victims, others have referred to a “safeguard” function²⁸; something that the Prosecutor himself seems to acknowledge as existing and proper, by recalling that the thus far successful safeguarding of victims, witnesses and their families in the Ugandan situation took place “under the oversight of the Chamber”²⁹.

²⁵ Similarly, article 57, paragraph 3(e), of the Statute vests the Pre-Trial Chamber with the autonomous power to seek the cooperation of States “to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims”.

²⁶ See the *chapeau* of article 57, paragraph 3, of the Statute, opening as follows: “In addition to its other functions under this Statute, the Pre-Trial Chamber [...]”.

²⁷ See O. Fourmy, Powers of the Pre-Trial Chambers, in A. Cassese, P. Gaeta, J.R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court. A Commentary* (Oxford University Press, 2002), p. 1229.

²⁸ See M. Marchesiello, Proceedings before the Pre-Trial Chambers, in A. Cassese, P. Gaeta, J.R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court. A Commentary* (Oxford University Press, 2002), p. 1235.

²⁹ See the *Prosecutor’s Application*, para. 2.

The power of the Chamber to determine its own competence

22. The mere enumeration of the powers mentioned above would hardly have any meaning, however, were the Pre-Trial Chamber not in a position to actually and effectively exercise them. The first necessary requirement to this effect is that the Chamber itself decides whether a particular matter falls within the scope of article 57, paragraph 3(c), of the Statute or, in the words of the Prosecutor, within its "proper sphere of activity"³⁰. It is a well-known and fundamental principle that any judicial body, including any international tribunal, retains the power and the duty to determine the boundaries of its own jurisdiction and competence. Such a power and duty, commonly referred to as "*Kompetenz-Kompetenz*" in German and "*la compétence de la compétence*" in French, is clearly established in article 36, paragraph 6, of the Statute of the International Court of Justice, pursuant to which "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". This principle was stated on several occasions by the International Court of Justice³¹, which held that "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction"³².

³⁰ *Ibid.*, para. 5.

³¹ See, in particular International Court of Justice, Order of 10 May 1984, *Military and paramilitary activities in and against Nicaragua case* (Nicaragua v. USA), para. 21: "The Court considers that where the contentions of the parties disclose a 'dispute as to whether the Court has jurisdiction', in accordance with Article 36, paragraph 6, of the Statute, 'the matter shall be settled by the decision of the Court', that is to say by a judicial decision stating the reasons on which it is based and rendered and rendered after fully hearing the parties", ICJ Reports, 1984, p. 178. See also International Court of Justice, Judgment of 4 December 1998, *Fisheries Jurisdiction case* (Spain v. Canada), para. 37: "The establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself", ICJ Reports 1998, p. 456.

³² International Court of Justice, Judgment of 18 November 1953, *Nottebohm case* (Liechtenstein v. Guatemala), ICJ Reports, 1953, p. 119. See also International Court of Justice, Judgment of 2 February 1973, *Fisheries jurisdiction case* (UK and Northern Ireland v. Iceland), ICJ Reports, 1973, p. 3; International Court of Justice, Judgment of 26 November 1984, *Case Concerning Military and paramilitary activities in and against Nicaragua* (Nicaragua v. USA), ICJ Reports, 1984, p. 392; International Court of Justice, Order of 31 March 1988, *Border and transborder case* (Nicaragua v. Honduras), ICJ Reports, 1988, p. 8. In all these cases the Court examined and established its jurisdiction before deciding the merits of the matter before it.

23. The principle is enshrined in article 19, paragraph 1, of the Statute, pursuant to which “the Court shall satisfy itself that it has jurisdiction in any case brought before it” and was also affirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its landmark “Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction” in the “*Tadić*” case.³³ According to the ICTY, this power “is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its ‘jurisdiction to determine its own jurisdiction’”³⁴; as such, “it is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals”³⁵. As a result, it is not for the Prosecutor, nor for the Registrar (nor for the Prosecutor together with the Registrar, or any section or unit thereof), to determine whether a particular matter falls within the scope of the powers of the Pre-Trial Chamber: such determination lies exclusively with the relevant Chamber itself.

24. The implications of this principle on the *modus operandi* of the Pre-Trial Chambers of the Court are obvious. Whenever an issue may involve the functions of the Chamber, there is a need for the Chamber to determine the actual relevance of such issue. Otherwise stated, prior to deciding whether any action is required from the Chamber, there is a need for the Chamber to assess the relevance of the matter *vis-à-vis* its own functions and powers. The fact that the relevance of a particular issue may be manifold and may possibly include aspects which exceed the competence of the Pre-Trial Chamber does not in any case detract from such need. The Prosecutor himself seems to acknowledge this, by conceding that “an administrative dispute might simultaneously involve the Chamber’s function of protecting victims and witnesses”³⁶. If this is true, however, the principle of the

³³ICTY, *Prosecutor v Dusko Tadić a/k/a “Dule”* (IT-94-1-AR72), Decision of 2 October 1995, paras. 14-22.

³⁴ *Ibid.*, para. 18.

³⁵ *Ibid.*

³⁶ See the *Prosecutor’s Application*, para. 7.

“compétence de la compétence” illustrated above requires that any decision as to the relevance of the matter rests with the Chamber and the Chamber alone. The fact that the Prosecutor, the Registry, the VWU or any other entity other than the Chamber deems a particular issue not to be within the scope of its jurisdiction and powers may well be submitted to the Chamber, with a view to assisting it in making its determination. However, under no circumstances can such opinions purport to replace the Chamber’s own assessment. Accordingly, in the matter at stake, prior to deciding on “the adequacy of the measures being taken to protect victims and witnesses”³⁷, the Chamber needed to become aware of the existence of a scenario possibly requiring it to take such a decision.

The need for the Chamber to receive all relevant information and the statutory provisions instrumental to this effect

25. The second necessary condition to be met for the Chamber to be able to actually exercise its powers, including the power to assess its own jurisdiction and competence, is that any information which might be relevant for the exercise of such powers be promptly submitted to it. With specific regard to the powers enshrined in article 57, paragraph 3(c), of the Statute, it is of essence for the Chamber to receive without undue delay relevant information to enable it to determine whether it is “necessary” to make provision for the protection of victims and witnesses. To state that the Chamber has a power to provide on its own motion for the security of victims and witnesses, without at the same time ensuring that the information required to do so actually flows to the Chamber, would be tantamount to depriving this power of any meaningful content. It is a general principle of international law that the provisions of a treaty must be interpreted not only in “good faith in accordance with the ordinary meaning” to be given to the relevant terms, but also “in their context” and “in the light of its object and purpose” (article 31, paragraph 1, of the 1969 Vienna Convention on

³⁷ See the *Prosecutor’s Application*, para. 6.

the Law of the Treaties), i.e., in such a way as not to defeat that object and purpose. The method of interpretation aimed at achieving this result is usually referred to as “functional” or “teleological” interpretation.³⁸ Equally inferred from article 31 of the 1969 Vienna Convention, and equally generally accepted, is the principle (commonly referred to as “*effet utile*”, “useful effect” or “principle of effectiveness”³⁹) that a treaty as a whole, as well as its individual provisions, must be read in such a way so as not to devoid either the treaty as such or one or more of its provisions of any meaningful content.⁴⁰

26. The Rules and the Regulations do indeed acknowledge the need not to nullify these powers vested in the Pre-Trial Chamber by providing a series of procedural tools. The main objective of these tools is to allow the Pre-Trial Chamber to receive any information which may have an impact on its determination of whether to exercise its powers and, in the affirmative, on the specific way in which such powers are to be exercised. Rule 103 of the Rules enables any Chamber of the Court (including therefore the Pre-Trial Chamber) to “invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate”, whenever it “considers it desirable for the proper determination of the case”. The most significant provision in this respect is regulation 48 of the Regulations, which allows the Pre-Trial Chamber to “request the Prosecutor to provide specific or additional information or documents in his or her possession, or summaries thereof, that the Pre-Trial Chamber considers necessary” in order to exercise the functions and responsibilities set forth, *inter alia*, in article 57, paragraph 3(c), of the Statute. Two elements are worth highlighting in this context. First, it is significant that this power of the Chamber is provided for under the heading

³⁸ See F. Jacobs, Varieties of approach to treaty interpretation: with special reference to the draft convention on the law of treaties before the Vienna diplomatic conference, *International and Comparative Law Quarterly*, Vol. 18 (1969), p. 318.

³⁹ See P. Daillier and A. Pellet, *Droit International Public* (Paris, LGDJ, 2002), p. 260-264.

