Cour Pénale Internationale

International Criminal Court

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

Date: **15 March 2006**

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PRE-TRIAL CHAMBER II

Before:	**Judge Mauro Politi**
	Judge Fatoumata Dembele Diarra
	Judge Ekaterina Trendafilova
Registrar:	**Mr Bruno Cathala**

SITUATION IN UGANDA
Case 01/05

Under Seal
***Ex Parte*, Prosecutor Only**

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

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Introduction and Relief Sought

1) The Prosecution respectfully seeks leave to appeal this Chamber's "Decision on Prosecutor's Application That The Pre-Trial Chamber Disregard As Irrelevant The Submission Filed By The Registry on 5 December 2005" ("the Decision"), under the authority of Article 82(1)(d) and Rule 155.

2) The Decision contains several rulings which are unprecedented in the jurisprudence of this and other international criminal tribunals and alter the fundamental principles under which current and future pre-trial and trial proceedings in this Court will be conducted. First, the Decision disregards existing procedures in the Statute and Rules and instead creates an entirely new procedure for the Pre-Trial Chamber to receive information and potential evidence. It does this by imposing on the Registry an implied duty to furnish to the Chamber any information in its possession – including information furnished to the Registry by the participants for other, independent purposes – which might potentially be deemed relevant by the Chamber to an exercise of its functions under Arts. 57(3)(c) (and potentially by implication other articles). Second, the Decision confers upon the Registry a *proprio motu* power[1] to initiate filings and provide information and potential evidence to the Chamber, even over the objections of the parties and participants who provided that information to the Registry in confidence. Finally, the Decision endorses a practice whereby the Chamber may receive communications from the Registry which are intended to influence the Chamber's case-related decisions without either notifying affected parties or making any record of the informal communications between the Registry and the Chambers.

3) In this instance, the Registrar provided to the Pre-Trial Chamber, over the OTP's objection and following unrecorded communications with the Chamber, potential evidence which the OTP had provided to the Registry to enable the Registry to perform the administrative function of ensuring ICC staff security. With respect to this potential evidence, it has always been the Prosecution's view that if the Chamber determined that the information was relevant to the Chamber's victim- and witness-protection duties under Art. 57(3)(c), the Statute, Rules and

[1] Decision, para. 33.

Regulations provided proper channels for the Chamber to receive the information. These channels included a request directed at the OTP, rather than the Registry, in conformity with Regulation 48, and on-the-record reporting directly from the VWU to the Chamber.

4) The Decision, however, bypasses these uncontroversial procedures in favour of creating a completely new pathway by which information may now be provided to the Pre-Trial Chamber. In changing the system, the Decision crosses two Rubicons. First, the Decision expands the Pre-Trial Chamber's authority by fundamentally misconceiving *proprio motu* power: it transforms the undeniable right of the Chamber to decide certain matters, regardless of a request from the participants, into a far broader power to inquire into a matter, and receive information from non-participants, in order to see whether that information *might* divulge some reason for Pre-Trial Chamber's intervention. The Decision authorizes the "fishing expedition" which constitutes inquiry, not adjudication. Second, the Decision re-positions the Registry, whose neutrality is scrupulously protected in the Statute itself, as a party, because it authorizes the Registry to initiate filings and communications with the Chamber, for the purpose of affecting judicial decision-making. Indeed, under the terms of the Decision the Registrar becomes an investigative aide who may override the objections of the participants in order to fulfil his superseding duty to the Pre-Trial Chamber.

5) For the reasons stated below, the novel and broad legal determinations contained in the Decision significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and involve issues the immediate resolution of which may materially advance the proceedings. Accordingly, it is respectfully submitted that the exceptional circumstance envisioned by Art. 82(1)(d) is presented and that leave to appeal should be granted.[2]

[2] The Prosecution notes that the Chamber's Decision can be read as suggesting that the Chamber considered itself to have determined a jurisdictional issue, because it emphasizes specific jurisdictional questions, including the applicability and consequences of the *Kompetenz-Kompetenz* principle (see *inter alia* Decision, paras. 22-25). Accordingly, the Prosecution cannot completely rule out the possibility that the Chamber's Decision would be viewed as a "decision with respect to jurisdiction," within the terms of Article 82 (1) (a). If that is the case, then this proposed appeal would lie as a matter of right and should be governed by Rule 154 and Regulation 64. If this is the Chamber's reading of its own Decision, then the Prosecution respectfully requests that the Chamber determine that it lacks jurisdiction to entertain this Application and forward this notice to the Appeals Chamber.

