

**Cour
Pénale
Internationale**

**International
Criminal
Court**

No.: ICC-01/04

Date: 6 February 2006

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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 CONGO

Public Document

**Prosecutor's Reply to "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 6"**

The Office of the Prosecutor

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Summary

1. The Prosecution files this document in reply to the “Observations du représentant légal de VPRS 1 à 6 suite à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la chambre préliminaire I sur les demandes de participation à la procédure de VPRS 1 à 6”. In that filing, the legal representative of VPRS 1 to 6 (“the Respondent”) requests that Pre-Trial Chamber I reject the Prosecution’s Application for Leave to Appeal. The Prosecution submits that the arguments advanced by the Respondent misconstrue the applicable legal test for determining whether leave should be granted under Article 82 (1) (d), misrepresent the Prosecution’s position, and misstate the terms of the decision for which leave to appeal has been requested. In addition, the Respondent makes submissions on matters going to the heart of the merits of the appeal, which are immaterial for the purposes of determining whether leave should be granted, and cannot be properly discussed before this Chamber.

Background

2. The Applicants filed Applications for Participation in the Proceedings No. 01/04-1/dp to 01/04-6/dp and a Memorandum in Support of Applications No. 01/04-1/dp to 01/04-6/dp *ex parte* on 26 May 2005. Pursuant to the Decision on Protective Measures Requested by Applicants 01/04-1/dp to 01/04-6/dp, delivered by the Chamber on 21 July 2005, the Prosecution filed a reply on 15 August 2005.
3. On 17 January 2006, the Pre-Trial Chamber rendered its “Décision sur les Demandes de Participation à la Procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6” (“the Decision”), which granted the Applications.
4. On 23 January 2006, the Prosecution filed an “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” (“the Application for Leave”). In response, the Respondent filed “Observations du représentant légal de VPRS 1 à 6 suite à la requête du Procureur sollicitant l’autorisation d’interjeter appel de la décision de la chambre préliminaire I sur les demandes de participation à la procédure de VPRS 1 à 6” (“the Response”) on 27 January 2006.¹

¹ The Prosecutor notes that a response to an application for leave to appeal must be filed within three days of notification under Regulation 65 (3). The official notification of the Application for Leave was on 23 January 2006; therefore any response should have been filed by 26 January 2006. The Prosecution also notes that the Observations do not comply with certain requirements of Regulation 36(4), as the body of the submissions does

5. The Prosecution applied for leave to reply to the Response on 30 January 2006. The Pre-Trial Chamber granted such leave in its “Décision sur la requête du Procureur sollicitant l'autorisation de déposer une réplique” on 1 February 2006.

Argument

6. As already noted, many of the arguments raised by the Respondent do not pertain to the confined issue of whether leave to appeal should be granted but rather go to the merits of a future appeal.² The object of the present proceedings is solely to determine whether the Decision impacts on the fairness and expeditiousness of the proceedings and whether these proceedings may benefit from the timely intervention of the Appeals Chamber. The correctness of the Decision is a matter that can be considered only by the Appeals Chamber, if and when leave to appeal is granted. Accordingly, the Prosecution will only address in this Reply those arguments presented by the Respondent which properly relate to the grant of leave. By proceeding in this way, the Prosecution is neither conceding any issue raised in the Response that is not addressed in this Reply, nor foregoing its right to address those arguments in a future appeal.
7. The arguments advanced by the Respondent can be grouped in the following categories: (1) general arguments pertaining to the Application for Leave, alleging that the document is drafted in general and abstract terms, and that it primarily refers to hypothetical risks that cannot be properly assessed at this stage of the proceedings;³ (2) arguments pertaining to whether the Decision involves an issue that would affect the fair and expeditious conduct of the proceedings; and (3) arguments pertaining to whether intervention by the Appeals Chamber would materially advance the proceedings. The Prosecution will deal with each category of arguments separately below.
- (a) The Decision involves actual, not hypothetical, consequences for the integrity, fairness and expeditiousness of the proceedings*
8. The Application for Leave does not refer to hypothetical or abstract considerations, as claimed by the Respondent,⁴ but to specific consequences that, it is submitted, flow naturally from the terms of the Decision. Further, the test in Article 82 (1) (d) – the only

not have 1.5 line spacing and many of the pages do not have at least a 2.5 centimeter margin at the top. While the Prosecution does not take issue with these formal irregularities in this instance, it stresses the importance that all participants abide by the Regulations of the Court in the preparation and filing of documents.

