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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**DECISION ON THE PROSECUTION'S APPLICATION FOR LEAVE TO APPEAL
THE CHAMBER'S DECISION OF 17 JANUARY 2006 ON THE APPLICATIONS
FOR PARTICIPATION IN THE PROCEEDINGS OF VPRS 1, VPRS 2, VPRS 3,
VPRS 4, VPRS 5 AND VPRS 6**

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PRE-TRIAL CHAMBER I (the “Chamber”) of the International Criminal Court (the “Court”);

I. Introduction

I.1. Overview of proceedings

1. On 17 January 2006, Pre-Trial Chamber I filed a “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”¹ (the “Decision”), according the six applicants victim status at the investigation stage of the situation in the Democratic Republic of the Congo (DRC).

2. On 23 January 2006, the Registrar registered the “Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”² (the “Prosecutor’s Application”) in the record of the situation in the DRC.

3. On 27 January 2006, the “Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6”³ (the “Observations of the Legal Representative for the Victims”) were registered in the record of the situation in the DRC.

4. On 30 January 2006, pursuant to regulation 24 (5) of the Regulations of the Court, the Prosecutor sought leave to reply to the Observations of the Legal Representative for the Victims. This was registered in the record of the situation in the DRC.⁴

¹ No: ICC-01/04-100-Conf-Exp-tEN. NB: The registration dates appearing in this decision are those of the original version of the relevant document as the translated versions were filed later, where applicable.

² No: ICC-01/04-103.

³ No: ICC-01/04-105-tEN.

⁴ No: ICC-01/04-107.

5. The Chamber issued a “Decision on the Prosecution's Application for Leave to Reply”⁵, registered in the record of the situation in the DRC on 1 February 2006, authorising the Prosecutor to reply to the Observations of the Legal Representative for the Victims.

6. On 6 February 2006, the Registrar registered the Prosecutor’s Reply to the Observations of the Legal Representative for the Victims⁶ (the “Prosecutor’s Reply”) in the record of the situation in the DRC.

I. 2. Preliminary Observations

7. The Chamber takes note of the observation of the Prosecutor in his Reply with regard to the calculation of the time limit for filing a response as laid out in regulation 65 (3) of the Regulations of the Court⁷.

8. The Chamber notes that regulation 33 (1) (b) of the Regulations of the Court provides that:

Days shall only be understood as “full days”, the day of notification of a document or the day of filing of a response or a reply by a participant to that document not being taken into consideration for the calculation of the time period available to file a document.

9. The Chamber takes note of the notification of the Prosecutor’s Application on 23 January 2006. Under regulation 65 (3) of the Regulations of the Court, the Legal Representative for the Victims had three days to file his response. As regulation 33 (1) (b) of the Regulations of the Court clearly states that neither the day of notification of a document nor the day of filing of a response are taken into consideration for the calculation of the time period available to file a document, the

⁵ No: ICC-01/04-110-tEN.

⁶ No: ICC-01/04-111.

⁷ Prosecutor’s Reply, para. 4.

Legal Representative for the Victims had until 16:00 hours on 27 January 2006 to file his observations. Accordingly, the Legal Representative for the Victims filed his response within the legal time limit.

10. The Chamber also notes that the Observations of the Legal Representative for the Victims do not comply with the formatting requirements laid out in regulation 36 (4) of the Regulations of the Court. Given that these irregularities affect only the presentation of the document, the Chamber will nonetheless take into consideration the Observations of the Legal Representative for the Victims. It would, however, remind the participants that they must comply with the document formatting requirements set out in the Regulations of the Court, in particular regulation 36.

II. Submissions of the parties

II.1. The Prosecutor's Application and Reply

11. The Prosecutor maintains firstly in his Application that the Decision gives rise to a series of questions affecting the fair and expeditious conduct of the proceedings within the meaning of article 82 (1) (d) of the Rome Statute (the "Statute")⁸. He argues that the Decision undermines the impartiality and integrity of the investigation and of any related proceedings⁹, and that the Decision creates a serious imbalance between the Victims and any future accused persons¹⁰. The Prosecutor also maintains that victim participation as set out in the Decision could not fail to have a grave impact on the expeditious conduct of the proceedings insofar as it creates the risk that the right to participate in the proceedings at the investigation stage will be granted to a large number of persons¹¹. In his Reply, the Prosecutor also submits that the Decision will impact greatly on the ability of the Court to protect victims and witnesses.¹²

⁸ Prosecutor's Application, para. 9.

