

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 July 2006

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Ekaterina Trendafilova

Registrar: Mr Bruno Cathala

**SITUATION IN UGANDA
CASE 01/05**

Under seal, Prosecutor only

**DECISION ON PROSECUTOR'S APPLICATIONS FOR LEAVE TO APPEAL
DATED THE 15TH DAY OF MARCH 2006 AND TO SUSPEND OR STAY
CONSIDERATION OF LEAVE TO APPEAL DATED THE 11TH DAY OF MAY
2006**

The Office of the Prosecutor

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

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

HAVING RECEIVED the “Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber II’s Decision on Prosecutor’s Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005”¹ dated the 15th day of March 2006 (the “Prosecutor’s Application”);

HAVING RECEIVED the Prosecutor’s “Application to Suspend or Stay Consideration of Prosecutor’s Application for Leave to Appeal”², dated the 11th day of May 2006;

HAVING CONSIDERED these submissions;

HEREBY RENDERS ITS DECISION.

I. Procedural History

1. On the 9th day of March 2006, the Chamber rendered its “Decision on the Prosecutor’s Application that the Pre-Trial Chamber disregard as irrelevant the submission filed by the Registry on 5 December 2005”³ (the “Decision”). Rejecting the Prosecutor’s request, the Chamber decided *inter alia* that the submission by the Registrar of the 5th day of December 2005 (the “Submission of the Registrar”⁴) was admissible and relevant and should therefore be kept

¹ ICC-02/04-01/05-79-US-Exp.

² ICC-02/04-01/05-85-US-Exp.

³ ICC-02/04-01/05-77-US-Exp.

⁴ ICC-02/04-01/05-70-Conf-Exp.

in the record of the proceedings. The Chamber also ordered that the title of the Registrar's submission be changed to "Submission filed by the Registrar on 5 December 2005" and that its status be changed from "Confidential" to "Confidential, *ex parte*, Prosecutor only". Furthermore, the Chamber rejected the Prosecutor's request that the Chamber "complete the record, by describing any communications between the Chamber and the Registry relating to staff security and the letter"⁵.

2. On the 15th day of March 2006, the Prosecutor applied to the Chamber for leave to appeal the Decision pursuant to article 82, paragraph 1 (d), of the Statute of the Court (the "Statute").
3. On the 11th day of May 2006, the Prosecutor filed an "Application to Suspend or Stay Consideration of Prosecutor's Application for Leave to Appeal"⁶, requesting the Chamber to stay or suspend its consideration of the application for leave pending the decision by the Appeals Chamber of the "Application for extraordinary review"⁷ filed by the Prosecutor as a consequence of Pre-Trial Chamber's I decision to deny leave to appeal the "Decision on the Applications for participation in the proceedings of Vprs 1, Vprs 2, Vprs 3, Vprs 4, Vprs 5 And Vprs 6"⁸ in the situation in the Democratic Republic of the Congo.

II. Submissions of the Prosecutor

Subject matter of the Prosecutor's Application and errors complained of

⁵ Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, ICC-02/04-01/05-73-US-Exp, paragraph 8.

⁶ ICC-02/04-01/05-85-US-Exp.

⁷ Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 24 April 2006 (ICC-01/04-141).

⁸ ICC-01/04-100-Conf-Exp-tEN.

4. The Prosecutor claims that the Chamber erred (i) in entering into unrecorded communications with the Registry on matters concerning the potential exercise of a function under the Statute and (ii) in allowing the Registrar to file in the record, despite the objections of the Office of the Prosecutor (“OTP”), a document which had been provided to the Registry by the OTP solely to enable the Registry to perform its administrative functions.
5. In particular, in the view of the Prosecutor, the Chamber committed the following errors of law:
 - a. it misinterpreted rule 103 of the Rules of Procedure and Evidence of the Court (the “Rules”) and regulations 46 and 48 of the Regulations of the Court (the “Regulations”), thereby unduly broadening its *proprio motu* powers⁹;
 - b. it misinterpreted the Statute’s provisions governing the role of the Registry and its responsibilities, thus jeopardising its neutrality¹⁰;
 - c. it wrongly held that the Chamber was under no obligation to provide parties with an account of direct communications between itself and the Registry relating to a potential exercise of a judicial function¹¹.