⁴⁰ See International Court of Justice, Judgment of 9 April 1949, *The Corfu Channel Case* (merits), ICJ Reports, 1949, p. 24.

"Information necessary for the Pre-Trial Chamber". This underscores not only the need for the Chamber to be in a position to effectively exercise all of its powers, but also makes clear that such a need may be so critical as to justify a request to the Prosecutor to submit "information or documents in his or her possession". Second, that it is for no-one else but for the Chamber to determine the actual existence of such necessity, without the Prosecutor being able to object to this determination except under regulation 48, paragraph 3, of the Regulations according to which "nothing in this regulation shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3(e), and paragraph 3(f), of the Statute".⁴¹ The importance of the role of the Pre-Trial Chamber *vis-à-vis* a given situation is also mirrored in regulation 46, paragraph 2, of the Regulations: the Pre-Trial Chamber to which a situation has been assigned by the Presidency "shall be responsible for *any matter*, request, or information"⁴² arising out of such situation. The use of the term "any matter" indicates the broad scope of the Chamber's functions and duties, again underscoring the need for the Chamber to have access to the information necessary for the exercise of its responsibilities. Accordingly, both regulation 46 and regulation 48 of the Regulations can be regarded as instrumental in allowing the Chamber to properly function in accordance with the Statute.

27. The foregoing remarks highlight the particularities of the functions entrusted to the Pre-Trial Chamber and the need for the Chamber to receive all necessary information for the proper exercise of its responsibilities. Regulation 48 can be regarded as a specific provision aimed at providing the Chamber with a tool to remedy the failure of the Prosecutor to provide the Chamber such information on his or her own motion. However, given its broad powers under article 57 of the Statute, the Chamber needs to rely on mechanisms other than those specifically provided for in these scenarios to guarantee that information does actually reach

⁴¹ On the issue of confidentiality, see *infra*, paras. 54 ff.

⁴² Emphasis added.

it, even in those situations where no “document or information in possession of the Prosecutor” is at stake. The Chamber believes that under the Statute, the Rules and the Regulations the Registry, including its Divisions and Units, is called upon to play a fundamental role, in particular, in the provision of relevant and necessary information, to ensure that the Pre-Trial Chamber is able properly and effectively to fulfil its responsibilities.

The role of the Registry within the Court

28. Irrespective of the substantive value or character of the documents contained in the Submission by the Registrar, the Prosecutor contests the authority of the Registry to file documents at all, arguing that the role of the Registry is merely that of a “channel of communication” whose responsibility extends only to the maintenance of the database of records of the Court, pursuant to rules 13 and 15 of the Rules. The Prosecutor contends that nothing in the Statute, Rules or Regulations authorises the Registrar to make filings on his own initiative.⁴³ In this regard, the Chamber notes that in fact there are no express provisions in the Statute or the Rules vesting the Registry with an autonomous power to file documents in the record of the proceedings. However, a firm conclusion on the existence of such power of the Registry can be reached only on the basis of a review of the overall role of the Registry, and of the Registrar, within the system established by the constituent instruments of the Court.

29. Article 34, paragraph (d), of the Statute lists the Registry as one of the four organs of the Court. Article 43 then outlines the role of the Registry within the Court, and sets forth its responsibilities and its relationship with the other organs. In particular, paragraph 1 specifies that “[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article

⁴³ See the *Prosecutor’s Application*, paras. 22–24.

42". This paragraph, read together with articles 1 and 34 of the Statute, clearly establishes the Registry as the principal administrative organ responsible for the servicing of "the Court" as a whole, and not of any one organ in particular.⁴⁴

30. At the same time, while article 43, paragraph 1, states that the Registry is responsible for the "non-judicial" aspects of the servicing of the Court, the Registry's functions and responsibilities go beyond that of providing mere administrative services to the institution. In addition to administration (which includes, *inter alia*, services such as security, information technology, travel, finance, procurement, and human resources), the Registry's functions more broadly cover the servicing of the Court and of all its organs for the exercise of their respective functions.⁴⁵ In fact, the functions of the Registry also extend, for example, to transmission of warrants of arrest, administration of a detention unit, court management, defence counsel matters, as well as to matters relating to participation of victims in proceedings.⁴⁶ Furthermore, pursuant to article 43,

⁴⁴ The Statutes of the *ad hoc* Tribunals use similar language to describe the Registry's principal administrative responsibilities. See D. Tolbert, Article 43, *op cit.*, p. 639. See also D. Tolbert, Reflections on the ICTY Registry, *Journal of International Criminal Justice*, Vol. 2 (2004), p. 480: "the Registry [of the ICTY] has played and continues to play a critical role in enabling the Tribunal to function. It is, in a sense, the 'engine room' of the Tribunal, unseen but providing the essential support that allows the other organs to function [...]"

⁴⁵ See J.R.W.D. Jones, The Registry and Staff, in A. Cassese, P. Gaeta, J.R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 276-277 and D. Tolbert, Article 43, *op cit.*, p. 640, who explains that the limitation that the Registry's responsibility is only for "non-judicial" aspects of the Court's administration was "apparently intended to ensure that the Registry does not interfere with judicial prerogatives. However, it is suggested that this limitation should be read narrowly only to cover any administrative aspects of the Court's judicial decision-making process, such as the judges' deliberations or consultations amongst the judges themselves. It is not intended to affect the Registry's duties to provide for the management of the Court's judicial activities, including scheduling and support services."

⁴⁶ See also D. Tolbert, Reflections on the ICTY Registry, *op. cit.*, p. 480, in describing the role of the Registry in the ICTY, which closely resembles the Registry of the ICC from a functional perspective: "It is an amalgam of judicial management responsibilities, combining features of a *Greffier* in the civil-law system with some aspects of common-law clerk-of-court functions, and administrative duties imported from the UN system. On the judicial side, the Registry manages the day-to-day work in the courtrooms, including such critical tasks as the filing and distribution of documents, managing courtroom scheduling and generally administering the court. Grafted onto those duties are responsibilities that in a domestic system would fall to the Justice Ministry, e.g. governing the Detention Unit and overseeing the legal aid system, or a Bar Council or Association, i.e. discipline of Defence Counsel."

paragraph 6, of the Statute, the VWU, a unit specifically charged with tasks related to victim protection, is set up within the Registry.⁴⁷ In other words, the Statute and the Rules establish a complex role for the Registry, which involves, together with the provision of pure administrative services, the responsibility for the management of several areas that are essential to the operation of an international judicial institution and its different organs.

The role of the Registrar and his or her relationship with the other organs of the Court

31. Under article 43, paragraph 2, of the Statute the Registrar is head of the Registry and the “principal administrative officer of the Court”⁴⁸. As such, the Registrar has ultimate responsibility for all of the functions and powers mentioned above which are vested in the Registry. The subsidiary divisions, sections or organisational units which are under the auspices of the Registry likewise fall under the Registrar’s responsibility.⁴⁹

32. The Court and the international *ad hoc* tribunals share a similar organisational structure to the extent that the Registry, headed by a Registrar, is the main administrative service provider. There is, however, one important difference between the two systems. In the case of the *ad hoc* Tribunals, the Registrar is appointed by the Secretary-General of the United Nations after consultation with the President of the Tribunal.⁵⁰ In contrast, pursuant to article 43, paragraph 4, of the Statute, the Registrar of the Court is elected directly by the judges of the Court. This system has prompted several commentators to emphasise the

⁴⁷ See *infra*, paras. 37 ff.

⁴⁸ In the exercise of his or her functions, the Registrar acts under the authority of the President of the Court pursuant to article 43, paragraph 2, and to article 38, paragraph 3(a), of the Statute by which the Presidency is responsible for the “proper administration of the Court, with the exception of the Office of the Prosecutor”.

⁴⁹ This principle is, however, subject to specific exceptions stipulated in the Regulations of the Court. See regulation 77, of the Regulations, for the Office of Public Counsel for the defense and regulation 81, for the Office of Public Counsel for victims.

⁵⁰ See article 17, paragraph 3 of the ICTY Statute and article 16, paragraph 3 of the ICTR Statute.

