

**Cour  
Pénale  
Internationale**

No.: ICC-01/04

**International  
Criminal  
Court**

Date: 11 March 2005

Original: English

**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 CONGO**

**Public Document**

**Prosecutor's Application for Leave to Appeal**

**The Office of the Prosecutor  
Mr. Luis Moreno Ocampo  
Mrs. Fatou Bensouda  
Mr. Ekkehard Withopf  
Mr. Fabricio Guariglia**

## Introduction

1. The Prosecution respectfully moves for leave to appeal solely the following issue: whether Pre-Trial Chamber I properly denied the Prosecution an opportunity to be heard before determining to proceed with a status conference during the investigation and to be attended by the Prosecution and Chamber only.

### *Procedural history*

2. On or about 23 June 2004, the Prosecutor notified all States Parties, pursuant to Article 18(1), that there was reasonable basis to commence an investigation into the situation in the Democratic Republic of Congo. To the best of the Prosecution's knowledge, no State since that date has made any application to the Chamber. The investigation has proceeded since that date without any known application to the Chamber by any interested party.
3. On 17 February 2005, Pre-Trial Chamber I, to which the situation in the Democratic Republic of Congo has been assigned, issued a Decision to Convene a Status Conference on 15 March 2005. The 17 February 2005 Decision specified that the status conference would be "a closed hearing session to be attended only by the Prosecutor and/or his representatives." The Decision also stated that the Chamber considered that it might be appropriate to address, "*inter alia*, the protection of victims and witnesses and the preservation of evidence" through the holding of the *ex parte* status conference.
4. The Prosecution elected not to appeal the 17 February 2005 Decision. Rather, on 8 March 2005, the Prosecution filed before Pre-Trial Chamber I a document entitled "Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference" (hereinafter, "Prosecutor's Position"). In that filing, the Prosecution requested an opportunity to be heard on the issue of whether the Chamber had the authority to convene a status conference during the DRC investigation. By means of its filing, the

Prosecution attempted formally to submit its arguments challenging the validity of the 17 February 2005 Decision, and further requesting that a hearing be substituted for the scheduled status conference in order that the Prosecution could make oral argument.

5. The next day, on 9 March 2005, the Pre-Trial Chamber issued a Decision summarily denying the Prosecution's request for an opportunity to be heard and ruled that it was "declin[ing] to consider the submissions made in the Prosecutor's Position" and "reject[ing] all requests" for relief.<sup>1</sup> The Chamber reasoned that the Prosecution had waived its right to raise arguments in relation to the scheduled conference by failing to lodge a timely interlocutory appeal under Article 82 (1) (d), and further found that there was no "procedural basis for the filing of the Prosecutor's Position." The Chamber determined to proceed with the Status Conference as previously scheduled.<sup>2</sup>
6. The Prosecution now moves before the Chamber for leave to appeal the Decision. Further, in the event leave to appeal is granted, the Prosecution requests postponement of the scheduled conference until the Appeals Chamber enters a decision on its appeal.

**The Decision is appealable within the terms of Article 82 (1) (d) of the Statute**

7. Article 82 (1) (d) provides that leave to appeal should be granted in the case of a decision involving "an issue that would significantly affect the fair and expeditious conduct of the proceedings [...] and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".<sup>3</sup>
8. Both limbs of the test enshrined in Article 82 (1) (d) are plainly satisfied in this case. The Chamber's Decision summarily denied the Prosecution a right

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<sup>1</sup> See Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference (hereinafter, the "Decision").

<sup>2</sup> The remaining portions of the Decision deal with the issue of references in the Prosecution's Position to confidential documents and are not relevant for the purposes of this filing.

<sup>3</sup> Only the relevant portions for the purposes of the instant litigation have been quoted.

fundamental to any participant – the opportunity to be heard – regarding the following fundamental issues: (1) the authority of the Pre-Trial Chamber to convene a status conference during an investigation, within the framework of the respective duties and authority of the Prosecutor and the Pre-Trial Chamber in that particular phase; and (2) the limits of the interaction between the Pre-Trial Chamber and the Prosecution during that same phase. The question of the balance of powers between the Pre-Trial Chamber and the Prosecution was critical during the negotiations leading to the signing of the Rome Statute, and any alteration of the balance struck at Rome would, without question, significantly affect all future investigations of the Prosecutor and all future proceedings before the Pre-Trial Chamber.