Prosecutor’s arguments in support of the issue(s) at stake affecting the fair and expeditious conduct of the proceedings or the outcome of the trial

6. By recalling this Chamber’s jurisprudence¹², as recently followed by Pre-Trial Chamber I of the Court¹³, the Prosecutor acknowledges that the only relevant question at the stage of an application under article 82, paragraph 1(d), of the Statute is whether the issue(s) underlying the errors of law complained of

⁹ Prosecutor’s Application, paragraph 13.

¹⁰ Prosecutor’s Application, paragraph 14.

¹¹ Prosecutor’s Application, paragraph 15.

¹² Prosecutor’s Application, paragraph 11.

¹³ 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, 31 March 2006 (ICC-01/04-135), paragraph 29.

satisfy the requirements set forth in that provision. Accordingly, the Prosecutor submits that the issues at stake significantly affect the fair and expeditious conduct of the proceedings and that immediate resolution of such issues by the Appeals Chamber may materially advance the proceedings.

7. As regards the alleged impact on fairness, the Prosecutor argues that off-the-record communications between the Chamber and the Registry affect several components of procedural fairness, including the following:
 - a. they violate a party's right to (and the public interest in) "a complete and accurate record of any particulars of the proceeding, and particularly the basis for any judicial decision-making"¹⁴;
 - b. they violate "any party's right to notification permitting a meaningful right to be heard"¹⁵;
 - c. they undermine "the appearance of impartiality and integrity of the judges"¹⁶;
 - d. they frustrate the right to a "meaningful" appellate review, because of the lack of "any official and contemporaneous record"¹⁷.
8. A significant impact on fairness is also alleged by the Prosecutor as regards the Registrar's power to initiate filings and to provide to the Chamber information furnished to the OTP by participants in the proceedings. The Registrar's duty to provide the Chamber with information relating to the powers of the latter envisaged by the Decision would impair its ability to adequately service the Court¹⁸ and "destroy" its neutrality, thus discouraging the parties from submitting information to it, especially such information which would qualify as "potential evidence"¹⁹.

¹⁴ Prosecutor's Application, paragraph 17.

¹⁵ Prosecutor's Application, *ibid.*

¹⁶ Prosecutor's Application, *ibid.*

¹⁷ Prosecutor's Application, paragraph 19.

¹⁸ Prosecutor's Application, paragraph 23.

¹⁹ Prosecutor's Application, paragraph 24.

9. Finally, allowing the Chamber to receive information *via* the Registrar would transform its role from one of an adjudicatory nature (i.e., of determining disputes and issues which come to light in the proceedings as a result of the participants' actions) into one of a pro-active nature; this would not only undermine the Chamber's impartiality and integrity, but would also result in unfairness *vis-à-vis* the Prosecutor, who would be prejudiced in his specific responsibilities and duties under the Statute²⁰.
10. In the view of the Prosecutor, the issues at stake also significantly affect the expeditious conduct of the proceedings. In particular, were the Appeals Chamber to find that the communications between this Chamber and the Registry needed to be recorded, the Chamber would have to "engage in a time-consuming and flawed process of after-the-fact reconstruction of the earlier Registry/Chamber interactions"²¹ at a later stage. Even more serious, a finding of the Appeals Chamber that the Chamber improperly entered into communications with the Registry would entail the need to re-conduct "confirmation and trial proceedings, or aspects of those proceedings affected by the initial deprivation of an opportunity to be heard"²². Similarly, a finding that the appearance of impartiality and integrity of the Chamber were affected by off-the-record communications would result in the nullification of decisions rendered by the relevant Pre-Trial Chamber and its subsequent disqualification²³. Furthermore, this would encourage disruptive applications alleging a lack of appearance of impartiality. Additionally, the *proprio motu* power of the Registry to file documents would affect expeditiousness because of its inevitable impact on the Registry's overall ability to provide the necessary administrative support to the Court²⁴.

²⁰ Prosecutor's Application, paragraph 28.

²¹ Prosecutor's Application, paragraph 30.

²² Prosecutor's Application, paragraph 34.