Registrar's responsibilities for servicing the Court and its judges in the performance of their functions.⁵¹

33. With this in mind, the Chamber notes that important elements can be drawn from the previous discussion pertaining to the role of the Registry and of the Registrar within the system established under the Rome Statute. The allocation of "non-judicial" aspects of the administration of the Court to the Registrar under article 43 of the Statute can be contrasted to the allocation of judicial aspects to the judges. However, it does not necessarily follow nor does it imply that the "non-judicial" aspects exclude the performance by the Registrar of tasks (in areas, already mentioned, such as court management, defence counseling, detention and victims participation and protection) which in fact are integral to, and have an important impact on, the judicial functions of the Court and of its Chambers. Furthermore, the fact that the Registrar is elected by and is responsible to the judges reinforces the idea that the Registrar's duties are in essence duties aimed at servicing the exercise of the Court's judicial functions. In this respect, the Chamber is of the view that clear guidance is provided by the Statute and the Rules also with regard to the issue here at stake, which involves the power of the Registrar to file *proprio motu* certain documents in the record of the proceedings.

34. It is not the purpose of this decision to examine all the circumstances under which the Registrar may file documents in the record of the proceedings. However, in light of the previous remarks, the Chamber considers that the timely provision by the Registrar to the Chamber of information which is essential for the exercise of the Chamber's prerogatives and duties to protect victims and witnesses (under

⁵¹ See D. Tolbert, Article 43, *op. cit.*, p. 638: "[u]nder the Rome Statute, the Registrar is in the more classical position of being the servant of the judges"; and *id.* at p. 642: "Thus, the lines of authority in the Court will differ in significant respects from that of the ad hoc Tribunals, and the Registrar, who is elected by the Judges and under authority of the President is, in essence, more clearly the servant of the Chambers than the Tribunals' Registrars". See also J.R.W.D. Jones, *The Registry and Staff, op. cit.*, p. 278-279: "[t]he ICC provision makes it crystal clear that the Registrar's job is to service the Court", and that "he is answerable to the judges in the performance of his functions".

articles 57, paragraph 3(c), and 68 of the Statute), falls within the competence and responsibilities of the Registrar. In this context, the capacity to file relevant documents in the record is crucial for the Registrar to be able to provide this information. To deny such competence and power on the part of the Registrar would be tantamount to preventing him from discharging his duties of “servicing” the Chamber in one of the most important judicial functions assigned to the latter by the Statute (the protection of victims and witnesses). This is even more apparent in the present case, considering that such protection has been the subject of specific requests, addressed to the Registrar in the current proceedings, to take any measures aimed at guaranteeing its effective implementation.⁵² This ability of the Registrar to “file” does not affect the Registry or the Registrar’s “neutrality” as the Prosecutor seems to contend. On the contrary, the failure of the Registrar to carry out these responsibilities would prejudice the Chamber and the Court’s capability to carry out its duties under article 57, paragraph 3(c), and article 68, thus ultimately hindering the effective operation of the Court.⁵³

35. It is also important to note that the foregoing discussion on the powers and functions of the Registrar is consistent with the doctrine of implied powers. In other words, beyond the functions and powers expressly conferred upon the Registry by the Statute, the Rules and the Regulations, the Registrar must act in such a manner so as to assure the proper functioning of the Court. Consequently, even in the absence of an explicit power to file, the Registrar would have to be considered as vested with the powers necessary for the proper exercise of his

⁵² See the Chamber’s requests to the Registrar in the Chamber’s “Decision on the Prosecutor’s application for the warrants of arrest under article 58”, dated 8 July 2005 (ICC-02/04-01/05-1-US-Exp.) and in the “Request for arrest and surrender of Joseph Kony”, dated 8 July 2005 (ICC-02/04-01/05-12-US-Exp), in which the Chamber addressed several requests to the Registrar, *inter alia*, “in consultation and cooperation with the Prosecutor, to take any measures [...] 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 [...] pursuant to articles 68 and 87, paragraph 4, of the Statute” (p. 4). The Chamber likewise requested the Registrar “to promptly refer to the Chamber for further direction any difficulty that may arise in the execution of this Request” (p. 5) and to “keep the Chamber informed of any difficulties in transmitting this Request and in executing the Warrant” (p. 7).

⁵³ The question of whether the Registrar may file “against the objections of the Prosecutor” given certain requirements for consultation will be explored below. See paras. 44 ff.

functions under the Statute. It is indeed an established principle of international law that any international organisation “must be deemed to have those powers which, though not expressly provided [...] are conferred upon it by necessary implication as being essential for the performance of its duties”⁵⁴. Such principle, stated by the International Court of Justice (ICJ) as early as 1949,⁵⁵ is usually referred to as the doctrine of “implied powers”, or “inherent powers” and has also been applied by the ICJ to the *organs* of an international organization⁵⁶.

The Victims and Witnesses Unit and the Registry

36. Having established that the Registrar may be required to file information necessary for the exercise of the Pre-Trial Chamber’s functions under certain circumstances, the Chamber will turn to examine the relationship between the Registry and the VWU. More specifically, the Chamber will consider this relationship in light of the Prosecutor’s claims that, while the VWU has the ability to communicate with the Chamber and file documents as “advisor” to the Prosecutor and the Court by virtue of article 68, paragraph 4, of the Statute, the Registrar does not have this power.⁵⁷

37. As mentioned above, the VWU is established by article 43, paragraph 6, of the Statute, and is housed in the Registry. While an analysis of the many provisions in the Statute, the Rules and the Regulations pertaining to victims and witnesses will not be undertaken here, it is essential at this stage to elaborate on: the place occupied by the VWU in the organisational structure of the Court; the nature of

⁵⁴ International Court of Justice, Advisory Opinion of 11 April 1949, *Reparation for injuries suffered in the service of the United Nations*, ICJ Reports 1949, p. 182.

⁵⁵ *Ibid.*

⁵⁶ International Court of Justice, Advisory Opinion of 13 July 1954, *Effects of awards of compensation made by the United Nations Administrative Tribunal*, ICJ Reports, 1954, p. 56. For the view that the doctrine of implied powers may be relied upon in the context of the International Criminal Tribunals set up by the Security Council of the United Nations, see S. Lamb, The powers of arrest of the International Criminal Tribunal for the Former Yugoslavia, *British Yearbook of International Law*, Vol. 70 (1999), p. 176.

⁵⁷ See the *Prosecutor’s Application*, para. 26.

the responsibilities vested in the Unit by the constituent instruments of the Court; and the ultimate responsibility for the functions ascribed to the VWU.

38. Although at the time of the negotiations of the Statute some delegations proposed that the VWU should be situated in the Office of the Prosecutor, this view ultimately did not prevail.⁵⁸ Placing the VWU in the Registry, rather than in the OTP, was a deliberate choice on the part of the drafters of the Statute⁵⁹. It would thus seem clear that the VWU is vested with the necessary statutory independence from the participants, in part to ensure that the interests of victims and witnesses are effectively protected and represented. The important function of providing protection and security support to victims and witnesses is thus entrusted to an impartial, neutral unit placed in the Registry, in recognition of the fact that the interests of the parties and of victims and witnesses may not necessarily coincide.⁶⁰

39. Article 43, paragraph 6, of the Statute sets forth the mandate and functions of the VWU, stating that the Unit “shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.” While article 68, paragraph 1, of the Statute requires “the Court”, which evidently includes the Registry, to “take appropriate

⁵⁸ See D. Tolbert, Article 43, *op. cit.*, p. 644. See also C. Steains, “Gender Issues”, in R. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (Kluwer Law International, 1999), p. 383.

⁵⁹ See D. Tolbert, Article 43, *op. cit.*, p. 644.

⁶⁰ In the ICTY and the ICTR, the Victims and Witnesses Unit is similarly located in the Registry, “thus ensuring that the victims are the responsibility of a non-combatant in the proceedings”. See R. Clark and D. Tolbert, *Toward an International Criminal Court*, in Y. Danieli et al. (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Pub. 1998), p. 99-112. See also D. Tolbert, Article 43, *op. cit.*, p. 643. See also J.R.W.D. Jones, *The Registry and Staff*, *op. cit.*, p. 280: “Not only do the interests of prosecution and defence not necessarily coincide, but neither do those of the VWU and the prosecution. The Prosecutor’s mandate is to investigate and prosecute offences, not necessarily to look after the best interests of witnesses.”

measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”, paragraph 4 of the same article bestows a specific advisory function on the Unit: “[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.” In addition, regulation 41 of the Regulations mandates the VWU, pursuant to article 68, paragraph 4, of the Statute to “draw any matter to the attention of a Chamber where protective or special measures under rules 87 and 88 require consideration.”