⁹ Prosecutor's Application, paras. 13-14.

¹⁰ Prosecutor's Application, para. 13; Prosecutor's Reply, para. 10.

¹¹ Prosecutor's Application, paras. 5, 31 and 32; Prosecutor's Reply, para. 18.

¹² Prosecutor's Reply, para. 20.

12. According to the Prosecutor, as this first condition – the effect on the fairness and expeditiousness of the proceedings – has been met, it is not necessary to determine whether the issue would affect the outcome of the trial, given that the first of the two criteria laid out in article 82 (1) (d) of the Statute stipulates that only one of the two conditions in question need be met (effect on the fair and expeditious conduct of the proceedings, or effect on the outcome of the trial).¹³

13. With regard to the second criterion listed in article 82 (1) (d), the Prosecutor submits that the resolution of the question by the Appeals Chamber will materially advance the proceedings, given that the issue of victim participation in the proceedings regularly arises¹⁴, and insofar as intervention by the Appeals Chamber would, first, make it possible to avoid pre-trial proceedings conducted in accordance with the Decision being subsequently overturned and, secondly, would provide certainty about the scale of victim participation¹⁵. Moreover, the Prosecutor adds that given the importance of the issues raised by the Decision, it would be in the interests of the Court as a whole for the Decision to be scrutinised by the highest judicial body of the Court.¹⁶

II. 2. The Observations of the Legal Representative for the Victims

14. In his Observations, the Legal Representative for the Victims argues that the Prosecutor's Application is hypothetical¹⁷ and that "the dangers evoked are not *significant* in the present state of the proceedings"¹⁸. He adds that "[t]he Statute, the Rules [of Procedure and Evidence] and the Regulations of the Court systematically make [...] respect for a fair and impartial trial conditional on victim participation"¹⁹

¹³ Prosecutor's Application, para. 9.

¹⁴ Prosecutor's Application, para. 38.

¹⁵ Prosecutor's Application, para. 39.

¹⁶ Prosecutor's Application, para. 42.

¹⁷ Observations of the Legal Representative for the Victims, para. 6.

¹⁸ Observations of the Legal Representative for the Victims, para. 6.

¹⁹ Observations of the Legal Representative for the Victims, para. 11.

and that “[t]he competent Chamber must therefore organise the manner of such participation, as did the Pre-Trial Chamber in its Decision”.²⁰

15. The Legal Representative for the Victims adds in his Observations that although the Decision does admittedly allow the Victims to present in general terms their views and concerns regarding the investigation of a situation, they do not have access to the record of the investigation, nor can their participation ever have an adverse impact on the investigation or affect the Prosecutor’s capacity to conduct the investigation.²¹

III. Considerations

III.1. Criteria set out in article 82 (1) (d) of the Statute

16. Under the terms of article 82 (1) (d) of the Statute, either party may appeal:

[any] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

17. The Chamber notes that in Pre-Trial Chamber II’s “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”²² (the “Decision of Pre-Trial Chamber II”) dated 19 August 2005, Pre-Trial Chamber II considered the question of how article 82 (1) (d) of the Statute should be interpreted;

18. Article 21 (2) of the Statute allows the Court to apply principles and rules of law as interpreted in its previous decisions. Accordingly, in the opinion of the Chamber, the principles set out in the Decision of Pre-Trial Chamber II should be applied here;

²⁰ Observations of the Legal Representative for the Victims, para. 11.

²¹ Observations of the Legal Representative for the Victims, para. 17.

²² No: ICC-02/04-01/05-20-US-Exp (unsealed pursuant to decision No: ICC-02/04-01/05-52 dated 13 October 2005).