²³ Prosecutor's Application, paragraph 35.

²⁴ Prosecutor's Application, paragraph 23.

Prosecutor's arguments in support of the immediate resolution of the issue by the Appeals Chamber materially advancing the proceedings

11. Finally, as regards the material advancement of the proceedings, the Prosecutor argues the following:

- a. the alleged errors committed by the Chamber establish "a procedure which will be applied for the duration of the Pre-Trial Chamber's tenure of the proceedings" and which gives "rise to an immediate and constant threat of challenges to the fairness of the pre-trial or trial proceedings"²⁵;
- b. any reversal by the Appeals Chamber would create the need to re-create the communication having taken place informally²⁶;
- c. immediate resolution by the Appeals Chamber would provide guidance to all Pre-Trial Chambers in respect of issues which "go to the heart of the Court's judicial policy and directly relate to the fairness and efficiency of its proceedings"²⁷.

III. Determinations by the Chamber

On the Prosecutor's "Application to suspend or stay consideration of Prosecutor's Application for Leave to Appeal"

12. The Chamber recalls that in his "Application to suspend or stay consideration of Prosecutor's Application for Leave to Appeal", the Prosecutor argues that it would be inappropriate for the Chamber to rule on the issue of granting leave prior to the Appeals Chamber's being able to "consider the propriety of the

²⁵ Prosecutor's Application, paragraph 39.

²⁶ Prosecutor's Application, *ibid.*

²⁷ Prosecutor's Application, paragraph 40.

legal standard adopted in both Pre-Trial Chambers”²⁸ following the filing of the Prosecutor’s Application for Extraordinary Review before the Appeals Chamber. In his view, suspension of the decision-making process would ensure consistency and avoid inefficiency, were the Chamber to base its decision upon a legal standard which would be altered by the Appeals Chamber. The Prosecutor also notes that he has simultaneously requested “that the Appeals Chamber suspend or stay this Chamber’s consideration of the pending Application for Leave to Appeal” and that this twofold filing is due to “uncertainty about the proper venue for this request”²⁹.

13. In the view of the Chamber, the “uncertainty” complained about by the Prosecutor inevitably flows from the fact that the procedure followed has no basis in the statutory instruments of the Court. As this Chamber has already pointed out, participants in proceedings before the Court must comply with the procedures provided for in the Statute and in the Rules, since only compliance with procedural requirements will preserve the integrity and transparency of Court proceedings³⁰. Accordingly, the inadmissibility of the Prosecutor’s request derives from the fact that neither the Statute, nor the Rules vest any of the participants in the proceedings with the power to request the “suspension” or the “stay” of the decision-making process of a Chamber. This conclusion appears strengthened by the fact that, in the system of the Statute, decisions other than final ones are meant to be effective immediately, that is, as of the time of their adoption, subject to the Appeals Chamber ordering a suspensive effect pursuant to a party’s request (article 82, paragraph 3, of the Statute). Accordingly, the application for suspension or stay of the Chamber’s consideration of the leave to appeal must be considered inadmissible.

²⁸ ICC-02/04-01/05-85-US-Exp, paragraph 4.

²⁹ ICC-02/04-01/05-85-US-Exp, paragraph 8.

³⁰ ICC-02/04-01/05-60, paragraph 13.

Preliminary issue: the nature of the decision against which leave to appeal is sought

14. Before examining the subject matter and the arguments raised in the Prosecutor's Application, the Chamber considers it appropriate to clarify a preliminary issue. In a footnote, the Prosecutor suggests that the Chamber's Decision might "be read as suggesting that the Chamber considered itself to have determined a jurisdictional issue, because it emphasises specific jurisdictional questions, including the applicability and consequences of the *Kompetenz-Kompetenz* principle"³¹. In the view of the Prosecutor, this would mean that the Decision might qualify as "a decision with respect to jurisdiction" within the meaning of article 82, paragraph 1 (a), of the Statute and may therefore be appealed "as a matter of right", i.e. without the need for leave by the Chamber.
15. The choice of dealing with the issue in a footnote may raise some doubts as to whether it was the Prosecutor's wish to entertain this argument. Nevertheless, the Chamber would point out that only decisions bearing on the scope of the Court's jurisdiction (as defined in articles 5 and 11 of the Statute), and on the preconditions to and requirements for the exercise of such jurisdiction (under articles 12 and 13 respectively), would qualify as "decisions with respect to jurisdiction" pursuant to and for the purposes of article 82, paragraph 1 (a) of the Statute. The fact that the Chamber relied on arguments of a jurisdictional nature to substantiate its findings as to the admissibility and relevance of the Submission by the Registrar within the context of its powers is not tantamount to bestowing on the Decision the nature of a "decision with respect to jurisdiction". Accordingly, it is understood that appeal against the Decision is entirely and exclusively subject to the requirements set forth under article 82, paragraph 1(d), of the Statute.