Procedural History

6) On 5 December 2005, the Prosecution applied to this Pre-Trial Chamber to supplement the record with a description of informal communications which had occurred between the Registry and the Chamber.[3] The application described the following facts, none of which appear now to be disputed:

- The OTP had learned from the Registry that about three weeks earlier, in mid-November, the Registry and Chambers had had an off-the-record conversation, without notifying the OTP.[4] The conversation concerned a letter which the OTP had collected in Northern Uganda from a third party and provided to the Registry in confidence to enable the Registry to assess the need, if any, to alter security measures for ICC staff in the field.[5] The letter was purportedly authored by LRA and referenced, in one part, an LRA threat to perpetrate attacks on "white" persons in the region.[6]
- Soon after the initial Registry/Chamber communication, agreement was reached at a meeting among the OTP, the VWU, and ICC Security Services that the purported LRA letter did not affect the adequacy of either victim- and witness-protection measures or staff security measures.[7]
- Just before 5 December 2005, the Registry informed the OTP that the Pre-Trial Chamber and the Registry had engaged in a second and different informal communication in which the Chamber had directed the Registry to file the purported LRA letter.[8] This communication again was conducted without notifying the OTP and off-the-record.[9] After the second informal communication, the Registry contacted the OTP. The OTP objected to the Registry's intention to file the document, explaining that the purported LRA letter

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[3] *See* Prosecutor's Application for Pre-Trial II to Supplement the Record With A Description of Informal Communications Between Registry and the Chamber (5 December 2005) (Public Document), (hereinafter, "Prosecutor's Application"). *See also* Sealed Annex to Prosecutor's Application to Supplement the Record (5 December 2005) (Under Seal) ("Sealed Application").
[4] Sealed Application, para. 3.
[5] Submission By the Registrar [redacted] Kampala Uganda (5 December 2005), ("Registrar's Submission"); *See also* Sealed Application para. 7.
[6] Registrar's Submission, pp. 6-7.
[7] Sealed Application, para. 6; *See* Transcript of 7 December 2005 hearing, English language version, ("Tr"), at pp. 11 and 40.
[8] Sealed Application, para.7; *See* also Tr, p. 12.
[9] Prosecutor's Application para.3; *See* Sealed Application paras. 7 and 8; *See also* Tr, p. 12.

belonged to the OTP, was potential evidence, and should not be filed over the OTP's objection.[10] That same day, the Registrar filed the letter.[11]

7) By its 5 December application, the OTP requested that the Chamber supplement the record with the Chamber's "description" of the "communications" between the Registry and the Chamber and of any "instruction" provided by the Chamber to Registry.[12]

8) On 7 December 2005, the Pre-Trial Chamber conducted a status conference. At that hearing, the OTP did not dispute the Chamber's authority to impose victim and witness protection measures *proprio motu*. The OTP also submitted that Regulation 48 existed to permit the Chamber to request *from the OTP* information within the OTP's possession, in the circumstances enumerated in the regulation itself.[13] The Prosecution contended, however, that the informal Registry/Chambers communications, and the Registrar's filing of the OTP document over the OTP's objection, implicated fundamental issues of fairness.[14] The Prosecution argued that the Chamber was presented with two possible courses of action:

- if the Chamber deemed the purported LRA letter to implicate the adequacy of victim- and witness-protection measures, then the letter should have been requested and received from the OTP, and the Chamber also bore an obligation to supplement the record with a description of its case-related communications with the Registry;[15]
- if, by contrast, the Chamber accepted the agreed-upon assessment of the VWU, the OTP and ICC Security Services that the letter did not implicate the adequacy of victim and witness protection measures, and the Chamber determined additionally that the letter therefore related only to the administrative matter of staff security, then the letter was not properly provided by the Registry, and failed to relate to any matter within the Court's competence, but no supplementation of the record was required since the letter was irrelevant in any event.[16]

[10] Tr, pp. 12 and 21.
[11] Tr, p. 21.
[12] Prosecutor's Application, paras. 1 and 8.
[13] Tr, p. 17.
[14] Tr, p. 16.
[15] Tr, pp.16-17.
[16] Tr, p. 15.

9) In a post-hearing brief invited by the Chamber, the Prosecution reiterated that the issue in dispute was the procedure by which the Chamber received the purported LRA letter, not the Chamber's *proprio motu* power to impose victim and witness protection measures.[17] It renewed its application for the Chamber to "complete the record, by describing any communications between the Chamber and the Registry relating to staff security and the letter," *if* the Chamber found the purported LRA letter to implicate the adequacy of victim and witness protection measures.[18]

10) The rulings in the Decision pertinent to this application are discussed below. The Decision "rejects" the request for supplementation of the record.[19] Absent from the Decision is any description, by the Chamber, of the communications between the Chamber itself and Registry regarding the purported LRA letter. Nor is there any confirmation or denial of the Registry's representation, to the OTP, that the Registry filed the purported LRA letter only after receiving an informal instruction from the Chamber to file the letter, and not on a *proprio motu* basis. The Decision finds the *post hoc* statements of the Registry, as provided in their pre-conference submission and representations at the status conference, sufficient to provide an adequate substitute for the record-keeping required under fundamental fairness principles.[20]

The Potential Errors Justifying Appellate Review

11) This Chamber has stressed that it is not necessary for an application for leave to appeal to address the merits of an argument on appeal, unless those arguments are legally relevant and have a bearing on the criteria set out in Art. 82(1)(d).[21] Those criteria are: (1) whether the issue would significantly affect the fair and expeditious

[17] Prosecutor's Application That the Pre-Trial Chamber Disregard as Irrelevant The Submission Filed by the Registry on 5 December 2005 (Under Seal) (12 December 2005), ("Post Hearing Brief"), paras. 27 and 31.
[18] Post Hearing Brief, para. 8.
[19] Decision, page 48.
[20] Decision, para. 78. The Decision identifies the transcripts of the proceedings, as well as Registry's pre-hearing submission, as a source for "the account of events." *Id.* At the status conference, however, only the Registry representative gave a first-hand account of the communications. He never denied receiving an instruction from the Chamber.
[21] *See* Decision on Prosecutor's Application for Leave to Appeal In Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Art. 58 (hereinafter, "19 Aug 2005 Decision on Leave to Appeal"), dated 19 August 2005, paras. 15 and 23.