19. Pre-Trial Chamber II states in its decision that the Prosecutor's Application must be examined in the light of the following three principles: the restrictive character of the remedy provided for in article 82 (1) (d) of the Statute; the need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by this provision; the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.²³

20. The Chamber will analyse the Decision of Pre-Trial Chamber II before applying it to the case at hand.

A. The restrictive character of the remedy provided for in article 82 (1) (d) of the Statute

21. With regard to the first principle, Pre-Trial Chamber II states that "the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal."²⁴

22. Pre-Trial Chamber II recalls that the drafting history of article 82 indicates that interlocutory appeals were meant to be admissible only under limited and very specific circumstances;²⁵

23. In this regard Pre-Trial Chamber II considers that:

[...] article 82, paragraph 1 (d) of the Statute reflects a general trend to narrow the grounds for interlocutory appeals, and in particular to deviate from the concept that an issue is subject to interim appeal because of its "general importance to proceedings" or "in international law generally", as a previous formulation of the relevant rule in the [International Criminal

²³ Decision of Pre-Trial Chamber II, para. 15.

²⁴ Decision of Pre-Trial Chamber II, para. 21.

²⁵ Decision of Pre-Trial Chamber II, para. 16.

Tribunal for the Former Yugoslavia] Rules of Procedure and Evidence had allowed;²⁶

24. Pre-Trial Chamber II also recalls that the most recent international standard for interlocutory appeals – article 73 B) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (SCSL) – also reflects this restrictive approach²⁷. This provision states that the Trial Chamber may give leave to interlocutory appeals only “in exceptional circumstances and to avoid irreparable prejudice to a party”;²⁸

B. The need for the applicant to satisfy the Chamber as to the existence of specific requirements stipulated by article 82 (1) (d)

25. With regard to the second principle, Pre-Trial Chamber II notes that the existence of the requirements set forth in article 82 (1) (d) of the Statute is the sole factor of relevance in determining whether leave should be granted or not.²⁹ “[S]ubmission of arguments on the merits or the substance at an early stage must be considered ‘irrelevant and premature’”³⁰.

26. In its decision, Pre-Trial Chamber II explains that the applicant must meet two concurrent criteria³¹:

- the decision must involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and
- an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings;

27. In this respect, Pre-Trial Chamber II notes that:

²⁶ Decision of Pre-Trial Chamber II, para. 16.

²⁷ Decision of Pre-Trial Chamber II, para. 17.

²⁸ Decision of Pre-Trial Chamber II, para. 17.

²⁹ Decision of Pre-Trial Chamber II, para. 22.

³⁰ Decision of Pre-Trial Chamber II, para. 22; see also *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, 18 March 2004, case No. ICTR-97-21-T, para. 20.

³¹ Decision of Pre-Trial Chamber II, para. 20.

[A]s elaborated in the case-law of the *ad hoc* Tribunals and the SCSL, this means that the party applying for leave to appeal needs to demonstrate the existence of both the above requirements; and that failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met. It is also to be noted that the first requirement consists of two conditions: the issue on which the appeal is sought must significantly affect either the proceedings both in terms of fairness and in terms of expeditiousness (the “first limb”) or the outcome of the trial (the “second limb”). [...] What the party seeking leave needs to demonstrate is that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings. Failing such demonstration, leave to appeal cannot be granted [...].³²

28. In view of the Prosecutor’s Application, according to which there was no need for him to present any arguments “as to whether the Decision could affect the outcome of any future trial”,³³ the Chamber considers that examination of this, the second option of the first criterion, is not justified. This Chamber holds that, from the analysis made by Pre-Trial Chamber II, the applicant must, firstly, meet the two concurrent conditions of the first criterion, that is, whether the issue could significantly affect the fairness and expeditiousness of the proceedings. In the view of the Chamber, if the conditions of the first criterion are not met, the examination of the second criterion, that is, whether an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings, is unnecessary. Moreover, as the conditions of the first criteria are concurrent, if the Chamber determines that one of the two conditions has not been met, the second condition need not be examined.

³² Decision of Pre-Trial Chamber II, para. 21.

³³ Prosecutor’s Application, para. 9.

C. The irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal

29. Pre-Trial Chamber II noted that “submission of arguments on the merits or the substance at an early stage must be considered ‘irrelevant and premature’”³⁴. Pre-Trial Chamber II also specified that “revising generally the thrust of previous arguments without demonstrating relevant conditions for leave is not sufficient for the party to satisfy the requirements set forth in the rule”.³⁵

30. With regard to the application of article 82 (1) (d) of the Statute it is the view of this Chamber that the applicant must demonstrate that the conditions stipulated in this article have been met, and that any considerations relating to the merit or substance of the appeal must be dismissed. In this respect the Chamber notes that the applicant too considers that “an application for leave to appeal need not discuss the merits of the appeal”.³⁶

31. In consideration of the above, the Chamber will proceed to examine the question at hand. Firstly it will examine whether the Decision could significantly affect the fairness and expeditiousness of the proceedings. It is the view of this Chamber that the applicant must first meet the two concurrent conditions of this first criterion. If, having examined this first criterion, the Chamber considers that one of the two conditions has not been met, it will not proceed to examine the second condition or the second criteria mentioned in article 82 (1) (d) of the Statute, that is, whether an immediate resolution of such issue by the Appeals Chamber may materially advance the proceedings.

