

**UNIVERSITY OF CAPE TOWN  
SCHOOL FOR ADVANCED LEGAL STUDIES  
FACULTY OF LAW  
DEPARTMENT OF PUBLIC INTERNATIONAL LAW**

**INSTITUTIONAL ASSESSMENT OF THE INTERNATIONAL CRIMINAL  
COURT: THE PRE-TRIAL CHAMBER AND THE OFFICE OF THE  
PROSECUTOR: A JUDICIAL OR A QUASI-JUDICIAL RELATIONSHIP?**

**STUDENT NAME:** SHIRLEY BALDWIN-MEENDA  
**STUDENT NUMBER:** BLDSHI002  
**DEGREE:** LL.M  
**EMAIL:** [shirley.meenda@gmail.com](mailto:shirley.meenda@gmail.com)  
**SUPERVISOR:** SALIM NAKHJAVANI

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Master of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Word count: 19,722

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## **DECLARATION**

I, **Shirley Baldwin-Meenda**, do hereby declare that this minor dissertation submitted for the degree of Master of Laws at the University of Cape Town has not previously been submitted by me at this or any other University, that it is my own work and that all referenced material in it have been duly acknowledged.

**Shirley Baldwin-Meenda**

**24<sup>th</sup> February 2009**

## ACKNOWLEDGEMENTS

This is my light burning brightly in the dark, dispelling all doubts that it *cannot* be done

To the Team members of Trial Chamber II of the ICTR who ignited the flame, my passion  
for international criminal law

To Salim Nakhjavani who rekindled the flame and challenged me to think beyond my  
confines

To my Cape Town family who held the candle wax together

To the Baldwinlets, Ukundi, Yvonne and Fanuel; the other candles stacked up alongside me

To Alnoor M. Nkya; the candle holder that held me high up and the love that saw me through  
all trials

And to my loving Dad and Mom, Nancy and Baldwin Mushi; without whom there would be  
no candle to light the flame

This lit candle is living proof that anything is possible if only you *believe!*

Thank you Lord for walking with me along this journey

## ABSTRACT

This thesis assesses the relationship between the Pre-Trial Chamber and the Office of the Prosecution of the International Criminal Court. It examines the relationship between the two respective organs of the court as laid down in the court's statute and Rules of procedure and Evidence and in practice. The purpose of the assessment is to establish whether the judicial relationship between the two organs laid down in the provision is honoured in practice or is the pre-trial chamber over stepping its boundaries and hence shifting the equilibrium of legal traditions reached in Rome. The research is based primarily on the provisions governing the court and the jurisprudence of the Pre-Trial division of the court. The conclusions reached upon the assessment are that, the relationship between the respective above mentioned organs of the court in practice is quasi judicial in nature contrary to the judicial relationship carefully laid down in the provisions. The Pre-Trial chamber has overstepped its boundaries assuming a more supervisory role and in some cases an investigative role and intern shifting the equilibrium of legal traditions reached in Rome.

## ABBREVIATIONS

- ICC International Criminal Court
- OTP Office of the Prosecutor
- RPE Rules of Procedure and Evidence
- UN United Nations

## TABLE OF CONTENTS

<b>CHAPTER I: INTRODUCTION TO THE ASSESSMENT</b> .....	1
1.1 Permanent International Criminal Court (ICC).....	1
1.2 Court free from Political manipulation and the case of an independent prosecutor (back ground of the assessment).....	3
1.3. Thesis statement.....	5
1.4. Methodology.....	7
1.5. Chapter outline.....	8
<b>CHAPTER II: THE IDEAL RELATIONSHIP BETWEEN THE OFFICE OF THE PROSECUTOR AND THE PRE-TRIAL CHAMBER AS PER THE ICC STATUTE AND THE RPE</b> .....	10
2.1 Introduction.....	10
2.2 An overview of the provisions in the Rome Statute establishing the two organs of the court.....	11
2.3 Triggering the jurisdiction of the Court, preliminary examination and the First encounter between the prosecution and the Pre-Trial Chamber.....	15
2.3.1 Triggering the jurisdiction of the court.....	15
2.3.2 Preliminary examination and the beginning of the relationship between the OTP and the Pre-Trial Chamber.....	17
2.3.3 The decision not to investigate upon the completion of the preliminary examination.....	18
2.3.4 Proceeding before the Pre-Trial Chamber with regard to the prosecutions decision not to initiate an investigation.....	19
2.4 The decision to initiate an investigation upon completion of preliminary examinations.....	23
2.4.1 The prosecutor's exercise of proprio motu powers and the authorization from the Pre-Trial Chamber.....	24
2.5 The investigation.....	27
2.6 The prosecutor's decision on whether to prosecute upon the completion of an investigation.....	30
2.6.1 Procedure in the case of a decision not to prosecute.....	30
2.6.2 The decision to prosecute.....	31
2.7 The confirmation hearing before the Pre-Trial Chamber.....	32
2.8 Assessment .....	34
<b>CHAPTER III: THE RELATIONSHIP BETWEEN THE OFFICE OF THE PROSECUTION AND THE PRE-TRIAL CHAMBER IN PRACTICE</b> .....	36
3.1 Introduction.....	36
3.2 Brief Overview of Cases and selection of decisions.....	36
3.3 The Pre-Trial Chamber's <i>proprio motu</i> involvement at the early stage of investigations.....	38

3.4. The prosecutor's unique investigative opportunity.....	42
3.5. The participation of victims at the investigation phase of proceedings .....	43
3.6. Issuance of arrest warrants.....	47
3.7. Disclosure of evidence.....	51
3.8. Confirmation of charges hearing.....	55
3.9. Interlocutory appeals.....	57
3.10. Assessment.....	59
<b>CHAPTER IV: CONCLUSION, IMPACTS AND RECOMMENDATIONS.....</b>	<b>60</b>
4.1 Conclusion.....	60
4.2 Impact of the quasi judicial relationship between the prosecutor and the Pre-Trial Chamber.....	60
4.3 Recommendations.....	62
<b>BIBLIOGRAPHY .....</b>	<b>64</b>

## CHAPTER I INTRODUCTION TO THE ASSESSMENT

### 1.1 Permanent International Criminal Court (ICC)

The genocides in Guatemala and Rwanda, ethnic cleansing in the former Yugoslavia, the ethno-religious conflicts in East Timor, the long-lasting apartheid regime in South Africa and Similar violations in Sudan, Uganda and the Democratic Republic of Congo are all evils that shocked the world after the words “never again”. “Never again”—the words once assumed at the aftermath of World War II. With the victor powers having established the Military tribunal<sup>1</sup> prosecuting those responsible for Nazi atrocities, never again was the world to experience such “radical evil”<sup>2</sup>. Nonetheless before all wounds were healed the century was highlighted with proof that ‘mans capacity of evil knows no limit’.<sup>3</sup>

Never at rest had the world struggled to attain justice, peace and security. Efforts were made at both national<sup>4</sup> and international<sup>5</sup> levels to bring to justice transgressors of the radical

---

<sup>1</sup> Established by the; Agreement for the prosecution and punishment of the Major War Criminals of the European Axis also known as the London Agreement of 8<sup>th</sup> August 1945, *reprinted in* (1945) 39 American Journal of International Law at 257 also see ‘Nuremberg trials – further readings’ American Law Encyclopedia Vol 7 Available at <http://law.jrank.org/pages/8878/Nuremberg-Trials.html> accessed on 29th April 2008

<sup>2</sup> Francis Deng ‘In the Shadow of the Holocaust’ Holocaust and the United Nations Discussion Paper Series: Discussion paper #7(2007) available at <http://www.un.org/holocaustremembrance/docs/paper7.shtml> [accessed on 30.Oct.2008]

<sup>3</sup> United Nations—Department of Public Information; INTERNATIONAL CRIMINAL COURT PROMISES UNIVERSAL JUSTICE, SECRETARY-GENERAL TELLS INTERNATIONAL BAR ASSOCIATION (Press Release 12 June 1997) SG/SM/6257 available at <http://www.ngos.net/un/icc.html> [accessed on 28.OCT.2008] also see Roy S. Lee(ed) *The International Criminal Court: The making of the Rome Statute—Issues, Negotiations, Results* (1999) ix

<sup>4</sup> The prosecution of Augusto Pinochet, prosecution of Mengistu Hailemariam and the rest of his cabinet by the Ethiopia federal high court and the case of former Chad president Hissène Habré are just a few of the examples of efforts made at the national level to prosecute gross human rights violators.

<sup>5</sup> At the international level there has been an establishment of both ad hoc and hybrid tribunals to combat impunity for mass atrocities. The International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994 are the *Ad hoc* Tribunals adopted by Security Council resolutions S.C. res. 827 of 25 May 1993 and SC res. 955 of 8 November 1994. to prosecute those most responsible for the mass atrocities in Rwanda and The Former Yugoslavia, The hybrid tribunals which are comprised of both international and national elements include the Special Panel for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in Cambodia among others. The tribunals are all established by special agreements between the UN and the respective countries.

evils that shock human conscience. Despite these efforts it was only in 1998 almost half a century from the words never again did nations unite and screamed enough. Enough is enough—were Screams of nations overwhelmingly approving the Statute establishing the permanent International Criminal Court in July 1998.<sup>6</sup>

A permanent International Criminal Court at last— success over the battle against impunity. Nations envisioned a court that will achieve justice by holding individuals accountable for the most serious crimes of concern to the international community as a whole.<sup>7</sup> They had in mind a court that will; facilitate the ending of conflicts and ease the transition to peace; remedy the deficiencies of previous institutions; ensure justice when national criminal justice institutions are unwilling or unable to act and a court that will deter future evils.<sup>8</sup> With Nations having high hope and vision, on April 11, 2002, the Rome Statute of the ICC received more than the 60 ratifications required, and the treaty then entered into force on July 1, 2002.<sup>9</sup> A new baby was born. Where as a good number of nations, scholars and activities were happy to ‘let the baby live’,<sup>10</sup> there were nations and activists who felt it was not yet time. A hand full of nations feared for their sovereignty and other political interests,<sup>11</sup> and some scholars held the view that it was too soon to have an international criminal justice system.<sup>12</sup>

---

<sup>6</sup> The *Rome Statute of the International Criminal Court* [UN Doc. A/CONF.183/9, 17 July 1998] was adopted by States participating in a Diplomatic Conference in Rome, with a non-recorded vote of 120 in favour, 7 against, and 21 abstentions: also see UN Press Release L/ROM/22, “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court”, 17 July 1998, available at <http://www.un.org/law/icc> [accessed on 2.Apr.2008] para. 24, *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10, 17 July 1998. For a comprehensive history of the negotiations that resulted in the Rome Statute, see; Roy.S. Lee (ed) *Supra FN3*

<sup>7</sup> United Nations Department of Public Information; Note to Correspondents of the ceremony marking expected establishment of International Criminal Court (December 2002) available at <http://www.un.org/News/facts/iccfact.htm> [accessed on 20.Oct.2008]

<sup>8</sup> *ibid*

<sup>9</sup> United Nations Treaty Collection: Chapter xviii: Penal Matters; 10. Rome Statute of the International Criminal Court available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en> [accessed on 7.Nov.2008]

<sup>10</sup> *William F. Jasper ‘Courting Global Tyranny’ and William Norman Grigg ‘In Loco Parentis’ in The New International Criminal Court (2004)* available at <http://www.apfn.org/apfn/international.htm> [accessed on 13.Oct.2008]

<sup>11</sup> United States, Israel, China, Libya, Qatar, Iraq, and Yemen voted adoption of the treaty.

<sup>12</sup> Suzanne Akila ‘The International Criminal Court – Taking Stock’ (June 2008) Chatham House International Law Discussion Group 5 available at [http://www.chathamhouse.org.uk/files/11735\\_il120608.pdf](http://www.chathamhouse.org.uk/files/11735_il120608.pdf) [accessed 12.Nov.2008] quoting Professor William Schabas in the Discussion

The journey to the long awaited “victory” was long and often contentious. It involved sober negotiations on sensitive issues between diverse groups and required difficult compromises.<sup>13</sup> Nonetheless what was clear and of common ground was the desire by all to establish an independent, impartial and credible court free from any political or other influences.<sup>14</sup> Though through a thorny debate involving awkward formulations, technical solutions and difficult compromises, a balanced instrument strong enough to ensure the effective functioning of the court and with sufficient safeguards to foster broad support among states was adopted.<sup>15</sup> The instrument established a free and independent court and highly insulated judicial powers from political influence and pressure from state parties and the Security Council of the United Nations—a body charged with the obligation of maintaining the world’s peace and security.<sup>16</sup> It is important to bear in mind that much as a generally accepted Statute was adopted, the Statute is not a “like-minded” instrument but one of thorny compromise.<sup>17</sup>

## **1.2 Court free from Political manipulation and the case of an independent prosecutor (back ground of the assessment)**

One of the “cornerstones” during the negotiations of creating an independent and impartial court free from political manipulation was the question of an independent prosecutor.<sup>18</sup> The view that an effective International Criminal Court requires not only an independent prosecutor able to access necessary information, but also an institutional framework that ensures that the prosecutor is able to make vital decisions devoid of unwarranted pressure or restraint was undisputed.<sup>19</sup> However, the contentious question was that of the prosecutor’s powers to initiate investigations on his own initiative. There were delegates who believed that the *proprio motu* role of the prosecutor was a key feature of an independent and effective criminal court rendering it essential to grant the prosecutor

---

<sup>13</sup> Philippe Kirsh, Q.C. ‘INTRODUCTION’ in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (2000) XXIII at XXV-XXVI

<sup>14</sup> *ibid*

<sup>15</sup> *Ibid* at XXVI

<sup>16</sup> Kenneth S. Gallant ‘the ICC in the System of States and International Organizations’ in Flavia Lattanzi and William A. Schabas (eds) *Essays on the Rome Statute of the International Criminal Court Vol.II* (2004) 3 at 10

<sup>17</sup> Philippe Kirsh, Q.C. *Supra* FN14

<sup>18</sup> Philippe Kirsh, Q.C. ‘The development of the Rome Statute’ in Roy S. Lee (ed.) *Supra* FN3 at 451 at 459

<sup>19</sup> Medard R. Rwelamira ‘Composition and administration of the court’ in Roy S. Lee (ed.) *Supra* FN3 at 168

ex officio powers for triggering the jurisdiction of the court.<sup>20</sup> This idea was however unconceivable to other delegates who had in mind concerns of having ‘an overzealous or politically motivated prosecutor targeting unfairly or in bad faith, highly sensitive political situations’ or a “lone ranger running wild” around the world with excessive powers overloaded with information and constrained by limited human and financial resources.<sup>21</sup>

Subsequent to extensive debates between the two camps, the significance of the *proprio motu* role of the prosecutor was generally appreciated. It was however generally acknowledged that there was some real risk of abuse of such power and hence a need to subject them to adequate safeguards.<sup>22</sup> A system of checks and balances was incorporated in the Statute to safeguard and regulate the broad powers and discretion afforded to the prosecutor.<sup>23</sup> One of the major safeguards incorporated in the Statute is the oversight of prosecutorial activities by a Pre-Trial Chamber.<sup>24</sup> The creation of the Pre-Trial Chamber was a complex compromise as the case with a good number of innovations under the Statute. It was a unique compromise of differing legal traditions and political positions represented during the negotiations.<sup>25</sup> Apart from regulating or checking prosecutorial powers, the Pre-Trial Chamber was also considered an organ that will ease any political pressure or influence towards the prosecution and ensure fairness of the accused in the early stages of proceedings.<sup>26</sup>

The Pre-Trial Chamber is charged with the obligation to authorise a number of enforcement measures, such as the issuance of arrest or search warrants;<sup>27</sup> hold the necessary hearings to confirm indictments if they deem that they contain sufficient evidence to establish substantial grounds to believe that an accused committed the crimes charged;<sup>28</sup> rule on

---

<sup>20</sup> Silvia A. Fernandez de Gurmendi ‘The Role of the International Prosecutor’ in Roy S. Lee (ed.) *Supra* FN3 175 at 176

<sup>21</sup> *Ibid* at 181

<sup>22</sup> Fabricio Guariglia ‘Investigation and Prosecution’ in Roy S. Lee (ed) *Supra* FN3 at 228

<sup>23</sup> These will be discussed in detail in chapter II However, see Héctor Olásolo ‘The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?’ (2003) 3 *International criminal law Review* 87 at 98-109

<sup>24</sup> Art.15(4), Art.53(3) a & b and Art.18(1), (2) and (4) of the ICC Statute

<sup>25</sup> Silvia A. Fernandez de Gurmendi *Supra* FN21 at 182 also see Fabricio Guariglia *Supra* FN23

<sup>26</sup> *Ibid* 184

<sup>27</sup> Art. 58 and Art. 57(3) ICC Statute

<sup>28</sup> Art. 61 ICC Statute

challenges of admissibility or jurisdiction<sup>29</sup> and take steps to protect national security information.<sup>30</sup> In addition, the Pre-Trial Chamber is also charged with the obligation of safeguarding the rights of the accused during the investigation.<sup>31</sup> Nonetheless, the Pre-Trial Chamber does not ordinarily act on its own initiative. In most instances it takes reactive actions— issuing orders only at the request of the prosecution, state or defence. Hence one can not entirely render the Pre-Trial Chamber an investigating chamber, yet it is at the same time not clear whether or not to consider it a “supervisory chamber” having real control over the prosecutor who is regarded to be independent. However, given broad powers to check and regulate prosecutorial activities at the early stages of investigation and indictment through complex pre-trial proceedings, the Pre-Trial Chamber has valid effect in the decisions of the prosecutor and the prosecution case. The pre-trial proceedings in the ICC system offer a fragile equilibrium between powers of the prosecution and the Pre-Trial Chamber enshrined in the ICC Statute and the Rules of Procedure and Evidence (RPE). My thesis aims at accessing the relationship between the Pre-Trial Chamber and the prosecution in practice. Particularly, the aim of this thesis is to analysis whether the relationship between the two organs of the court in practice reflects the fragile balance of powers between them enshrined in the Statute and RPE.

