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

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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.

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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.

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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"⁷;

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.

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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

The 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.

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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 their 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