² For example Response, para. 4. Further examples are provided below at para. 12 of this Reply.

³ See in particular Response, paras. 5 and 6.

⁴ See, *inter alia*, Response, para. 5.

requirement that must be satisfied at this stage – refers to the manner in which a decision “affects” the fair and expeditious of the proceedings, i.e., the test primarily involves the *effects* of such decision, and therefore necessarily demands that a participant seeking leave to appeal identify and explain the future consequences of the decision.

9. Prior to developing its arguments, the Prosecution must once more stress the particular breadth and scope of the Decision. Under the Chamber’s ruling, the Court will be forced to extend participation at the investigative stage to a broad category of persons, on the basis of a very general determination of their personal interests; those individuals will be entitled, *inter alia*, to file evidence with the Chamber, which may be completely unrelated to the focus of the investigation in question and any future case stemming from it; the form of participation established in the Decision can even extend to specific instances of access to confidential information, thereby increasing the risks to persons and to protected material; the Decision can further impact on the Court’s ability to effectively protect persons in danger by virtue of their cooperation with the Prosecution’s investigative efforts if, as the Respondent claims,⁵ the Court (in particular the Victims and Witnesses Unit) is required to engage in protective activities relating to those victims who have been allowed to participate.⁶ The proposition that a decision which has such a broad spectrum of far-reaching consequences for the Court as a whole would not involve issues affecting the fair and expeditious conduct of the proceedings, and would not require timely intervention by the Appeals Chamber, is, in light of the foregoing, untenable.
10. The Prosecution further notes that the arguments advanced in its Application for Leave primarily referred to matters that automatically flow from the Decision. The detrimental effects to the rights of the defence, for instance, instantly flow from the imbalance created by the Decision and from the arguable prejudgement arising from the test adopted by the Chamber to make individual determinations under Rule 85.⁷ Similar considerations apply to other aspects of the Decision, already highlighted by the Prosecution in its Application for Leave: under the terms of the Decision, any person that has suffered harm as a consequence of conduct that can qualify as a crime under the

⁵ See paras. 19-20 below.

⁶ This list of consequences is by no means exhaustive.

⁷ See Application for Leave, paras. 20-28. The Prosecution notes that the Respondent has dealt with these points in a summary fashion, and has apparently decided to omit altogether the question of prejudgement arguably stemming from the test developed by the Chamber.

jurisdiction of the Court can participate *now*, regardless of whether such conduct is related to the ongoing investigative efforts or any future case – a feature of the Decision that, as the Respondent rightly concedes, could lead to “a very large number of victims participating”⁸; victims whose participation has been admitted are *already* entitled to present evidence before the Chamber, a feature of the Decision that substantially modifies the role of the Pre-Trial Chamber and the system of flow of information to it, as enshrined in the Statute and the Rules; the same applies to their ability to request undefined “special procedures” from the Chamber.⁹

11. None of the arguments raised by the Prosecution are hypothetical or abstract: the effects of the Decision to the fairness and expeditiousness of the proceedings are clear and will not be avoided merely by repeating that they are “pure conjecture”.¹⁰ Further, the vast majority of the arguments offered in support of the Prosecution’s Application for Leave relate to *immediate* consequences of the Decision.¹¹

(b) The Decision affects the fair and expeditious conduct of the proceedings

12. The Respondent has failed to offer any arguments that effectively contradict those brought by the Prosecution in support of its Application for Leave. Further, rather than addressing the issues raised by the Prosecution in its Application, the Response contains a number of considerations as to the correctness of the Decision, passages of which are often reproduced without further elaboration. For instance, the Respondent states, *inter alia*, that:

- It is “difficult to see how the Appeals Chamber could reach a different conclusion to that of the Pre-Trial Chamber with regard to the meaning of Article 68 (3)” (para. 4).¹²

⁸ Response, para. 23.

⁹ These arguments have already been developed in the Prosecution’s Application for Leave, see para. 16.

¹⁰ Response, para. 5.