### 1.3. Thesis statement

The first case to reach the trial phase of the ICC calls for the above-mentioned assessment of the relationship of the prosecution and the trial chambers. On the decision dated 2 July 2008, judges of Trial Chamber I of the International Criminal Court in the case of Prosecutor .v. Thomas Lubanga Dyilo<sup>32</sup> ordered the release of the accused Thomas Lubanga Dyilo. This followed the chamber’s earlier decision dated 13 June 2008 “on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June2008” (hereinafter, the decision). In the Decision, the Chamber indefinitely stayed the

---

<sup>29</sup> Art. 19(6) ICC Statute

<sup>30</sup> Art. 72 ICC Statute

<sup>31</sup> Art. 57(3) ICC Statute

<sup>32</sup> Decision on the release of Thomas Lubanga Dyilo ICC-01/04-01/06-1418-[02.07.2008]

proceedings against Mr. Thomas Lubanga Dyilo following the failure of the Office of the Prosecutor ("prosecution") to disclose potentially exculpatory materials that the Chamber was told are covered by confidentiality agreements. Upon an appeal on both decisions by the prosecutor, on 21<sup>st</sup> October 2008, the Appeals Chamber confirmed the stay of proceedings and reversed the trial chamber's decision on the release of Thomas Lubanga Dyilo, remanding the matter to the Trial Chamber for a new determination of the question of release of Mr Lubanga Dyilo.<sup>33</sup>

The decision sparked a variety of conflicting views. To a number of human rights activists, the court's decision to release Lubanga was a triumph to justice and the epitome of fairness.<sup>34</sup> To others however, the decision was viewed as a disappointing blow to the victims of Ituri among others who had suffered or lost their lives at the hands of Thomas Lubanga and an ultimate example of 'justice denied'.<sup>35</sup> The prosecution has been blamed for mishandling evidence and as a result bringing its credibility in question. However, according to Rule 121 and Rule 132 of the ICC-RPE, the Pre-Trial Chamber is required to hold a status conference before the confirmation hearing in order to ensure that the disclosure of evidence between the prosecutor and the defence takes place under satisfactory conditions and before the trial. Could it be possible that the prosecution is receiving more than its share of blame? Did the pre trial chamber play an important role in the result of the court's decision?

My thesis will explore the relationship between the pretrial chamber and the prosecution as prescribed by the ICC Statute. In particular it will examine whether this relationship is as it should be in practice. The thesis will investigate whether the pretrial chamber is over stepping its boundaries in handling pre-trial proceedings and the impact of the found relationship on the

---

<sup>33</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the release of Thomas Lubanga Dyilo"

ICC-01/04-01/06-1487 [21.10.2008] and Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008

ICC-01/04-01/06-1486 [21.10.2008]

<sup>34</sup> AllAfrica Global Media 'Congo-Kinshasa: Trial Chamber Orders Release of Thomas Lubanga Dyilo' (3 July 2008) available at <http://allafrica.com/stories/200807030371.html> [accessed on 16.Jul.2008]

<sup>35</sup> Heikelina Verrijn Stuart 'The ICC in Trouble' (2008) 6(3) *Journal of International Criminal Justice* 409

operation of the office of the prosecutor and the prosecution's case. Specifically my thesis aims at looking at whether the Pre-Trial Chamber and the prosecution have a judicial or a quasi-judicial relationship.

#### **1.4. Methodology**

Thus far the court's docket consists of four situations of—The Democratic Republic of the Congo, Uganda, Central African Republic and Sudan (Darfur). Of these situations, there are so far six cases. Of the six, the case of Prosecutor v. Thomas Lubanga Dyilo from the DRC situation is on trial and the case of Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui also from the DRC situation is expected to begin trial on the 27<sup>th</sup> November 2008. The rest of the cases are at the pre-trial phase with the case of Prosecutor v. Jean-Pierre Bemba Gombo from the Central African Republic situation waiting for a confirmation of charges hearing scheduled on the 8<sup>th</sup> of December 2008.

A good number of decisions on motions filed by the prosecution, defence and in some instances victims on the above cases have been passed by the Pre-Trial Chamber. However, my study will be based on the court's decision which sets the judicial standards or precedents to be followed such as the first decision on the status conference, decision on the participation of victims and victim status, the confirmation of charges decisions and the like. This does not however mean that non-standard setting decisions will not be considered. Such decisions where need arises will be used when collecting and analysing empirical data. Not only will this assessment look at the decisions of the chamber but also at the submissions made by the prosecution.

The assessment will be carried out by way of both quantitative and qualitative research. The qualitative research will be done by analyzing court decisions and prosecution motions on a number of seminal topics. I will analyze data such as the manner in which these decisions are issued; are they merely guiding giving particular guides to follow and stating what is acceptable according to the Statute of the court or are they orders or commands. The number of decisions issued versus the number of appeals by the prosecution. The appeals rejected versus those

accepted looking specifically at the topic and kind of appeal accepted and rejected. The kinds of appeals by the prosecutions are they related to general issues or are they related to discretionary and power issues. This data may be presented in form of tables or graphs where possible. The quantitative research method will be conducted using available resources from the International Criminal Court website (i.e. Decision and Prosecutor's motions and other submissions), the ICC Statute and its preparatory works and the ICC-RPE, and Journals, books and other Articles available in the Internet.

## **1.5. Chapter outline**

### **Chapter I: Introduction to the Assessment**

This chapter introduces the assessment as a whole. The background to the assessment and the thesis statement form an integral part of the discussion in this chapter.

### **Chapter II: The Ideal Relationship between the Office of the Prosecutor and the Pre-Trial Chamber as Per the ICC Statute and the RPE.**

This chapter looks at the mandates of both the prosecution and the Pre-Trial Chamber. It studies the pre-trial proceeding of the ICC and the relationship between the prosecution and the Pre-Trial Chamber as provided for under the ICC Statute and the RPE. In order to give a clear understanding of the proceeding and the mandates, the analysis will draw from the preparatory works of the Statute and the rationale behind the RPE.

### **Chapter III: The relationship between the office of the prosecution and the Pre-Trial Chamber in practice**

This chapter is the core of the thesis. It carefully analyses pre-trial proceedings of the ICC drawing the relationship of the two organs in practice. The chapter analyses how the relationship of the two organs enshrined in the Statute and RPE unfolds in practice.

### **Chapter IV: Conclusions, Impacts of the found relationship and Recommendations.**

This chapter provides a summary and conclusions of the assessment as well as analyses the kind of impacts the found relationship between the two respective organs of the court has on

prosecution and the work of the ICC at large. The chapter is concluded by providing a number of recommendations.

## CHAPTER II

### The Ideal Relationship between the Office of the Prosecutor and the Pre-Trial Chamber as Per the ICC Statute and the RPE

#### 2.1 Introduction

As noted in chapter one, the question of the independence of the prosecution and its importance in the achievement of an independent and impartial court free from political manipulation is inevitable. Consequently, being labeled the 'central figure of the current international criminal justice system'<sup>1</sup>, the office of the prosecutor (*hereinafter* the OTP) and its independence has been a center of debate among scholars and human rights activists. There exist a detailed and systematic assessment of the powers of the OTP and the system of checks and balances of prosecutorial independence.<sup>2</sup> Whereas the pre-trial proceedings before the Pre-Trial Chamber of which I aim at accessing are a major check of prosecutorial independence, the aim of my thesis is not to generally address the question of prosecutorial independence as that has already been done. Instead of looking at the limitations of prosecutorial independence including jurisdictional boundaries limiting prosecutorial freedom, personnel boundaries, deferral by the Security Council, Financing matters by the assembly of states among other check and balances<sup>3</sup>, my aim is solely to review the kind of relationship that exists between the Pre-Trial Chamber and OTP. Is the relationship judicial— with the Pre-Trial Chamber exercising judicial oversight over prosecutorial activities— or quasi-judicial—with the Pre-Trial Chamber exercising a general supervisory role over the OTP? Hence my work in this chapter and through out the thesis will focus on the Pre-Trial Chamber and the prosecution alone.

---

<sup>1</sup> Dov Jacobs 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase' (2007) 6 *The Law and Practice of International Courts and Tribunals* 317 at 317.

<sup>2</sup> Generally see; Giuliano Turone 'Powers and Duties of the Prosecutor' in: Antonio Cassese, Paola Gaeta and John G W D Jones *The Rome Statute of the International Criminal Court: A commentary* vol 1 (2002) 1147, Matthew R Brubacher 'Prosecutorial discretion within the International Criminal Court' (2004) 2 *Journal of international Criminal Justice* 73, Rod Rastan 'The Power of the Prosecutor in Initiating Investigations' A paper prepared for the Symposium on the International Criminal Court February 3 – 4, 2007; Beijing, China *available at* [icclr@law.ubc.ca](mailto:icclr@law.ubc.ca) [ accessed on 6<sup>th</sup> Dec 2008], C Gallavin, 'Prosecutorial Discretion within the ICC: Under the Pressure of justice' (2006) 17 *Criminal Law Forum* 43 and Héctor Olásolo 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?' (2003) 3 *International Criminal law Review* 87

<sup>3</sup> For a detailed analysis of the checks and balances *see* Héctor Olásolo FN2 and Mathew Gillette 'Intrepid Justice: Matthew Gillette discusses prosecutorial discretion at the International Criminal Court.' (March 2007 ) *New Zealand international Review* 14

The aim of this chapter is to analysis the ideal relationship between the OTP and the Pre-Trial Chamber as stipulated in the ICC Statute and the RPE. In carrying out this analysis, I will first look at the establishment and mandates of the two organs focusing on their general powers and duties. Secondly, I will focus on pre-trial proceedings before the Pre-Trial Chamber from the investigation stage to the confirmation hearing which marks the end of pre-trial proceedings while noting the kind of relationship the later seems to purport.

## **2.2 An overview of the provisions in the Rome Statute establishing the two organs of the court**

Following the undisputed need of having an independent prosecutor able to access necessary information and institutional frameworks that ensure the prosecutor's ability to make vital decisions devoid of unwarranted pressure or restraint, Article 42 of the Rome Statute establishes the OTP as a separate and independent organ of the court. The OTP is given full operational independence. The prosecutor—who is the head of the office—has 'full authority over the management and administration of the office including staff facilities and other resources thereof'.<sup>4</sup> The registrar who is the overall administrator of the day-to-day operations of the court has no powers over the office of the prosecutor.<sup>5</sup> In fact the registrar is to seek the accord of the prosecutor in dealing with matters relating to the staff in the OTP.<sup>6</sup>

Being an independent and separate organ of the court, the OTP is directly accountable to the Assembly of states parties (*hereinafter* ASP) — the management oversight and legislative body of the Court<sup>7</sup> unlike the registrar who is under direct supervision of the presidency which is charged with an obligation to ensure 'the proper administration of the court, with exception of

---

<sup>4</sup> Article 42(2) Rome Statute(hereinafter the statute)

<sup>5</sup> Article 43 of the statute establishes a Registry responsible for the non-judicial aspects of the administration and servicing the court. The registry operates under the supervision of the presidency and has powers over the prosecutor and his office.

<sup>6</sup> Article43(6) and 44

<sup>7</sup> The ASP is establish under Article 112 of the statute and is not an organ of the court. The ASP provides management oversight of the Court and acts like a parliament under a national system..

the OTP.<sup>8</sup> As a matter of fact, in ensuring the proper administration of the court, the presidency is required to 'coordinate with and seek the concurrence of the prosecutor on all matters of mutual concern.'<sup>9</sup> Article 112(2)b, c and d grants the ASP chief powers with regard to the oversight of the administrative management of the office of the prosecutor, the approval of its regular budget and the acquisition and use of additional recourses , including the use of gratis personnel offered by state parties, intergovernmental organizations or non-governmental organizations.

The prosecutor is elected by secret ballot by an absolute majority of the members of the ASP.<sup>10</sup> In performing his duties, the prosecutor is to be assisted by the deputy prosecutor(s)<sup>11</sup> who is to be elected by the ASP in the same manner but from a list of three persons nominated by the prosecutor.<sup>12</sup> Currently, Mr. Luis Moreno-Ocampo is the prosecutor of the ICC inaugurated on the 16 of June 2003 as the first prosecutor of the ICC by consensus by the ASP on the 21 of April 2003 at the Second resumption of its first session.<sup>13</sup> Mr. Luis Moreno-Ocampo is assisted by Mrs. Fatou Bensouda of the Gambia elected by ASP on the 8th of September 2004.<sup>14</sup>The prosecutor and deputy prosecutor are also removed from office in the same manner—by an absolute majority of the ASP. This would however be following their commission of serious misconduct or a serious breach of their duties under the statute and RPE or following their failure to exercise the functions required under the statute.<sup>15</sup>

The OTP is charged with the responsibility for receiving referrals and any substantial information on the crimes with in the jurisdiction of the court (that is the crime of genocide, crimes against humanity and war crimes and the crime of aggression at the near future, once the

---

<sup>8</sup> Article38(3)

<sup>9</sup> Art.38(4) Rome Statute

<sup>10</sup> Article42(4)Note period of tenure

<sup>11</sup> The prosecutor could have one or more deputies Article 42(2)

<sup>12</sup> Article 42(4), both the prosecutor and the deputy prosecutor are to hold office for a term of nine years and are not to be eligible for reelection. In accordance with Sub-article 3 of the statute, both the prosecutor and the deputy prosecutor have to be persons of high moral and character and be highly competent and have extensive experience in prosecution or trial of criminal cases.

<sup>13</sup> See General organization of the office of the prosecutor at <http://www.icc-cpi.int/organs/otp.html>

<sup>14</sup> ibid

<sup>15</sup> Article46 (2) a & b, Rules 26, 28&29 of the RPE and Rule81 of the rules of the ASP.

States Parties have agreed to a definition of the crime), for examining such referrals or information and at a later stage conduct investigations and prosecutions of the respective crimes.<sup>16</sup> The OTP is central to the overall objective of the Court – to end impunity for the perpetrators of the ‘most serious crimes of concern to the international community as a whole’.<sup>17</sup>

On the other hand, the Pre-Trial Chamber is part of the judicial organ of the court which consists of an appeal’s division, a trial division and the pre-trial division.<sup>18</sup> In addition to the three divisions, there is the presidency which is responsible for the proper administration of the court and other functions conferred to it by the statute.<sup>19</sup> Generally the court should have 18 judges at any given time elected by the ASP.<sup>20</sup> Having been elected, the judges are responsible for organising themselves into the various divisions. The presidency which consists of the president together with the first and second vice-president, are elected by the judges amongst them selves by an absolute majority.<sup>21</sup> The appeals division is composed of the president and four other judges and the trial and pre-trial division are to have not less than six judges each.<sup>22</sup> The judicial functions of the court are then to be carried out in each division by chambers.<sup>23</sup> The removal from office of a judge is also effected by the ASP by a secret ballot. However unlike the Prosecutor, a judge is removed from office by a two-thirds majority of the ASP upon a recommendation from adopted by a two-thirds majority of the other judges.<sup>24</sup>

The pre-trial division is composed of judges with predominantly criminal cases’ experience.<sup>25</sup> Currently the pre-trial division has seven judges—six judges and the first vice president.<sup>26</sup> Judge Hans-Peter Kaul is the president of the division charged with the obligation of

---

<sup>16</sup> Article42(1)

<sup>17</sup> Preamble of the Rome Statute

<sup>18</sup> Article34(b)

<sup>19</sup> Article34(a), the presidency and its powers is established under Article38

<sup>20</sup> Article 36(1)

<sup>21</sup> Article38

<sup>22</sup> Article39(1)

<sup>23</sup> Article 39(2)

<sup>24</sup> Article46(2)a

<sup>25</sup> Article39(1)

<sup>26</sup> See ‘The pre-trial division’ at <http://www.icc-cpi.int/chambers/pretrial.html>

overseeing the administration of the division for a period of one year.<sup>27</sup> The pre-trial judges are to serve in the Division for a period of three years, and thereafter until the completion of any case if the hearing has already started.<sup>28</sup> Where the presidency's deems fit for the effective management of the court's workload, judges from the Pre-trial division may be temporarily attached to the trial chambers and vice versa provided that a judge who has participated in the pre-trial phase of a respective case does not take part in the same case at the trial phase.<sup>29</sup> According to article 39 (2) (b) (iii) of the Rome Statute, functions of the Pre-Trial Chamber may be carried out by either of a single judge or of a bench of three judges of the chamber.

The Pre-Trial Chamber is charged with the obligation of adjudicating on preliminary concerns of the case. It makes a preliminary determination as to whether or a case falls within the jurisdiction of the Court, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.<sup>30</sup> The Pre-Trial Chamber issues warrants of arrests and summons to appear before the Court at the request of the Prosecutor,<sup>31</sup> issue orders to grant the rights of the parties in the proceeding, and, where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons,<sup>32</sup> and the protection of national security information.<sup>33</sup> The Pre-Trial Chamber also confirms or rejects the authorisation to commence an investigation<sup>34</sup> and other pre-trial matters as we shall discuss in detail in the next section.