40. The VWU is situated as a Unit within the Division of Court Services (“DCS”), functioning administratively under the DCS. The DCS has a Head of Division, who exercises his duties under the authority of the Registrar.⁶¹ Rule 16 of the Rules establishes the Registrar’s general responsibilities relating to victims and witnesses, whereas rules 17 to 19 set forth the more specific functions and responsibilities of the VWU. The VWU is vested with a degree of procedural autonomy which is reflected in its standing before the Chamber pursuant to the provisions mentioned above (i.e., article 68, paragraph 4, of the Statute, rules 87 and 88 of the Rules, regulation 41 of the Regulations). However, this does not imply that the Registrar no longer holds ultimate responsibility for the Unit or that he or she cannot put forward views on its behalf.⁶² The VWU necessarily acts

⁶¹ See p. 103 and Annex II of the *Proposed programme budget for 2006, Official Record of the 4th session of the ASP 28 November – 3 December, The Hague* for a description of the organisational structure and responsibilities of the Division of Court Services (DCS) and of the VWU’s placement within the DCS, available at: http://www.icc-cpi.int/library/asp/Part_II_-_Proposed_Programme_Budget_for_2006.pdf, (ICC-ASP/4/32).

⁶² See G. Dive, “The Registry”, in R. Lee (ed.) in *International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 268-9: “Despite the title of subsection 2 (Victims and Witnesses Unit), its contents are not restricted to the functions of the Victims and Witnesses Unit. Indeed, it covers all the functions to be carried out within the Registry, either by the Registrar or by the Unit, which acts under the Registrar’s responsibility, in respect of victims, witnesses and other persons who are at risk on account of testimony given by such witnesses.” The title originally developed by the Working Group during the negotiations was “Responsibilities of the Registry relating to Victims and Witnesses”, *ibid.*, p. 269, footnote 36. Also of note is the fact that the French version of this subsection of the Rules retained this original title, and reads “Sous-section 2

impartially, as acknowledged in rule 18(b) of the Rules, in order to serve the interests of the victims and witnesses.⁶³ Nevertheless, the VWU's specific duty to victims and witnesses does not relieve the Registrar of his responsibility over the unit or of his authority over the work of the Registry. In addition, while the VWU may possess the functional expertise required to exercise its advisory role to the Court, overall responsibility for the protection of victims and witnesses lies with the Court as a whole pursuant to article 68, paragraph 1, of the Statute. The "Court" as indicated above, comprises the four organs set forth in article 34 of the Statute.

41. As previously mentioned, the Prosecutor claims that while the VWU does have the ability to make a direct communication with the Chamber because it may "advise" the Court on victim and witness protection measures pursuant to article 68, paragraph 4, of the Statute, the Registrar does not.⁶⁴ Putting aside for the moment the Prosecutor's other objections to the Submission by the Registrar, it is clear that this specific objection ignores the statutory reality that authority for the Unit, as a functional part of the Registry, lies with the Registrar. The specific functions and powers given to the Unit under article 68, paragraph 4, of the Statute, rules 17 to 19 of the Rules, and regulation 41 of the Regulations, do not dissociate the Registrar from his role as head of the organ, nor do they disallow the Registrar, or his or her representative for that matter, from putting forward views on behalf of the VWU. In any event, the OTP is not called upon to decide whether or not the Registrar is authorised to do so.

42. Article 68, paragraph 4, read together with article 43, paragraph 6, of the Statute and rule 18(b) of the Rules, makes it clear that the VWU has a duty first and foremost to the interests of victims and witnesses and to act impartially in the

Responsabilité du Greffe à l'égard des victimes et des témoins", unlike the English version which reads "Subsection 2 Victims and Witnesses Unit".

⁶³ See G. Dive, *op. cit.*, p. 272.

⁶⁴ See the *Prosecutor's Application*, para. 26.

exercise of this duty. Any doubt as to the relevance of an issue that may affect the security of victims and witnesses is to be brought to the attention of the relevant Chamber. The Chamber is the ultimate arbiter of the relevance of any such issue pertaining to victim and witness security.

43. Just as article 42 of the Statute grants administrative autonomy to the Prosecutor for the management and administration of his office, the Registrar is responsible for the administration of the Registry, subject to the overall authority of the President. Appointing the Head of the DCS, under which VWU falls as a unit, as an agent or representative to act on the Registrar's behalf, is within the prerogative of the Registrar. The Pre-Trial Chamber notes that the Registrar's representative (Mr. Dubuisson, Head of DCS), appeared at the status conference of the 7th day of December 2005 in his capacity as the head of the DCS on behalf of the Registrar, and ultimately, as the responsible authority of the VWU. Indeed, the "Submission by the Registrar [REDACTED]

dated the 5th day of December 2005, was signed by Marc Dubuisson, Head of the Division of Court Services, "On behalf of the Registrar". It was understood by the Chamber that it was in that same capacity that the Registrar's representative had communicated with the Pre-Trial Chamber.

The claim that the Registrar failed to consult with the Prosecutor prior to the filing

44. The Prosecutor further claims that the Registrar was not entitled to file his submission without his authorisation. It is therefore necessary for the Chamber to establish whether the Registrar, within the context of his mandate *vis-à-vis* victims and witnesses, was under a duty to obtain the authorisation or the agreement of the Prosecutor before proceeding with the filing.

45. Article 43, paragraph 6, of the Statute establishes indeed that the VWU “shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements” for victims and witnesses who appear before the Court and others who may be at risk. It has been highlighted that the explicit element of consultation between the VWU and the Office of the Prosecutor represents a departure from the rules and practice of other international institutions.⁶⁵ In particular, some commentators have cautioned against interpreting article 43, paragraph 6, of the Statute to the effect that the duty of the Unit to consult is absolute; specifically, as regards defence witnesses, consultation with the Prosecutor would prejudice the right of the accused to a fair trial.⁶⁶

46. In any event, the requirement of “consultation” stipulated by article 43, paragraph 6, of the Statute is not equivalent to any “authorisation” or “permission” that must be sought from the Prosecutor each time the Registrar, or by extension, the VWU, act in the discharge of their duties. On the contrary, the proper exercise of the functions of other organs of the Court, including those of the Pre-Trial Chamber, is reliant on the performance of the Registrar’s responsibilities and functions in accordance with the Statute, the Rules and the Regulations. In the case at bar the Pre-Trial Chamber, in fulfilling its

⁶⁵ See J.R.W.D. Jones, *The Registry and Staff*, *op cit.*, p. 279-280, who is critical of the requirement that the VWU consult with the Prosecutor: “Moreover, the ICTY experience has shown the dangers of the OTP and the VWU having too close a relationship. In the *Delalić* case, the defence brought a motion complaining that the VWU had handed over evidence which it had gained from a witness to the prosecution. The Chamber did not consider that the VWU had shown bias, but it is not evident why the VWU should bring the matter – which involved a threatening letter sent to a prosecution witness – to the notice of the prosecution rather than to the Registrar, President, or Trial Chamber.”

⁶⁶ See D. Tolbert, *Article 43*, *op. cit.*, p. 644: “It is submitted that the Victims and Witnesses Unit’s obligation to consult with the Office of the Prosecutor should not be interpreted strictly and that this provision does not proscribe similar consultations by the Victims and Witnesses Unit with the defence.” See also J.R.W.D. Jones, *The Registry and Staff*, *op cit.*, p. 280. The representative of the Registrar commented on this point at the status conference on 7 December 2005 with reference to articles 68, paragraph 4, and 43, paragraph 6: “[I]t is clearly indicated that they are consultations with the Prosecutor, and I do agree on this fully. However, let me qualify this in two regards. First of all, we are working on the protection of victims and witnesses, and we have a methodology, through seminars and our meetings, I keep repeating this, we are working on a methodology that will apply to defence teams and potentially to the Chamber’s witnesses. In that particular context, of course I am not going to consult with the Prosecutor in order to protect a Defence witness.” See transcript (T-02/04-01/05-4-Conf-En.), p. 30, lines 11-18.

responsibilities as set out in articles 57, paragraph 3(c) and 68, paragraph 4, of the Statute, depends on the Registrar to act independently and neutrally in his capacity as the ultimate authority of the VWU.