³¹ Prosecutor's Application, footnote 2, at page 3.

General remarks on interlocutory appeals

16. As first established in this Chamber's decision dated the 19th day of August 2005³², recently confirmed by Pre-Trial Chamber I in its decision dated the 31st of March 2006³³, and acknowledged by the Prosecutor³⁴, the existence of the requirements of article 82, paragraph 1(d), of the Statute is the sole factor relevant to determining whether leave to appeal should be granted. Accordingly, this Chamber will not re-examine the merits of the issues addressed in its Decision of 9th of March 2006, or assess whether the contents of that Decision and/or their supporting arguments are accurately reflected in the Prosecutor's Application. Consistent with the practice of the Chamber and that of international *ad hoc* tribunals, arguments on the merits of the decision will be examined only to the extent that they have a bearing on the criteria set out in article 82, paragraph 1(d) of the Statute.
17. The Chamber wishes to highlight once again the main features of the remedy enshrined in article 82, paragraph 1(d), of the Statute. In the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances. This is apparent both from the wording and from the drafting history of the Statute.
18. Article 82 of the Statute singles out certain decisions that are subject to appeal *per se* (paragraph 1 (a), (b), (c)). Interlocutory appeals against other decisions are permitted only upon leave by the Chamber and on the basis of the criteria enumerated in paragraph 1 (d). Article 82, paragraph 1 thereby implies that the decisions by a Trial or Pre-Trial Chamber which do not fall under paragraph 1 (a)-(c), or which do not satisfy the requirements under paragraph 1 (d), are not subject to interlocutory appeal.
19. Article 82, paragraph 1(d) specifies that only decisions "that involve an issue that would significantly affect the fair and expeditious conduct of the

³² ICC 02/04-01/05-20.

³³ ICC-01/04-135-tEN, paragraphs 29-30.

³⁴ Prosecutor's Application, paragraph 11.

proceedings or the outcome of the trial” are subject to leave to appeal. Moreover, even if those two criteria are satisfied, leave shall be granted only if “an immediate solution by the Appeals Chamber may materially advance the proceedings”. This wording reflects the intention of the drafters of the Statute to limit the scope of interlocutory appeals to issues of crucial importance to the fairness and expeditiousness of the proceedings or to the outcome of the trial.

20. This rationale is further reflected in the drafting history of the provision. Draft article 81 in the Report of the Preparatory Committee of 14 April 1998 limited the possibility of interlocutory appeals exclusively to decisions taken by a Trial Chamber³⁵. Paragraphs 1 and 2 specified that interlocutory decisions would be subject to appeal “[w]hen the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal”³⁶. Interlocutory appeals against decisions of a Pre-Trial Chamber were only introduced at the Rome Conference.³⁷

21. More specifically, some choices made in the course of the negotiations clearly signal the restrictive intention of the drafters. First, a proposal which would allow all “other” decisions (i.e., other than final decisions) to be appealed, subject to the leave of the Chamber concerned but irrespective of the nature of

³⁵ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Document A/CONF.183/2 B, page 65.

³⁶ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, page 127 (Article 81, Appeal against interlocutory decisions).