³⁴ Decision of Pre-Trial Chamber II, para. 22. In this instance Pre-Trial Chamber II relied on case-law from the trial chambers of the International Criminal Tribunal for Rwanda (ICTR). See *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, 18 March 2004, case No. ICTR-97-21-T, para. 20.

³⁵ Decision of Pre-Trial Chamber II, para. 22. See also *The Prosecutor v. Ndayambaje et al.*, 4 February 2005, case No. ICTR-98-42-T, para. 12.

³⁶ Prosecutor’s Application, para. 8.

III.2. Does the Decision raise an issue that could significantly affect the fairness and expeditiousness of the proceedings?

32. The Prosecutor invokes three reasons in support of the argument that the decision raises an issue that could significantly affect the fairness and expeditiousness of the proceedings: firstly, he submits that the Decision endangers the impartiality and integrity of the investigation; then he alleges that the “Decision creates a serious imbalance between the Victims and any future accused persons”.³⁷ The Prosecutor concludes that the Chamber’s use, in the Decision, of the criterion “grounds to believe” to rule in application of rule 85 of the Rules of Procedure and Evidence (the “Rules”), commits the Chamber to inquiry and fact-finding activities not provided for in the Statute.

33. Part V of the Statute, headed “Investigation and prosecution” contains a number of articles which guarantee fair conduct of the proceedings. Although the most prominent provision in this respect is probably article 55 (“Rights of persons during an investigation”), it should be noted that article 54 (“Duties and powers of the Prosecutor with respect to investigations”), article 56 (“Role of the Pre-Trial Chamber in relation to a unique investigative opportunity”) and article 57 (“Functions and powers of the Pre-Trial Chamber”) also contribute to the fair conduct of the proceedings.

34. Many international instruments guarantee the right to a fair trial. In this respect one could cite article 10 of the Universal Declaration of Human Rights,³⁸ article 14 (1) of the International Covenant on Civil and Political Rights,³⁹ article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental

³⁷ Prosecutor’s Application, para. 13.

³⁸ Pursuant to article 10 of the Universal Declaration of Human Rights, “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”, United Nations General Assembly resolution 217 A (III) of 10 December 1948, third session.

³⁹ Article 14, paragraph 1 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaties Series 14668.

Freedoms,⁴⁰ article 8 (1) of the American Convention on Human Rights,⁴¹ or indeed article 7 (1) of the African Charter on Human and Peoples' Rights.⁴²

35. Considering the safeguards enshrined in the above-mentioned texts, the Chamber is of the opinion that these principles are also applicable to the preliminary phase of the proceedings before the Court. Accordingly, the Chamber observes that the American Convention on Human Rights, article 8 of which is intended to guarantee a fair trial, is not uninterested in the preliminary phases of criminal proceedings. For this reason, in the *Baena Ricardo et al.* judgment, the Inter-American Court on Human Rights ruled that, despite its English heading, *Right to a fair trial*, article 8 of the Convention is applicable to all stages of the proceedings.⁴³ On the basis of article 6 of the Convention, the European Court of Human Rights (ECHR) also issued several rulings to the effect that article 6 (1) was applicable as of the investigation stage.⁴⁴

36. In the case at hand the Chamber views the phase of the proceedings during which the Decision was issued as unique: at issue is the investigation phase of a situation, prior to the case itself, for which there is no defendant as such, given that no individual has been issued with a warrant of arrest or a summons to appear. It is the Chamber's view nonetheless that the principle of a fair trial applies not only to the case phase – on issuance of a warrant of arrest or a summons to appear – but also prior to the case phase.⁴⁵

⁴⁰ Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as revised by Protocol No. 11, 213 United Nations Treaties Series 2889.