conduct of proceedings or the outcome of the trial, and (2) whether the immediate resolution of the issue might materially advance the proceedings.[22]

12) This principle reflects that at this stage in the proceedings, the Chamber need only determine whether the errors alleged in the Decision satisfy the criteria in Art. 82(1)(d), without examining the correctness of the potential appellant's argument. For this reason, this application will identify the potential errors of law, without elaboration, except to the extent that discussion of the merit of the legal issue relates to the standard under Art. 82(1)(d).

13) Three main errors of law are respectfully alleged by the Prosecution. *First*, the Decision expands the authority of the Pre-Trial Chamber beyond any jurisdiction granted by terms of the Rome Statute, Rules and Regulations. This error has three dimensions:

- The Decision wrongly relies upon Rule 103 and Regulations 48 and 46 in finding a broad, implied authority for the Chamber to receive information which *might* lead it to conclude that it has *proprio motu* responsibilities (in this case under Art. 57(3)(c) but perhaps by extension to possible exercises of jurisdiction under Arts. 53(3)(b) and 56(3)(a)).[23] Regulation 48 by its terms permits only requests for information directed to the OTP. Neither Rule 103 nor Regulation 46 address "information" requests at all.
- To grant the Pre-Trial Chamber the authority to receive information from the Registry which might lead it to exercise a *proprio motu* function[24] contravenes the Statute by: (1) disregarding the Prosecutor's express responsibility to act independently in "conducting investigations and prosecutions before the Court," as a means of seeking truth,[25] and (2) the Chamber's express responsibility to maintain the appearance of impartiality.[26]

[22] Art. 82(1)(d); *See* 19 August 2005 Decision on Leave to Appeal, para. 20.
[23] Decision, *e.g.*, paras. 25-27 (Chamber must receive, "without undue delay" "any information which might be relevant for the exercise of [its] powers"; Registry, including its Divisions and Units, must provide this information because the Chamber must "have access to" information necessary to the exercise of its responsibilities).
[24] Decision, para. 33.
[25] *See* Art. 42(1) and 54(1)(a).
[26] *See* Art. 41(2)(a).

- The Chamber erroneously assumes that "jurisdiction to determine jurisdiction" necessarily includes the authority affirmatively to seek information which might lead to intervention.[27] If this proposition were true, every court's jurisdiction would be limitless and self-determined. In any system that separates the investigative and jurisdictional functions, be it in civil or common law, the limit is that a judge must await a case or controversy, rather than seeking one.[28] Even a *juge d'instruction* may not in all circumstances act *ex officio*, *i.e.*, without being triggered by a specific request from the prosecution.[29]

14) *Second*, the Decision expands the authority of the Registry in a manner which contravenes the Statute. Specifically:

- Under Art. 43(2), the function of the Registrar is to serve as the "principal administrative officer." In ruling that the Registry can go beyond the administrative act of providing a "channel" of communications between the participants and the Chamber, *see* Rule 13(1), and provide case-related filings and information of its own initiative,[30] the Decision makes the Registry a *de facto* party, not a neutral administrator.
- The Decision also appears to endorse an erroneously broad view that the Chamber has an obligation to protect all potential witnesses and victims in the situation in question.[31]

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[27] Decision, paras. 22-24.
[28] *See, e.g.*, Claus Roxin, *Straverfahrensrecht*, C.H. Beck, Munich, 2005, pp. 70 *et seq*. (stressing that the investigative judge in Germany can only react to specific requirements made by the prosecution and cannot perform his or her own investigation); Tiziana Trevison Lupacchini, *La Ricusazione del Giudice Nel Processo Penale*, Milano-Dott. A. Giuffrè Editore, 1996, pp. 172 *et seq*. (the investigative judge performs limited functions upon request and within the framework of an investigation controlled by the prosecution).
[29] *See* Jan Woischnik, *Juez de Instrucción y Derechos Humanos en Argentina*, Konrad Adenauer Stiftung/Ad Hoc, Buenos Aires, 2003, pp. 125 *et seq*. (under no circumstance may the investigating magistrate open an investigation without a prior specific requirement from the prosecution).
[30] Decision, para. 33 (Registry may file *proprio motu* certain documents in the record of the proceedings, as part of "servicing" the exercise of the Court's judicial functions); para. 35 ("doctrine of implied powers" support this *proprio motu* power of the Registry); para. 48 (Registry need not obtain "concurrence" that *proprio motu* filing is appropriate from any of the "participants," including in this case OTP).
[31] Decision, para. 68. The Prosecution has sought leave to appeal a similarly broad ruling in the DRC situation that potentially expands the scope of protection to all victims who apply for participation during the investigation. *See* Situation in the Democratic Republic of Congo, ICC-01-03-103, Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings, 23 January 2006 ("Prosecution's Application for Leave to Appeal in the DRC Situation").