³⁷ See Document A/CONF.183/C.1/WGPM/L.72, Working Paper on article 81, 10 July 1998 (in Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Volume III, Part Two, Annex F, Documents of the Committee of the Whole, page 319).

the decision or of the issues being debated, was rejected³⁸. Second, two grounds for interlocutory appeals appearing at one stage in Draft Article 81 were deleted: namely, one allowing interlocutory appeals against rulings on evidence, and another allowing interlocutory appeals in relation to the confirmation or denial of an indictment.³⁹ The aim of the discussions was to shape a provision that, whilst allowing interlocutory appeals when necessary to preserve fairness and expeditiousness in proceedings or when crucial for the outcome of the trial before the Court, would ensure that such appeals would not have a paralysing effect. Accordingly, one could infer that the ultimate purpose was to limit interlocutory appeals to decisions involving issues with a bearing on the conduct of proceedings related to criminal responsibility for offences under the jurisdiction of the Court.

The alleged impact on the fairness and expeditiousness of the proceedings

22. As the Chamber has already stated, this background, namely the fact that this remedy was meant to be exceptional, should be borne in mind in the interpretation of the criteria set forth in article 82, paragraph 1 (d).

³⁸ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Proposal submitted by Kenya (article 81, appeal against interlocutory decisions), 3 July 1998, Doc. A/CONF/.183/C.1/WGPM/L.46.

³⁹ Draft Article 81 read as follows:

"Appeal against interlocutory decisions

1. Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence:

(a) A decision with respect to jurisdiction or admissibility;

(b) An order granting or denying release of the defendant on bail;

[(c) *An order that confirms or denies, wholly or in part, the indictment;*]

[(d) *An order of exclusion of evidence;*]

[(e) When the majority of members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear the appeal.]

2. An interlocutory appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders upon request in accordance with the rules."

See Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1, 14 April 1998, pages 127-128 (Emphasis added). See also Helen Brady & Mark Jennings, *Appeal and Revision*, in Roy S. Lee, *The Making of the Rome Statute*, at 300.

23. The first element for the Chamber, seized of an application for interlocutory appeals, is to assess the existence of a significant impact of the issue at stake on the fairness and expeditiousness of the proceedings. In this connection, the Chamber wishes to recall that the first limb of the first requirement of article 82, paragraph 1(d) is two-fold and that, accordingly, leave to appeal can be granted only if the issue on which appeal is sought would significantly affect the proceedings both in terms of fairness and in terms of expeditiousness⁴⁰. The same approach has recently been followed by Pre-Trial Chamber I⁴¹.

On the notion of fairness under article 82, paragraph 1 (d)

24. When determining the standard of fairness under article 82, paragraph 1 (d), one must take into account the well-established understanding of the right to a fair trial under international human rights conventions, in particular, article 6 of the European Convention on Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 8 of the American Convention on Human Rights and articles 7 and 26 of the African Charter on Human and Peoples' Rights. In these instruments, the right to a fair trial has two main components: "a general one", applicable to various types of proceedings (civil, criminal or administrative), and a specific one, related to the rights of the defence in criminal proceedings.⁴² With regard to criminal proceedings, it is usually understood that the right to a fair trial applies first and foremost to a defendant or to the defence. However, the Chamber wishes to recall that "the general component" of fairness should be preserved to the benefit of all participants in the proceedings, including the Prosecutor. What is essential in determining whether fairness is preserved is that participants be granted a genuine opportunity to present their case and to be apprised of and comment

⁴⁰ ICC-02/04-01/05-20, paragraph 24.

⁴¹ ICC-01/04-135, paragraphs 28 and 61.

⁴² See Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press 2005, at 89; Fatsah Ouguergouz, *The African Charter on Human and People's Rights*, Martinus Nijhoff 2003, at 138.

on the observations and evidence submitted to the Court that might influence its decision.⁴³

The alleged impact on the fair conduct of the proceedings: communications between the Chamber and the Registry and lack of record

25. The Prosecutor argues that no informal (i.e., out-of-courtroom) contact between the Registrar and the Chamber should take place on issues which go beyond the purely administrative functions of the Registry, unless the Chamber makes an account of the content of that contact available. He claims that permitting this kind of contact would have a significant impact on the fairness of the proceedings within the meaning of article 82, paragraph 1(d), of the Statute.