9. The Chamber's Decision contains procedural errors and errors of law related both to its *in limine* dismissal of the Prosecution's request to be heard and to the applicable law on waiver, as interpreted by the Chamber. Those errors affect the fair and expeditious outcome of the proceedings and require "immediate resolution by the Appeals Chamber", within the terms of Article 82 (1) (d).
10. For the Chamber summarily to deny the Prosecution even the opportunity to be heard, before proceeding to hold a "closed session" conference which arguably was beyond the authority of the Pre-Trial Chamber to order, is error. The precedent of denying the Prosecution the right to state its position on a matter which may gravely prejudice its authority, and its ability to conduct an appropriately independent investigation, significantly affects not only the fairness of this proceeding, but potentially the integrity of future proceedings, and accordingly should serve as the subject of an appeal.

*The decision involves issues significantly affecting the fair and expeditious conduct of the proceedings*

(a) The Prosecution's right to be heard

11. No right is more fundamental to the integrity of judicial proceedings than the opportunity of a party to be heard by the court on any matter that, if decided adversely to the party, would significantly affect that party's interests. In the words of the judicial decision relied upon by the Prosecution on this particular topic, it is "the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made".<sup>4</sup>
12. Notwithstanding its brevity, the Chamber's 17 February 2005 Decision raised a number of substantive issues which clearly implicated the independence and spheres of competence of the Chamber and the Office of the Prosecutor, and the proper boundaries of the Chamber's authority during an investigation. The Prosecutor's Position advocated a narrow principle: that a decision of this importance should only be entered on the basis of a complete record, including written and oral submissions from the Prosecution setting forth its legal and factual arguments on the issues presented. The Prosecution further refined the argument to state that even assuming that the decision to convene a status conference had properly proceeded without prior solicitation of the Prosecution's views, the Prosecution's express request for an opportunity to be heard, in the Prosecutor's Position, provided sufficient basis for that opportunity to be afforded.<sup>5</sup> Finally, the Prosecution noted that in light of prior exchanges between the organs and the incomplete nature of the existing record, the Chamber had ample notice, even before issuing its 17 February 2005 Decision, that the Prosecution had serious concerns about the boundaries of a proper interaction between both organs.

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<sup>4</sup> ICTY Appeals Chamber, *Prosecutor v. Jelusic*, Judgment, 5 July 2001, para. 27.

<sup>5</sup> See Prosecutor's Position at p. 7, paragraph 10.

13. In summarily declining even to consider the Prosecutor's Position, the Decision reasoned: (1) that the Prosecution effectively forfeited its right to present arguments by not lodging an interlocutory appeal against the decision within the timeframe provided for in Rule 155<sup>6</sup>; and (2) that there was no procedural basis for the filing of the Prosecutor's Position.<sup>7</sup>
14. Both propositions are in error. First, the determination that there was waiver on the part of the Prosecution fundamentally misapprehends the nature of the relief sought by the Prosecution. The Prosecution did not wish to appeal the 17 February 2005 Decision – the first-ever issued by Pre-Trial Chamber I – and did not do so. Rather, the Prosecution sought a different remedy, which was to seek, from the Pre-Trial Chamber, the right to be heard in that forum in the first instance.
15. The Prosecution never waived its right to seek this more conservative remedy. Indeed, this remedy has now been foreclosed by the Chamber twice. Before the 17 February 2005 Decision was entered, the Prosecution had no chance to obtain a hearing because the Decision was issued *proprio motu*. The Prosecution's subsequent attempt to obtain a hearing by means of the Prosecutor's Position was summarily denied.
16. It is submitted that a participant's right to be heard is one of a fundamental nature, going to the heart of the fairness of any judicial proceedings, and is recognized as such in most jurisdictions, either by way of specific statutory provisions<sup>8</sup> or through judicial precedent.<sup>9</sup> The availability of this right to a participant is also instrumental for a proper judicial determination of the issues, since the court seized with the matter can benefit in substantial ways

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<sup>6</sup> Decision at p. 2 et seq.

<sup>7</sup> Decision at p. 3.

<sup>8</sup> See, *inter alia*, § 33 of the German Code of Criminal Procedure (StPO).

<sup>9</sup> See, *inter alia*, *Director of Public Prosecutions v. Christopher Cosier*, High Court of Justice Queen's Bench Division (England and Wales), CO/4180/99, 5 April 2000.

from that participant's analysis and argument.<sup>10</sup> The Chamber's Decision fails to consider these fundamental principles.