⁴¹ Article 8, paragraph 1 of the American Convention on Human Rights, "Pact of San Jose, Costa Rica", 22 November 1969, 1144 United Nations Treaties Series 17955.

⁴² Article 7, paragraph 1 of the African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaties Series 26363.

⁴³ The Inter-American Court of Human Rights decided that although Article 8 of the American Convention is called "Right to a Fair Trial" (meaning literally, in French, "Droit à un procès équitable", but officially translated into French as "Garanties judiciaires"), its application is not limited to judicial remedies in a strict sense, but extends to all the requirements that must be observed at the various stages of the proceedings, see Inter-American Court of Human Rights, case of *Baena-Ricardo et al. v. Panamá*, Judgment of February 2, 2001, para. 124.

⁴⁴ See, e.g., ECHR, case of *Wloch v. Poland*, Judgment of 19 October 2000, Application no. 27785/95, para. 144; case *Deweer v. Belgium*, Judgment of 27 February 1980, Application no. 6903/75, para. 41.

⁴⁵ For a definition of the terms "situation" and "case" under the Statute, see the Decision, para. 65.

37. The principle of a fair trial has been the subject of much case-law at domestic,⁴⁶ European⁴⁷ and international level.⁴⁸ However the Chamber must in fact decide on what is meant by the term “fairness of the proceedings” in the context of the Statute at the investigation stage of a situation, the stage prior to a case.

38. The term “fairness” (*équité*), from the Latin “*equus*”, means equilibrium, or balance. As a legal concept, equity, or fairness, “is a direct emanation of the idea of justice”.⁴⁹ Equity of the proceedings entails equilibrium between the two parties,⁵⁰ which assumes both respect for the principle of equality⁵¹ and the principle of adversarial proceedings⁵². In the view of the Chamber, fairness of the proceedings

⁴⁶ See the examples of case-law given in GUINCHARD S., BANDRAC M., DELICOSTOPOULOS C., DELICOSTOPOULOS I., DOUCHY-LOUDOT M., FERRAND F., LAGARDE X., MAGNIER V., RUIZ FABRI H., SINOPOLI L., SOREL J.-M., *Droit processuel, droit commun et droit comparé du procès*, Précis Dalloz, 3rd edition, 2005, pp. 770-843.

⁴⁷ The ECHR judged that the right to a “fair trial” entails, *inter alia*, the right to adversarial proceedings and the principle of equality of arms. See in particular the case of *Lobo Machado v. Portugal*, Judgment of 20 February 1996, Application no. 15764/89, p. 206, para. 31; the case of *Vermeulen v. Belgium*, Judgment of 20 February 1996, Application no. 19075/91, p. 234, para. 33.

⁴⁸ *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 60, para. 71; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. The Netherlands)*, Judgment, I.C.J. Reports 1969, p. 47, par. 85 and pp. 49-50, para. 91; *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 6, para. 50.

⁴⁹ *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 60, para. 71.

⁵⁰ All parties to proceedings must have the opportunity to present their case to the court in circumstances which do not place them at a substantial disadvantage vis-à-vis the opposing party: see European Commission of Human Rights, case of *Szwabowicz v. Sweden*, Opinion of 30 June 1959, Application no. 434/58, Yearbook II, p. 535. In its Decision, Pre-trial Chamber II defines the concept of fairness as being, *inter alia*, “[...] closely linked to the concept of ‘equality of arms’, or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour”, see Decision of Pre-Trial Chamber II, para. 30. In this respect, Pre-Trial Chamber II relies upon the Tadic decision rendered by the International Criminal Tribunal for the former Yugoslavia, in which it was said that “equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case, see *The Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, case no. IT-94-1-A, para. 48. See also *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment of 1 June 2001, case no. ICTR-95-1-A, para. 69.

⁵¹ GUINCHARD S., BANDRAC M., DELICOSTOPOULOS C., DELICOSTOPOULOS I., DOUCHY-LOUDOT M., FERRAND F., LAGARDE X., MAGNIER V., RUIZ FABRI H., SINOPOLI L., SOREL J.-M., *Droit processuel, droit commun et droit comparé du procès*, Précis Dalloz, 3rd edition, 2005, p. 770. See also article 14 (1) of the International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaties Series 14668.