Comments from scholars suggest a supervisory or rather a quasi judicial relationship between the OTP and the Pre-Trial Chamber. The Pre-Trial Chamber has been considered a 'watch dog'<sup>35</sup> and has been criticised for interfering with and limiting the independence of the

---

<sup>27</sup> *ibid*

<sup>28</sup> Article 39(3)a

<sup>29</sup> Article 39(4)

<sup>30</sup> Article 18

<sup>31</sup> Article 58

<sup>32</sup> Article 57(3)c

<sup>33</sup> Article 72

<sup>34</sup> Article 53(3)

<sup>35</sup> Héctor Olásolo FN2 at 144

prosecutor thus hindering the effective execution of prosecutorial functions.<sup>36</sup> However the question remains—is the prosecution not to be accountable like any other administrative body with broad powers, duties and responsibilities? Is the claim of interference of the powers of the prosecution by the trial chamber an exaggeration? Is the Pre-Trial Chamber really a quasi-judicial organ or is it a judicial organ adjudicating on preliminary matters of the case brought forward by all parties in an impartial manner and in accordance with the requirements of the law? Analysing the relationship between the two organs of the court as per the statute and the RPE the rest of the chapter aims at addressing these questions.

In the following section I will analyse the first step in the proceedings before the ICC which is the processes triggering the jurisdiction of the court while figuring out when does the relationship between the Pre-Trial Chamber and the prosecution begin.

## **2.3 Triggering the jurisdiction of the Court, preliminary examination and the First encounter between the prosecution and the Pre-Trial Chamber**

### **2.3.1 Triggering the jurisdiction of the court**

To begin with, although the ICC has broad jurisdiction, its jurisdiction is not entirely universal. First, the courts jurisdiction is limited to ‘...the most serious crimes of concern to the international community as a whole’<sup>37</sup>—crimes that are ‘...extra-ordinarily transgressive of universal norms’.<sup>38</sup> Secondly the court only has jurisdiction where; the person accused of committing a crime is a national of a state party or where the person's state has accepted the jurisdiction of the Court; where the alleged crime was committed on the territory of a state party or where the state on whose territory the crime was committed has accepted the jurisdiction of

---

<sup>36</sup> Wouters, Jan; Verhoeven, Sten & Demeyere, Bruno ‘The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?’(2008) 8 1-2 *International Criminal Law Review* 273-317

<sup>37</sup> Preamble and Article 1: Rome Statute. As noted earlier these include The Crime of genocide, crimes against humanity, war crimes and the crime of aggression. - see above as to the current limitation on jurisdiction over the crime of aggression.

<sup>38</sup> Mark A.Drumbl ‘Collective violence and individual punishment: The criminality of mass atrocity’(2005)99 *Northwestern university law review* 539 at540

the Court; or where a situation is referred to the Court by the UN Security Council.<sup>39</sup> Thirdly, the court's jurisdiction is not retroactive in nature— it only has jurisdiction over crimes committed on or after 1 July 2002<sup>40</sup> and where states become parties after that date, the court has jurisdiction for crimes committed from the date the statute enters into force for that state.<sup>41</sup> Lastly the ICC's relationship with domestic criminal justice systems is complementary in nature. Hence the court is considered to be a court of last resort which can only exercise its jurisdiction if a state with jurisdiction over the situation is unwilling or unable to genuinely carry out the investigation or prosecution.<sup>42</sup>

The jurisdiction of the ICC may be triggered in a situation in which one or more of the crimes within the jurisdiction of the court appear to have been committed or are being committed in one of the following ways as stipulated in Article 13 of the Rome statute. First is the referral of a situation to the prosecutor by a state party indicating as far as possible the specific relevant circumstances pertaining to the situation and providing supporting documentation as is available to the state. Second is the referral of a situation to the prosecutor by the Security Council of the United Nation acting under Chapter VII of the Charter of the United Nations and third is the prosecutor's exercise of his *proprio motu* investigation powers upon receiving and reviewing information regarding a situation from any other source or collected by himself on his own initiative.<sup>43</sup> The referral of a "situation" instead of a particular case is considered to be one of the safeguards against politically motivated referrals and a check of prosecutorial powers when investigating *proprio motu*.<sup>44</sup>

---

<sup>39</sup> Art.12 and 13 of the Rome Statute

<sup>40</sup> Date of entry into force of the Rome Statute

<sup>41</sup> Art.11 of the Rome Statute

<sup>42</sup> Complementarity principle embodied in the preamble and Article17(1) of the Rome Statute

<sup>43</sup> For triggering mechanisms of the court generally see; Héctor Olásolo *The triggering procedure of the international criminal court* (2005)

<sup>44</sup> Silvia A. Fernández de Gurmendi 'The Role of the International Prosecutor' in Roy S. Lee(ed) *The International Criminal Court: The making of the Rome Statute—Issues, Negotiations, Results* (1999)175 at 180 also see Alexander K.A. Greenawalt 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007)39 *NYU Journal of International Law and Politics* 583

### **2.3.2 Preliminary examination and the beginning of the relationship between the OTP and the Pre-Trial Chamber**

Upon receiving a referral from a state or the Security Council and information from any other source, the prosecutor has to conduct a preliminary examination so as to establish whether there is actually a serious and adequate base to initiate an investigation. In accordance with Article 15(2) in the case of information from other sources and Rule 104 of the RPE in the case of referrals from a state or the Security Council, the prosecutor in seeking to establishing whether to initiate an investigation or not 'may seek additional information from states, organs of the United Nations, inter-governmental or non-governmental organizations or other reliable source that he deems appropriate and may receive written or oral testimony at the seat of the court'.

It should be noted that the Pre-Trial Chamber and prosecution do not necessarily encounter at this stage of the proceeding. The phrase 'to collect written or oral testimony at the seat of the court' does not literary mean at the seat of the court before a pre-trial judge. A written testimony refers to a written statement written and signed by a declaring person delivered to the office of the prosecutor at that seat and an oral testimony is given orally by the declaring person to an interviewer from the office of the prosecutor, which must be duly recorded and signed by both the declaring person and the interviewer like any other witness testimony received by the prosecution.<sup>45</sup> However, in accordance with Rule 47 of the RPE, where 'the prosecutor considers that there is a serious risk that the testimony might not be subsequently taken, [he] ... may request the Pre-Trial Chamber to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony in order to protect the rights of the defence.'<sup>46</sup> In this case, the Pre-Trial Chamber and the prosecution might have had an encounter however at this stage there is no actual investigation on any situation and the prosecutor may even arrive at a decision not to investigate. The pre-trial proceedings begin with the prosecutor's decision whether or not to initiate an investigation.

According to Article 53 (1)a, b and c, the prosecutor may only initiate an investigation where there is a reasonable basis to believe that a crime within the jurisdiction of the court prima

---

<sup>45</sup> Rule 111 and 112 RPE *also see* Giuliano Turone *supra* FN2 at 1149-1150

<sup>46</sup> Rule 47(2) RPE

facie admissible under Article 17 of the statute whose investigation is in the interest of justice has been committed in the particular situation.<sup>47</sup>

### **2.3.3 The decision not to investigate upon the completion of the preliminary examination**

Where the prosecutor arrives at a conclusion that there is no 'reasonable basis' for an investigation in the light of information provided, he is to inform those who provided the information 'in a manner that prevents any damage to their safety, well being and privacy, giving them reasons for which he decided not to initiate an investigation. This is with regard to information obtained from other sources other than a state or the Security Council pursuant to Article 15(6) and Rule 49 of the RPE. Equally, where a referral is made by a state or the Security Council, the prosecutor upon deciding not to initiate an investigation must inform the referring state or Security Council with the reasons there of in writing in accordance with Rule 105 of the RPE.<sup>48</sup>

At this stage, there is no encounter between the Pre-Trial Chamber and the prosecution unless one of the following occurs. One; where the prosecutor's decision not to investigate is based solely on the interest of justice—regardless of the source of the referral—by the chamber's own initiative<sup>49</sup> and two; where a referring state party or the Security Council request the Pre-Trial Chamber to review the prosecutor's decision and request the prosecutor to reconsider his

---

<sup>47</sup> In determining whether an investigation serves the interest of justice, the prosecutor is to consider the gravity of the offence and the interest of the victims. Given the ambiguous wording and lack of a definition in the statute with regard to the phrase the 'interest of justice', the prosecutor adopted a policy paper on the interest of justice under Article 53(1) c on September 2007. The policy paper sets out the OTP's understanding of the concept of the interests of justice in an abstract manner not giving a detailed discussion on all possible factors that the prosecutor considers when determining the interest of justice. However the policy paper indicates that each situation is different and what constitutes the 'interest of justice' will depend on the facts and circumstances of the case or situation. It is also noted that the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue. However a proper understanding of the concept is subject experience. The policy paper is available at [www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf](http://www.icc-cpi.int/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf)

<sup>48</sup> Rule 105(1) and (3) RPE

<sup>49</sup> Article 53(3)b, in accordance with Rule 105(4) and (5), where the prosecutor's decision is based solely on the interest or justice, regardless of the source of information, he shall notify the chamber in writing and the notification must contain the reasons for his decision.

decision.<sup>50</sup> However where the above situations do not occur there would be no encounter between the two organs at this stage of the proceedings.

We should bear in mind that, where the prosecutor decides not to initiate an investigation, without basing his decision solely on the interest of justice in both referrals and information resulting to investigation *proprio motu* and where a state or Security Council does not request the Pre-Trial Chamber to review the prosecutor's decision, it does not mean that the referred situation or information is never to be pursued again. The parties communicating the situation can re-refer the situation to the prosecutor in the light of new facts and evidence.<sup>51</sup>

#### **2.3.4 Proceeding before the Pre-Trial Chamber with regard to the prosecutions decision not to initiate an investigation**

As noted above, proceedings before the Pre-Trial Chamber with regard to the prosecutor's decision not to initiate an investigation may be activated in two ways. One is by a request made by a referring state or the Security Council to the chamber asking it to review the prosecutor's decision, and two is on the chamber's own initiative to review the prosecutor's decision not to initiate an investigation where such a decision is solely based on the interest of justice regardless of whether the situation was referred to the court by a state, Security Council or any other source triggering the prosecutor's *proprio motu* powers.

In the first instance where the proceedings are triggered by a request of a state or the Security Council, the requesting party ought to file the request in writing and support it with reasons to the Pre-Trial Chamber within ninety days following the notification given to them by the prosecutor in accordance with Rule 105(1).<sup>52</sup> Upon receiving the request, the Pre-Trial Chamber may where it deems necessary for the review, request the prosecutor to transmit the information or documents in his possession or summaries that the chamber considers necessary to enable it to carry out the review. The chamber may also seek further observations where

---

<sup>50</sup> Article 53(3)a

<sup>51</sup> Article 53(4)

<sup>52</sup> Rule 107(1) RPE

necessary from the requesting state or the Security Council.<sup>53</sup> On receiving the necessary information or documents from either party (The prosecutor and the referring state or Security Council), the chamber is to take all necessary measures as are necessary to protect the information and documents and under Article 68(5) take measures to protect the safety of witnesses and victims and members of their families.<sup>54</sup>

Upon concluding the judicial review, a reasoned decision of the chamber must be concurred in by the majority of the judges and shall be communicated to all those who participated in the review.<sup>55</sup> Where upon completion of the review the Pre-Trial Chamber requests the prosecutor to review, in whole or in part his decision not to initiate an investigation, the prosecutor is to reconsider his decision as soon as possible and once he has made a final decision, he is to notify the Pre-Trial Chamber in writing.<sup>56</sup> The prosecutor's notification just like the chambers decision is to equally be communicated to all those who participated in the review and the notification must contain the conclusions of the prosecutor and reasons thereof.<sup>57</sup>

In the second instance where the Pre-Trial Chamber reviews the prosecutor's decision not to investigate where such a decision is solely based on the interest of justice the proceedings are somehow different. Where the chamber has decided to carry out the judicial review, the chamber is to notify the prosecutor of the chamber's intentions to conduct such a review within a hundred and eighty days following the prosecutor's notification promptly after his decision not to investigate solely based on the interest of justice in accordance with Rule 105(4).<sup>58</sup> The chamber is also to set a time limit within which the prosecutor may submit observations and other materials.<sup>59</sup> Though not expressly stated in the statute or in the RPE, the rules suggest that apart from relying only on submissions and materials provided by the prosecutor, the chamber may also rely on materials submitted to it by other parties such as states or the Security Council or

---

<sup>53</sup> Ibid sub-rule(2)and(4)

<sup>54</sup> Ibid sub-rule (3) referring to necessary measures under Articles 54,72 and 93 of the Statute.

<sup>55</sup> Rule108(1) RPE

<sup>56</sup> Rule108 (2)and(3) RPE

<sup>57</sup> Ibid sub-rule(3)

<sup>58</sup> Rule109(1)RPE

<sup>59</sup> ibid

even other organizations. I arrive at this conclusion by considering the wording of Rule 110(1) which states that the decision of the chamber with regard to the review of the prosecutors decisions under Article 53 1(c) shall be communicated to all those who participated.<sup>60</sup>

Upon completion of the judicial review, where the Pre-Trial Chamber does not confirm the decision of the prosecutor not to initiate an investigation based solely on the interest of justice, the prosecutor is to proceed with the investigation referred to.<sup>61</sup> This hence implies that once the chamber does not agree with the prosecutor's decision, the chamber's decision is in actual sense equivalent to a judicial order that the prosecutor should proceed with the said investigation.<sup>62</sup>

Up to this point, it would seem as if the rules suggest that the relationship between the Pre-Trial Chamber and the prosecution is quasi-judicial other than judicial. It is undisputed that when the chamber upon the request of a state or the Security Council reviews the decision of the prosecutor not to investigate, it acts as a judicial organ. The chamber does not act on its own accord and the requesting state or Security Council and the prosecutor are both participating parties to the judicial review. The chamber reviews documents from each party and as a neutral body and comes up with its own conclusion. Much as the wording of Rule 108(2) may be interpreted to suggest that the decision of the chamber is not as such a judicial order—as it reads 'where the chamber comes to the conclusion that the prosecution should review its decision in whole or in part, the chamber is to "request" the prosecution to review such a decision', the same Rule 108(2) continues to the effect that the prosecutor upon such a request "shall" reconsider his decision as soon as possible. This leads one to the conclusion that the prosecutor "ought to" reconsider his decision as requested by the chamber. The wording "shall reconsider" represents a sense of the prosecutor being obliged to reconsider his decision and not consider reconsidering

---

<sup>60</sup> The preparatory works of the statute offer no much assistance in the matter.

<sup>61</sup> Rule 110(2)RPE

<sup>62</sup> For a detailed discussion on this judicial order *see* Giuliano Turone *supra*FN2 at 1156-58

upon request which would have been the case if the wording was the prosecutor "will reconsider".<sup>63</sup>

On the other hand, in the case of the chambers review of the prosecutor's decision not to initiate an investigation on its own initiative, the relationship between the Pre-Trial Chamber and the prosecution may be considered more supervisory. Hence given the above judicial relationship, the relationship between the two organs may be considered quasi-judicial. However, one may argue that the notification made by the prosecutor to the chamber promptly after arriving at the conclusion not to initiate an investigation in the interest of justice may serve as triggering the chamber's powers to review or not to review the decision. The wording of the statute is that the chamber "may" in its own initiative review the prosecutor's decision. This implies that upon the detailed notification which lies down the reasons leading to the prosecutor's decision, where the chamber feels that the prosecutor might have error it may review the prosecutor's decision. I am of the belief that unless given the facts of the situation and reasons of the prosecutor of his decision the chamber has reason to believe that the prosecutor might have error it would not review the prosecutor's decision.

As observed earlier, where the chamber exercises its powers to review the prosecutor's decision, the chamber may seek information from the prosecutor and/or other parties such as a state or the Security Council or any other source as it considers necessary and upon arriving at a decision or conclusion the chamber is to inform all those who participated in the review. This implies that apart from the chamber merely evaluating the prosecutor's activities, it acts as a neutral organ analyzing two sides of the situation so as to come up with a credible conclusion.

The decision of the chamber in this case is expressly a judicial order or command. According to Rule 110(2), where the chamber upon review does not confirm the prosecutor's decision not to initiate an investigation in the interest of justice, the prosecutor is to proceed with the said investigation. From the above argument, I would say that up to this point the relationship between the Pre-Trial Chamber and the prosecutor is a judicial relation. However, I would

---

<sup>63</sup> The preparatory works of the rules do not offer any elaboration with regard to the nature or effect of the chamber's decision

appreciate why one might regard the relationship in the above instance as being supervisory since on the face of it, the chamber reviews the prosecutor's decision on its own accord and its decision is in actual sense the final order or command. Additionally, judicial reviews of a similar nature exist or are contemplated in many nation legal systems<sup>64</sup> so as to avoid arbitrary and non-transparent choices in prosecutorial determinations concerning criminal action<sup>65</sup> as is the case with the ICC but such reviews does not render the judicial organs quasi-judicial.

## **2.4 The decision to initiate an investigation upon completion of preliminary examinations**

Where upon the completion of a preliminary examination the prosecutor concludes that there exists a reasonable basis to initiate an investigation or where upon the judicial review of the prosecutor's decision not to investigate he is ordered to investigate, the procedure followed in initiating the investigation differs depending on the nature of referral as accessed below.