47. It is also relevant to note the difference in language used in various provisions of the Statute with regard to the role held by the Office of the Prosecutor in its relationship with the other organs of the Court and in the exercise of their respective responsibilities. Article 43, paragraph 6, of the Statute speaks of "consultation", and not of "concurrence" as is the case in other provisions of the Statute requiring the explicit participation and assent of the Prosecutor on matters of mutual concern.⁶⁷

48. The Chamber takes note of the Prosecutor's reference to the "good and close cooperation and consultations among the OTP, the VWU and the Registry",⁶⁸ in conformity with statutory requirements for consultation as well as with previous rulings of this Chamber.⁶⁹ Nevertheless, the Chamber wishes to make clear that neither the Prosecutor, nor the VWU or the Registrar may confound the statutory and operational needs for cooperation and consultation with an obligation on the part of the VWU, and by extension, the Registry, to seek approval from the Prosecutor before discharging its duties. On the contrary, as stated above, the Registrar, in the discharge of his functions as head of the Registry, acts under the authority of the President of the Court, and is answerable to the judges. To allow control by one of the participants would undermine the clear intention of the

⁶⁷ See in particular article 38, paragraph 4 of the Statute: "In discharging its responsibility under paragraph 3(a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern." See J. Deschênes, Article 38, in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, Baden-Baden, p. 614: "The current paragraph 4 [...] imposes on the Presidency the duty to act, in this respect, in agreement with the Prosecutor. Thus not only is the Prosecutor independent from the Presidency – and, therefore, from the judicial component of the Court – he (or she) is entitled to express his (or her) view on all matters of common concern and to expect that his (or her) agreement shall be sought on those matters."

⁶⁸ See the *Prosecutor's Application*, para. 2.

⁶⁹ See Chamber's "Decision on the Prosecutor's application for the warrants of arrest under article 58, dated 8 July 2005 (ICC-02/04-01/05-1-US-Exp.) and "Request for arrest and surrender of Joseph Kony", dated 8 July 2005 (ICC-02/04-01/05-12-US-Exp).

drafters in choosing to house the VWU within the Registry rather than in the Prosecutor's office and in requiring, as does rule 18 (b) of the Rules, that the VWU "act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers".

49. It is also worth remembering that, according to the statements made by the participants in the status conference of the 7th day of December 2005, contacts and consultations between the OTP and the Registrar did in fact take place with regard to the documents concerned and their possible filing. In other words, it cannot be argued that the Registrar did not comply with his duty to consult with the Prosecutor.

On the alleged evidentiary nature of the document

50. The conclusions reached so far by the Chamber with regard to the issues at stake still need to be tested against the additional arguments brought by the Prosecutor in support of his application; namely, the evidentiary nature of the LRA letter filed by the Registrar, and the condition of confidentiality on which the same document was obtained by the OTP and provided to the Registrar. Regarding the first aspect, the Prosecutor argues that the Registrar was not authorised to file the LRA letter because it constituted "evidentiary material, received and maintained by OTP as evidence, in addition to being a 'document' of the OTP".⁷⁰ At the status conference held on the 7th day of December 2005, the Chamber requested the Prosecutor to specify "more clearly, why [the letter] is of an evidentiary significance, as opposed to general case-related-material information [...] that should be part of the record".⁷¹ The submissions of the Prosecutor are ambiguous on this point.

⁷⁰ See the *Prosecutor's Application*, para. 36.

⁷¹ See the transcript of the Status Conference held on the 7th day of December 2005 (T-02/04-01/05-4-Conf-En.), p. 35.

51. The Prosecutor alleges that the letter was “registered as evidence”⁷² and “treated *within the OTP* as evidence”⁷³. However, the document has not been formally treated as such in relation to other organs. The circumstances surrounding the communication of the letter indicate that the Prosecutor treated the document as general information rather than evidence in its relations with other organs. The Prosecutor acknowledges that the OTP forwarded the letter “once to the Registrar [...], without noting its evidentiary character on that [...] occasion”⁷⁴. This point was confirmed by the representative of the Registry at the status conference held on the 7th day of December 2005.⁷⁵ Moreover, the letter was communicated by the OTP to the President of the Court, without any indication of its “plain evidentiary value”. Such conduct is difficult to reconcile with the “evidentiary nature” of the document now alleged by the Prosecutor.

52. The Chamber notes further that the letter has not yet been invoked or presented by the Prosecutor in connection with any situation or case-related proceedings other than the status conference held on the 7th day of December 2005. The letter therefore has a dual nature. It contains information which may also be used as “potential evidence”⁷⁶ at a later stage. Such a dual status does not preclude the filing of the document. The fact that a document can be used as evidence later in the proceedings does not exclude its inclusion into the record of the case or situation. The Chamber is entitled to receive material or information for the exercise of its powers and functions under the Statute and the Rules, which can also be used as evidence at a later stage in the proceedings. Such material may be filed as general information forming part of the record. At the relevant time, a

⁷² See the *Prosecutor's Application*, para. 34.

⁷³ *Ibid.* (emphasis added).

⁷⁴ *Ibid.*, para. 38.

⁷⁵ See the transcript of the status conference held on the 7th day of December 2005 (T-02/04-01/05-4-Conf-En.), p. 32 (“On 17th November, when the Prosecutor gave us the letter, we were never told that this was evidence”).

⁷⁶ This qualification is also used by the Prosecutor, see the *Prosecutor's Application*, para. 38 (“[The Registry] thus filed the *potential evidence* with the Chamber without the OTP authorization, which it had no power to do so”) (emphasis added).

Chamber may then rule on the “admissibility or relevance” of such material as evidence in accordance with article 64, paragraph 9, and article 69 of the Statute.

53. The filing of this type of documents can be made subject to certain conditions. In the case at bar, the Prosecutor points out correctly that there may be a need to ensure that the LRA letter “will not be automatically made available to future parties, absent a disclosure obligation”.⁷⁷ The Chamber notes, however, that this concern may be addressed by restricting the access to the document.

On the alleged confidential nature of the document

54. The Prosecutor submits further that the Registry lacked the authority to file the letter, because it was “furnished in confidence [...] 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”.⁷⁸ The Chamber requested the Prosecutor to elaborate on this argument at the status conference held on the 7th day of December 2005. The Chamber asked the Prosecutor specifically to explain his claim for confidentiality in light of the criteria of article 54, paragraph 3(e), of the Statute and to clarify “to what extent confidentiality is claimed in this instant *vis-à-vis* the judges”.⁷⁹ The subsequent submissions made by the Prosecutor remain unclear in this respect.

55. In particular, it is not clear whether the Prosecutor seeks to base his claim for confidentiality on article 54, paragraph 3(e), of the Statute. In his application dated the 12th day of December 2005, the Prosecutor invokes provider protection as an argument in support of confidentiality. Yet this submission makes express

⁷⁷ See the *Prosecutor’s Application*, para. 49.

⁷⁸ *Ibid.*, para. 35.

⁷⁹ See transcript of the status conference held on the 7th day of December 2005 (T-02/04-01/05-4-Conf-En.), p. 35.

reference to the authority of the OTP under article 54, paragraph 3(f) rather than under article 54, paragraph 3(e), of the Statute.⁸⁰

56. The Chamber does not exclude that it may have been the Prosecutor's (unstated) intention to rely on the authority of the OTP under article 54, paragraph 3(e), of the Statute. However, if this were to be the case, the Prosecutor's submission is deficient, because it fails to address the two points on which the Chamber sought clarification (see *supra*, para. 54). The Chamber does not need to determine here whether confidentiality under this provision may be invoked *vis-à-vis* a Chamber at all, but notes that article 54, paragraph 3(e), of the Statute deals with restrictions on disclosure and is subject to strict requirements. In any event, the Prosecutor failed to establish that one of the requirements of article 54, paragraph 3(e), of the Statute, was met. This provision allows the Prosecutor to "agree not to disclose [...] documents or information that the Prosecutor obtains on the condition of confidentiality and *solely for the purpose of generating new evidence*". The Prosecutor has not demonstrated that this last requirement was fulfilled.

57. The Chamber will therefore assess whether and to what extent article 54, paragraph 3(f), of the Statute may be invoked by the Prosecutor to bar the filing of a document that was furnished to the OTP in confidence. The Chamber notes that article 54, paragraph 3(e) and article 54, paragraph 3(f), of the Statute differ in content. Paragraph 3(e) regulates a specific right of non-disclosure ("agree not to disclose") concerning documents or information obtained on the condition of confidentiality, and solely for the purpose of generating new evidence.⁸¹ Paragraph (f), by contrast, regulates the general power of the Prosecutor to "[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information", the protection of any person or the preservation of evidence. This latter provision cannot be interpreted as a potential objection

⁸⁰ See the *Prosecutor's Application*, para. 36.

⁸¹ See also rule 70 (B), of the Rules of Procedure and Evidence of the ICTY.

against the admissibility of the present filing, particularly if it is ensured that this filing remains confidential and *ex parte*.