26. In presenting this argument, the Prosecutor fails to take into account several significant circumstances. First, it should be recalled that the Registrar did not approach the Chamber as a party to the proceedings, that is with a view to influencing a determination on issues of guilt or innocence, but rather with a view to allowing the Chamber to exercise its powers relating to victims and witnesses under article 57, paragraph 3(c). It is therefore difficult to see how the communication between the Registrar and the Chamber could have an impact on fairness as explained above.

27. Irrespective of these considerations, it should be recalled that the informal contact was followed by a status conference in which the entire sequence of facts was recalled, and that the Prosecutor had an opportunity to present his views both orally and in writing prior to the Chamber's decision on the issues

⁴³ See, among many: ECHR, *Belziuk v. Poland*, Judgment 25 March 1998, paragraph 37(iii); ECHR, *Van de Hurk v. The Netherlands*, Judgment 19 April 1994, paragraph 57; ECHR *Lobo Machado v. Portugal*, Judgment 20 February 1996, paragraph 31; ECHR, *Ruiz-Mateos v. Spain*, Judgment 23 June 1993, paragraph 63; ECHR, *McMichael v. the United Kingdom*, Judgment 24 February 1995, paragraph 80; ECHR, *Laukkanen and Manninen v. Finland*, No. 50230/99, 3 February 2004, paragraph 34 (“[t]he right to an adversarial trial means, in a criminal case, that both the prosecution and defence must be given the opportunity to have knowledge of and comment on the observation filed and evidence adduced by the other party”).

raised in the Registrar's submission. The reconstruction of facts as recalled at the status conference was also confirmed by the Chamber in its decision⁴⁴. In this respect, no impact, let alone a significant one, on the fair conduct of the proceedings can be detected.

The role of the Registrar

28. According to the Prosecutor, the filing power vested in the Registry would destroy its neutrality and therefore have a significant impact on the fairness of the proceedings. This argument is unfounded. Indeed, a survey of the relevant case-law indicates that the role of the Registry, or of a similar neutral organ assisting a court in fulfilling its functions, has not been challenged as being contrary to the principle of fairness before a national or international court. More specifically, the filing power of the Registrar has not been challenged as being contrary to the principle of fairness in other international criminal jurisdictions.⁴⁵ These examples indicate that the filing of documents by the Registry which relate to the exercise of the Chamber's powers does not conflict with the neutrality of the Registrar or the fairness of proceedings.

⁴⁴ ICC -02/04-01/05-77-US-Exp, paragraph 78 ("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 [i.e., to ensure that all information relating to matters of the case is duly registered] to be fully satisfied").

⁴⁵ Rule 33(B) of the Rules of Procedure and Evidence of both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") vest in the Registrar the power, "in the execution of his or her functions", to "make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary". Accordingly, in the *ad hoc* tribunals, the Registrar is entitled to contact the Chamber both orally and in writing as far as the discharge of its functions is concerned. It is also stipulated that notice to the parties *may not be necessary*.

The alleged impact on fairness: the nature of the document filed by the Registry

29. The Prosecutor also argues that the alleged impact on fairness flows from the “potential” evidentiary nature of the particular document filed by the Registry. Specifically, the Prosecutor argues that “it is the Chamber’s receipt and review of that information or potential evidence, without any accompanying obligation of the party or participant to disclose it, which substantially alters the fairness of the proceedings.”⁴⁶
30. In its Decision, the Chamber noted that although the Prosecutor alleged that the letter was treated within the OTP as evidence, it had not been invoked or presented by the Prosecutor in connection with any situation or case-related proceedings other than the status conference held on 7 December 2005.⁴⁷ The decision also stated that the purpose of the document was two-fold. Whereas the Registrar filed the document in relation to victim and witness security, the Prosecutor would be able to submit the same document for a different purpose in the future, namely as evidence. The filing of a document which the Chamber is entitled to receive for the exercise of its powers and functions under the Statute⁴⁸ does not preclude this information from being submitted as evidence by one of the parties at a later stage.
31. In any event, the fact that the Chamber receives information which may at one stage be submitted as evidence does not *per se* affect the fairness of the proceedings. In the case at bar, the document was filed by the Registrar in order to allow the Chamber to exercise its functions *vis-à-vis* victims and witnesses and was not presented as being related to the cases and the criminal proceedings in the situation in Uganda.
32. Moreover, as the letter itself relates to the security and threats which may affect witnesses and victims and the security of staff, no finding of guilt of the persons for whom arrest warrants have been issued could ever be based

⁴⁶ Prosecutor’s Application, paragraph 25.