15) *Third*, even assuming *arguendo* that the Decision properly defines the scope of authority of the Pre-Trial Chamber and the Registry, it remained error for the Decision to conclude additionally that the Chamber has no obligation: (1) to notify affected party or parties (here, the OTP) of direct Chamber/Registry communications relating to a potential exercise of a judicial function, either at the time of the communication or as soon thereafter as practicable; or (b) to determine or maintain a record in which the Chamber itself describes the off-the-record communications between the Registry and the Chamber about a potential exercise of jurisdiction.[32]

The Criteria for Granting Leave to Appeal under Article 82(1)(d)

16) As is detailed below, the necessary requirements of the test enshrined in Article 82(1)(d) are amply satisfied in this case. The remainder of this application considers, in turn, whether the Decision involves issues which would significantly affect the fair conduct of the proceedings and the expeditious conduct of the proceedings, and whether immediate resolution of those issues may materially advance the proceedings.[33]

A. The Decision Involves Issues Significantly Affecting the Fair Conduct of the Proceedings [34]

1. The Determination to Permit Off-the-Record Chamber/Registry Communications Regarding the Potential Jurisdiction of the Chamber

17) Even assuming that the Decision encompassed only the last of the three legal errors identified above, the Decision would satisfy the requirement under Article 82(1)(d)

[32] Decision, para. 78. Because the Chamber denied the Prosecution's request for supplementation of the record, there remains a contradiction in a fact which goes to a core assumption of the Decision. The Registry stated to the OTP that the Chamber directed the filing of the purported LRA letter, not that it filed the letter *proprio motu*, and the Registry has never withdrawn that allegation. The Decision does not confirm or deny that allegation.
[33] Although the Prosecution disagrees with certain aspects of the manner in which the 19 Aug 2005 Decision on Leave to Appeal construed Art. 82(1)(d), and has reserved its position, *see* Prosecution's Application for Leave to Appeal in the DRC Situation (in particular footnotes 4 and 5, and paras. 12, 29 and 37-38), the disagreements are not relevant for the purposes of the current application, because as is set forth herein the criteria as set forth in the 19 Aug 2005 Decision are satisfied in any event.
[34] Because demonstrating a substantial effect on the fair and expeditious conduct of proceedings is sufficient to meet the first requirement of the test under Art. 82(1)(d), the Prosecution does not develop any argument that the Decision could affect the outcome of the trial. The ways in which the trial process, and the result of the trial, also could become subject to challenge as a result of the procedures endorsed by the Decision, however, should be apparent from the following discussion.

of substantially affecting the fairness of the proceeding.[35] To state that a judge may engage in communications with a third party, for the purpose of gathering information to be used in judicial decision-making, without notifying any of the parties to the proceeding or creating or maintaining any independent record of the communications, drastically alters two of the most fundamental requirements of fairness, in both common and civil law proceedings: (1) any party's right to a complete and accurate record of any particulars of the proceeding, and particularly the basis for any judicial decision-making;[36] (2) any party's right to notification permitting a meaningful right to be heard.[37] The Decision also necessarily derogates the public's interest in having access to the complete record of the proceedings and the basis for decisions and judgements.[38] Finally, the Decision impairs fairness by undermining the appearance of impartiality and integrity of the judges. *See* discussion *infra*. Significantly, while the Decision disclaims any intent to reproduce the features of a *juge d'instruction*,[39] it does not acknowledge that no *juge d'instruction* would fail to maintain a full and accurate dossier of the information gathered during the investigation which was relevant to his or her determinations.

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[35] The 19 August 2005 Decision on Leave to Appeal comments that interlocutory appeals have typically been sought in the *ad hoc* tribunals "at a stage of the trial when both the Prosecutor and the defence have made their respective cases before the Chamber." *Id.*, para. 30. In combination with the Decision's suggestion that fairness is linked (though not necessarily limited) to the concept of "equality of arms," the comment implies that perhaps interlocutory appeals are disfavoured when the appeal arises from ""*ex parte*" proceedings involving only the Prosecutor." The Prosecution, however, does not interpret the Chamber's statements in this fashion, because as this proposed appeal demonstrates, a determination which arguably substantially and equally impairs the rights of all participants can equally be rendered in an *ex parte* proceeding. The relevant consideration is the effect of the ruling on all parties throughout the subsequent proceedings, not the parties present when the ruling was rendered.

[36] *See, e.g.*, *H.A.L. v. Finland,* ECHR Judgment, 27 January 2004, para. 44 ("the right to adversarial proceedings means in principle the opportunity for the parties to court proceedings falling within the scope of Article 6 to have knowledge of and comment on all evidence adduced, or observations filed, with a view to influencing the court's decision"); *Nideröst-Huber v. Switzerland*, ECHR Judgment, 27 January 1997, para 24 (same); *Furtado v. Furtado*, 402 N.E.2d 1024, 1029 n.1 (Massachusetts Supreme Judicial Court 1980) (a "judge may not rely on his private knowledge of particular facts that are not matters of which he can take judicial notice").

[37] *See, e.g.*, *Prosecutor v. Jelisic*, IT-95019-A, Judgment on Appeal, 5 July 2001, para. 27 (existence of *proprio motu* power does not relieve the Chamber of the "normal duty of a judicial body first to hear a party whose rights can be affected by the Decision to be made"); *Ford v. Wainwright*, 477 U.S. 399, 413 (U.S. Supreme Court 1986) (a "fundamental requisite of due process of law is the opportunity to be heard").