¹¹ The Prosecution notes that the Respondent claims that the Prosecution contradicts itself when it recognizes the existence of a body of procedural rights afforded to victims by the Statute and the Rules, but simultaneously opposes the Decision (Response, para. 6). The Respondent apparently fails to identify the core issues of the current litigation: there is no dispute as to the existence of procedural rights afforded to victims; what is in issue is the *scope* of those rights, and in particular whether they extend to the investigative stage, in the manner determined by the Decision. This, in any case, goes to the merits of an eventual appeal, and not to the question of whether leave to appeal ought to be granted.

¹² Contrary to the “paradox” purportedly identified by the Respondent in para. 4, the Prosecutor has not admitted that the investigation stage constitutes proceedings – the test in Article 82 (1) (d) is applied by looking at the impact that the Decision will have on the instant judicial proceedings or those that will arise out of the investigation.

- Giving 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”, “without giving access to the record of the investigation”, the Chamber reasonably concluded that victim participation in such a framework “cannot have an adverse impact on the investigation”, and that it does not “affect the Prosecutor’s capacity to conduct the investigation” (para. 17).
 - The participation of victims during the investigation is in conformity with international human rights law (para. 18).
 - The participation of victims during the investigation is in fact necessary for preserving the independence and impartiality of the Office of the Prosecutor (para. 19).
 - The Court is equipped to handle and assist the participation of victims (e.g. Victims’ Participation and Reparation Section, Office of Public Counsel for Victims) (para. 25).
 - The rights of victims do not affect in any way the rights of the Prosecution, Defence or the function of the Court organs. This is why the Prosecutor’s request must be rejected (para. 34).
13. All these arguments go to the merits of a future appeal, if this Chamber grants leave, and accordingly should have no bearing on the current determination of the discreet and much more confined issue of whether leave to appeal ought to be granted by the Pre-Trial Chamber. The relevant question here is not whether the Prosecution’s impugning of the Decision is correct, a matter that cannot be decided in this forum; rather, the question is whether the Decision involves issues that would affect the fair and expeditious conduct of the proceedings, and for which an immediate resolution by the Appeals Chamber – either confirming, overturning or modifying the Decision – would materially advance the proceedings (Article 82 (1) (d)).
14. The Prosecution will briefly address in the following paragraphs the main remaining arguments offered by the Respondent in relation to the first limb of Article 82 (1) (d).

Access to confidential material

15. The Respondent claims that, contrary to the Prosecution’s position, the Decision does not raise “a question of allowing victims access to confidential documents which might prejudice the diligence of investigations and the proceedings”, but merely deals with the

participation of victims “within the framework of that diligence”.¹³ It is respectfully submitted that the Respondent misstates the terms of the Decision. The Pre-Trial Chamber has expressly reserved the right to determine access to closed session hearings on a case-by-case basis;¹⁴ further, the same Decision states that non-public documents in the case-file will not be available to victims “for the time being”.¹⁵ Accordingly, access to sensitive information in some circumstances is indeed envisioned in the Decision. The Prosecution need not repeat here its arguments on the detrimental consequences to the integrity and impartiality of the investigation and to the safety and well-being of persons that undue access to sensitive information by third parties can entail.¹⁶

Ability to appeal interlocutory decisions prior to the trial stage

16. The Prosecution has already outlined its interpretation of fairness to this Chamber: fairness requires a Chamber to respect the fundamental rights and obligations of all participants (including the rights of future participants, where they may be affected by the current decision);¹⁷ equality of arms¹⁸ is *one* element of fairness.
17. The Respondent recites PTC-II’s observation on the type of proceedings in which fairness has been raised in the *ad hoc* tribunals.¹⁹ In those tribunals, the judicial organ is rarely involved until a person is in custody and a trial is approaching or underway. Their jurisprudence thus naturally focuses on decisions taken once formal proceedings preparatory to the trial, or the trial itself, have commenced. In contrast, the creation of Pre-Trial Chambers means that judicial decisions in the ICC are taken at a much earlier stage. These decisions may have great impact on the fair and expeditious conduct of the proceedings that flow from an investigation.²⁰ On this point, the structural difference render the analogy false: the Chamber should not deny the importance and effects of a Pre-Trial Chamber decision by restricting itself to the circumstances in which other jurisdictions, which do not include similar judicial structures, have acted.