58. It should also be noted that article 54, paragraph 3(f), of the Statute cannot be invoked by the Prosecutor to preclude information from coming before a Chamber. This provision does not grant the Prosecutor an absolute right to confidentiality, especially towards the judges or the Chambers, but simply an entitlement "to ensure the confidentiality of information", which the Chamber itself may also ensure. Also, the same provision is based on the assumption that the protection of confidentiality comes in some cases within the prerogative of the Prosecutor, but in other cases is subject to a "request".⁸² It would therefore be inconsistent with the above assumption to say that article 54, paragraph 3(f), of the Statute is meant to be a norm opposable to the Chamber, if that same provision makes the protection of confidentiality in some cases dependent on orders from the Court.

59. At the same time, article 54, paragraph 3(f), of the Statute cannot serve as a basis to invoke confidentiality as a way to ensure protection of the provider *vis-à-vis* a Chamber in cases where the requirements under article 54, paragraph 3(e), of the Statute are not met. Article 54, paragraph 3(e) is not only a more specific provision. It contains strict requirements for the protection of provider confidentiality. An interpretation which would allow the Prosecutor to invoke provider confidentiality before the Chamber outside the parameters of article 54, paragraph 3(e), of the Statute would render this provision meaningless.

60. Finally, the Chamber observes that the identity of a provider may be adequately protected, even in cases where a confidential document is filed in the record of

⁸² Contrary to what is asserted in paragraph 39 of the Prosecutor's submission, it is understood by the commentators cited by the Prosecutor that article 54, paragraph 3 (f), of the Statute is "subject to disclosure orders by the Court pursuant to the Statute and Rules of Procedure and Evidence". See M. Bergsmo and P. Kruger, Article 54, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 724.

the proceedings. Adequate protection may be ensured by way of specific measures taken by the Court to that effect. The Chamber notes in this context the suggested change in title and status of the filing⁸³, and proceeds accordingly.

B. Whether the Submission by the Registrar involved a matter within the competence or jurisdiction of the Chamber

61. The preceding remarks demonstrate: a) that it is for the Chamber to determine whether a matter falls within the boundaries of its jurisdiction; b) that such determination requires the Chamber to be able to rely on procedural mechanisms whereby it receives all information which may be relevant for the purposes of such determination; and c) that such procedural mechanisms are indeed enshrined in the instruments of the Court, in particular with respect to the Chamber's powers to request and obtain information necessary to the exercise of its functions, as well as with regard to the role of the Registrar. These basic principles allowed the Chamber to establish that, on the one hand, it had the authority to acquire knowledge of and/or to receive the LRA letter for the purpose of the ongoing proceedings; on the other hand, that the Registrar, whether directly or through the VWU, was under a duty to provide the Chamber with the letter and any information relating thereto as soon as he became aware of it.

62. Having established that the matter of the LRA letter was appropriately brought to its attention for the foregoing reasons on procedural grounds, the Chamber will now consider the relevance of the filing on its substance. More specifically, the Chamber will determine whether the Submission by the Registrar pertains to a matter falling within the ambit of one of the functions of the Chamber as defined in the Statute and the Rules.

⁸³ See the *Prosecutor's Application*, paras. 39 and 49.

The contents of the LRA letter and its relevance for security purposes

63. On its face, the LRA letter does indeed refer to issues of security of victims and witnesses and does raise security concerns. Allegedly signed by
[REDACTED]

it also informs that they (the LRA) "have been directed to kill any white person moving anyhow in this region" and provides a sort of justification for the instruction, alleging that such people "come like NGOs but they are the ones talking bad about LRA". The explicit reference to the existence of a specific direction requiring the killing of "any white person moving in the region" apparently signals a development in the overall attitude and strategy of the LRA. Against this background, it comes as no surprise that the OTP's reaction, as witnessed in Operations Security Officer Purnell Roach's letter dated the 17th day of November 2005⁸⁴, had been to "restrict [...] OTP missions to Northern Uganda in direct relation to an elevated level of LRA activity, which resulted in the death of several individuals".

64. Such statements demonstrate that the OTP's own assessment was that the letter affected the overall security situation in Northern Uganda to such an extent as to recommend restrictions on the Office's missions in the field; the more so since the letter was considered against the background of repeated attacks and killings widely reported by international media during the fall of 2005, a background which on the 25th day of November 2005 prompted the Chamber to convene the status conference on "matters related to safety and security in Uganda" held on

⁸⁴ See "Submission by the Registrar" [REDACTED]
dated the 5th December 2005 (ICC-02/04-01/05-70-Conf), p. 5 (Letter Ref. OTP/OSU/05/029).

the 7th day of December 2005⁸⁵. The scenario resulting from the development of events in Northern Uganda, as well as from the LRA letter, definitely amounted to one whereby there was a need for the Chamber to be involved, with a view to making its own assessment as to whether it was necessary to order any additional protective measures, or to modify the existing ones. In this context, the LRA letter undoubtedly qualified as an additional piece of information, the acquisition of which was crucial for the Chamber to be in a position to accurately assess the situation in northern Uganda within the framework of its powers and prerogatives in victim and witness security matters pursuant to article 57, paragraph 3(c), of the Statute.

The Chamber as ultimate arbiter of the relevance of any matter relating to the situation or the case

65. The fact that such assessment was reviewed and that OTP operations resumed at a later stage does not detract from the soundness of this conclusion; nor does the circumstances that the OTP, the Registrar and the VWU eventually came to the conclusion that the letter did not affect the adequacy of the existing protective measures and did not require any amendment or adjustment to the security plan⁸⁶. According to the Prosecutor, the fact that the LRA letter “upon evaluation by the VWU after receipt [...] was deemed *not* to affect the adequacy of victim and witness security measures and therefore not to require any change in the

⁸⁵ See “Decision to convene a status conference on matters related to safety and security in Uganda” dated the 25th day of November 2005 (ICC-02/02-01/05-64), whereby the Chamber noted “recent reports in the Ugandan and international media on serious attacks and violence against civilians in northern Uganda and southern Sudan, allegedly by the Lord’s Resistance Army, resulting in the death of at least twenty-two civilians, including five humanitarian workers, as well as in a significant number of injuries and abductions”.

⁸⁶ The Prosecutor seeks the agreement of the Chamber that “the information shared informally with the Chamber, and Registry’s 5 December 2005 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”. By agreeing to this, the Chamber 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”, *Prosecutor’s application*, para. 6.

measures already in place” would have prevented the VWU and the Registry from drawing the attention of the Chamber on the matter⁸⁷. The submission does not stand close scrutiny, either in fact or in law. First, from a factual standpoint, the sequence of events as witnessed by the relevant documents⁸⁸ and established at the status conference⁸⁹ shows beyond controversy that the initial assessment of at least some of the Court’s officers was that the letter might indeed pose a security threat, which could have affected the overall plan for the security of victims and witnesses. This *per se* made the involvement of the Chamber necessary and proper; even more so, since a discrepancy in the judgment of the relevant experts of the Court seemed to exist, at least for a certain amount of time. Second, and more importantly, as a matter of law the legitimacy of the Chamber’s involvement cannot be made conditional upon the participants’ view on whether or not there is a need for the Chamber to be involved. As it is for the Chamber, as opposed to the participants or other actors before the Court, to decide upon its own jurisdiction and the scope of its competence⁹⁰, it is equally for the Chamber to ultimately decide how a particular issue falling within its sphere of competence is to be decided on the merits. While the Chamber can (and typically will) rely on the experts’ advice in making its determinations, it is crucial that the Chamber remain the ultimate arbiter of the adequacy and effectiveness of the course of action or the specific measures suggested by such experts. This view is supported not only by the literal, systematic and functional reading of the powers of the Chamber, but also by the consultative nature of the role vested in the VWU: according to rule 17, sub-rule 2(a)(ii), of the Rules, the Unit shall “recommend [...] to the organs of the Court the adoption of protection measures”, as well as “advise [...] relevant States of such measures”. Accordingly, the fact that the

⁸⁷ *Prosecutor’s Application*, para. 11.

⁸⁸ See “Submission by the Registrar

[REDACTED]

dated 5 December 2005 (ICC-02/04-01/05-70-Conf), p. 5 (Letter Ref. OTP/OSU/05/029).

⁸⁹ See statements made at the status conference held on the 7th day of December 2005 by Mr Marc Dubuisson (T-02/04-01/05-4-Conf-En.), p. 27-28.

⁹⁰ See *supra*, paras. 22 ff.

VWU came to the conclusion that no action was needed, or that the Registrar was aware of such conclusion at the time of the filing, cannot *per se* result in the Chamber being excluded from duly acquiring knowledge of the matter.