[38] *See, e.g.,Prosecutor v. Brdjanin and Talić*, IT-99-36/1, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("there is a public interest in the workings of courts generally [...] not just in the hearings, but in everything to do with their working– which should only be excluded if good cause is shown to the contrary.").

[39] Decision, para. 19.

18) The impact of the Decision upon the fairness afforded all of the parties and participants to this proceeding is direct and substantial. The Decision adopts the view that the Registry may freely engage in off-the-record communications with the Chamber, because of its purportedly neutral status.[40] This proposition might be uncontroversial when applied to communications which involve purely administrative matters: functions like human resources, courtroom management, or budgeting. The Decision, however, makes clear that it is also authorizing unrecorded communications between Registry and the Chamber to enable the Chamber to receive information which may potentially influence the judges' exercise of their functions.[41]

19) This determination has clear, negative consequences upon fairness. Parties and participants to this proceeding who have interests in the information being conveyed and may be affected by the resulting judicial determination will be deprived of the contemporaneous notice enabling them to submit argument on the propriety of the means by which the Chamber received the evidence, any applicable confidentiality restrictions, or the relevance or meaning of the communication received by the Chamber. In addition, the lack of any official and contemporaneous record permanently will deprive the parties and participants of an accurate basis upon which to make objections or comments, if the affected parties ever come to learn of the information received by the Chamber. Meaningful appellate review of the Chamber's decisions cannot occur because of a lack of a record of the Chamber's communications, and thus an independent component of fair proceedings is also frustrated.

20) In addition, the operation of a court system which authorizes off-the-record communications with the judges, for the purpose of affecting judicial decision-making, substantially impacts fairness by affecting the appearance of impartiality of the judges. Under the express terms of the Statute, the judges must not only be impartial, but appear to be impartial. *See* Art. 41(2)(a). By their nature, off-the-

[40] Decision, para. 76.
[41] Decision, paras. 24 and 26 (receipt of information is authorized because it "may have an impact o its determination of whether to exercise its powers and, in the affirmative, on the specific way in which such powers are to be exercised").

record communications, when engaged in by judges for the purpose of informing their case-related decisions, undermine impartiality and integrity:

> If the fact of the communication is at first kept secret and later becomes known, there is an inevitable appearance of bias in the decision-maker. The general rule, founded firmly on the requirements of natural justice, is 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 or contradict it.[42]

Importantly, the point is not any concern about the conduct of the judges. Instead, the problem and the unfairness to the parties arise 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.

21) The rulings permitting off-the-record communications for the purpose of affecting decisions in the case go beyond substantially affecting the fairness of the proceedings. They potentially contravene basic principles of natural justice.

2. *The Determination to Permit the Registry to Initiate Filings and Provide to the Chamber Information Furnished to the Registry by a Participant for a Different Purpose*

22) The rulings in the Decision which expand the authority of the Registry also significantly impact the fairness of the proceedings, for all participants.

[42] *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* (High Court of Australia 1986), 162 CLR 24 V.C. 86/040. The Decision reasons that communications between the judges and a "neutral" entity are somehow less problematic than communications from a party. (Decision, para. 76). This distinction is incorrect; the relevant consideration is whether the communication, from party or non-party, affected the making of judicial decisions in the case. *See, e.g.*, *Commonwealth v. O'Brien*, 673 N.E.2d 552, 562 (Massachusetts Supreme Judicial Court of Massachusetts 1996) ("When a fact finder discusses factual matters of a case with a non-party in the absence of one or more parties, the communication (...) implicates many of the same fairness and due process concerns that result from an ex parte communication"); *United States v. Craven*, 239 F.3d 91, 102 (United States Court of Appeals, 1st Cir. 2001) ("key witnesses or court appointed experts are no exception" to the rule against extra-record contacts regarding the case; the most appropriate communication is " 'an on-record-conference in chambers or an on-the-record conference call so that counsel for all parties may participate' "). Codes of conduct and ethics for judges also support the contention that off-the-record and case-related communications with third parties are as problematic as informal communications with one party. Some of these provisions also emphasize the violation to the principle of impartiality that such communications entail. *See, e.g.*, Code of Ethics of the Federal Judiciary of Mexico, Ch. I (Independence) (obligating judges to reject "all types of recommendation . . . that seek to influence the processing or outcome of the cases submitted to their jurisdiction"); Code of Judicial Ethics of the Republic of Paraguay, Ch II, Art. 21 (Conduct of Judges) (requiring judges to reject submissions from persons extraneous to the judicial structure as well as documents extraneous to the dossier); Code of Conduct of U.S. Judges, Canon 3A(4), Commentary (proscribing all off-the-record communications with judges "concerning a proceeding," by persons including court experts, lawyers, law teachers and "other persons who are not participants in the proceeding," unless the parties consent to the contact); Code of Judicial Ethics of Costa Rica, Art. 9 (Duty of Impartiality) (obligates judges in dealing with the parties to ensure that no perceptions of special treatment can be inferred and extends this obligation also to "dealings with other citizens").