¹³ Response, para. 17.

¹⁴ Decision, para. 74.

¹⁵ Decision, para. 76 and *Dispositif*.

¹⁶ See Application for Leave, paras. 17-18.

¹⁷ See Application for Leave, para. 12.

¹⁸ The Respondent refers to this element in their Response, at para. 18.

¹⁹ Response, at para. 18, citing PTC-II Decision at para 30.

²⁰ See also Application for Leave, para 12.

The Decision can lead to a vast number of victims seeking participation

18. In a striking assertion, and after conceding that the Decision, given the particular nature and scope of the crimes falling under the jurisdiction of the Court, can lead to a “large number of victims participating”, the Respondent claims that it has not been “established” that participation at the investigative stage would result in participation of a larger number of victims than at subsequent stages of the proceedings.²¹ This particular contention is misplaced: it is merely common sense that a Decision that enables “*situation* victims” to participate across the entire investigation will, in the ordinary course of events, lead to a larger number of victims seeking participation than one that would only permit “case victims” (necessarily, a much more confined universe of individuals) to apply for participation in specific cases. Given the scale of criminality in the DRC, thousands of individuals will qualify for participation under the interpretation adopted in the Decision (including the interpretation of when a victim’s personal interests are affected). As the Decision would require that participation be granted to such numbers if they apply, it will gravely affect the expeditious conduct of the proceedings.²²

The consequences of the Decision for the Court’s ability to protect persons

19. The arguments advanced by the Respondent on this point not only do not refute those offered by the Prosecution, but actually *confirm* the need for appellate review of the Decision, within the terms of Article 82 (1) (d). The Respondent argues that the “Registry, and especially the Victims and Witnesses Unit, must provide for the protection of victims appearing before the Court, *hence including the participating victims*”;²³ further, victims who request to participate find themselves “in an even more vulnerable position when they have not yet been authorised to participate, as only such authorisation may entitle them to the potential enjoyment of the protection system provided by the Court”.²⁴

20. The implications, under the Respondent’s understanding of the Decision, for the Court’s ability to protect persons are apparent: the number of persons to be protected increases

²¹ Response, para. 23.

²² The fact that the Decision will impact on the expeditious conduct of the ongoing proceedings does not itself necessarily constitute an error in the Decision. However the question of whether the Decision struck the correct balance is a question of correctness, which is a matter for the Appeals Chamber, not the grant of leave.

²³ Response, para. 27. Emphasis added.

²⁴ Ibid.

exponentially, and protection at the investigative stage is no longer predicated solely on the need to ensure that persons approached in the course of ongoing investigative efforts do not suffer harm as a result of their cooperation with the investigation, but now also on the desire of third parties, who may have never been approached by the Prosecution, to participate in the investigation. The additional burden on VWU, in particular, which already faces a formidable task involving three different situations and only has very limited resources, can be enormous, and ultimately reach the point of precluding the Unit from properly assisting those victims and witnesses that are in danger as a result of their cooperation with the investigation. The Prosecution need not expand here its arguments as to the scope of the Court's protective duties and the limits to its ability to provide for effective protection. It suffices for the confined purposes of the instant litigation to stress that a Decision that can lead to such a profound transformation of the Court's protective scheme necessarily has to affect the fairness and expeditiousness of the proceedings.

Relevance of the "outcome of trial" element in Article 82 (1) (d) for the purposes of this litigation

21. The Respondent requests the Chamber to dismiss the Application for Leave as it does not discuss whether the Decision would affect the outcome of the trial. The Respondent interprets Article 82 (1) (d) as requiring that a decision affect both "the fair and expeditious conduct of the proceedings" and "the outcome of the trial" cumulatively, and cites the PTC-II decision in support.²⁵ Article 82 (1) (d) clearly states that an issue must affect "the fair and expeditious conduct of the proceedings or the outcome of the trial".²⁶ The Respondent has also misinterpreted the decision of PTC-II, which states that affecting the outcome of the trial is an "alternative limb" – i.e. that effect on either "the fair and expeditious conduct of the proceedings" or "the outcome of the trial" is capable of sustaining an application for leave to appeal.²⁷ If the Chamber is satisfied that the Decision involves an issue that would affect that fair and expeditious conduct of proceedings, and that immediate resolution by the Appeals Chamber may materially advance the proceedings, then leave should be granted.