⁵² According to the well-established case-law of the ECHR, the right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court’s decision”, case of *Morel v. France*, judgment of 6 June 2000, Application no. 34130/96, para. 27. See also case of *Apeh Üldözötteinek Szövetsége and others v. Hungary*, judgment of 5 October 2000, application no. 32367/96, para. 39 to 42.

includes respect for the procedural rights of the Prosecutor, the Defence, and the Victims as guaranteed by the relevant statutes (in systems which provide for victim participation in criminal proceedings).

39. The Chamber also holds that within the context of the Statute, respect for the fairness of the proceedings with regard to the Prosecutor, at the investigation phase of a situation, means that the Prosecutor must be able to exercise the powers and fulfil the duties listed in article 54.

40. The Chamber will now turn to the question of whether the Decision could raise an issue that calls into question the Prosecutor's ability to exercise his powers and fulfil his duties as listed in article 54 of the Statute.

A. Could the Decision prejudice the impartiality and integrity of the investigation?

41. The Prosecutor argues firstly that the Decision might raise a question which could affect the fairness of the proceedings insofar as it puts the integrity of his investigation at risk and might lead to exposure of the Victims and witnesses.⁵³

1. Objectivity of the Prosecutor's investigation

42. In his Application, the Prosecutor argues that the Decision:

endangers the integrity of the investigation, and thus the fairness of any proceedings stemming from it, thereby opening the door for future allegations that the inquiry was subject to undue influence and bias⁵⁴

A vital aspect of the fairness of the proceedings is [...] the requirement that the investigation be carried out in an independent and objective

⁵³ Prosecutor's Application, para. 13.

⁵⁴ Prosecutor's Application, para. 13.

manner, with equal care being given to incriminating and exonerating circumstances (Article 54(1)(a)).⁵⁵

The Prosecutor also alleges that:

(t)hese dangers are heightened by the fact that the Decision allows for a broad category of persons to participate in the proceedings and does not provide for any safeguards to prevent that the process of participation be abused with the aim to obstruct or impede the investigation and prosecution of crimes within the jurisdiction of the Court⁵⁶

The Prosecutor further argues that:

the Decision opens the door for direct - and unregulated - presentation of evidentiary or documentary material ("pièces") by victims to the Chamber during the investigative stage, thereby allowing for consideration by the Chamber of material collected *outside* the framework of the investigation conducted by the Prosecution in compliance with the requirements and safeguards of Article 54(1).⁵⁷

43. The Chamber is of the view that its role is to guarantee and preserve the rights of the Prosecutor, Defence and Victims throughout the entire pre-trial proceedings and in particular to preserve the impartiality and integrity of the Prosecutor's investigation. More specifically, the role of the Chamber, at the investigation stage of a situation, is to ensure that the Prosecutor is able to exercise the powers and fulfil the functions stipulated in article 54 of the Statute.

44. As Pre-Trial Chamber II recalls in its decision, it is incumbent upon the applicant, in this case the Prosecutor, to "demonstrate [...] that the issue at stake affects, first and foremost, the fairness [...] of the proceedings".⁵⁸ As such however the Prosecutor does not present concrete evidence in his Application that would enable the Chamber to determine that its Decision undermines the fairness of the

⁵⁵ Prosecutor's Application, para. 14.

⁵⁶ Prosecutor's Application, para. 18.

⁵⁷ Prosecutor's Application, para. 16.

⁵⁸ Pre-Trial Chamber II Decision, para. 21.

proceedings and that, consequently, the investigation cannot be carried out independently and impartially in the interests of investigating incriminating and exonerating circumstances equally.

45. Moreover, the Chamber observes that the Prosecutor will be notified of any documents or material presented by the Victims, and will have all necessary latitude to respond. It would seem therefore that the system of participation can only enhance the impartiality of the Prosecutor's investigation in that it will afford him access to additional evidence.

46. With regard to the issue raised by the Prosecutor regarding the confidentiality of the investigation, the Chamber recalls that giving persons with the status of Victims the right to present in general terms their views and concerns regarding the investigation of a situation and to submit material to the Pre-Trial Chamber cannot have an adverse impact on the investigation. This procedural right does not entail giving access to the confidential documents in the "record of the investigation".⁵⁹ The Chamber considers therefore that giving Victims this right has no impact whatsoever on the confidentiality of the investigation. Accordingly the grounds raised by the Prosecutor remain, for the time being, theoretical and the Chamber will allow the Prosecutor to present observations on this point when a real need arises.