17. There is, moreover, no provision or deadline in the Rules or Regulations which foreclosed the Prosecution's request for an opportunity to be heard. It is manifest, to the contrary, that the Statute, the Rules and the Regulations must be read to include "a right of the parties to be heard in accordance with the judicial character" of the Chamber.<sup>11</sup> Depriving a party of an opportunity to be heard on a decision affecting that party's rights amounts to the denial of a fundamental procedural right. The Chamber erred by deciding to do so. The Prosecution will further develop these arguments on appeal if leave is granted.

(b) The availability of a potential interlocutory appeal and the issue of waiver

18. It is submitted that the Chamber's conclusions that the appropriate avenue to raise concerns was an interlocutory appeal, and that having the Prosecution failed to lodge one it has waived its right to advance its arguments, are in error.

19. The Prosecution firstly submits that equating the right to be heard by the Chamber seized with a matter with the availability of a remedy destined to have errors corrected by a different body, is incorrect. The first one is a right to present arguments; the second one, a remedy to correct flawed decisions. The availability of the latter is completely irrelevant vis-à-vis the duty of a Chamber to respect the former. If the Chamber's reasoning is correct, then Chambers of this Court would be free to enter decisions without granting the potentially affected parties an opportunity to be heard first, in the understanding that a subsequent remedy would be available in the form of an appeal.<sup>12</sup> It is respectfully submitted that such an interpretation would not

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<sup>10</sup> *Jelisić Appeals Judgement*, cit., para. 27.

<sup>11</sup> *Jelisić Appeals Judgment* at para. 27.

<sup>12</sup> In addition, it must be stressed that the system of interlocutory appeals enshrined in the Statute is not one where any decision may be appealed, but one setting specific conditions for an appeal to

only collide against basic considerations of fairness, but also imply an exorbitant interpretation of the function and availability of interlocutory appeals, effectively encouraging appellate intervention *in lieu* of presentation of arguments before the Chamber seized with the matter.

20. The Decision further errs in its interpretation of the basic principles of the waiver doctrine. A party is not expected to remain silent on an issue before a Chamber and subsequently attack a decision on such issue on appeal; rather, the party should bring to *that Chamber's* attention the issue in question in order to enable timely solution by the same Chamber.<sup>13</sup> If a participant considers that an infraction of the basic documents of this Court has occurred, or may occur, it is the responsibility of that participant to raise the issue before the Chamber seized with the matter, and that Chamber "must have the matter put to it, directly and in due form".<sup>14</sup> The Prosecution expressly stated in its Prosecutor's Position document that it not only had the right "but also the duty to present arguments to *this* Chamber before pursuing any other available remedy".<sup>15</sup>

21. It is submitted that raising the relevant concerns before this Chamber was, contrary to the Chamber's conclusion, the appropriate and required course of action. Firstly, the Chamber had not had the opportunity to consider the relevant legal arguments pertaining to the convening of the status conference and decide on them. Secondly, the Prosecution was raising factual issues pertaining to the information exchange relied upon by the Chamber in its 17 February 2005 Decision, to which *this* Chamber was privy; accordingly, the Chamber was better placed to make initial determinations on those issues. Filing an interlocutory appeal against the 17 February 2005 decision would

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proceed, namely: that the decision belong to those where an appeal lies as a matter of right, like in the ones established in Article 82 (1) (a)-(c), or that leave from the Chamber seized with the matter is granted (Article 82 (1) (d)).

<sup>13</sup> See ICTY Appeals Chamber, *Prosecutor v. Delalic et al*, Appeals Judgement, 20 February 2001, at para. 641.

<sup>14</sup> ICTR Appeals Chamber, *Kambanda v. Prosecutor*, Appeals Judgement, 19 October 2000, at para. 23.

<sup>15</sup> Prosecutor's Position at p. 7, para. 10. Emphasis in the original.

have been premature, contrary to the Prosecution's duty to raise the relevant concerns first before the Chamber seized with the matter and inconsistent with basic principles of judicial economy.

22. Finally, there is an independent reason that the Prosecution has not waived any argument that the Chamber exceeded the authority granted by the Rome Statute in scheduling a status conference. If the Prosecution is correct that the Chamber lacks the statutory power to hold a Status Conference during the investigation phase, then the issue can be properly addressed either by the same Chamber or the Appeals Chamber notwithstanding any arguable failure to timely raise the issue on the part of the Prosecution.<sup>16</sup> Any view to the contrary endorses the notion that the Pre-Trial Chamber can exceed its statutory authority at will, and rely on procedural failings – or forbearance – on the part of the parties to confer that authority instead.<sup>17</sup> Such a reading of the Statute and Rules is patently illogical and would manifestly raise serious questions about the balance of powers not merely between the Pre-Trial Chamber and the Prosecution but also potentially between the Pre-Trial Chamber and the Appeals Chamber.
23. The Chamber's construction of the waiver principle is accordingly incorrect both in relation to its procedural aspects, in particular its reliance on interlocutory appeals as an adequate way to raise concerns never heard or considered by the first instance court, and in relation to its application to the substantive issue in question. The Prosecution will develop all these arguments further before the Appeals Chamber if and when leave to appeal is granted.