Where a judicial review by the Pre-Trial Chamber was carried out upon a request from the Security Council or a state or where such a judicial review was on the chamber's own initiative pursuant to Article 53(3) b resulting to a judicial order obliging the prosecutor to proceed with an investigation, the procedure followed is the same as in the case where upon completion of a preliminary examination, the prosecutor decides to initiate an investigation. Provided that the situations are referrals from the state or Security Council.<sup>66</sup>

Having decided to initiate an investigation, where the situation was referred to the court by the Security Council, the prosecutor simply initiates an investigation and is not obliged to notify the state or seek authorization from the chamber. However, where the situation was a referral from a state, the prosecutor is to notify the referring state and any other states which would have normally exercised jurisdiction on the situation pursuant to Article 18 (1). In the case of an investigation *proprio motu*, the prosecutor is to first seek the authorization of the Pre-Trial

---

<sup>64</sup> Of both civil and common law

<sup>65</sup> See Giuliano Turone supraFN2 at 1157

<sup>66</sup> Ibid at 1159

Chamber<sup>67</sup> and upon being granted the authorization, he is to notify the states in accordance with Article 18 (1). Conversely, where initially the prosecutor had decided not to investigate solely based on the interest of justice and upon judicial review in accordance with Article 53(3)b, the chamber ordered the prosecutor to proceed with an investigation, the prosecutor's authorization request becomes redundant and therefore he is only to notify the respective states in accordance with Article 18(1).<sup>68</sup>

#### **2.4.1 The prosecutor's exercise of proprio motu powers and the authorization from the Pre-Trial Chamber**

The question of judicial authorization of where the prosecutor exercises his *proprio motu* powers has been one of the most debated questions among scholars. Especially when no such authorization is required where the situation is a referral from a state or the Security Council. To a number of scholars, the need for the prosecutor to obtain authorization from the Pre-Trial Chamber is seen as a breach or restraint of the prosecutor's independence.<sup>69</sup> Some scholars regard this procedure as creating an extraordinarily premature pre-trial control over the prosecutor's activities.<sup>70</sup> Such a perspective leads one to the conclusion that the Pre-Trial Chamber is a supervisory body in this aspect and hence making the relationship between it and the prosecution a quasi-judicial relationship.

However, if one looked closely at the flip side of the coin, the requirement of an authorization of the Pre-Trial Chamber where the prosecutor exercises his *proprio motu* powers in no way infringes the prosecutor's independence or makes the chamber less of a purely judicial organ as long as the chamber does not cross its boundaries. The question of drawing boundaries

---

<sup>67</sup> Article 15 (3) Regulation 49 of the Regulation of the Court provide detailed proceeding to be followed on the prosecutor's request. Generally it elaborates on the kind of information the prosecutor is to submit to the chamber and the manner of its presentation.

<sup>68</sup> Giuliano Turone supraFN2 at 1159

<sup>69</sup> Alexander K.A. Greenawalt 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007)39 NYU Journal of International Law and Politics 583, Wouters, Jan ,et al SupraFN36, Matthew R Brubacher SupraFN2

<sup>70</sup> L. Arbour, A. Eser, K. Ambos, A. Sanders, (eds) *The Prosecutor of a Permanent International Criminal Court* (2000) 11

is however to be discussed at a practical level in chapter III. However generally, the chamber at this stage as we shall discuss shortly, is to carry a *prima facie* review of legal issues.

One could pick a different angle of analyzing the question of Pre-Trial Chamber authorization in the case of the exercise of *proprio motu* powers by the prosecutor apart from the political reasons drawn from the preparatory works of the Rome Statute as observed in chapter one. It is undisputed that the Pre-Trial Chamber plays a role of checking prosecutorial powers so as to avoid abuse of powers, avoid politically motivated decisions, avoid the risk of dismissing vital situations without due regard as well as to ease political pressure and influences towards the prosecutor from states.<sup>71</sup> However, the later roles of the chamber do not make it any less of a judicial organ and so is the question of authorizing the prosecutor's decisions when he is exercising his *proprio motu* powers.

First is the question of accountability. Like any other authoritative or decision making organ or prosecuting body, the prosecutor ought to be accountable.<sup>72</sup> When a situation is referred to the court by the Security Council or a state party, the prosecutor upon completing his preliminary investigation has to notify the respective states or the Security Council of his decision and the Security Council or state has the right to challenge the prosecutor's decision before the Pre-Trial Chamber. States and the Security Council may request the Pre-Trial Chamber for a judicial review of the prosecutor's decision where necessary. For the very accountability reason, the need of the chamber's authorization in the case of the prosecutor's exercise of his *proprio motu* powers is inevitable. It should be noted that victims, witnesses and other sources of information triggering the prosecutor's *proprio motu* powers may not challenge the prosecutor's decision as the state or the Security Council. In fact, in some cases the victims have to be discreet for the sake of their own peace and security and where the prosecutor feels that notifying them of his decision would endanger them or jeopardize the investigation the

---

<sup>71</sup> Silvia A. Fernandez de Gurmendi 'The Role of the International Prosecutor' in Roy S. Lee (ed.) *The International Criminal Court: The making of the Rome Statute—Issues, Negotiations, Results* (1999) 175 at 184

<sup>72</sup> For a detailed analysis on prosecutorial accountability at both domestic and international level see Kai Ambos 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports' (2000) 8/2 *European Journal of Crime, Criminal Law and Criminal Justice* 89

prosecutor is not to notify them.<sup>73</sup> Hence the authorization request remains necessary as it is only through it that the chamber may seek representation from the victims or other sources or the victims may make representations to the chamber. Additionally the prosecutor remains accountable as with the case with referrals made by a state or the Security Council. In the same way that not all times states call for judicial review by the chamber to order the prosecutor to review in whole or in part his decision, is the same way that not all times the chamber may grant the prosecutor the authorization hence calling for the prosecutor to further examine the situation and request for an authorization in light of new facts or evidence.

Besides accountability, there exists the question of political will and conflicting interests. It is most likely that a situation referred to the court by sources other than a state or Security Council lack political backing and will of states to cooperate with the prosecutor. When a situation is referred to the court by a state or the Security Council, the situation would have passed through political intervention and hence there exists the political will of the states to ensure full Co-operation with the court.<sup>74</sup> However, where the situation is referred to the court by other sources triggering the prosecutor's *proprio motu* powers, it is most likely to have not passed or is just passing through political intervention. In this case states may have conflicting interest and also peace negotiations may still be taking place, hence states would lack the necessary political will to co-operate which is of vital importance to the ICC as it has no police force or a detective unit. Situations of this delicate nature require more than one person or office to deal with them or make decisions on the matters. Hence a review of the prosecutor's decision by the Pre-Trial Chamber for authorization is of the essence. At least as far as *prima facie* legal issues are concerned, the review of the chamber limits any unwarranted flows that may coast the OTP and the court at large its integrity and competence.

The above mentioned, it is also clear from the provisions that the relationship between the chamber and the prosecution is still judicial. According to the RPE<sup>75</sup>, the chamber still

---

<sup>73</sup> Rule 49 RPE

<sup>74</sup> A good example is the case in Rwanda and Yugoslavia, where state cooperation with the two ad hoc tribunals does not hamper the tribunals' activities.

<sup>75</sup> Rule 50

conducts its review as a neutral judicial organ. It not only reviews the decision of the prosecutor by looking at the prosecutor's supporting documents submitted to it but also at representations from victims and witnesses. The chamber may seek more information from the prosecution as well as victims and where necessary and the chamber consider it appropriate it may hold a hearing.<sup>76</sup> Additionally, where after conducting its review the chamber does not confirm the prosecutor's decision, the prosecutor may still make a subsequent request based on new facts and evidence.<sup>77</sup> Hence the prosecutor's independence still remains intact. Besides, the chamber would only not confirm the prosecutor's decision if upon the review of the supporting documents, on the face of it, there is no reasonable basis to proceed and the situation appears to fall outside the jurisdiction of the court as it is not in the chamber's place at this stage to examine the merits of the situation. Hence up to this point the prosecution and the Pre-Trial Chamber still have a judicial other than a quasi-judicial relationship.

## 2.5 The investigation

At the investigation stage, the Pre-Trial Chamber still plays a more judicial role and maintains a judicial relationship with the prosecutor. The chamber ensures the smooth functioning of prosecutor's activities as well as protecting the rights and interests of victims and defendants. At the early stage of the investigation, the Pre-Trial Chamber and the prosecution may have an encounter in case a deferral of an investigation from the ICC prosecutor to national investigation arises. As noted earlier— with the exception of situations referred to the court by the Security Council—when initiating an investigation, the prosecutor is to notify all states in accordance with Article 18(1). Upon such notice, the states may within one month inform the prosecutor of any admissibility issues under Article 17(1) a, b, c and request the prosecutor to defer the situation to national investigation.<sup>78</sup> Pursuant to Article 18(2), the prosecutor in this case has to defer the investigation to national jurisdiction unless he decides to challenge the request before the Pre-Trial Chamber and the Pre-Trial Chamber authorization the investigation. Rule 53 through 55 of the RPE set the procedure to be followed in this instance. The prosecutor and the

---

<sup>76</sup> Rule 50(4) RPE

<sup>77</sup> Ibid sub-rule (6) and Article 15(5)

<sup>78</sup> Article 18(2) and Rule 52(2) RPE

states all become parties of the matter before the chamber. In fact when the prosecutor decides to lodge an application to the chamber he ought to inform the state.<sup>79</sup> The chamber reviews both the information from the prosecutor as well as from the state requesting for the deferral and the chamber's decision is equally communicated to both parties.<sup>80</sup> Additionally, both parties have the right to appeal the Pre-Trial Chamber's decision.<sup>81</sup> Hence the chamber in no way supervises the prosecutor who is independent to carry out his prosecutorial activities as he thinks fit.

Besides the above deferral situation, the prosecutor keeps on seeking the necessary judicial orders from the Pre-Trial Chamber so as to full his prosecutorial duties. For instance, in accordance with Article 18(6), at any time of the deferral or pending the above mentioned ruling by the Pre-Trial Chamber, the prosecutor may on exceptional basis seek the authority of the chamber to pursue necessary investigative steps for the preservation of evidence where there is a unique opportunity to obtain important evidence or where there is a significant risk of unavailability of such evidence in the near future. Apart from the above provision, Article 56 of the statute also provides for the role of the Pre-Trial Chamber in the case of unique situations where the prosecutor considers that the evidence may not be available subsequently for the purpose of trial. Article 56 (1) b obliges the chamber to ensure the efficiency and integrity of the proceedings upon the prosecutor's request and particularly obliges the chamber to protect the rights of the defence.

When conducting proceedings under Article 56(1), the Pre-Trial Chamber is to take necessary measures referred to in Article 56(2) but in so doing must hold consultations with the prosecutor and subject to provisions of Article 56(1)c, with the person who has appeared before the court.<sup>82</sup> Article 56(3) a also allows the Pre-Trial Chamber to take measures to acquire evidence that might be of use by the defence in trial but only where the prosecutor has no justified reasons for his failure to acquire such evidence. The prosecutor is however free to

---

<sup>79</sup> Rule 54(2)

<sup>80</sup> Rule 55(2) and (3)

<sup>81</sup> Article 18(4)

<sup>82</sup> Rule 114(1) RPE

appeal the chamber's decision.<sup>83</sup> According to Rule114, the decision of the chamber pursuant to Article56 (3) must take place after consultations with the prosecutor who may advice the chamber that the intended measures could jeopardize the proper conduct of the investigation.<sup>84</sup>

It is evident from the above that the prosecutor and the Pre-Trial Chamber have a purely judicial relationship. It is not in the chamber's place to dictate on the prosecutor the kind of investigative measures he ought to take to secure evidence and hence the consultations by the chamber with the prosecutor before making any decisions. The chamber's evidence is only to ensure that the required evidence is duly collected.

The judicial relationship of the prosecutor and the Pre-Trial Chamber is further manifested by the judicial authority for direct investigation on the territory of a state party which is not willing to cooperate in accordance with Article57 (3) d. The procedure applied in this instance upon the prosecutor's application is stipulated in Rule115 of RPE. Upon such a written request from the prosecutor, the chamber shall whenever possible inform and invite the respective state for views.<sup>85</sup> In arriving at its determination, the chamber is to take into account any views expressed by the state and it may on its own initiative or upon a request from a state or the prosecutor, decide to hold a hearing.<sup>86</sup> The chamber's decision may also specify the procedure to be followed in carrying out the collection of evidence.<sup>87</sup> The manner in which the chamber takes into consideration views from both parties—the prosecutor and the state— is purely judicial and in no way supervisory. Where as one might question the chamber's power to specify manner of the collection of evidence as interfering with the prosecutor's investigation activities, such a challenge holds no water as the chamber's recommendations are the most viable as they take into consideration the reasons and views of the state in which the investigation is to take place. Additionally, at this point where there is no will from the state to cooperate, a judicial order is of the essence.

---

<sup>83</sup> Article56(3)b

<sup>84</sup> Rule114(2)

<sup>85</sup> Rule115(1)

<sup>86</sup> Ibid sub-rule (2)

<sup>87</sup> Ibid sub-rule (3)

Apart from the above situations at this investigation stage of the proceedings, the chamber also carries out other judicial functions such as the issuance of orders or arrest warrants as may be required for the purpose of an investigation upon the prosecutor's request<sup>88</sup>, authorizing the prosecutor upon his request for exceptional reasons to follow the procedure of audio or video recording in other circumstances other than those of the collection and examination of evidence provided for in Rule 111 and 112 among other judicial orders.<sup>89</sup>

## **2.6 The prosecutor's decision on whether to prosecute upon the completion of an investigation**

Upon the completion on an investigation, the prosecutor is to decide whether there is a sufficient basis for a prosecution in accordance with Article 53(2) a, b and c. The prosecutor may arrive at a decision not to prosecute in the following scenarios. First is the case where there is not sufficient legal or factual basis to seek a warrant of arrest or summons to appear under Article 58, which provides that a warrant or summons may be sought only where there are reasonable grounds to believe that an investigated person has committed the alleged crime. The second scenario is where such reasonable grounds exist but the case is inadmissible under Article 17 and third is where the case is admissible under Article 17 but there are substantial reasons to believe that a prosecution would not serve the interest of justice. However, where there are reasonable grounds to believe that a person committed the alleged crime and the case is admissible before the court and a prosecution would conform to and serve the interest of justice, the prosecutor shall decide to prosecute by requesting the Pre-Trial Chamber for a warrant of arrest or a summons to appear under Article 58.

### **2.6.1 Procedure in the case of a decision not to prosecute**

Where having completed the investigation, the prosecutor concludes that there is no sufficient basis for a prosecution owing to any of the above reasons, he is to inform in writing the pre-trial and in case of a referral by a state or the Security Council to the respective states or the Security

---

<sup>88</sup> Article 54(3)f

<sup>89</sup> Rule 112(4) RPE

Council in accordance with Article 53(2) and Rule106 of the RPE which requires prosecutor to explain the reasons for his decision. Additionally, in situations investigated by the prosecutor *proprio motu*, the prosecutor is only to notify the chamber and not the victims or other sources triggering his *proprio motu* powers.<sup>90</sup>

The procedure followed in this instance is the same as in the case where the prosecutor decides not to initiate an investigation upon the completion of a preliminary examination. The prosecutor's decision is reviewed by the Pre-Trial Chamber either on request by a state or the Security Council in case of referrals under Article 13 a-b or on the chamber's own initiative in cases of *proprio motu* investigations or where the prosecutor's decision not to prosecute was solely based on the interest of justice regardless of who referred the situation.<sup>91</sup> The same procedure and the same Rules 107,108,109 and 110 of the RPE apply at this stage of the proceedings as they applied in the case of the prosecutor's decision not to initiate an investigation. Hence there is no need to repeat what has already been duly assessed.

### **2.6.2 The decision to prosecute**

The prosecutor's decision to prosecute is signified by his application to the Pre-Trial Chamber of the issuance of either a warrant of arrest or a summons to appear pursuant to Article58. A summons to appear is however only issued as an alternative to a warrant of arrest where the chamber 'is satisfied that there are reasonable grounds to believe ...that a summons is sufficient to ensure' the appearance of a person alleged to have committed the crime.<sup>92</sup> The prosecutor's application to the chamber under Article58 (2) and (7) must contain all particulars of the accused person, a specific reference to the alleged crime committed and a concise statement of facts and a summary of evidence.<sup>93</sup> One could regard it as a provisional indictment as the indictment is to be filed and confirmed by the pre-chamber at the confirming hearing which marks the end of pre-trial proceedings. Upon the prosecutor's application, the Pre-Trial Chamber may issue a

---

<sup>90</sup> Article53(2) and Rule106(1) RPE

<sup>91</sup> Article53(3) a and b and Rule107 RPE

<sup>92</sup> Article58(7)

<sup>93</sup> Article58(2)

summons to appear or a warrant of arrest when upon the examination of the prosecutor's application and evidence; it is satisfied that there are reasonable grounds to believe that the person has committed the alleged crime within the jurisdiction of the court.<sup>94</sup> The chamber here still plays a purely judicial and it only has to review the information provided to it by the prosecutor so as to issue the required warrant or summons.

Having issued the arrest warrant or summons and before the confirmation hearing, the prosecutor and the Pre-Trial Chamber may encounter in a number of scenarios but maintain a purely judicial relationship. At this stage of the proceedings, the chamber presides over a number of motions filed by states, the accused person, victims or even the prosecutor himself. For instance, motions by the accused challenging whether a warrant of arrest was properly issued<sup>95</sup>, motions relating to arrest proceedings and interim release in the custodial state<sup>96</sup>, motions relating to the rights of the accused person upon detention or arrest including the right to legal counsel<sup>97</sup>, among others under possible motions under the statute and the RPE.