47. Furthermore, the Chamber considers that the system of victim participation as provided for in the Decision is very limited, largely because it provides for a case-by-case assessment of victim participation. Moreover, the Chamber recalls that if it decides to give the Victims the right to participate in specific procedural activities, it will take such measures as are necessary, under articles 56 and 57 of the Statute, to preserve the integrity of the proceedings.⁶⁰ In this respect the Chamber

⁵⁹ Decision, para. 59.

⁶⁰ Decision, para. 60.

will ensure the impartiality and integrity of the investigation at all stages of future proceedings.

48. Moreover, the Chamber will assess the appropriateness of the transmission of confidential documents to the Victims, on a case-by-case basis. It has already indicated in its “Decision Establishing a Deadline for Final Submissions on the NFI’s Additional Report”⁶¹ of 8 February 2006, that “the proceedings related to the NFI’s examination have been conducted confidentially and that they do not have any impact on the personal interests of participants VPRS 1 to VPRS 6 because they refer to incidents wholly unrelated to those in which they were allegedly victimized”⁶². Accordingly the Chamber considers that the examples given by the Prosecutor in his Application⁶³ relate only to hypothetical situations which have not yet materialised and do not concern the investigation stage of the proceedings in the situation in the DRC.

2. Identification of Victims and Witnesses

49. The Prosecutor adds that the Decision affects the fairness of the proceedings in the sense that it “can lead to exposure of victims and witnesses, thereby affecting their safety, well-being and privacy”.⁶⁴

50. The Chamber recalls that one of the functions of the Pre-Trial Chamber is to ensure the protection of victims and witnesses by ensuring their security in application of article 57 (3) (c) of the Statute. The Chamber, in its “Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp”,⁶⁵ filed on 21 July 2005, stated:

⁶¹ No: ICC-01/04-112.

⁶² No: ICC-01/04-112, p. 2.

⁶³ Prosecutor’s Application, paras. 14 - 19.

⁶⁴ Prosecutor’s Application, para. 13.

⁶⁵ No: ICC-01/04-73

that according to rule 89, paragraph 1 of the Rules, the Prosecutor and the Defence are entitled to reply to any application for participation within the time limits set by the Pre-Trial Chamber; and that in order to place them in a position to effectively exercise this right the Registrar shall provide them a copy of any application for participation [...]

[and]

that the format in which the copy of any application for participation is to be transmitted to the Prosecutor and the Defence is “subject to the provisions of the Statute, in particular to article 68, paragraph 1”; and that article 68, paragraph 1 of the Statute mandates the Pre-Trial Chamber, as well as the other organs of the Court, to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of the victims without prejudicing or being inconsistent with the rights of the accused and a fair and impartial trial.⁶⁶

51. It is the opinion of the Chamber that the Prosecutor has not presented any concrete evidence to support his argument; as such the Chamber is not in a position to determine whether the Decision may raise an issue that could significantly affect the fairness and expeditiousness of the proceedings.

52. The Chamber recalls that it is responsible, under article 57 (3) (c) of the Statute, for ensuring the protection and privacy of victims and witnesses where necessary. Where applicable the Chamber will take all measures necessary to protect the safety and well-being of victims, in particular by protecting their identity.

B. Does the Decision create a serious imbalance between the Victims and any future accused persons?

53. The Prosecutor contends, secondly, that the system of victim participation established by the Decision prejudices the rights of the Defence insofar as it seriously affects the balance between Victims and accused persons and is therefore detrimental to the fairness of the proceedings.⁶⁷

⁶⁶ No: ICC-01/04-73, pp. 2 and 3.

⁶⁷ Prosecutor’s Application, paras. 13 and 20 to 22.

54. The Chamber observes that the Decision was issued at a stage of the proceedings where no accused are involved, that is to say, at the situation stage. The Chamber holds that the Prosecutor adduces no actual evidence showing that the Decision places the equality of arms at risk. Indeed, subject to victim and witness protective measures, future accused will be afforded access to all evidence for the purposes of preparing their defence.⁶⁸ Furthermore, the Chamber has appointed an *ad hoc* Counsel for the Defence whose responsibility it is to promote the rights of the Defence when any issue having direct repercussions on the fairness of the proceedings arises.