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<sup>16</sup> See United States Supreme Court, *US v. Cotton* (535 U.S. 625, 122 S. Ct. 1781 (2002)), at 630: the "concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived".

<sup>17</sup> In a number of Civil Law jurisdictions, defects pertaining to a Court's capacity and competence to decide are considered to be cases of "absolute nullities" or "absolute grounds of appeal" in which no waiver can apply. See, *inter alia*, Italian Code of Criminal Procedure, Arts. 178 (1) (a) and 179; German Code of Criminal Procedure (StPO), § 338, 1-4.

(c) The fair and expeditious outcome of the proceedings is affected by the Decision

24. It is submitted that the Decision rejecting the requests advanced in the Prosecutor's Position affects both the fairness and the expeditiousness of the specific proceedings instituted by the Pre-Trial Chamber in its 17 February 2005 Decision, namely the status conference to be held on 15 March 2005 and the instant litigation pertaining to it.

25. The Chamber has effectively denied the Prosecution a right to be heard on the substantive issues raised by the Chamber's 17 February 2005 Decision. If the Prosecution is correct, and this rejection is unfounded, then the status conference would proceed on an unfair basis, since it would emerge from a substantive decision made by a Chamber without the affected party having had a proper opportunity to be heard on the matter. In addition, the Chamber's erred application of the law on waiver further increases this state of unfairness since it presumably precludes the Prosecution to make submissions on the issues raised in the Prosecutor's Position during the same conference. Further, if not timely corrected, the incorrect application of the waiver doctrine could even lead to confusion as to the Prosecution's right to oppose further status conferences convened by the Chamber despite the Prosecution's clear position on this issue, a situation capable of leading to further unfairness to the Prosecution.<sup>18</sup>

26. The denial of the right to be heard also affects the expeditiousness of the proceedings. By denying the Prosecution's request to be heard, the Chamber has deprived itself of the benefit of the Prosecution's arguments in relation to the legal and factual basis of the scheduled conference. The Decision expressly states that the Chamber "*declines* to consider the submissions made in the

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<sup>18</sup> The Prosecution submits that a conclusion that the Prosecution has waived its right to oppose future conferences would be a renewed error of law pertaining to the waiver principle, appealable on its own.

Prosecutor's Position" and further rejects its additional request to be heard orally on the relevant issues.<sup>19</sup> Effectively, this means that the Chamber has decided to maintain a decision entered on the basis of an incomplete record, instead of supplementing that record with the necessary legal and factual submissions that would assist the Chamber in reaching an informed conclusion on the relevant issues. If the Prosecution is however correct in its arguments on the lack of a legal and factual basis for the convening of a status conference, and the status conference nonetheless proceeds, then the Chamber would be holding an unauthorized process, with obvious negative consequences for the efficiency and judicial economy of the proceedings. Proceedings that should not be held, but are nonetheless held, can never be "expeditious". If the Prosecution is first granted an opportunity to be heard, the Chamber will be effectively in a better position to determine whether holding this status conference is an authorized and warranted procedural step to take or not, and to do so in a specific decision.

27. Further, depriving the Prosecution of an opportunity to present arguments – and therefore denying the Chamber the assistance that those arguments can provide for a proper determination of the issues- necessarily implies that proceedings will continue with a contentious issue remaining unresolved, and which is bound to arise again<sup>20</sup> if the Pre-Trial Chamber considers that holding status conferences during an investigation is an appropriate course of action. In contradistinction, providing the Prosecution with an opportunity to be heard, and entering an informed decision on the basis of a complete record, will dispose of the issue in a fair and efficient manner.

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<sup>19</sup> Decision at p. 3.

<sup>20</sup> The formula "an issue that would significantly affect [...] the expeditious conduct of the proceedings" has been interpreted as encapsulating situations where "the issue is bound to arise at some time and is bound to affect the proceedings or the outcome". See R. Roth and M. Henzelin, *The Appeal Procedure of the ICC*, in: Cassese, Gaeta & Jones (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 1549.