## **2.7 The confirmation hearing before the Pre-Trial Chamber**

At this stage of the proceedings, the Pre-Trial Chamber plays the central role of preparing the case for trial. It acts as a neutral judicial body which over sees the indictment process as well as the disclosure of evidence between the prosecutor and the accused person or persons. The chamber also safeguards the rights of the accused person and ensures the fairness of the trial. The initial procedure before the confirmation hearing and the procedure during the confirmation hearing are provided for under Articles 60 and 61 of the statute and Rules 121 through 126 of the RPE.<sup>98</sup> Again, the relationship between the Pre-Trial Chamber and the prosecution remains purely judicial.

---

<sup>94</sup> Article 58(1)

<sup>95</sup> Article 59(4) claims may be brought before the relevant authority of the custodial state which would inform the Pre-Trial Chamber pursuant to sub-article (5)

<sup>96</sup> Article 59

<sup>97</sup> Rules 117, 118 and 119, Article 55(2)c and 61(2)

<sup>98</sup> For a detailed discussion on the this stage of the pre-trial phase *see* Marchesiello M., 'Proceedings before the Pre-Trial Chambers' in Cassese A., Gaeta P. and Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court, Volume II* (2002) 1231-1246

Upon the surrender of the accused person to the court or upon the person's appearance voluntarily or pursuant to a summons, the chamber is to satisfy to itself that the person has been informed of the crimes he or she allegedly committed, and his or her rights under the statute including the right to apply for an interim release pending trial.<sup>99</sup> At this first appearance, the Pre-Trial Chamber is to set a date of the hearing to confirm the charges.<sup>100</sup> The chamber then takes measures concerning the personal freedom of the accused pending trial as well as ensuring that a person is not detained for an unreasonable period before the trial.<sup>101</sup> Before the confirmation hearing, the prosecutor has to provide a copy of the charges and all amendments if any to the accused person or his council within the required time in accordance with provisions in Rule 121 of the RPE. Additionally, the person is to also be informed of all evidence the prosecutor intends to rely on at the hearing.<sup>102</sup> The Pre-Trial Chamber may issue orders regarding the disclosure of evidence and it is supposed to hold a status conference to ensure satisfactory disclosure of evidence between the prosecutor and the accused.<sup>103</sup> During the confirmation hearing the accused has the right to challenge the prosecutor's charges and even provide supporting evidence to his defence.<sup>104</sup>

On the basis of the confirmation hearing, the Pre-Trial Chamber is to determine whether there is sufficient evidence to establish that a person committed each of the crimes charged.<sup>105</sup> Based on its determination, the chamber may; confirm the charges and commit the accused to the trial chamber or decline to confirm all or some charges which it has determined that there is insufficient evidence or adjourn the hearing and request the prosecutor to either provide further evidence or conduct further investigation with respect to a particular charge or amend a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the court.<sup>106</sup> Following the later provisions, it is obvious that the independent of the chamber is highly observed by the chamber, its decision is to only be based on the evidence before it and

---

<sup>99</sup> Article 60(1)

<sup>100</sup> Rule121(1) RPE

<sup>101</sup> Article 60(4) and Rule118 RPE

<sup>102</sup> Article 61(3) and Rule 121(2) through (10) RPE

<sup>103</sup> Rule121(2)b RPE

<sup>104</sup> Article61(6)

<sup>105</sup> Ibid sub-article (7)

<sup>106</sup> Ibid sub-article(7) a, b and c

matters of amending and reviewing the indictment are left to the prosecutor. Even where the chamber does not confirm a charge, the prosecutor may subsequently request for its confirmation if the request is supported by additional evidence.<sup>107</sup>

## 2.8 Assessment

Following the above assessment on the basis of the Rome Statute and the RPE of the ICC, the relationship between the Pre-Trial Chamber and the prosecution is a judicial relationship. The Regulations of the Court adopted by the Judges on 24<sup>th</sup> May 2004<sup>108</sup> do not offer any substantiation to the contrary. The Regulations actually only provide a detailed procedure with regard to information provided by the prosecutor to the presidency upon receiving a referral,<sup>109</sup> request of information necessary to the Pre-Trial Chamber<sup>110</sup>, request for authorization by the prosecutor<sup>111</sup>, specific time limits<sup>112</sup>, decision on interim release<sup>113</sup>, document containing the charges<sup>114</sup> and the decision following the confirmation hearing<sup>115</sup>.

The claims that the Pre-Trial Chamber is a supervisory and an investigating body<sup>116</sup> or the claims that it infringes prosecutorial powers are an exaggeration. As observed above, all investigating and prosecuting powers are left to the prosecutor. The Pre-Trial Chamber only ensures fairness and integrity of the proceedings as well as protecting the interest of the defense and the victims and carries out judicial scrutiny and review. As stated by the International Law commission commenting on Article 29 of its Draft Statute for the ICC, 'During the investigation and pre-trial phase, the bureau of the court would perform various judicial functions...that it

---

<sup>107</sup> Ibid sub-article (8)

<sup>108</sup> At its Fifth Plenary Session, The Hague, 17- 28 May 2004: Official documents of the International Criminal Court ICC-BD/01-01-04

<sup>109</sup> Regulation 45

<sup>110</sup> Regulation 48

<sup>111</sup> Regulation 49

<sup>112</sup> Regulation 50

<sup>113</sup> Regulation 51

<sup>114</sup> Regulation 52

<sup>115</sup> Regulation 53

<sup>116</sup> Jérôme de Hemptinne 'The Creation of Investigating Chambers at the International Criminal Court: An Option worth Pursuing?' (2007) 5 *Journal of International Criminal Justice* 402

might otherwise assign to a chamber of the court'.<sup>117</sup> (Functions of which were later assigned to the Pre-Trial Chamber) Additionally, the accountability of the prosecutor is inevitable. Given his delicate position in the global fight against impunity, the ICC prosecutor hangs in the middle of two very thorny poles. Not only is he to champion the battle against impunity but he is also to observe the sacredness of the doctrine of sovereign equality of states under international law—as given the nature of mass atrocities as we observed earlier, he is bound to make politically explosive decisions. Hence, the prosecutor's accountability towards judicial authorities especially when exercising his *proprio motu* powers is essential in ensuring his independence in decision making and to avoid political pressure and influence. Besides, where he cannot be accountable to political authorities, he ought to be accountable to judicial authorities.

---

<sup>117</sup> Revised Report of the working group on the Draft Statute for an International Criminal Court, AC/CN.4/L.490/Add.1(19 July 1993) cited in Olivier Fourmy 'Powers of the Pre-Trial Chambers' in Antonio Cassese, Paola Gaeta and John G W D Jones *The Rome Statute of the International Criminal Court: A commentary* vol 1 (2002) at 1207 at 1209

## CHAPTER III

### The Relationship between the Office of the Prosecution and the Pre-Trial Chamber in Practice

#### 3.1 Introduction

Having established the judicial relationship between the Pre-Trial Chamber and the prosecutor of the ICC set forth in the Rome Statute and the RPE in chapter II, chapter III analyses how this judicial relationship is preserved or obliterated in practice. The chapter analyses the jurisprudence of the pre-trial division of the ICC trying to depict the kind of relationship it seems to suggest between the pre-chamber and the OTP. Due to the allocated limited time, this assessment will be based on the first key experiences of the pre-trial division which lay down a foundation of its practice. Much focus will be put on the Pre-Trial Chamber's decisions on a variety of seminal issues that are likely to significantly impact the structure and operations of the ICC. In carrying out this assessment, I will first provide a brief overview of cases before the ICC and then identify decision that will form the base of my analysis and lastly analyse the identified decisions with regard to the relationship they seem to purport between the above mentioned two organs of the court.

#### 3.2 Brief Overview of Cases and selection of decisions

With about nine years of operation, the ICC's docket comprises of six cases at different phases of proceedings arising from four situations in the African continent. Of the six cases, three cases<sup>1</sup> arise from the Democratic Republic of the Congo (DRC) situation referred to the court by the respective state party<sup>2</sup> and a case arising from each of the other situations in Uganda,<sup>3</sup> Darfur (Sudan)<sup>4</sup>, and the Central African Republic (CAR)<sup>5</sup>— with the situations in Uganda and CAR been referred to the court by the respective state parties<sup>6</sup> and the situation

---

<sup>1</sup> Cases of: *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06; *the Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06 and *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07

<sup>2</sup> ICC press release: 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' The Hague, 19 April 2004 ICC-OTP-20040419-50-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.htm](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.htm) [accessed of 12 Dec 2008]

<sup>3</sup> The case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ICC-02/04-01/05

<sup>4</sup> *The case the Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/07

<sup>5</sup> *The case of the Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/051/08

<sup>6</sup> ICC press release: 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' The Hague, 29 January 2004 ICC-20040129-44-En available at <http://www.icc->

in Darfur by the UN Security Council<sup>7</sup>. At the time of writing, only the cases of; the Prosecutor v. Thomas Lubanga Dyilo<sup>8</sup> and the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui<sup>9</sup> of the DRC situation had completed the pre-trial phase and was in Trial. The other five cases were all at the pre-trial phase with the case from the CAR situation of the Prosecutor v. Jean-Pierre Bemba Gombo<sup>10</sup> at its final stages of the pre-trial phase.

In the context of the above cases, the pre-trial division of the ICC has issued decisions on a variety of issues at both the investigation and pre-trial phase relating to: the designation of a single judge; participation of victims in proceedings; confirmation of charges; arrest warrants; disclosure of evidence; the prosecutor's unique investigative opportunity; jurisdiction and admissibility; leave for interlocutory appeal; among other decisions related to housekeeping and procedural matters such as decisions on the extension of deadlines; exceeding number of pages; assigning defence or victim counsels, and holding consultations with the prosecutor. My assessment will however only be based on a selected few precedent-setting decisions which directly reflect on the relationship between the Pre-Trial Chamber and the prosecution and have substantial impact on the structure and operations of the court. For instance where as decisions such as those relating to the extension of deadlines may be precedent-setting and reflect on the relationship between the two organs of the court, they do not parse in themselves impact on the structure and operations of the court or the judicial relationship between the two organs set forth in the statute and the RPE. On the contrary, a decision relating to say the issuance of a warrant of arrest or the disclosure of evidence, substantially impacts on the structure and operations of the court and offers a solid reflection of the relationship between the Pre-Trial Chamber and the prosecution.

Following the above, my assessment will be based on the first key precedent-setting decisions selected from topics with substantial impact on the structure and operation of the court. At the time of writing, decisions of the pre-trial division of the ICC evolved around six

---

[cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.cpi.int/pressrelease_details&id=16&l=en.html) [accessed 12 Dec 2008]; ICC press release: 'Prosecutor receives referral concerning Central African Republic' The Hague, 7 January 2005 ICC-OTP-20050107-86-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html) [accessed 12 Dec 2008]

<sup>7</sup> United Nations press release: 'SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT; Resolution 1593 (2005) Adopted by Vote of 11 in Favour To None Against, with 4 Abstentions (Algeria, Brazil, China, United States)' Press Release SC/8351 of 31/03/2005 available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [accessed on 12 Dec 2008]

<sup>8</sup> ICC-01/04-01/06

<sup>9</sup> ICC-01/04-01/07

<sup>10</sup> ICC-01/051/08

primary topics which include; the Pre-Trial Chamber's *proprio motu* involvement at the early stage of investigations, the participation of victims at the investigation phase of proceedings, issuance of arrest warrants, disclosure of evidence, confirmation of charges hearing, and the prosecutor's unique investigative opportunity. Consequently, in carrying out my assessment, I will consider seminal or precedent-setting decisions on these topics. It must be pointed out that, where as these decisions raise salient, and contentious legal issues that call for a legal and intellectual debate, such a response or a detailed analysis of the raised legal issues is beyond the scope of this assessment. My aim is to purely establish whether the judicial relationship between the Pre-Trial Chamber and the prosecutor portrayed in the Rome Statue and RPE is upheld or obliterated in practice. Accordingly, in analysing the decisions, I will focus on determining whether the Pre-Trial Chamber is over stepping its boundaries in dealing with its pre-trial obligations or is it maintaining the judicial relationship between it and the prosecutor as carefully laid down in the respectful provisions.

### **3.3 The Pre-Trial Chamber's *proprio motu* involvement at the early stage of investigations**

In June 2004, the prosecutor of the ICC opened the permanent court's first investigation on the situation in the DRC.<sup>11</sup> About four months into the prosecutor's investigation following a couple of unsatisfactory communications<sup>12</sup> between the prosecutor and Pre-Trial Chamber I<sup>13</sup>, the Pre-Trial Chamber summoned the prosecutor to an informal meeting whose agenda was to discuss the progress of the prosecutor's investigation.<sup>14</sup> Following this classified meeting, on 17<sup>th</sup> of February 2005, Pre-Trial Chamber I issued the pre-trial division's first

---

<sup>11</sup> ICC Press release; The Office of the Prosecutor of the International Criminal Court opens its first investigation, The Hague, 23 June 2004; No. ICC-OTP-20040623-59-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) [accessed on 3 Dec 2008]

<sup>12</sup> Lettered from Pre-Trial Chamber I numbered ICC-01/04-letter/1 referred to in pg4 of ; The prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference: No.ICC-01/04 dated 8 March 2005(public document) available at [http://www.icc-cpi.int/library/organs/otp/ICC0104Anx\\_2005March08-e.pdf](http://www.icc-cpi.int/library/organs/otp/ICC0104Anx_2005March08-e.pdf) [accessed on 28 Nov 2008]; Letter from the Chief Prosecutor to Pre-Trial Chamber I numbered OTP/13/204/LMO-sv; and Letter from the Deputy Prosecutor Fatou Bensouda to Pretrial chamber I numbered OTP/231204/FB-sv: all referred to in the prosecutor's position on the status conference pg 4 and 5.

<sup>13</sup> On 23 June 2004, the Presidency of the ICC decided to constitute three Pre-Trial Chambers (Decision Constituting Pre-Trial Chambers (ICC-Pres-01/04), Presidency, 6 June 2004). The Presidency assigned the situation in DRC to Pre-Trial Chamber I, composed by Judge Claude Jorda (President), Judge Akua Kuenyehia and Judge Sylvia Steiner (Presidency:Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I [ICC-01/04], 5 July 2004 available at <http://www.icc-cpi.int/cases.html> [accessed 18Dec 2008]

<sup>14</sup> Informal meeting of 9 November 2004 referred to in page 2 of the Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo (ICC-01/04), Pre-Trial Chamber I, 17 February 2005 and page 4 of the prosecutor's position supra FN11

decision deciding to convene a status conference on the situation in the DRC.<sup>15</sup> In its rather plain decision, Pre-Trial Chamber I relying on Article 57(3) c and Regulations 30<sup>16</sup> of Regulations of the Court observed that considering the chamber's earlier communications with the prosecutor, there are arising matters in the situation which indicate the need for the chamber '...to provide *inter alia* for the protection of victims and witnesses and preservation of evidence through the holding of a status conference'.<sup>17</sup> The chamber's first decision came sooner than expected and was indeed a shock to both the prosecutor and bystanders. At this stage of the investigation, the prosecutor had not yet identified any suspects or called on the chamber to take any measures to preserve evidence. Whereas the chamber has the duty to protect the rights of the accused (suspect in this instance) and victims as well as the duty to balance the Prosecutor's and the defence's positions during the pre-trial phase of the proceedings including the investigation stage plus speeding up the proceedings, the chamber's move at this very early stage of the investigations is contentious.<sup>18</sup>

At the outset, it must be recalled that from the initiation of an investigation to the issuance of a warrant of arrest or summons to appear, the Pre-Trial Chamber is given very limited powers to intervene in investigative activities on its own initiative. At this stage of the proceedings, the Pre-Trial Chamber is only given the power 'to 'supervise' the Prosecutor, principally, but not exclusively, when he decides to investigate *proprio motu*.'<sup>19</sup> From an exacting procedural approach, at this phase of proceedings, short of the prosecutor's investigation *proprio motu*, the chamber may only act as an organ of judicial scrutiny and review when called upon by the prosecutor, state or Security Council. Neither the Rome Statute nor the RPE authorizes the holding of a status conference by the Pre-Trial Chamber at the early investigation stage of proceedings. The RPE only permit the holding of a status

---

<sup>15</sup> Pre-Trial Chamber I: Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo [ICC-01/04], 17 February 2005 available at [http://www.icc-cpi.int/library/cases/ICC-01-04-9\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-9_English.pdf) [accessed 28 Nov 2008]

<sup>16</sup> Under Article 57, paragraph 3(C), of the Statute, one of the functions of the Pre-Trial Chamber is to "provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information". Regulation 30 provides the "Chambers" of the Court with the power to convene a status conference by way of hearings, "including by way of audio- or video-link technology or by way of written submissions"

<sup>17</sup> Pre-Trial Chamber I's Decision Supra FN15 at 2

<sup>18</sup> For scholarly comments on the decision see: Michela Miraglia 'The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure Under Construction' (2006) 41 *Journal of International Criminal Justice* 188, Mahnoush H. Arsanjani and W. Michael Reisman, 'The Law-in-Action of the International Criminal Court' (2005) 99 2 *American Journal of International Law* 385

<sup>19</sup> Michela Miraglia; *ibid* at 192

conference by the Pre-Trial Chamber before the confirmation hearing in order to ensure that the disclosure between the Prosecutor and the defence takes place under satisfactory conditions pursuant to Rule 121 and before the trial in order to set its date or to facilitate the fair and expeditious conduct of the proceedings pursuant to Rule 132. In addition, Regulation 30 of the Regulations of the court relied on by the chamber does not authorise the chamber to alter the provisions of statute or RPE. Regulation 30 merely sets out the manner in which status conferences may be conducted.<sup>20</sup>

On the other hand, despite the holding of a status conference by the chamber at this stage of proceedings being unauthorized, the agenda of the conference leaves a lot to be desired of the chamber's interplay with the prosecutor. The conference's agenda was to discuss the progress of the prosecutor's investigation in DRC—an inquiry which is beyond the judicial obligations of the chamber. At this stage of the investigation there were no specific issues which the chamber sought to address. The chamber merely wanted to obtain information on the progress of the prosecutor's investigation. Where as it has been argued that the chamber's inquiry was to speed up investigations so as to protect the rights of the defendants in the interest of justice<sup>21</sup>, at this stage of the investigation the prosecutor had not identified any suspects. Besides, the chamber need not inquire of the progress of the prosecutor's investigation so as to speed up investigations. As observed in the previous chapters, the ICC Pre-Trial Chamber is a judicial organ and not an investigation chamber. Arguably the chamber's inquiry of the prosecutor's progress in the investigation is an act of an investigation chamber contrary to the provisions of the statute and the RPE. Hence, it may be contended that the chamber exercised control over prosecutorial activities and therefore over stepped its boundaries. In addition, the chamber being a judicial organ it ought to have hard the prosecutor on the matter.