66. The factual circumstances of the present case (namely, the fact that missions in the field were stopped for a certain amount of time, thus unquestionably affecting the capability and ways of the Court's operations in the field) provide a strikingly apt example of the need to ensure the prompt involvement of the Chamber; a need the Prosecutor himself seems to acknowledge when stating that, should there be a threat to staff simultaneously affecting victim or security measures, "the Chamber might be forced to consider changing witness and security measures, in response to the VWU's changed capabilities"⁹¹. The assumption on which the Prosecutor seems to rely (i.e., that it is for the Prosecutor and the VWU, whether jointly or separately, preliminarily to assess the existence of a scenario requiring the intervention of the Chamber⁹²) is plainly inconsistent with the autonomous and independent powers vested in the Pre-Trial Chamber by the Statute in victim and witness security matters. These matters clearly transcend the particular interests of one or more participants in the proceedings and have therefore been entrusted by the Statute to the ultimate authority and responsibility of the Pre-Trial Chamber. Accordingly, under no circumstances can an "agreement" between the participants, the Registry or any of its units result in pre-empting the Chamber from exercising such responsibility.

⁹¹ *Prosecutor's application*, para. 16.

⁹² "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" (*Prosecutor's application*, para. 19); "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" (*Prosecutor's application*, para. 20).

The scope of powers for the protection of victims and witnesses

67. The Prosecutor submits further that the Chamber lacked the authority to consider the subject-matter of the letter because its content did “not relate to victim and witness security”.⁹³ The Prosecutor advances two arguments in support of this submission. The Prosecutor alleges that the letter does not threaten any relevant “witness, victim, or family member thereof”⁹⁴ because no existing witness or victim fits the category of persons envisaged by the threat pronounced in the letter (to kill “any white person moving [...] in this region”).⁹⁵ In addition, the Prosecutor claims that matters of staff security do not fall into the competence of the Chamber merely “because the well-being of the staff of the ICC, and particularly VWU, *can affect* the protection of victims and witnesses”.⁹⁶ Both arguments are questionable.

68. It is difficult to understand the argument that the subject-matter of the letter falls outside the scope of the Chamber’s mandate to protect victims and witnesses merely because the letter threatens no existing “witness, victim or family member”. The submission by the Prosecutor seems to imply that the responsibilities of the Chamber for the protection of victims and witnesses extend only to those victims and witnesses who have been identified by the Prosecutor at a given stage of the proceedings. Such a reading of the Chamber’s responsibilities is too restrictive. The Chamber has an independent and objective responsibility *vis-à-vis* victims and witnesses. This responsibility is *inter alia* reflected in article 68, paragraph 1 of the Statute and in rules 87 and 88 of the Rules, which authorise the Chamber to take protective or special measures “[u]pon the motion of the Prosecutor or the defence” or “*on its own motion*”.⁹⁷ The wording of rule 87, sub-rule 1, of the Rules (“[A] Chamber may order measures to protect *a* victim, *a*

⁹³ See the *Prosecutor’s application*, para. 12.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, para. 15, (emphasis added).

⁹⁷ See rule 87, sub-rule 1 as well as rule 88, sub-rule 1 of the Rules. Emphasis added.

witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2") makes it clear that the Chamber is also empowered to order protective measures *vis-à-vis* victims and witnesses of the defence.⁹⁸ Even staff members of VWU may potentially be called upon to serve as witnesses before this Chamber. It is therefore impossible to construe the scope of protection of victims and witnesses by the Chamber as narrowly as suggested by the Prosecutor, i.e., as extending only to those victims and witnesses identified by the Prosecutor at a given moment in time.

69. It is not necessary for the Chamber to define here in detail the scope of its powers for the protection of victims and witnesses. Nor is the Chamber being called upon to decide to what extent the notion of "others [...] at risk on account of testimony" includes staff of the Court.⁹⁹ Suffice it to state that there are instances in which a threat or other matter relating to staff security is sufficiently closely linked to the protection of victims and witnesses to come within the ambit of the powers of the Chamber. In particular, there are instances where the safety of the staff of the VWU, namely those entrusted with the protection and security of victims and witnesses may be linked to their very ability to exercise these functions effectively.¹⁰⁰ This principle is even recognised by the Prosecutor.¹⁰¹ The Chamber finds that such circumstances existed in the present case.

⁹⁸ See rule 87, sub-rule 1 of the Rules (emphasis added).

⁹⁹ See the *Prosecutor's Application*, para. 14.

¹⁰⁰ See also the transcript of the status conference held on the 7th day of December: "The Victims and Witnesses Unit is a unit of the Court, charged specifically with duties with respect to victims and witnesses. But the safety and well-being of field staff of the Victims and Witnesses Unit are integral, indeed vital, to the very integrity and functioning of the Unit for the protection of victims and witnesses." (T-02/04-01/05-4-Conf-En.), p. 5, lines 5-9.

¹⁰¹ See the *Prosecutor's Application*, para. 18: "The OTP is not contending that there is *no* circumstances 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 appropriate for the Chamber to consider additional or altered victim and witness security measures".

70. The Prosecutor argues that the Chamber does not have jurisdiction over all matters that “*can* affect the protection of victims and witnesses”.¹⁰² However, in the present case, the connection between the threat and the protection of victims and witnesses was not merely hypothetical. The threat had direct implications for the operation of the Court. Again, the Chamber notes that “OTP’s Operations’ Security Officer restricted missions to Northern Uganda” following receipt of the letter.¹⁰³ Similarly, it has been reported to the Chamber at the status conference on the 7th day of December 2005 that the Registry “decided to stop all field missions” after learning about the existence of the letter.¹⁰⁴ Such a step affects not only the respective functions of OTP and VWU, but the general capacity of the Court to protect victims, including the responsibility of the Chamber. Moreover, it has certain implications for the operation of the system of protection that has been put in place under the scrutiny of the Chamber. It is, for example, difficult to conceive how the mobile response system put in place by OTP and VWU could operate effectively if the staff of the Court is under threat and unable to operate on the ground. The threat therefore entailed risks concerning the implementation of specific security measures monitored by the Chamber in the discharge of its functions and responsibilities under article 57, paragraph 3, and article 68 of the Statute. These risks are sufficiently closely linked to the functions and powers of the Chamber to justify a timely alert and subsequent consideration by the Chamber.

¹⁰² See the *Prosecutor’s application*, para. 15 (emphasis added).

¹⁰³ See Letter from OTP Operations Security Officer 17 November 2005 (OTP/OSU/05/029).

¹⁰⁴ See transcript of the status conference held on the 7th day of December 2005 (T-02/04-01/05-4-Conf-En.), p. 32.

Absence of need for the Chamber to provide for additional or amended security measures

71. The foregoing remarks lead the Chamber to establish that the submission of the LRA letter by the Registrar was not only legitimate but necessary, with a view to allowing it to properly discharge its responsibilities under article 57, paragraph 3, of the Statute. The Chamber's involvement in the matter was proper and the holding of a status conference crucial in enabling the Chamber to make its determinations as to the continued adequacy, notwithstanding the LRA letter, of the protective measures already in place. In the light of the statements made at the status conference by the Prosecutor, the Registrar and the VWU, the Chamber is now satisfied that such measures are indeed still adequate and that there is no need, for the time being, for any addition or amendment thereto. The Chamber wishes to take this opportunity, however, to reiterate its request to both the Prosecutor and the Registrar to promptly submit to it any and all information or development which may potentially have a bearing on security matters, irrespective of whether it is the opinion of either the Prosecutor, the Registry, or of both, that no specific action should be taken.

The alleged administrative relevance of the issue and its impact on the legitimacy of the filing by the Registrar

72. Both at the status conference held on the 7th day of December 2005¹⁰⁵ and in his application, the Prosecutor argues that the LRA letter was inappropriately brought to the attention of the Chamber, since it concerned matters of an administrative nature, as such outside the scope of the Chamber's competence. In the Prosecutor's view, the submission of the letter by the Registrar resulted in "the Chamber improperly being called upon to become the arbiter of an internal

¹⁰⁵ See Mr Moreno Ocampo's statement at the status conference (T-02/04-01/05-4-Conf-En.), p. 13, lines 23-24; p. 14, line 23.