23) The role of the Registry, as transformed by the Decision, impairs the Registry's very ability to administer those proceedings, and therefore necessarily the fairness of the proceedings. The first impact arises from the sheer burden of the implied duty created by the Decision. The Registry is the repository of: media information; communications from the public; information and potential evidence from the OTP which enables the Registry to provide adequate staff security and victim and witness protection; potential evidence from the OTP, defence counsel and victims' representatives which enables Registry to create a database to implement disclosure, to present and store admitted evidence, and to furnish translations; confidential information and potential evidence from defence counsel enabling Registry to support defence services; and confidential information and potential evidence from victims representatives and applicants for participation. The Decision nowhere describes how the Registry is to interpret or meet its new burden to identify and furnish, from this universe of material, information sufficient to permit the Chamber "to determine *whether* a particular matter falls within the scope of the powers of the Pre-Trial Chamber."[43] Even assuming the duty is validly imposed on the Registry, the duty cannot be carried out without requiring the devotion of resources. This will impact upon the ability of the Registry to perform its other obligations and to provide the administrative support necessary for this Court to conduct fair proceedings.

24) More fundamentally, by making the Registry the Chamber's "service" provider in evaluating and collecting information, even over the objections of the participants who provided that information to the Registry, the Decision destroys the neutrality which is necessary for the Registry to perform its statutory functions. Put simply, the Registry cannot operate if the participants cannot trust that the Registry will maintain the information or potential evidence provided by the participant, unless and until the participant authorizes disclosure to the Chamber, or the Chamber orders the participant to make disclosure. The participants rely on the Registry to provide administrative services, but they equally service Registry by providing the information which permits Registry to perform its functions. To take just one example from hundreds, victim and witness security in this case, as emphasized by

[43] Decision, para. 23 (emphasis supplied).

the VWU Operations Officer at the 7 December 2005 hearing, relies heavily upon the OTP's provision of intelligence information relating to security in Northern Uganda.[44] No party or participant, however – whether victims' representative, defence counsel, or the OTP – rationally will entrust the Registry with such information in the face of a constant risk that the Registry, without authorization or notification, may disclose that information or potential evidence to the Chamber, based on the Registry's unilateral judgment that the information might potentially be deemed by the Chamber to be relevant to the possible exercise of a *proprio motu* function.[45]

25) It deserves emphasis that this is not any comment upon the Chamber's undoubted ability to maintain confidentiality. Regardless of the Chamber's ability to safeguard confidentiality, 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. Under the Decision, the rules which now expressly regulate the circumstances and timing of the Chamber's receipt of information and potential evidence – disclosure rules, rules regarding the admissibility of evidence, and Regulation 48 – are supplanted by the possibility that the Registry will furnish the same information to the Chamber, off-the-record and before the party or participant is under any obligation to disclose or produce the evidence or information. The Decision thus logically alters the rights of any party who has furnished such information to the Registry for an independent reason or any participant whose interests could be prejudiced by the content of the Registry disclosure.

26) The Decision, in fact, forces the Registry to operate under a disabling conflict of interests, therefore dismantling the neutrality which is key to its operations. Under the Decision, the Registry will no longer restrict itself to acting as an indifferent "channel" of otherwise authorized case filings, but instead must select participant-provided information to forward to the Chamber. If, for example, the Registry determines to forward information to the Chamber which the Registry had received

[44] Tr, pp. 38 and 39.
[45] Again, once the Chamber finds information to bear on the adequacy of victim and witness protection functions, it could request that information from the OTP under Regulation 48. The VWU also, of course, is under an obligation to report matters which could affect the adequacy of victim- and witness-protection measures to the Chamber, and presumably would do so on-the-record.

from defence counsel, without informing that counsel, the Registry rationally will be perceived to have acted against defence counsel's interest. If the information further reflects poorly on that defence counsel's client, the Registrar will have taken a step possibly perceived to be in favour of the interests of the OTP. The Decision repeatedly emphasizes the "neutral" character of the Registry, while disregarding that it obligates the Registry to perform functions which are not neutral. This lack of neutrality cannot fail to affect the fairness of the proceedings from the standpoint of the party whose interests have been adversely affected by the Registry's actions and therefore affects also the integrity of the proceedings.

3. *The Determination That It Is Within the Pre-Trial Chamber's Authority to Receive Information from the Registry Which Might Establish that It Has Jurisdiction*

27) Finally, it is vital to the fairness provided to all participants that the Pre-Trial Chamber reserve itself to determining disputes and issues which come to light in the proceeding, as a result of the participants' interventions, rather than proactively seeking information which might or might not bear on the Chamber's functions. This restraint is not any denigration of the Chamber's power, but instead an acknowledgment that the Chamber holds the unique and ultimate authority as the adjudicator and decision maker. The Rome Statute distinguishes investigative and judicial functions and incorporates universally-applied standards of judicial impartiality. Given these requirements, and the channels of information disclosure and filings expressly provided in the Statute, the Decision cannot permit the Registry unilaterally to pre-submit additional and perhaps irrelevant and or highly prejudicial information and potential evidence, without undermining the Chamber's authority and credibility as the fact-finder, either at confirmation or at trial. For the Chamber to pre-expose itself to information which it is not expressly granted the authority to seek or receive, including information constituting potential evidence of the OTP, victims' representatives, or the defence, is to invite allegations of impermissible taint, pre-judgment, and compromise of impartiality and integrity.[46]

[46] The appearance of pre-judgment is further compounded by the Decision's endorsement of a practice whereby the Chamber will accept this information and potential evidence directly from Registry, without affording the participants any opportunity to be heard about that acceptance.