Notwithstanding the above, judges of Pre-Trial Chamber I on their own initiative intervened with the prosecutor's investigative activities under the cover of the general provisions contained in Article 57(3) (c) through the holding of an unauthorised status conference. At this stage, the chamber had already assumed more of a supervisory other than

---

<sup>20</sup> Also see; Prosecutor; Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo (ICC-01/04) 8 March 2005. 'Redacted version' of the position, available at [www.icc-cpi.int/libraryorgans/otp/ICC0104Anx\\_2005March08-e.pdf](http://www.icc-cpi.int/libraryorgans/otp/ICC0104Anx_2005March08-e.pdf) [accessed on 28.Nov 2008]

<sup>21</sup> Michela Miraglia FN 18at192-3

a purely judicial role. Sceptical of the chamber's move, the prosecutor challenged the chamber's decision as being unauthorized by the provisions; as being an unwarranted conclusion given the stage of investigation and the information relied on by the chamber and above all challenged the chamber on his right to be heard or make submissions as to whether a status conference should be convened.<sup>22</sup> Pre-Trial Chamber I discarded the submissions made by the Prosecutor on the ground that they lacked procedural basis.<sup>23</sup> The chamber only discussed the Prosecutor's delay in responding within the prescribed time-limits in the statutory remedy available to raise his concerns. The chamber observed that the Prosecutor had not availed himself, within the time-limit contained in Rule 155 of the RPE, of the only procedural mechanism available under Article 82(1) d, of the Statute to raise his concern regarding the procedural and substantial grounds of the decision.<sup>24</sup> The prosecutor's efforts to seek redress from the appeal's chamber were also rejected<sup>25</sup> and a status conference was held on 15<sup>th</sup> march 2005. The chamber held that the Prosecutor had failed to show that the challenged decision involved an issue that "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial",<sup>26</sup> as required by Article 82(1) d of the Statute.<sup>27</sup>

Following the above, the chamber's first decision seems obliterate the judicial relationship between the chamber and the prosecutor as carefully laid down in the statute and the RPE. However, it is too early to draw such a conclusion. Whereas we can look at the chamber's decision as 'the first step of the Pre-Trial Chamber toward defining its powers in relation to the Prosecutor', support to this assertion is subsequent to comparable further encounters between the two organs.

---

<sup>22</sup> Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision; SupraFN20

<sup>23</sup> Pre-Trial Chamber I, "Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference", 9 March 2005 [ICC-01/04], available at [http://www.icc-cpi.int/library/organs/chambers/Decision\\_PTCI\\_20050309.pdf](http://www.icc-cpi.int/library/organs/chambers/Decision_PTCI_20050309.pdf) [accessed on 28 Nov 2008]

<sup>24</sup> Rule 155 provides that; Rule 155 reads as follows: "When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal".

<sup>25</sup> Pre-Trial Chamber I, "Decision on the Prosecutor's Application for Leave to Appeal", 14 March (ICC-01/04, available at [http://www.icc-cpi.int/library/organs/chambers/ICC\\_01-04\\_2005March14\\_e.pdf](http://www.icc-cpi.int/library/organs/chambers/ICC_01-04_2005March14_e.pdf) [accessed on 28 Nov 2008]

<sup>26</sup> Ibid at p.3

<sup>27</sup> Article 82(1)d reads: "Either party may appeal [... a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

### 3.4. The prosecutor's unique investigative opportunity

Shortly after the status conference, the Prosecutor informed Pre-Trial Chamber I of the existence of a unique investigative opportunity, requesting for measures under Article 56 of the statute.<sup>28</sup> This act was regarded by some scholars as a positive result of the Pre-Trial Chamber's first move.<sup>29</sup> Upon holding expert consultations with the prosecutor subsequent to his request,<sup>30</sup> the chamber acknowledged the existence of the unique investigative opportunity and adopted all of the necessary measures so as to ensure efficiency and integrity of the proceedings and in particular to protect the rights of the defence.<sup>31</sup> The chamber adopted *inter alia* the measure of the participation of an *ad hoc* 'counsel for the defence' appointed by the registrar in the proceedings.<sup>32</sup> A measure one may consider unwarranted and again leaves a lot to be desired of the interplay between the chamber and the prosecutor.

While the chamber acknowledges the need and its duty to protect the rights of the defendant(s), it fails to take into consideration some of the core prosecutorial obligations which in turn affect the chamber's interplay with the prosecutor. Much as the statute provides for the measure of the appointment of a counsel to represent the interest of the defence, such a measure was not called for at this very early stage of the proceedings where the prosecutor had not even identified a suspect. The chamber's decision disregards the prosecutor's duty of investigating both incriminating and exonerating circumstances equally pursuant to Article 54(1) a. Taking into account the subject matter of the procedure—a forensic examination of items considered not available at subsequent stages of the proceedings,<sup>33</sup> the representation of the interests of the defence by an *ad hoc* counsel was unnecessary—especially where the chamber itself had established the independence and impartiality of the proposed body (Netherlands Forensic Institute) in charge of the

---

<sup>28</sup> Prosecutor's Request for Measures under Article 56 filed on 19 April 2005 cited in: Pre-Trial Chamber I; Decision to Hold Consultation under Rule 114(Public Redacted Version) 21-April -2005 [ICC-01/04-19] 2 available at [http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC\\_01-04\\_19\\_e%20Decision,%2021%20April%202005.pdf](http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC_01-04_19_e%20Decision,%2021%20April%202005.pdf) [accessed on 29.Nov.2008]

<sup>29</sup> Michela Miraglia FN 18at192

<sup>30</sup> Pre-Trial Chamber I; Decision to Hold Consultation under Rule 114(Public Redacted Version) 21-April -2005 [ICC-01/04-19] 2 available at [http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC\\_01-04\\_19\\_e%20Decision,%2021%20April%202005.pdf](http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC_01-04_19_e%20Decision,%2021%20April%202005.pdf) [accessed on 29.Nov.2008]

<sup>31</sup> Pre-Trial Chamber I; Decision on the Prosecutor's Request for Measures under Article 56 (Public Redacted Version) 26 April 2005 [ICC-01/04] available at [http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-21\\_e%20Decision,%2026%20April%202005.pdf](http://www.iccklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-21_e%20Decision,%2026%20April%202005.pdf) [accessed on 29.Nov.2008]

<sup>32</sup> *Ibid* p.4

<sup>33</sup> Pre-Trial Chamber I; Decision to Hold Consultation under Rule 114: *Supra* FN30 at p.1

examination.<sup>34</sup> Where on the one hand the chamber has been praised for ensuring fairness of proceedings by appointing a defence council,<sup>35</sup> on the other hand, it may be contended that; the chamber assumed a supervisory role undermining the prosecutor's ability to fulfill his obligation— investigating both incriminating and exonerating circumstances equally. Hence, decided to control prosecutorial activities by appointing a 'watchdog'. As a result, the chamber continues to over step its boundaries. Indeed the first moves of the chamber portray the chamber's assumption of a more supervisory other than a purely judicial role.

### **3.5. The participation of victims at the investigation phase of proceedings**

One of the unique features of the ICC's system which is commonly referred to as the major innovation of the court is the participation of victims in proceedings before the ICC.<sup>36</sup> The Rome Statute gives victims the right to participate in court proceedings by expressing "views and concerns" through their own legal representatives.<sup>37</sup> The first decision on the topic issued by judges of Pre-Trial Chamber I steered yet another debate on the balance of power between the chamber and the prosecution in pre-trial proceedings.<sup>38</sup> The chamber was faced with applications of victims wanting to participate in the proceedings at an early investigation stage.<sup>39</sup> The prosecutor at this point had not yet moved from investigating a situation to investigating a case. Upon due consideration of the victims submissions and the prosecutor's responses, Judges of Pre-Trial Chamber I established what may be considered a rather expansive interpretation of the provisions stipulating the unprecedented right allowing victims to participate at the early investigation stage of the proceedings.<sup>40</sup>

---

<sup>34</sup> Pre-Trial Chamber I; Decision on the Prosecutor's Request for Measures under Article 56: Supra FN31 at p.3

<sup>35</sup> Michela Miraglia FN 18at194

<sup>36</sup> Haslam, Emily 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in McGoldrick, Dominic; Rowe, Peter and Donnelly, Eric (eds) *The Permanent International Criminal Court: Legal and Policy Issues*. (2004) pp. 315-334; A Caesius, 'The statute of the International Criminal Court: some preliminary reflections' (1999) 10 *1 European Journal of International Law* 144

<sup>37</sup> Article 68 of the Statute

<sup>38</sup> Pre-Trial Chamber I; Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6. (Public Redacted Version) 17 January 2006[ICC-01/04-101] available at [http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101\\_tEnglish-Corr%20Decision.%2017%20January%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101_tEnglish-Corr%20Decision.%2017%20January%202006.pdf) [accessed on 1.Dec.2008]

<sup>39</sup> Letter from Mr Sidiki Kaba, President of the International Federation for Human Rights (FIDH) registered by the registry on 14 June 2005 as ICC-01/04-23-Conf-Exp-tEN, submitting the applications for participation of victims designated VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 and a mandate authorising Emmanuel Daoud to represent them. Cited in p.4 of Ibid.

<sup>40</sup> For scholarly review on the chambers decision See; Jérôme de Hemptinne, Francesco Rindi 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings'(2006)4 *Journal of International Criminal Justice* 342; Elisabeth Baumgartner 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008)90 *870 International Review of the Red Cross* 409

To the judges, the central questions were whether the Statute, RPE and the Regulations of the Court “accord victims the right to participate in the proceedings at the stage of investigation of a situation and if so what form such participation should take.”<sup>41</sup> Upon such an establishment the chamber was then to consider whether the applicants meet all the criteria to be considered as ‘victims’ under Rule 85.<sup>42</sup> The prosecutor had made submissions challenging the applications on the grounds that; one, investigations were not proceedings within the meaning of Article 68(3) since investigations appeared under the trial section of the statute;<sup>43</sup> two, participation of victims at the investigation stage of the proceedings is inappropriate;<sup>44</sup> and three, the applicants had not shown that their personal interests were affected at the investigation stage of proceedings.<sup>45</sup> The chamber rejecting the prosecutor’s argument adopted a technical approach, developing literal, contextual and teleological well argued and balanced arguments. The chamber held that the word proceedings in the statute does not exclude the investigation stage noting that the words proceedings and investigations are used interchangeably in several parts of the statute.<sup>46</sup> It also observed that provisions under Chapter VI of the ICC Statute include general principles applicable at different stages of the proceedings and that Article 68(3) could, therefore, also be interpreted as referring to the investigations.<sup>47</sup> In sum, the Chamber observed, devoid of any detail, that the ICC Statute grants victims an independent voice and a role which allows them to express their views and concerns before the Prosecutor during the investigation phase— distinguishing victims of a situation from victims of a case.<sup>48</sup> Additionally, based on the information provided by the applicants, the chamber concluded that the applicants were victims within the meaning of Rule 85 and they suffered from crimes under the jurisdiction of the court within the DRC situation.<sup>49</sup>

---

<sup>41</sup> Pre-Trial Chamber I; Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6 SupraFN38.p.7

<sup>42</sup> Ibid.

<sup>43</sup> Prosecution; ‘Prosecution’s Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp’(Public document pursuant to Decision ICC-01/04-140) 15-August-2005 [ICC-01/04-84-Conf ] *available at* <http://www2.icc-cpi.int/iccdocs/doc/doc183749.PDF> [accessed on 2.Dec.2008] p.8

<sup>44</sup> Ibid.p.11

<sup>45</sup> Ibid.p.9-10

<sup>46</sup>Pre-Trial Chamber I; Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6. Super FN38 at P.11

<sup>47</sup> Ibid.P.13

<sup>48</sup>Ibid. P.19-20

<sup>49</sup> Ibid.P.41

Again, the prosecutor striving to preserve his freedom in fulfilling his investigative duty as he deems fit requested the chamber for a leave to appeal the decision.<sup>50</sup> The prosecutor challenged the idea that there could be victims of a situation as opposed to victims affected by a case particularly by the accused of such a case.<sup>51</sup> The prosecutor also raised concerns that, "given the massive scale of the alleged criminality in DRC, [the] ruling could result in tens of thousands or hundreds of thousands of individuals seeking participation at the investigation stage."<sup>52</sup> The prosecutor further added that the Pre-Trial Chamber was prematurely concluding, "Without any application by the prosecutor for an arrest warrant or request for confirmation of charges that crimes within the court's jurisdiction had likely occurred, seemingly a usurpation of the prosecutor's leading role in specifying a case."<sup>53</sup> After a number of filings from victims' representatives and the prosecutor with regard to the leave to appeal, the chamber rejecting the prosecutor's arguments found in favour of the victims according them victim status and participation at the investigation stage of proceedings.<sup>54</sup>

The chamber's decision has been uploaded by human rights activists acknowledging the chamber's ability to define its role as the protector of victims and witnesses from the earliest stage of proceedings.<sup>55</sup> However, given a close scrutiny, the chamber's decision has major negative implications with regard to its interplay with the prosecutor. Apart from the drawbacks the decision has on the investigative activities of the prosecutor and the defence, the decision also marks the chamber's interference with the prosecutor's investigation activities. According to the chamber, 'the personal interests of the victims are affected at the investigation stage in a general manner, in that their participation enables them to **clarify**

---

<sup>50</sup> Prosecution: Prosecution's 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 (Public Document) 23-January-2006 [ICC-01/04-103] available at <http://www2.icc-cpi.int/iccdocs/doc/doc183444.PDF> [accessed on 3.Dec.2008]

<sup>51</sup> Ibid.p.6-7

<sup>52</sup> Ibid.p.14

<sup>53</sup> Ibid.p.6

<sup>54</sup> Pre-Trial Chamber I: Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6 (Public Document) 31-March-2006 [ICC-01/04-135-tEN] available at <http://www2.icc-cpi.int/iccdocs/doc/doc183511.PDF> [accessed on 2.Dec.2008]

<sup>55</sup> Institute for war & peace reporting; 'ICC: Victims to Have Greater Voice' report by Katy Glassborow in The Hague (AR No. 73, 08-Aug-06) available at [http://www.iwpr.net/?p=acr&s=f&o=322840&apc\\_state=henpacr](http://www.iwpr.net/?p=acr&s=f&o=322840&apc_state=henpacr) [accessed on 3.DEC.2008]; Institute for war & peace reporting; 'ICC Enters Uncharted Territory' Report by Janet Anderson in The Hague (TU No 445, 24-Mar-06) available at [http://www.iwpr.net/?p=tri&s=f&o=260514&apc\\_state=henh](http://www.iwpr.net/?p=tri&s=f&o=260514&apc_state=henh) [accessed on 3.DEC.2008]

facts, punish those responsible for crimes and seek reparation for harm suffered'.<sup>56</sup> Admittedly, following the prosecutor's response on the matter, it is obvious that he sought no clarification of the facts of his investigation from the victims. Arguably, it may be contended that through victim participation, the chamber sought to collect its own information, in addition to that to be presented by the Prosecutor for purposes of future pre-trial proceedings, for instance, when considering whether to request the Prosecutor to reconsider his decision not to commence an investigation. Once again the chamber assumes an investigative role beyond its judicial capacity. Over stepping its boundaries the Pre-Trial Chamber forgets its main function is to ensure the fair and expeditious conduct of the preliminary phase of the trial.

Pre-Trial Chamber I's decision was subsequently adopted by the other Pre-Trial Chambers in the division sittings in the situations of Uganda and Darfur. The Single Judge assigned by Pre-Trial Chamber II to manage victims' issues in the Uganda situation affirmed the "broad approach" of according a general right of victims to participate in the investigation phase.<sup>57</sup> The decision was also upheld by the Single Judge charged with managing victim-related matters in the Darfur situation stating, devoid of any details, that she would follow the ruling of Pre-Trial Chamber I in deeming the stage of investigation of a situation to be an appropriate stage for victim participation.<sup>58</sup> Accordingly, the chamber continued with "investigative" activities and control over prosecutorial duties while constantly suppressing the prosecutor's efforts to seek reform from the appeals. Amazingly, on 23 January 2008, Pre-Trial Chamber I granted a leave to appeal to the Office of Public Counsel for the Defence on *inter alia* whether Article 68(3) of the Statute can be interpreted as providing for a procedural status of victim at the investigation stage of a situation and the pre-trial stage of a case.<sup>59</sup>

---

<sup>56</sup> Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, *Supra*FN38 at para 63 (emphasis added).

