

**Cour
Pénale
Internationale**

**International
Criminal
Court**

No.: ICC-01/04

Date: 09 November
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 DEMOCRATIC REPUBLIC OF CONGO

Public Redacted Version

**Decision following the Consultation held on 11 October 2005 and the
Prosecution's Submission on Jurisdiction and Admissibility filed on 31 October
2005**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Mrs Fatou Bensouda
Mr Ekkehard Withopf
Ms Lyne Décarie

Counsel for Defence
Mr Tjarda van der Spoel

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

NOTING the Prosecutor’s Request for Measures under Article 56 filed on 19 April 2005 (the “Prosecutor’s Request”);

NOTING the Decision to Hold Consultation under Rule 114 issued by Pre-Trial Chamber I on 21 April 2005 (the “Decision to Hold Consultation”);

NOTING the Decision on the Prosecutor's Request for Measures under Article 56 issued by Pre-Trial Chamber I on 26 April 2005 (the “Decision on the Prosecutor's Request”);

NOTING the Report of the Netherlands Forensic Institute (2005.05.02.089) filed on 4 August 2005 (the “NFI Report”);

NOTING the *Ad hoc* Defence Counsel’s Submission pursuant to the Decision of Pre-Trial Chamber I on the Prosecutor’s Request for Measures under Article 56 of the Rome Statute of the International Criminal Court (the “*Ad hoc* Counsel for the Defence’s Submission”) filed on 22 August 2005, whereby he makes some preliminary remarks on issues of jurisdiction and admissibility,¹ challenges the existence of a unique investigative opportunity concerning the examinations

¹ The *Ad hoc* Counsel for the Defence’s Submission, No. ICC-01/04-86-Conf 22-08-2005, par. 8-13.

conducted by the NFI,² requests the adoption of additional measures³ and submits some additional questions to the NFI concerning the NFI Report;⁴

NOTING the Prosecution's Observations on the NFI 28 July 2005 Forensic Report (the "Prosecution's Observations") filed on 23 August 2005, whereby the prosecution states that the observations of the *Ad hoc* Counsel for the Defence "exceed the scope of the submission as determined by the Pre-Trial Chamber's Decision"⁵ and that the prosecution requests translation of the Dutch portions of the NFI Report⁶;

NOTING the Submission of the NFI Correspondence of 20 September 2005 (the "NFI Correspondence") filed on 29 September 2005, whereby the NFI answers most of the observations made by the prosecution and awaits further guidance from Pre-Trial Chamber I;

NOTING the Decision to Hold Consultation filed on 5 October 2005 and the said consultation held on 11 October 2005 (the "Consultation"), whereby the prosecution was requested to submit, within three weeks, comments on the questions of jurisdiction and admissibility raised by the *Ad hoc* Counsel for the Defence ;

²The *Ad hoc* Counsel for the Defence's Submission, No. ICC-01/04-86-Conf 22-08-2005, par. 14-20.

³The *Ad hoc* Counsel for the Defence's Submission, No. ICC-01/04-86-Conf 22-08-2005, par. 21.

⁴The *Ad hoc* Counsel for the Defence's Submission, No. ICC-01/04-86-Conf 22-08-2005, par. 22-32.

⁵The Prosecution's Observations, No. ICC-01/04-87-Conf 23-08-2005, par. 1, footnote 2.

⁶The Prosecution's Observations, No. ICC-01/04-87-Conf 23-08-2005, par. 3-6.

NOTING the Prosecution's Response to Defence Counsel *Ad hoc*'s 22 August 2005 and 11 October 2005 Submissions on Jurisdiction and Admissibility (the "Prosecutor's Submissions") filed on 31 October 2005;

NOTING articles 1, 19 (2) and 56 of the Rome Statute (the "Statute");

CONSIDERING the context of article 56 of the Statute and the Decision on the Prosecutor's Request, whereby the Registrar was ordered to appoint the *Ad hoc* Counsel for the Defence to represent the "general interests of the defence for the purpose of the forensic examination";

CONSIDERING that challenges to the jurisdiction of the Court or the admissibility of a case pursuant to article 19 (2)(a) of the Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under article 58; that at this stage of the proceedings no warrant of arrest or summons to appear has been issued and thus no case has arisen; and that the *Ad hoc* Counsel for the Defence has no procedural standing to make a challenge under article 19 (2)(a) of the Statute;