⁴⁷ ICC-02/04-01/05-77-US-Exp, page 31, paragraph 52.

⁴⁸ See, amongst others, articles 53, 56 and 57 of the Statute.

exclusively on consideration of such a letter. Accordingly, the Prosecutor clearly overstates the likely impact of such information on fairness. If it is presented by the Prosecutor, the letter will be only one piece of evidence in the entire body of evidence the Prosecutor will necessarily put before the Chamber. Therefore, the Prosecutor's claim that the filing of a letter which is related to general victim and witness and staff security affects the "fairness of proceedings" is also unfounded from this point of view.

The relationship between fairness and impartiality

33. The Prosecutor further argues that off-the-record communications between the Chamber and the Registry for the "purpose of affecting judicial decision-making" substantially impact fairness "by affecting the appearance of impartiality of the judges".⁴⁹

34. The Chamber's exposure to the content of the letter does not violate standards of impartiality as usually understood.⁵⁰ On the contrary, exposure to

⁴⁹ The Prosecutor quotes authorities highlighting that "information furnished by an *ex parte* communication must not be taken into account without giving the parties whose interests might be affected by the information an opportunity to correct and contradict it" and concludes that unfairness arises from the fact that the Court "will be unable to establish its proper behaviour and the basis for its decisions, because of the failure to create and preserve a contemporaneous record" (Prosecutor's Application, paragraph 20). The Chamber notes in passing that the authority quoted by the Prosecutor not only does not appear of relevance to the present scenario (since no *ex parte* communication is at stake), but even results in strengthening the view of the Chamber: fairness may be affected when a court fails to provide the parties with an opportunity to become aware of the information and to respond to it.

⁵⁰ Impartiality is generally understood as the "absence of prejudice or bias" of judges: see ECHR, *Piersack v. Belgium*, Judgment of 1 October 1982, Series A No. 53, (1983), 5 EHRR 169, paragraph 30. See also Trechsel, *supra* note 42, at 50 and 61. It implies that "judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties" (see Human Rights Committee, *Karttunen v. Finland*, Communication No. 387/1989, UN. Doc. CCPR/C/46/D/387/1989 (1992), paragraph 7.2.) Impartiality requires *inter alia* that judges shall not be affiliated to one of the parties or sit in cases in which they have been previously involved in another capacity (e.g. as a prosecutor, magistrate, witness etc.). See, for example, ECHR, *Piersack v. Belgium*, paragraphs 30-31 (involvement of a judge who acted as a senior deputy to the public prosecutor in the same case), ECHR, *Oberschlick v. Austria*, Judgment of 23 May 1991, Series A No. 204 (case where a judge who had participated in a judgment at first instance also took part in examining an appeal against that judgment). See also ECHR, *Wettstein v. Switzerland*, Judgment of 21 December 2000, No. 33958/98, ECHR 2000-XIII, 387, paragraphs 45-49 (case where the lawyer representing the other side sat as a judge in related proceedings to which the applicant was a party). The objections

documents relating to the security of victims is inherent to the functions bestowed on the Chamber and cannot therefore be considered as “tainting” its impartiality without undermining the whole system of the Statute.

35. Indeed, under the Statute, the Pre-Trial Chamber may deal with evidence not only in the context of disclosure and the confirmation hearing, but also at various other stages of the proceedings. For example, pursuant to article 56, paragraph 3 (a) and article 57, paragraph 3 (c), the Chamber may take measures to preserve evidence on its own motion at an early stage of the proceedings. Under these provisions, the Chamber may even preserve evidence in favour of the defence. These elements indicate that the Prosecutor’s claim unduly stretches the meaning of impartiality in a way unwarranted by the Court’s constitutive texts.

36. The Chamber therefore finds that neither of the issues singled out by the Prosecutor’s Application as resulting from errors of law can be considered to have a significant impact on the fairness of the proceedings within the meaning of article 82, paragraph 1(d) of the Statute.