55. The Chamber thus finds that the Prosecutor does not offer any specific information or facts in support of his submission or any means enabling it to assess the merits of his argument.

C. Use of the “grounds to believe” test for the purposes of entering a rule 85 determination

56. Lastly, as a third argument, the Prosecutor claims that by using the “grounds to believe” test to arrive at the determination that the applicants qualify as Victims, Pre-Trial Chamber I prejudged the issue of whether the crimes in question had been committed.⁶⁹

57. The Chamber notes first that, in the “Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp”,⁷⁰ the Prosecutor in no sense challenged the application of rule 85 of the Rules⁷¹ or even the fact that the Applicants met the

⁶⁸ In keeping with the right to adversarial proceedings, the parties to a trial are afforded the opportunity to have knowledge of all evidence adduced or observations filed. See ECHR, *Vermeulen v. Belgium*, Judgment of 20 February 1996, application no. 19075/91, para. 33.

⁶⁹ Prosecutor’s Application, paras. 13 and 23 to 28.

⁷⁰ No. ICC-01/04-84-Conf.

⁷¹ No. ICC-01/04-84-Conf, para. 7 and para. 25.

conditions laid down by the provision.⁷² On the contrary, he states that “the Applicants appear to qualify as victims under rule 85 (a) [...]”.⁷³

58. The Chamber considers that, given the applicability of rule 85 of the Rules, a test enabling a victim status assessment to be made at the investigation stage of a situation needed to be defined. The “grounds to believe” test was drawn from article 55 (2) of the Statute for two reasons. Firstly, article 55 (2) is applicable to the investigation stage of a situation, in contrast to articles 58 and 61 of the Statute which are applicable at the case stage. The applications for participation have been submitted in connection with the investigation in the DRC situation. The Chamber notes that the Decision deals only with the participation of the Victims at the investigation phase in the DRC situation. Secondly, the “grounds to believe” test is the least rigorous test. It may be noted that in articles 58 and 61 the tests become stricter as one moves from one stage of the proceedings to the next.

59. The Prosecutor further argues that by using the “grounds to believe” test the Chamber prejudged the commission of crimes falling within the jurisdiction of the Court and that the Decision is detrimental to the fairness of the proceedings. The Chamber recalls that, in relation to the crimes reported by each of the six Applicants, it found in the Decision that “subject to re-examination of the matter under rule 91 (1) of the Rules and taking into account available information, there are grounds to believe that these crimes fall within the jurisdiction of the Court pursuant to articles 6 to 8 of the Statute.”⁷⁴ The Chamber’s finding may therefore be re-examined on the basis of the information available to it later on in the proceedings. In this connection, the Chamber notes that the system established by the Statute under articles 55, 58 and 61 requires that a preliminary chamber rule on the existence of grounds to believe, reasonable grounds to believe and substantial grounds to believe that a person committed a crime falling within the jurisdiction of the court. Were one to

⁷² No. ICC-01/04-84-Conf, para. 56.

⁷³ No. ICC-01/04-84-Conf, para. 5.

⁷⁴ Decision, paras. 123, 134, 152, 166, 175 and 185.

adopt the Prosecutor's line of reasoning, the issuance of a warrant of arrest or summons to appear would also constitute a prejudgement with respect to a decision on the confirmation of charges and would therefore be detrimental to the fairness of the proceedings. The Prosecutor's argument thus appears to run counter to the system provided by the Statute itself.

60. The Chamber therefore finds no merit in the Prosecutor's argument that "the Chamber [is engaging] in inquiry and fact-finding activities not provided for in the Statute and capable of giving rise to allegations of prejudgement."⁷⁵

61. Accordingly, the Chamber holds that since the first condition of the first requirement of article 82 (1) (d) of the Statute has not been met, the Chamber need examine neither the second condition, relating to the expeditiousness of the proceedings, nor the second requirement, consisting of reaching a determination as to whether the immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings.

FOR THESE REASONS

REJECTS the Prosecutor's Application.

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

⁷⁵ Prosecutor's Application, para. 13.

Judge Claude Jorda
Presiding Judge

Judge Akua Kuenyehia

Judge Sylvia Steiner

Dated this Friday 31 March 2006

At The Hague

The Netherlands