²⁵ Response, paras. 29-30.

²⁶ Emphasis added. See Application for Leave, para. 9 and footnote 6. The Response itself refers to the requirement as "or the outcome of the [related] trial" in paras. 3 and 8.

²⁷ PTC-II Decision, para. 45.

(c) *Intervention by the Appeals Chamber will materially advance the proceedings*

22. Whether immediate resolution of the issue may materially advance the proceedings should be determined in light of the underlying principle of Article 82 (1) (d), which regulates when, not whether, a party may appeal an issue.²⁸ The Respondent does not challenge the Prosecution's submissions that these are not issues that could be addressed as part of any final appeal, and that granting leave to appeal will not delay the proceedings.²⁹

23. The Respondent only addresses the three issues raised in paragraph 39 of the Application for Leave.³⁰

(a) The first argument is based on the Respondent's earlier arguments relating to the fairness of proceedings, which have been addressed above.³¹ The Respondent does not appear to dispute that, if there is an issue which may affect the fairness of the proceedings, then the danger that the decision will later result in proceedings being nullified is an instance in which immediate resolution may materially advance proceedings.³²

(b) The Respondent's arguments on the second issue likewise repeat arguments made, and addressed to the extent that they are relevant to Article 82 (1) (d), above.³³

(c) On the third issue, the Respondent appears to confuse certainty (over the scale of victim participation) with clarity (of the terms of the Decision). The Decision leaves a range of the parameters of victim participation in the discretion of the Pre-Trial Chamber.³⁴ The discussion and guidance from the Appeals Chamber on the factors that should guide these parameters would advance proceedings by providing certainty that would allow Court organs involved in victim participation to plan and conduct their tasks. Further, if these issues are not resolved by the

²⁸ Application for Leave, para. 37 and authorities cited therein.

²⁹ Application for Leave, paras. 40 and 41.

³⁰ Response, at paras. 32-34.

³¹ See paras. 12-20 above.

³² Application for Leave, para. 37, footnote 21, citing *Prosecutor v Bagosora*, ICTR-98-41-T, Decision of 11 September 2003 at para. 9.

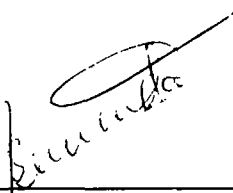
³³ See in particular para. 18 above.

³⁴ For example Decision at paras. 74, 75 (referring to undefined "specific procedures) and 76 (no access to non-public documents "for the time being"). See also para. 72 (granting a broad discretion to determine that personal interests are affected by the mere fact of an investigation in a situation). The Response itself alludes to the uncertain scope and scale of participation in its constant references to the generic obligation on the Chambers to preserve the rights of the Defence and a fair trial in paras. 12-16, but appears to make respect for the rights of the Defence and a fair trial subject to the overriding interest of victim participation in para. 11.

Appeals Chamber at this stage, particular instances of victim participation may be challenged in final appeals. While that could never directly resolve the issue of participation across the entire situation, it could cast doubt on the propriety and legality of a broad range of instances of prior participation.

Conclusion

24. It is respectfully submitted that the exchange between the Respondent and the Prosecution further confirms the need to allow the Appeals Chamber to review the Decision. The exchange has exposed a substantial difference of views on the interpretation and implications of fundamental provisions of the Statute, in turn involving issues which go to the very heart of the functioning of the Court.
25. The Prosecution submits that the Respondent has failed to provide any relevant arguments capable of countering those advanced in the Prosecution's Application for Leave. The Respondent's failure to address the fundamental importance of the Decision, and the scope of its implications, does not alter the way in which the issues covered by the Decision affect the fair and expeditious conduct of the proceedings. In this sense, the Prosecution submits not only that the Decision amply meets the test for leave to appeal under Article 82 (1) (d); it has, as the Prosecution has demonstrated, far-reaching consequences for all organs of the Court and all procedural participants before it. It is in the interest of all organs and participants, including the Respondent, that a constitutional decision with such fundamental implications be properly reviewed by the highest judicial body of this Court.



Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of February, 2006

At The Hague, The Netherlands