<sup>57</sup> Pre-Trial Chamber II: Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Public Redacted Version) 10-August-2007 [ICC-02/04-101] available at <http://www2.icc-cpi.int/iccdocs/doc/doc311236.PDF> [accessed on 4.Dec.2008]

<sup>58</sup> Pre-Trial Chamber I: Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07(Public) 06-December-2007 [ICC-02/05-111] available at <http://www2.icc-cpi.int/iccdocs/doc/doc366322.PDF> [accessed on 4.Dec.2008]

<sup>59</sup> Pre-Trial Chamber I: Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation (Public) 23-January-2008 [ICC-02/05-121] available at <http://www2.icc-cpi.int/iccdocs/doc/doc431983.PDF> [accessed on 4.Dec.2008]

On a decision dated 19<sup>th</sup> December 2008,<sup>60</sup> the Appeals Chamber ruled that, the participation of victims can take place only within the context of judicial proceedings. It observed that, “Article 68 (3) of the Statute correlates victim participation to “proceedings”, a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible.”<sup>61</sup> The Appeals Chamber also added that, “the authority for the conduct of investigations vests in the Prosecutor”<sup>62</sup> as outlined in Article 42 statute and accordingly; “[a]cknowledgment by the Pre-Trial Chamber of a right to victims to participate in the investigation would necessarily contravene the Statute by reading into it a power outside its ambit and remit.”<sup>63</sup> The Appeals chamber concluded that “the decisions of the Pre-Trial Chamber acknowledging procedural status to victims, entitling them to participate generally in the investigation of a situation are ill-founded and must be set aside.”<sup>64</sup> The Appeals Chamber decision certainly demonstrates the will of the Pre-Trial Chamber to dig deep into the investigative procedures and effectively control prosecutorial activities.

It is a fair comment that thus far, the Pre-Trial Chamber has assumed a more supervisory role over the prosecutor other than maintaining the required judicial relationship. Better yet one could assert that the chamber has indeed shifted the balance of legal traditions reached in Rome labelling itself an investigating chamber.

### **3.6. Issuance of arrest warrants**

On 8<sup>th</sup> July 2005, Pre-Trial Chamber II of the ICC issued the court’s first arrest warrants ever arising from the courts investigation in the situation in northern Uganda. Upon the request of the prosecutor, the chamber issued five arrest warrants under seal as well as requests for arrest and surrender relating thereto.<sup>65</sup> The warrants were later unsealed after the chamber

---

<sup>60</sup> Appeals Chamber: Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007(Public) 19-December-2008 [ICC-01/04-556] available at <http://www2.icc-cpi.int/iccdocs/doc/doc612293.pdf> [accessed on 4.Dec.2008]

<sup>61</sup> Ibid.p.20

<sup>62</sup> Ibid.p.22

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.p.25

<sup>65</sup> Pre-Trial Chamber II: Warrant of Arrest for Raska Lukwiya (Public redacted version) issued 8-July-2005 [ICC-02/04-01/05-55 13-10-2005] available at

ascertained that necessary and adequate protective measures for all concerned at that stage had been taken.<sup>66</sup> In its decision on the arrest warrant request by the prosecutor, the chamber steered yet another procedural debate on the overlapping of powers between the chamber and the prosecutor and again managed to control prosecutorial activities.<sup>67</sup>

In its decision, the chamber decided *inter alia* that the warrants and the requests of arrest and surrender be issued as separate documents and that the registrar was the competent and appropriate organ to transmit the requests.<sup>68</sup> In support of its decision, the chamber noted that, "articles 87 and 89 of the Statute provide, respectively, that a request for cooperation may be made and that a request for arrest and surrender may be transmitted by the "Court"<sup>69</sup> through the registrar pursuant to "Rule 176, sub-rule 2, of the RPE, which provides explicitly that the Registrar of the Court "shall transmit" the requests for cooperation "made by the Chambers" and shall receive the responses, information and documents from requested States."<sup>70</sup> The chamber also acknowledged the existence of a separate and distinct procedure under the statute and Rule 176(2); declaring the prosecutor a competent and appropriate organ to transmit requests for cooperation made by him, in line with his powers under Articles 42 and 54 of the Statute.<sup>71</sup> However, the chamber ruled that the possibility of

---

[http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-0204010555\\_English%20Warrant%20of%20Arrest%20for%20Raska%20Lukwiya,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-0204010555_English%20Warrant%20of%20Arrest%20for%20Raska%20Lukwiya,%208%20July%202005.pdf); Pre-Trial Chamber II: Warrant of Arrest for Okot Odhiambo (Public redacted version) issued 8-July-2005[ICC-02/04-01/05-56 13-10-2005] available at [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-0204010556\\_English%20Warrant%20of%20Arrest%20for%20Okot%20Odhiambo%20,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-0204010556_English%20Warrant%20of%20Arrest%20for%20Okot%20Odhiambo%20,%208%20July%202005.pdf); Pre-Trial Chamber II: Warrant of Arrest for Vincent Otti(Public redacted version) issued 8-July-2005[ICC-02/04-01/05-54 13-10-2005] available at [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010554\\_English%20Warrant%20of%20Arrest%20for%20Vincent%20Otti,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010554_English%20Warrant%20of%20Arrest%20for%20Vincent%20Otti,%208%20July%202005.pdf); Pre-Trial Chamber II: Warrant of Arrest for Dominic Ongwen (Public redacted version) issued 8-July-2005[ICC-02/04-01/05-57 13-10-2005] available at [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010557\\_English%20Warrant%20of%20Arrest%20for%20Dominic%20Ongwen,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010557_English%20Warrant%20of%20Arrest%20for%20Dominic%20Ongwen,%208%20July%202005.pdf); Pre-Trial Chamber II: Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005(Public redacted version) issued 8-July-2005[ICC-02/04-01/05-53 13-10-2005] available at [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05-53\\_English%20Warrant.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05-53_English%20Warrant.pdf)

<sup>66</sup> Pre-Trial Chamber II: Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest (Public document) 13-October-2005[ICC-02/04-01/05-52] available at

[http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010552\\_English%20Decision,%2013%20October%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010552_English%20Decision,%2013%20October%202005.pdf) [accessed on 8.Dec.2008]

<sup>67</sup> Pre-Trial Chamber II: Decision on the Prosecutor's Application for Warrants of Arrest under Article 58(Under Seal, Ex Parte, Prosecutor Only) 8-July-2005[ICC-02/04-01/05-1-US-Exp] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) available at

[http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC020401051USExp\\_English%20Decision,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC020401051USExp_English%20Decision,%208%20July%202005.pdf) [accessed on 8.Dec.2008]

<sup>68</sup> Ibid.p.8

<sup>69</sup> Ibid.p.4

<sup>70</sup> ibid

<sup>71</sup> Ibid.p.4-5

allocating the request transmission responsibility to the prosecutor was subject to the establishment by the prosecutor of "specific and compelling circumstances" of which the prosecutor failed to establish.<sup>72</sup>

The Prosecutor challenged the chambers ruling and requested the chamber to grant him leave to appeal the decision in respect of whether the Chamber properly denied his request of being the organ to transmit the Requests upon issuance of the Warrants by the Chamber.<sup>73</sup> The prosecutor noted that reference to "transmission" of such Requests should be understood as encompassing "the entire process of preparation of the requests for arrest and surrender, as well as subsequent transmission to the relevant States".<sup>74</sup> The prosecutor submitted *inter alia* that the chamber erred by making transmission by the Prosecutor conditional upon the test of "specific and compelling circumstances", which is not enshrined in the Statute, and which is so restrictive in formulation and effect as to contravene the object and purpose of Article 89(1) of the Statute.<sup>75</sup> Supporting his application for leave to appeal, the Prosecutor contended that the errors of law and procedural errors incurred in the Decision would "affect the fair and expeditious outcome of the proceedings" and "require immediate resolution by the Appeals Chamber" within the meaning of article 82(l)d of the Statute.<sup>76</sup> The Prosecutor submitted, *inter alia*, that the decision implicated the fair conduct of proceedings by "substantially altering the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber" during the investigation phase of the ICC's operations.<sup>77</sup>

Rejecting the prosecutor's leave to appeal, devoid of much detail pertaining to the overlapping powers and concerns raised by the prosecutor, the chamber relied principally on a narrow and strict interpretation of "fairness" within the meaning of Article 82(1) d and ruled that in "general terms," it is "hard to see how a merely procedural issue, such as the preparation and the transmission of a request for arrest and surrender, might impair or

---

<sup>72</sup> Ibid.p.6

<sup>73</sup> Prosecution: 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 Article 58" of the Statute of the Court (Under Seal)18-July-2005[ICC-02/04-01/05-23] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) available at <http://www2.icc-cpi.int/NR/exeres/611E2EAA-C5C5-48F0-A345-C82452E1FCB2.htm> [accessed on 8.Dec.2008]

<sup>74</sup> Ibid.para.1

<sup>75</sup> Ibid. Para.11, 18, 23 and 27

<sup>76</sup> Ibid.para.30

<sup>77</sup> Ibid.para.31

otherwise adversely affect the fairness of the proceedings.”<sup>78</sup> The chamber went on to hold that, it is “debatable whether a question exclusively relating to the apportioning of powers between organs of the Court may qualify as an issue that pertains to or would significantly affect the fair and expeditious conduct of proceedings.”<sup>79</sup>

Accordingly, the chamber continued to suppress the powers of the prosecutor even where the provisions clearly suggest that the PTC and OTP share overlapping authority on the matter and no where indicates the need of any qualification (“specific and compelling circumstances”) on the part of the prosecutor. On the other hand, even if the chamber rightfully denied the prosecutor the duty to carry out such transmission, the chamber’s holding that questions of “apportioning of powers between organs of the Court may [not] qualify as an issue that pertains to or would ‘significantly affect the fair... conduct of proceedings’” is problematic. The decision leaves the prosecutor suppressed with no recourse and the chamber in control of prosecutorial activities. The question remains; if the prosecutor has no recourse for procedural errors altering the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber during the investigation phase of the court’s operations, what then was the aim of balancing the legal traditions in the ICC’s system and laying down specific responsibilities of the respective organs at each stage of proceedings? Better yet, is the prosecutor truly the only investigative authority of the chamber?

Whereas the decision on the prosecutor’s request for arrest warrants in the situation in the DRC was successful and had no procedural hampers,<sup>80</sup> a discussion between the chamber and the prosecutor during the arrest warrant hearing is worth noting.<sup>81</sup> During the hearing, the prosecution had to once again endeavour to preserve its freedom in fulfilling its prosecutorial obligations. The prosecutor had to remind the chamber that intensions of the OTP “do not

---

<sup>78</sup> Pre-Trial Chamber II: 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 Article 58(Under Seal; Ex Parte, Prosecutor Only) 19-August-2005[ICC-02/04-01/05-20-US-Exp ] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) available at [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010520USExp\\_English%20Decision\\_%2019%20August%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010520USExp_English%20Decision_%2019%20August%202005.pdf) [accessed on 8.Dec.2008]p.19-20

<sup>79</sup> Ibid.p.21-22

<sup>80</sup> Pre-Trial Chamber I: Warrants of Arrest (Under Seal) 10-February-2006[ICC-01/04-01/06-2-tEN] (Unsealed Pursuant to decision ICC-01/04-01/06-37) available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC010401062\\_tEnglish%20Warrant%20of%20Arrest\\_%2010%20February%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC010401062_tEnglish%20Warrant%20of%20Arrest_%2010%20February%202006.pdf) [accessed on 9.Dec.2008]

<sup>81</sup> Pre-Trial Chamber I: ICC-01/04—Situation in Democratic Republic of the Congo ‘Procedural matters hearing’ 2-February-2006: Transcript [ICC-01/04-T-8-EN[2Feb2006 WT]1-1 SZ PT] available at <http://www2.icc-cpi.int/iccdocs/doc/doc236274.PDF>

form part of the decision-making process of [the] Pre-Trial Chamber in respect to the application”.<sup>82</sup> The prosecutor’s response followed the chamber’s inquiry as to where the OTP is heading. “Do you intend to prosecute individuals with national level responsibility? Or do you intend to limit your action to individuals who are leaders of militias?”<sup>83</sup> Though upon the prosecutor’s response and further explanation the judge accepted it was surely no direct concern of his<sup>84</sup>, this still shows how much the judges of the Pre-Trial Chamber have assumed quite a supervisory role.

### 3.7. Disclosure of evidence

After the initial appearance or surrender of an accused, before the confirmation hearing takes place, there is a disclosure phase which covers the disclosure of evidence between the prosecutor and the defence of evidence they intend to rely on at the confirmation hearing.<sup>85</sup> The Pre-Trial Chamber is charged with the duty of ensuring that such disclosure takes place in a satisfactory manner.<sup>86</sup> Art. 61 (3) and 67 (2) of the Statute, and Rules 76 – 84 and 121 of the RPE deal with the disclosure of evidence but do not established the scope of disclosure obligations and the procedure to be followed. The first decision on disclosure was issued by Pre-Trial Chamber I after the initial appearance of Thomas Lubanga Dyilo. After due deliberations between the chamber and the prosecutor and defence both in writing<sup>87</sup> and at a hearing on disclosure matters on 24 April 2006<sup>88</sup>, Pre-Trial Chamber I’s single judge examined and decided upon the final system of disclosure and the establishment of a timetable in a decision dated 15 May 2006.<sup>89</sup> Following the Pre-Trial Chamber’s record as discussed above, it is no surprise that even after due deliberations as to the right disclosure procedure with the prosecutor and the defence, the chamber’s decision still steered up another procedural debate with the prosecutor.

---

<sup>82</sup> Ibid.p.30

<sup>83</sup> Ibid.p.29

<sup>84</sup> Ibid.p.32

<sup>85</sup> Article.61(3) of the Statute

<sup>86</sup> Rule121(2)(b)

<sup>87</sup> See submissions by both the prosecutor and the defence on disclosure of March-May 2006; available at <http://www2.iccpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Cout+Records/Filing+of+the+Participants/>

<sup>88</sup> Pre-Trial Chamber I: ICC-01/04-01/06— The Prosecutor v. Thomas Lubanga Dyilo ‘hearing on disclosure matters’ 24-April-2006: Transcript: [ICC-01/04-01/06-T-4-EN[24APR2006 WT] 1-88 SZ PT] available at <http://www2.icc-cpi.int/iccdocs/doc/doc215746.PDF> [accessed on 15.Dec.2008]

<sup>89</sup> Pre-Trial Chamber I: Decision on the Final System of Disclosure and the Establishment of a Timetable (Public Document) 15-May-2006 [ICC-01/04-01/06-102] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106102\\_English%20Decision%20on%20the%20Final%20System%20of%20Disclosure%20and%20the%20Establishment%20of%20a%20Timetable.%2015%20May%202006..pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106102_English%20Decision%20on%20the%20Final%20System%20of%20Disclosure%20and%20the%20Establishment%20of%20a%20Timetable.%2015%20May%202006..pdf) [accessed on 15.Dec.2008]

The Pre-Trial Chamber I single judge in the extensive decision ruled *inter alia* that, disclosure of evidence between the prosecutor and defence was to take place through the registrar and to ensure transparency and a permanent record of the procedure; they were to file “disclosure notes” or “inspection reports” in the record of the case.<sup>90</sup> The decision disregarded the vehement protests of both the prosecutor and defence who argued that, “the principle [of] disclosure is directly between the Prosecution and the Defence and vice versa, without the Registry or any other third party being the intermediary.”<sup>91</sup> The judge also rejected the prosecutor’s argument that “the bulk of disclosure” is supposed to occur between the confirmation hearing and the beginning of the actual trial and that the prosecutor is only to submit evidence he will rely on the confirmation hearing.<sup>92</sup> The decision went on to oblige the prosecutor to disclose most, if not all, of the disclosable material to the Defence before the confirmation hearing.<sup>93</sup>

On 19<sup>th</sup> May 2006, the single judge rendered another decision “Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”.<sup>94</sup> In the decision, the Pre-Trial Chamber established certain general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the RPE, relating to the disclosure of evidence in preparation for the confirmation hearing in respect of Mr. Thomas Lubanga Dyilo.<sup>95</sup> The chamber decided *inter alia* conditions of which it would grant applications by the Prosecutor for non-disclosure of the identity of Prosecution witnesses to Mr. Lubanga Dyilo prior to the confirmation hearing. The chamber ruled that, “... any Prosecution request pursuant to article 68 of the Statute and rule 81(4) of the Rules for non-disclosure of the identity of Prosecution witnesses at the confirmation hearing to ensure their safety or that of their families shall be granted only if: (i) the Prosecution has first sought protective measures from the Victims and Witnesses Unit concerning the relevant witness; and (ii) the Prosecution shows that, due to

---

<sup>90</sup> Ibid.p.7

<sup>91</sup> Prosecution: Prosecution's Final Observations on Disclosure (Public Document) 02-May-2006 [ICC-01/04-01/06-91] available at <http://www2.icc-cpi.int/NR/exeres/6F2E2A93-17EA-4CDA-8624-E7B2DFE2DF63.htm> [accessed on 15.Dec.2008] p.5-6