28) At the same time, the OTP is deprived of fundamental fairness in the proceedings[47] because the Decision disregards the OTP's explicit duties and independence under Art. 42(1). Here, the fair process established by the governing texts was for the Chamber first to find the purported LRA letter to be relevant to the adequacy of victim and witness protection measures and then to request it *from the OTP*, under Regulation 48. To empower the Chamber to receive information provided by the Registry, in the absence of any triggering in-court event, makes the Chamber an investigator, rather than an adjudicator of controversies presented by the participants, or an impartial arbiter of the necessity of measures suggested by the participants' presentations. Likewise, a system in which the Chamber may supplement the information provided by the parties is replaced by an active and ongoing inquiry into potential exercises of judicial function. This "fishing expedition," in which the Chamber is aided by the Registry, cannot be reconciled with the express responsibility conferred upon the Prosecutor: to independently conduct investigations and prosecutions before the Court, as set forth in Art. 42(1).

29) Nor can the fishing expedition occur without substantially affecting the fairness afforded to the other participants in the proceedings. Defendants and victims obviously are no less prejudiced than the OTP by a system in which their information may be turned over unilaterally by the Registry to Chambers. *See* discussion *supra* at paras. 23-27. The likelihood of a Registry communication which prejudices one's interests is equally shared by all participants.

B. The Decision Involves Issues Significantly Affecting the Expeditious Conduct of the Proceedings

30) Each of the potential legal errors also substantially impairs the expeditiousness of the proceedings. The lack of contemporaneous notice to potentially affected participants generates additional and burdensome litigation by preventing all issues relating to the communication or information from being heard at one time. It will not be uncommon, in this proceeding or others, for any information provided informally to the Chamber under the Decision to have relevance later in the proceedings. The purported LRA letter here, for example, if authenticated to the satisfaction of the Chamber, could easily be proffered by the OTP at the

[47] *See* 19 August 2005 Decision on Leave to Appeal, para. 31 (acknowledging that the requirement of fairness exists for all participants, and thus "operates to the benefit of the Prosecutor").

confirmation or trial proceedings to establish, for example, the LRA's targeting of civilians. If the defence applies to challenge the Chamber's pre-exposure to this evidence, or the defence's lack of an opportunity to challenge the relevance or authenticity of the information when the Chamber received it, the Chamber will be unable to establish, because of the lack of record-keeping, that the earlier communication was either irrelevant or harmless. The Chamber thus is likely to be compelled to engage in a time-consuming and flawed process of after-the-fact reconstruction of the earlier Registry/Chamber interactions.[48] In addition, these re-constructions could delay trial and even appellate proceedings, because it is logical that a party will request reconstructions and an opportunity to be heard any stage in the proceedings when the party learns of a prior communication which arguably may have affected subsequent proceedings.

31) Second, the possibility of disruptive applications alleging a lack of appearance of impartiality will be constant. All parties – defence, victims, and the OTP – will soon be aware that the judges in this Chamber may be participating in case-related communications, the content of which is unknown to them. The communications themselves, even apart from their relatedness to some future issue in the case, create an "inevitable appearance of bias" which promotes the interruption of proceedings.[49]

32) Third, the void which the Decision creates in Registry's ability to guarantee neutrality to the participants independently and substantially affects the expeditious conduct of proceedings. Efficiency, no less than fairness, will be impeded if the Registry's ability to perform its administrative functions is impaired by its new *proprio motu* power, and therefore all the arguments about fairness apply when considering the factor of expeditiousness as well.[50]

33) This Chamber has stated that the relevant question is whether the decision from which appeal is sought "risk[s] that lengthy and costly trial activities are nullified at

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[48] The alternative would be to render the proceedings substantially non-transparent. In addition, during the reconstruction, as was the case here, the organ which bears the responsibility for maintaining the official record will instead become a witness in the process of establishing the content of its interaction with the Chamber.
[49] See *supra*, footnote 42 at 12, *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.*
[50] On this point, *see* paras. 23-26 *supra*.

a later stage, following the decision of first instance by the Trial Chamber."[51] Here, the risk is fully presented.

34) If the Appeals Chamber were to rule only after final judgment that it was never appropriate to permit the practice of permitting unrecorded Registry/Chambers communications, relating to the exercise of the Chamber's functions, the Chamber would also consider the legal remedy of granting the affected parties the opportunity to raise arguments of which they were previously deprived.[52] The burdens imposed by any re-constructions ordered by the Appeals Chamber would obviously be exorbitant. Moreover, insofar as those arguments are found, upon further evaluation, to have arguably altered the course of the pre-trial or trial proceedings or substantially prejudiced a party's interests during those proceedings, it will be necessary to revisit judicial decisions. Confirmation and trial proceedings, or aspects of those proceedings affected by the initial deprivation of an opportunity to be heard, might have to be re-conducted, depending on the degree of prejudice suffered.