The alleged impact on the expeditiousness of the proceedings

37. The Prosecutor argues that a possible finding by the Appeals Chamber that the communications between the Registrar and the Chamber were not appropriate, and/or that the letter was submitted to the Chamber irregularly, would make it necessary to reconstruct the content of those communications at a later stage, entail the nullification of decisions rendered by the Pre-Trial

raised by the Prosecutor are in no way related to this meaning of impartiality. See also the definition of impartiality in *Vocabulaire juridique*, Association Henri Capitant, Editions Presses Universitaires de France (PUF), publié sous la direction de Gérard Cornu, Septième Edition 2005, at 458: “Absence de parti pris, de préjugé, de préférence, d’idée préconçue, exigence consubstantielle à la fonction juridictionnelle dont le propre est de départager des adversaires en toute justice et équité [...] De la part du juge, attention scrupuleuse à respecter et à faire respecter le principe de la contradiction, en veillant à ce que chacune des parties jouisse des mêmes chances de faire valoir ses prétentions, en tenant entre elles la balance égale dans la recherche des preuves.”

Chamber⁵¹ and require the Court to reconduct “any portion of the pre-trial or trial proceedings in which the outcomes were deemed to have been affected by the improper influence of the Registry-furnished information”⁵².

38. As the Chamber stated in its Decision dated 19 August 2005 and recalled above⁵³, failure by the Prosecutor to demonstrate that the “fairness” tenet of the first limb of the first requirement of article 82 has been met *per se* exonerates the Chamber from the need to assess the “expeditiousness” tenet of the same limb.⁵⁴ This approach has also been adopted by Pre-Trial Chamber I which has referred to the “cumulative” nature of the two conditions to be satisfied within the context of the first requirement of article 82.⁵⁵ Hence, the Chamber need not examine arguments of expeditiousness.

Irrelevance of assessment whether the issue at stake would have a significant impact on the outcome of the trial

39. As the Prosecutor does not claim that the issue at stake may have a significant impact on the second (alternative) limb of the first requirement of article 82, paragraph 1(d), i.e. on the outcome of the trial, there is no need for the Chamber to examine it.

Lack of material advance to the proceedings following immediate resolution of the issue by the Appeals Chamber

40. Finally, this Chamber has stated already that the Prosecutor’s failure to demonstrate that the issue at stake may have an impact on the fairness and expeditiousness of the proceedings or the outcome of the trial makes it

⁵¹ Prosecutor’s Application, paragraph 35.

⁵² Prosecutor’s Application, paragraph 36.

⁵³ ICC-02/04-01/05-20, paragraph 24.

⁵⁴ ICC-02/04-01/05-20, paragraph 35.

⁵⁵ ICC-01/04-135, paragraphs 28 and 61.

unnecessary for the Chamber to assess whether the second requirement of the provision has been satisfied.⁵⁶

FOR THESE REASONS, THE CHAMBER HEREBY:

REJECTS the Prosecutor's Application to Suspend or Stay Consideration of the Prosecutor's Application for Leave to Appeal and **ORDERS** the Registrar to notify the Appeals Chamber thereof;

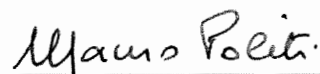
REJECTS also the Prosecutor's Application for Leave to Appeal Pre-Trial Chamber II's Decision on Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005;

DECIDES to authorise the disclosure of the Prosecutor's Application and this decision to the Registrar and the Victims and Witnesses Unit;

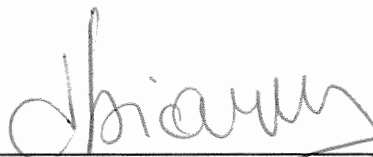
DECIDES that this decision shall remain under seal until further order by the Chamber.

⁵⁶ See ICC-02/04-01/05-20, paragraph 52 and ICC-01/04-135, paragraphs 26 and 28.

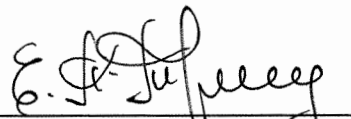
Done in both English and French, the English version being authoritative.



Judge Mauro Politi
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Ekaterina Trendafilova

Dated this 10th day of July 2006

At The Hague, The Netherlands