(d) Immediate resolution by the Appeals Chamber will materially advance the proceedings

28. It is respectfully submitted that appellate intervention at this stage will “materially advance the proceedings”, since a decision by the Appeals Chamber overturning the Chamber’s Decision will prevent the conference to proceed on an unfair and incomplete basis, and will re-focus the judicial process on the substantive issues prior to any decision on the scheduling of such a conference. There will be a proper presentation and consideration of the Prosecution’s arguments and concerns, a hearing to present submissions before the Chamber and to answer questions from the Chamber on the issues raised, and a specific ruling on the basis of a complete record. The quality and procedural fairness of the process will be substantially enhanced and so will the quality of any decision emerging from that process.

29. Even if the Appeals Chamber considers that the Prosecution’s arguments are unfounded, and that the Pre-Trial Chamber proceeded in an appropriate manner by rejecting the Prosecution’s request to be heard, then the status conference will proceed on a much firmer basis, to the extent that the Prosecution’s grievances over the fairness and legal quality of the underlying decision-making process would have been properly considered and dismissed by the highest judicial organ of this Court exercising its powers of appellate review. No allegations of unfairness or legal defect capable of tainting the perceived integrity of the proceedings would remain outstanding.

30. In addition, the Prosecution respectfully submits that the issues raised by the Chamber’s Decision are of general importance for the Court as a whole. The Chamber’s Decision deals with fundamental legal questions, such as whether there is a right of every participant to be heard on a substantive issue before that issue is decided upon -and, if so, the scope of that right-, the availability, function and purpose of interlocutory appeals under Article 82 (1) (d) and the

scope of application of the waiver principle. In a novel institution where the law is still unsettled, timely intervention by the Appeals Chamber on these central issues will not only directly benefit the current proceedings, but also provide extremely valuable guidance for any future proceedings before Chambers of this Court.

31. Immediate intervention by the Appeals Chamber will substantially improve<sup>21</sup> the current proceedings, avert allegations of unfairness and settle important legal principles. It is respectfully submitted that, in light of the issues raised by the Chamber's Decision, and the importance of ensuring proper adjudication of the substantive issues raised by the Chamber's 17 February 2005 Decision, such intervention is at this stage not only warranted, but also necessary.

**Request to suspend the conference pending intervention by the Appeals Chamber**

32. If the Chamber grants leave to file an appeal against its Decision, the Prosecution will request that the appeal have suspensive effect, within the terms of Article 82 (3) and Rule 156 (5). However, considering the current time limitations, and in order to avoid irreparable prejudice to the Prosecution's rights, the Prosecution respectfully requests the Chamber to suspend the scheduled conference, if and when leave to appeal the Decision is granted, pending final determination of the issues by the Appeals Chamber. It is respectfully submitted that it would be inconsistent with basic considerations of justice and fairness if the status conference proceeded as scheduled while the very issue of whether the process leading to such scheduling and thereafter was appropriate and fair is being reviewed on appeal. Proceeding with the conference pending a decision by the Appeals Chamber will

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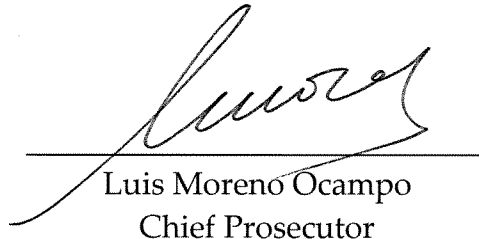
<sup>21</sup> The test under Article 82 (1) (d) is whether appellate intervention may "materially advance" the proceedings. "*Material*" means "important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form" (Black's Law Dictionary, Abridged Sixth Edition, 5<sup>th</sup> Reprint 1995); "*advance*" means "to go or move something forward or to develop or improve something" (Cambridge Advanced Learner's Dictionary, available <http://www.dictionary.cambridge.org>), "to go on towards completion or perfection" (Oxford English Dictionary, available at: <http://www.dictionary.oed.com>).

effectively mean that the issue becomes moot, since prejudice to the appealing party would occur before the Appeals Chamber can decide on any remedial action.

### **Conclusions**

33. For the foregoing reasons, the Prosecution respectfully requests the Chamber to:

- (a) Consider this application for leave to appeal to have been properly filed within the time-limits set forth in Rule 155;
- (b) To grant leave to appeal the Chamber's 9 March 2005 Decision; and
- (c) To suspend the scheduled status conference pending final determination of the issues raised in this document by the Appeals Chamber.



Luis Moreno Ocampo  
Chief Prosecutor

Dated this 11th day of March 2005

At The Hague, The Netherlands