35) If the Appeals Chamber were to conclude that the appearance of impartiality and integrity of the Pre-Trial Chamber was compromised by the off-the-record communications, the remedies would include the nullification of decisions of the

[51] 19 August 2005 Decision on Leave to Appeal, para. 36 (citing *Prosecutor v. Bagosora*, ICTR-98-41-T, Decision of 11 September 2003, para 9). The cited portion of *Bagasora* may have been describing the requirement that immediate resolution of the issue would "materially advance the proceedings." The Prosecution respectfully submits in any event that expeditiousness may also be linked with timely and efficient proceedings. *See* authorities cited in the Prosecution's Application for Leave to Appeal in the DRC Situation, para 29. In addition, portions of the 19 August 2005 Decision find the Prosecution's showing of substantial affect upon efficiency to be lacking because, for example, the Prosecution's descriptions of possible consequences were "based on surmise" (*id*.,. para. 43), or did not "necessarily" follow from the impugned Decision (*id*., para. 40). The Prosecution does not read these phrasings to require it to demonstrate with certainty or near-certainty that the described affect on the proceedings will occur, for such a standard would entirely frustrate appellate review. Rather, as the 19 August 2005 Decision elsewhere states, the issue is whether the failure to review the question "would entail the risk" described. (*id*. para. 36). *See also Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence's Request for Certification to Appeal the Trial Chamber's Decision dated 12 December 2003, para. 6 (the error must "have the capacity to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial"); *Prosecutor v. Bagosora*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defense Witnesses, 21 July 2005, para. 9 (granting leave to appeal even when consequences urged by potential appellant were deemed "remote," because the effect on the appellant if the Chamber were wrong would be "profound").
[52] *See, e.g.*, *Prosecutor v. Karemera et al.*, ICTR-98-44-A15bis, Appeal Decision in the Matter of Proceedings Under Rule 15Bis(D), 21 June 2004 (remedying denial of opportunity to be heard by remanding for submission of arguments and reconsideration of affected issue); *Ford v. Wainwright*, 477 U.S. 399, 418 (U.S. Supreme Court 1986) (remedy for deprivation of right to be heard is evidentiary hearing, *de novo*, on issue affected by deprivation of fair procedure).

Pre-Trial Chamber, and/or the disqualification of the Pre-Trial Chamber from engaging in re-conducting proceedings on remand.[53]

36) Likewise, the entitlement to judicial decision-making free of the Registry's self-initiated filings and communications could not be satisfied without effectively engaging in a painstaking process of determining what information was conveyed to the Chamber and whether the information prejudiced a party by affecting the outcome of the Chamber's decision-making. The remedies could extend to re-conducting 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.

37) In sum, in delaying, rather the promoting, the opportunity of parties to be heard, in endorsing the failure to maintain a contemporaneous record, and in introducing grave potential for challenges based on pre-judgment and/or lack of appearance of impartiality, the Decision substantially impairs the efficiency and the integrity of these proceedings.

C. Immediate Resolution May Materially Advance the Proceedings

38) In addition to the aspects of expeditiousness which relate to whether the error could be effectively remedied as part of a final appeal, discussed above, a further factor relevant to whether immediate resolution of the disputed issues may materially advance the proceedings is whether an interlocutory appeal would delay, rather than promote, the prompt resolution of the instant proceedings.[54]

39) It is respectfully submitted that the balance greatly favours immediate resolution of the disputed issues, rather than resolution in the context of a final appeal. Each of the three alleged legal errors establishes a procedure which will be applied for the

[53] *See, e.g., Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* [2000] 1 A.C. 119 (nullifying extradition order against Pinochet based on lack of impartiality of judge); *Edouard Karemera, et al. v. The Prosecutor*, ICTR-98-44-AR15 bis.2, For Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material," 23 October 2004, paras. 68-72 (ordering re-trial before new chamber based on appearance of bias of judges).
[54] For example *Prosecutor v. Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004, paras. 7 and 8; *Prosecutor v. Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification To Appeal, 29 May 2003; *Prosecutor v. Hadzihasanovic*, IT-01-47-T, Decision on The Request For Certification to Appeal the Decision Rendered Pursuant to Rule 98*bis* of the Rules, 26 October 2004.

duration of the Pre-Trial Chamber's tenure in the proceedings and which gives rise to an immediate and constant threat of challenges to the fairness of the pre-trial or trial proceedings. Any reversal, in addition, will create nothing short of a need to re-create the previously off-the-record communications and re-evaluate the adequacy of the proceedings to that point in time. As such, interlocutory appellate review of the determinations will promote the expeditious resolution of the instant proceedings, rather than delaying them.

40) In addition, timely intervention of the Appeals Chamber will provide guidance to this Chamber, as well as other Pre-Trial Chambers, on issues of fundamental institutional importance, such as the boundaries of a proper exercise of *proprio motu* powers, the scope of the autonomy and independence of participants before the Court, the proper role and functions of the Registry and the appropriateness of case-related informal contacts between Registry and Chambers of the Court. All these issues go to the heart of the Court's judicial policy, and directly relate to the fairness and efficiency of its proceedings. As such, they merit review by the Appeals Chamber.

CONCLUSION

For all of the foregoing reasons, the requirements for permissive leave to appeal are fully satisfied, and the Prosecution respectfully submits that leave to appeal should be granted.

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Prosecutor

Dated this 15th day of March, 2006

At The Hague, The Netherlands

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