CONSIDERING that REDACTED; that the prosecution contends that the items examined by the NFI were handed over REDACTED on the condition that they would be returned to it within six months or at the latest once the forensic processing

⁷ REDACTED.

had been completed;⁸ that there is a likelihood that the items submitted for the forensic examination will not be available at subsequent stages of the proceedings; and that, therefore, as stated in the Decision to Hold Consultation, there is a unique investigative opportunity within the terms of article 56 (1)(a) of the Statute;

CONSIDERING that the measures adopted by the Chamber under article 56 (1)(b) and (2) of the Statute are sufficient to adequately ensure the efficiency and integrity of the proceedings and the protection of the general interests of the defence in the likelihood that the items submitted for the forensic examination will not be available at subsequent stages of the proceedings;

CONSIDERING that Pre-Trial Chamber I requested the internal translation from Dutch into English of pages 131 to 317 (inclusive) of the NFI Report, which according to the NFI corresponds to the forms filled in by the investigators in order to ensure the quality of the research⁹; that such a translation was completed on 4 November 2005; that, previously, the prosecution was not in a position to fully submit its additional observations and questions; and that the *Ad hoc* Counsel for the Defence indicated to Pre-Trial Chamber I that, as a Dutch speaker, he read the entire report and its annexed forms¹⁰ and was not prejudiced by the fact the forms annexed to the NFI Report were written in Dutch;

CONSIDERING that the prosecution originally assured Pre-Trial Chamber I that it would not be involved in the forensic examinations performed by the NFI¹¹; that, in

⁸The Prosecution's Request, No. ICC-01/04-17-Conf 19-04-2005, par 11

⁹The NFI's Correspondence, No. ICC-01/04-88-Conf-AnxII 29-09-2005, page 2.

¹⁰Consultation held on 11 October 2005, Transcripts, page 32, lines 17-23.

¹¹The Decision on the Prosecutor's Request, No. ICC-01/04-21 26-04-2005, page 3

the Prosecution's Observations, the prosecution requested the Chamber "to allow the Prosecution's Forensic Expert [to have] access to the items as detailed in paragraph 9 and [examine] them"¹²; and that during the Consultation held on 11 October 2005, the prosecution explained to the Chamber that after consideration of the entire NFI report in English, it would be in a better position to inform Pre-Trial Chamber I of the necessity to proceed with further forensic examination together with the *Ad hoc* Counsel for the Defence and in the presence of the NFI forensic expert¹³;

FOR THESE REASONS,

REJECTS

- (i) the preliminary remarks on the jurisdiction of the Court, the admissibility of a case and the challenge to the existence of a unique investigative opportunity concerning the examinations conducted by the NFI contained in paragraphs 8 to 20 (inclusive) of the *Ad hoc* Counsel for the Defence's Submission; and
- (ii) the request for the adoption of additional measures contained in paragraph 21 of the *Ad hoc* Counsel for the Defence's Submission;

RECALLS that the prosecution has a period of fifteen days to submit its additional questions or observations on the English translation of the NFI Report as of 4 November 2005, the date of the notification of the NFI Report, as ordered by Pre-Trial Chamber I during the Consultation held on 11 October 2005;

ORDERS the prosecution to notify Pre-Trial Chamber I if it maintains its requests to:

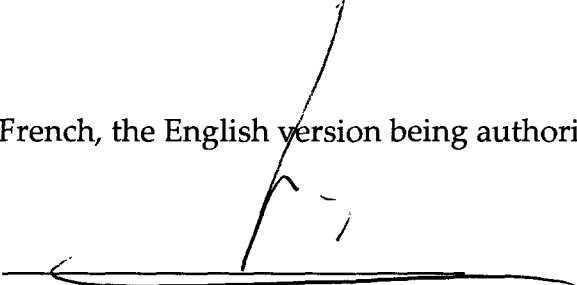
¹²The Prosecution's Observations, No. ICC-01/04-87-Conf 23-08-2005, par. 10 (iv).

¹³Consultation held on 11 October 2005, Transcripts, page 19, lines 7-24.

- (i) proceed with the forensic examination of REDACTED; and
- (ii) proceed with further examination of the REDACTED;

INFORMS the NFI that the Chamber will instruct it as to when to produce its final report and as to the content of such a report once the fifteen-day deadline given to the Prosecutor has expired;

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



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Dated this Wednesday 9 November 2005

At The Hague

The Netherlands