ICC administrative dispute”¹⁰⁶. The “dispute” at stake seems to originate from an alleged failure by the OTP to promptly share the LRA letter with the relevant officers of the Registry upon its reception. Such failure is apparently acknowledged by OTP Security Officer Purnell Roach in his letter dated the 17th day of November 2005¹⁰⁷, whereby he admits having “acted on the assumption that existence of the letter was known to the Kampala base field Security Officers” and, accordingly, failed to take “further action”. In the same letter, Mr. Roach further admits that such assumption was later proved to be “ill-conceived” and regrets that the episode has led to a “perceived non-sharing of information”. He concludes by expressing the wish that such a situation would not repeat itself and points to the forthcoming “creation of a joint Situation Centre where such information will be disseminated to all parties in a timely manner” as a suitable solution. These remarks have been to a great extent confirmed by the Prosecutor’s statements at the status conference. The Prosecutor did acknowledge that his office erred in failing to share the information with the relevant units within the Registry upon its reception¹⁰⁸. Nevertheless, his reconstruction of the sequence of the events seems to differ to some extent from the one submitted by the representative of the Registrar at the same status conference.¹⁰⁹

¹⁰⁶ *Prosecutor’s Application*, para. 7.

¹⁰⁷ See “Submission by the Registrar [REDACTED] dated the 5th December 2005 (ICC-02/04-01/05-70-Conf), p. 5 (OTP/OSU/05/029).

¹⁰⁸ See Mr Moreno Ocampo’s statements at the status conference held on the 7th day of December 2005: “The introduction of the letter was the consequence of the series of mistakes that affected the process and the trust between organs. I am here because my office committed the first mistake” (Transcripts, p. 7, lines 17-19) “From the beginning we intended to share the letter with the Registry, and because of mis-communication we failed” (T-02/04-01/05-4-Conf-En.), p. 8, lines 21-23; “So I am not saying that we did well; we failed, but I will explain to you why we failed”) (T-02/04-01/05-4-Conf-En.), p. 9, lines 7-8.

¹⁰⁹ In particular, respective recollections seem to differ with respect to the following issues: a) whether the letter was furnished to the Registrar in confidence: see Mr Moreno Ocampo’s statement at the Status Conference (T-02/04-01/05-4-Conf-En.), p. 12, line 18 and Mr Dubuisson’s statement (T-02/04-01/05-4-Conf-En.) p. 28, lines 11-16); b) whether and, in the affirmative, at what stage the OTP informed the Registrar that it was attaching evidentiary value to the letter (see Mr Moreno Ocampo’s statement at the hearing, transcripts, p. 12, line 17 and Mr Dubuisson’s, p. 31, line 25; p. 32, lines 5-8).

73. The Chamber wishes to clarify that it does not intend, and never intended, to “become the arbiter of an internal ICC administrative dispute”; its unique concern is to properly and promptly discharge the responsibilities bestowed upon it by the Statute, in particular in matters of witnesses and victims security. In the view of the Chamber, the relevance of the LRA letter and of the sequence of events triggered by it was twofold: on the one hand, it undoubtedly raised an issue directly related to the administration of the Court, thereby triggering the competence of the Registry, the Prosecutor and the Presidency; on the other hand, it also had a clear relevance for the purposes of security issues in the context of the situation in Uganda.

74. Whether the behaviour of the Prosecutor following the receipt of the letter may actually amount to a “mistake” in terms of the Prosecutor’s relation *vis-à-vis* the Registry, is not a matter for the Chamber to decide; the proper organ to consider it, for any relevant determination and measure that may be necessary or appropriate, is the Presidency of the Court, pursuant to the Statute and the Rules.

75. The Chamber notes that the President of the Court¹¹⁰, and it would seem the Presidency also¹¹¹, have been informed of the LRA letter and of the issues related to the Submission by the Registrar.

76. The Prosecutor’s claim that contacts between the Registrar and the Chamber should be subject to as strict a standard as contacts between the Chamber and participants in the proceedings is inconsistent with the neutral role vested in the Registry by the constitutive instruments of the Court. In fact, the Registry, while exercising a broad range of responsibilities under the Statute, Rules and Regulations, is a neutral organ of the Court. It is not a participant in proceedings before the Chamber, and hence, cannot be said to have engaged in “*ex parte*” communications with the Chamber. Rather, as previously discussed, the

¹¹⁰ See the status conference transcript (T-02/04-01/05-4-Conf-En.), p. 32, lines 9-10.

¹¹¹ *Ibid.*, p. 27, lines 18-20.

Registry's role is essential to ensure the proper functioning of the Court as required by the Statute. It is on this basis that the Chamber was in fact informed of the documents forming the subject of the Submission by the Registrar, and is more generally entitled to have contacts with the Registrar or his representative.

77. Finally, the Chamber wishes to highlight that the twofold nature and relevance of the LRA letter (i.e., administrative and judicial) justified the initial informal contact between the Registrar and the Chamber.¹¹² Furthermore, this contact enabled the Chamber to appreciate the relevance of the letter for the purposes of the security of victims and witnesses.

The Prosecutor's request to the Chamber to supplement the record with the description of its communications with the Registry: absence of legal and factual basis

78. The Prosecutor has repeatedly requested the Chamber "to supplement the record" with a description of informal communications between itself and the Registrar, or its representatives, as well as with a description "of any instruction provided by the Chamber to the Registry" in respect of the letter at stake.¹¹³ It is the view of the Chamber that such a request is deprived of any legal and factual basis and should therefore be dismissed. From a legal standpoint, no basis for such a request can be found in any of the constitutive instruments of the Court. Given the reasons outlined above on the neutrality of the Registry, its distance from the parties and other participants in the proceedings and its crucial role in servicing the Court and allowing all of the organs to function properly, communications between a Chamber and the Registrar can under no

¹¹² The Prosecutor himself acknowledges the legitimacy of such a contact in matters of an administrative nature. See the *Prosecutor's Application*, para. 46, p. 23: "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".

¹¹³ See Prosecutor's "Application for Pre-Trial Chamber II to Supplement the Record with a Description of Informal Communications Between Registry and the Chamber", dated the 5th day of December 2005 (ICC-02/04-01/05-69); "Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission filed by the Registry on 5 December 2005", dated the 12th day of December 2005, para. 8, p. 5.

circumstances qualify as “particulars of the proceedings” within the meaning of rule 15 of the Rules, and as such necessitating inclusion in the database referred to in that provision. The purpose of this rule is to ensure that all information relating to matters of the case is duly registered, in the interest of fairness *vis-à-vis* all participants and with a view to preserving the overall transparency and integrity of the proceedings. It is the view of the Chamber that the account of events, as resulting both from the Registrar’s submission dated the 5th day of December and from the transcripts of the hearing held on the 7th day of December 2005, provides sufficient information for these requirements to be fully satisfied. Accordingly, the Chamber finds that the request by the Prosecutor should be dismissed.

V. Decision by the Chamber

FOR THESE REASONS, THE CHAMBER HEREBY:

GRANTS the request for the extension of the page limits pursuant to regulation 37, sub-regulation 2, of the Regulations in relation to the Prosecutor’s application dated the 12th day of December 2005;

DECIDES that the Submission by the Registrar of the 5th day of December 2005 is admissible and relevant and shall be kept in the record of the proceedings;

ORDERS that the title of the filing made by the Registrar on the 5th day of December 2005 be changed to “Submission Filed by the Registrar on 5 December 2005”;

ORDERS that the status of the Submission by the Registrar on the 5th day of December 2005 be changed from “Confidential” to “Confidential, *ex parte*, Prosecutor only”;

DECIDES that, on the basis of the information gathered at the status conference of the 7th day of December 2005, no specific additional security measure needs to be ordered;

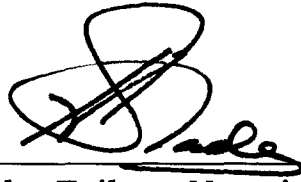
REJECTS the request of the Prosecutor, to supplement the record of the proceedings with the description of communications between the Chamber and the Registry;

REQUESTS the Prosecutor and the Registry to keep the Chamber informed as to security issues which may be relevant for the Chamber in order to exercise its functions and powers pursuant to article 57, paragraph 3(c), of the Statute;

AUTHORISES this decision to be made available and disclosed to the Registrar, the Victims and Witnesses Unit and the Presidency;

ORDERS that in all other respects this decision remains under seal, *ex parte*, Prosecutor only, until further order of the Chamber, to protect sensitive and confidential information contained therein.

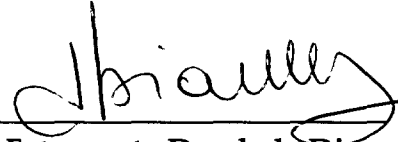
Done in both English and French, the English version being authoritative.



Judge Tuiloma Neroni Slade
Presiding Judge



Judge Mauro Politi



Judge Fatoumata Dembele Diarra

Dated this 9th day of March 2006

At The Hague, The Netherlands