<sup>92</sup> Ibid.p.10-11

<sup>93</sup> Pre-Trial Chamber I: Decision on the Final System of Disclosure and the Establishment of a Timetable Supra FN89 at p.9-11

<sup>94</sup> Pre-Trial Chamber I: Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence (Public Document) 19-May-2006 [ICC-01/04-01/06-108-Corr ] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106108Corr\\_English%20Decision%20Establishing%20General%20Principles%20Governing%20Applications,%2019%20May%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106108Corr_English%20Decision%20Establishing%20General%20Principles%20Governing%20Applications,%2019%20May%202006.pdf)

<sup>95</sup> Ibid.p.3-4

exceptional circumstances surrounding the relevant witness, non-disclosure of identity remains necessary due to infeasibility of protective measures sought or insufficiency of protective measures adopted within the framework of the protection program of the Victims and Witnesses Unit as a result of the Prosecution request"; and that "... any redaction in the statements of witnesses on whose written or oral testimony the Prosecution intends to rely at the confirmation hearing in order not to prejudice the ongoing investigation in the case against Thomas Lubanga Dyilo: (i) shall be temporary and (ii) shall not be maintained beyond the 15-day time limit provided for in rule 121 (4) and (5) of the Rules"<sup>96</sup>

The prosecutor sought for the chambers reconsideration<sup>97</sup> and later a leave to appeal the chamber's decision<sup>98</sup> and on 23<sup>rd</sup> June 2006 Pre-Trial Chamber I's single judge rendered a decision on the prosecution motion for reconsideration and, in the alternative, Leave to appeal.<sup>99</sup> The chamber granted the prosecutor leave to appeal the 19<sup>th</sup> May decision in respect of: "(i) The issue of the determination of the criteria to be met for granting applications for protection purposes for non-disclosure prior to the confirmation hearing of the identity of those witnesses on which the Prosecution intends to rely at the confirmation hearing;"

"(ii) The issue of the temporal scope of the ongoing investigation of Thomas Lubanga Dyilo and the consequent temporary nature of those redactions granted under rule 81 (2) of the Rules in order not to prejudice that investigation; and"

"(iii) The issue of the regime encompassed by the term *ex parte* in the context of applications under rule 81 (2) and (4) of the Rules."<sup>100</sup>

The Appeals Chamber judgement dated 13<sup>th</sup> October 2006<sup>101</sup> though to a great extent reserved in large the single judge's decision, it clearly demonstrated the Pre-Trial Chamber's

---

<sup>96</sup> Ibid.p.22-23

<sup>97</sup> Prosecution: Prosecution's Motion for Reconsideration (Public Redacted Version) 22-May-2006 [ICC-01/04-01/06-120] available at <http://www2.iccpi.int/NR/exeres/A4304CBE7B46485888ECE033EAD70.htm> [accessed on 16.Dec.2008]

<sup>98</sup> Prosecution: Prosecution's Motion for Reconsideration and, in the Alternative, Leave to Appeal (Public Redacted version) 24-May-2006[ICC-01/04-01/06-108] available at <http://www2.iccpi.int/NR/exeres/6F2E2A93-17EA-4CDA-8732-e8b2df2d24.htm> [accessed on 16.Dec.2008]

<sup>99</sup> Pre-Trial Chamber I: Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal (Public Redacted Version)(23-June-2006) [ICC-01/04-01/06-166] available at [http://www.iccklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106166\\_English%20In%20Decision%20on%20the%20prosecution%20motion%20for%20reconsideration,%2023%20June%202006.pdf](http://www.iccklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106166_English%20In%20Decision%20on%20the%20prosecution%20motion%20for%20reconsideration,%2023%20June%202006.pdf) [accessed on 16.Dec.2008]

<sup>100</sup> Ibid.p.25

<sup>101</sup> Appeals Chamber: Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence" (Public document) 13-October-2006 [ICC-01/04-01/06-568] available at [http://www.iccklamberg.com/Caselaw/DRC/Dyilo/Appeals/ICC01040106568\\_English%20Judgment.%2013%20October%202006.pdf](http://www.iccklamberg.com/Caselaw/DRC/Dyilo/Appeals/ICC01040106568_English%20Judgment.%2013%20October%202006.pdf) [accessed on 16.Dec.2008]

efforts to 'shrink the Prosecutor's discretionary powers in the investigative realm'.<sup>102</sup> The Appeals Chamber reversed Pre-Trial Chamber I's decision with respect to the conditions it imposed on the prosecutor's request for non-disclosure of certain witnesses. The Appeals Chamber ruled that such prior application by the Prosecutor to the Victims and Witnesses Unit for protection measures was not required by the Rome Statute, the RPE<sup>103</sup>, or the Regulations of the Court as a prerequisite for an application for non-disclosure of the identity of a witness.<sup>104</sup> The Appeals Chamber went on to add that, 'whether a request for non-disclosure will be Successful will depend on the Pre-Trial Chamber's case-by-case evaluation'.<sup>105</sup> The Appeals Chamber stressed that, whereas " [I]t is the duty of the Pre-Trial Chamber pursuant to rule 121(2)(b) of the Rules of Procedure and Evidence to hold status conferences 'to ensure that disclosure takes place under satisfactory conditions'[,] [t]hese provisions [only] give the Pre-Trial Chamber important functions with respect to the regulation of the disclosure process prior to the confirmation hearing, which might involve, within the confines of the applicable law, the issuing of procedural directions to facilitate the disclosure process. These provisions, however, do not vest a Pre-Trial Chamber with the competence to pre-determine the merits of future applications for authorization of non-disclosure pursuant to rule 81(4) of the Rules of Procedure and Evidence. It is fundamental to the exercise of judicial power that applications are adjudicated on a case-by-case basis."<sup>106</sup>

The Appeals Chamber also reversed the Pre-Trial Chamber's ruling that redactions of statements<sup>107</sup> would be temporary and in any event not maintained beyond 15 days. The appeals chamber established that the limitation of time for sustaining redactions of statements will apply only where the ongoing investigation into a matter is finished at the time of the confirmation hearing.<sup>108</sup> In support of the prosecutor's arguments, the Appeals Chamber observed that the Prosecutor's investigation could certainly extend beyond the confirmation hearing; hence the Prosecutor should not be compelled to cut short the investigation by reason of being forced to disclose redactions.<sup>109</sup> The appeal judges well put it that; "The Appeals Chamber is not persuaded by the Pre-Trial Chamber's interpretation of article 61(4) of the Statute. The Pre-Trial Chamber is correct in stating that while article 61(4) of the Statute mentions investigations before the confirmation hearing, nowhere in the Statute are post-confirmation hearing investigations mentioned. To

---

<sup>102</sup> David Scheffer 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence' (2008) 21 *Leiden Journal of International Law* 151 at 159

<sup>103</sup> notably Rule 81(4)

<sup>104</sup> Appeals Chamber's Judgment; SupraFN101 P.14

<sup>105</sup> Ibid

<sup>106</sup> Ibid.15-16

<sup>107</sup> due to concern for witness identification and safety

<sup>108</sup> Appeals Chamber's Judgment; SupraFN p.23

<sup>109</sup> Ibid.p.33

give this omission as much importance as the Pre-Trial Chamber does is, however, not warranted . . . [T]he Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation . . . [T]he possibility to amend the charges after their confirmation, albeit with the permission of the Pre-Trial Chamber, must necessarily mean that the investigation could continue after the confirmation of the charges . . . The Appeals Chamber accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence – particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing.”<sup>110</sup>

In no better way could the Appeals Chamber judgement be of help in awaking the Pre-Trial Chamber from its “supervisory and investigating judge role hallucination”.

### **3.8. Confirmation of charges hearing**

The Pre-Trial phase of the ICC ends with a confirmation hearing whose purpose is to determine whether sufficient evidence exists to establish substantial grounds to believe that the person committed the charged crimes.<sup>111</sup> Upon receiving evidence provided by the prosecutor in support of the charges and objections and evidence or challenge of the prosecutor’s evidence from the defence, the Pre-Trial Chamber is to determine whether sufficient evidence exists to establish substantial grounds to believe that the person committed each of the crimes charged.<sup>112</sup> On the 29<sup>th</sup> day of January 2007 Pre-Trial Chamber I issued the court’s first decision on confirmation of charges. The chamber confirmed the charges against Thomas Lubanga Dyilo in the situation in DRC committing him for trial for the war crime of conscripting and enlisting children under the age of 15 years.<sup>113</sup> The chamber’s decision like any other president setting decision analysed so far raised another procedural tragedy altering the powers between the prosecutor and the Pre-Trial Chamber.

Pursuant to Article 61(7) of the statute, upon the completion of its determination as to whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged, the chamber may either confirm the charges, decline to confirm the charges where it has determined that the evidence is insufficient or adjourn the hearing and request the prosecutor to consider providing further evidence or conducting

---

<sup>110</sup> Ibid.p21-22

<sup>111</sup> Article 61 of the Statute

<sup>112</sup> Ibid. Sub-Article (7)

<sup>113</sup> Pre-Trial Chamber I: Decision on the confirmation of charges (Public Redacted Version with Annex I) 29-January-2007 [ICC-01/04-01/06-803-tEN] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106803tEN\\_English%20Decison%20on%20the%20confirmation%20of%20charges.%2029%20January202007.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106803tEN_English%20Decison%20on%20the%20confirmation%20of%20charges.%2029%20January202007.pdf)

further investigation with respect to a particular charge or to consider amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the court.<sup>114</sup> Accordingly, Pre-Trial Chamber I in its decision on the confirmation of charges against Thomas Lubanga Dyilo, having determined that the conflict in Ituri—in the context of which the alleged crime had been committed—was, in any case to some extent, of an international nature, ought to have adjourned the hearing in order to allow the Prosecutor to amend the charge because the evidence submitted appears to establish a different crime within the jurisdiction of the court. Nonetheless, the chamber chose to amend the charge on its own initiative diverting from the charge brought by the Prosecutor who marked the Ituri conflict an internal conflict and found it to be part of an international armed conflict.<sup>115</sup> In support of its decision, the chamber observed that, the purpose Article 61(7) is ‘to prevent the Chamber from committing a person for trial for crimes which would be materially different from those set out in the Document Containing the Charges and for which the Defence would not have had the opportunity to submit observations at the confirmation hearing’.<sup>116</sup> The chamber interpreted the term ‘crime’ contained in Article 61(7) ICC Statute based on the concept of ‘criminal conduct’ and concluded that as far as Articles 8(2)(e)(xxvi) and Article 8(2)(b)(vii) of the statutes are concerned, they criminalize the same material conduct of which the defence already had the opportunity to exercise its respective rights. The chamber hence ruled that it was entitled to amend the charges without adjourning the hearing pursuant to Article 61(7) (c) ii.<sup>117</sup>

The prosecutor, seeking leave to appeal the chamber’s decision argued that, the Chamber exceeded the scope of its authority under Article 61(7) of Statute.<sup>118</sup> The prosecutor stated that the chamber violated his right to accordingly amend the charges under Article 61(7) (c).<sup>119</sup> The prosecutor also added that, by changing the charges the fairness of the subsequent proceedings are in danger, because this decision imposes the duty on the Prosecution to find, what already has been tried, evidence to prove the international nature of the conflict.<sup>120</sup> Rejecting the prosecutor’s request for leave, the chamber solely relied on Regulation 55 of the regulation of the court. The chamber ruled that, pursuant to Regulation

---

<sup>114</sup> Article 61(7)(a)-(c) of the Statute

<sup>115</sup> Pre-Trial Chamber I: Decision on the confirmation of charges SupraFN113 at p.71

<sup>116</sup> Ibid.72

<sup>117</sup> Ibid.98

<sup>118</sup> Prosecution: Prosecution’s Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 ‘*Décision sur la confirmation des charges* (Public Document) 5-February-2007 [CC-01/04-01/06-806.]

<sup>119</sup> Ibid.p.2

<sup>120</sup> Ibid.p.7-8

55, the Trial Chamber may ‘change the legal characterization of facts accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused’.<sup>121</sup>

However, Arguably, one may contend that even by relying on Regulation 55, the Pre-Trial Chamber still exceeded its powers under Article 61(7) and erred in law. Regulation 55 of the Regulations of the Court particularly refers to the trial chamber and not the Pre-Trial Chamber. Regulation 55 is under section three titled ‘Trial Chamber’ under chapter three of the Regulations of the Court which deals with proceedings before the court as opposed to section two which is titled ‘Pre-Trial Chamber’. Additionally, Regulations that apply to all phases of proceedings are listed under section one of chapter three. Despite the later observation, Regulation 55 reads; “In its *decision under article 74*, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.”(*Emphasis added*) Article 74 of the statute falls under Part 6 of the statute titled ‘The Trial’ and it particularly refers to a decision by judges of the trial chamber. It is also worth noting that the terms “Trial Chamber” and “Pre-Trial Chamber” are not used interchangeably in the statute or the regulations of the court unless the provisions clearly state so as is the case of section one of chapter three of the Regulations of the Court. It is also worth noting that altering the provisions of the Statute or the RPE could not have been one of the judges’ objectives when adopting the Regulations of the Court. Consequently, Pre-Trial Chamber I one exceeded the scope of its authority under Article 61(7) (c) ii and hence violated the rights of the prosecutor under the respective article.

Once again the Pre-Trial Chamber seizes control of prosecutorial activities with no recourse what so ever to the prosecutor.

### **3.9. Interlocutory appeals**

Article 82 of the ICC Statute provides for interlocutory appeals where parties may appeal against decisions ruled before the final judgement of the case. Article 82(1) (a) through (c) identifies specific decisions that may be appealed by the parties while Sub-Article (d) gives

---

<sup>121</sup> Pre-Trial Chamber I: Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges (Public Document) 24-May-2007 [ICC-01/04-01/06-915] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106915\\_English%20Decision,%2024%20May%202007.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106915_English%20Decision,%2024%20May%202007.pdf) [accessed on 18.Dec.2008] p.14

the chamber (trial and pre-trial) the discretion of allowing parties to appeal decisions—other than those set forth in the later Sub-Articles, if it is of the opinion that the issue involved would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Accordingly, at this pre-trial phase, for decisions other than those specified by Sub-Articles (a) through (c) of Article 82(1), the only statutory remedy available for parties is the discretionary grant of leave to appeal by the Pre-Trial Chamber pursuant to Sub-Article (d) of Article 84. As noted by the Appeals Chamber, it is the opinion of the lower court “that constitutes the definitive element for the genesis of a right to appeal.”<sup>122</sup>

As noted from the above discussion, with the exception of the decisions on disclosure of evidence, the Pre-Trial Chamber has rejected all of the prosecutor’s requests for leave to appeal. The chamber regarded procedural matters related to designation of powers between the chamber and the prosecutor as insufficient to warrant immediate resolution by the Appeals Chamber so as to materially advance the proceedings. The first decision to examine the requirements of Article 82(1) (d) of the statute was issued by Pre-Trial Chamber II with regard to the “Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Application for Warrants of Arrest under Articles 58.”<sup>123</sup> Applying a restrictive interpretation of the statute, the chamber observed that; “the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal”.<sup>124</sup> The chamber noted that the term “fairness” contained in Article 82(1) (d) is closely related to the concept of “equality of arms”, between the parties during the proceedings.<sup>125</sup> It concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour. The chamber ruled that it is “debatable whether a question exclusively relating to the apportioning of powers between organs of the Court may qualify as an issue that pertains to or would ‘significantly affect the fair and expeditious conduct of proceedings.’”<sup>126</sup>

---

<sup>122</sup> Appeals Chamber: Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal (Public Document) 13-July-2006[ICC-01/04-168] available at [http://www.iclklamberg.com/Caselaw/DRC/Appealschamber/ICC-01-04-168\\_English%20Judgment,%2013%20July%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Appealschamber/ICC-01-04-168_English%20Judgment,%2013%20July%202006.pdf) [accessed on 22.Dec.2008] p.8

<sup>123</sup> SupraFN78

<sup>124</sup> Ibid.p.15

<sup>125</sup> Ibid.p.20

<sup>126</sup> Ibid.p.21

Subsequently, the chamber's narrow interpretation of Article 82(1) (d) directly affects the relationship between the Pre-Trial Chamber and the prosecution set forth in respective provisions governing the ICC. Contentious procedural matters remain unsettled with no hope recourse. Whereas the drafters of the ICC Statute were busy creating a check and balance system to monitor prosecutorial activities, they failed to equally protect and guarantee freedom and independence of the prosecutor in fulfilling his obligations.

### **3.10. Assessment**

Following the above analysis, it may be contended that, in practice, the relationship between the Pre-Trial Chamber and the OTP is a quasi-judicial relationship. The Pre-Trial Chamber has in a large part overstepped its powers as an organ of judicial review and scrutiny and has assumed a more supervisory and investigating role contrary to the provisions of the Rome Statute, the ICC RPE and the Regulations of the Court.

## **Chapter IV**

### **Conclusion, Impacts and Recommendations**

#### **4.1 Conclusion**

Having analysed the relationship between the Pre-Trial Chamber and the prosecutor with regard to both the position set forth by the provisions and the situation in practice, it is evident that the original intent of the negotiators of the Rome Statute has not been honoured by the Pre-Trial Chamber. The Pre-Trial Chamber has exercised a rather supervisory and investigative role contrary to that of judicial scrutiny and review set forth in the ICC provisions. Whereas we have seen the Appeals chamber playing a big role in reminding the Pre-Trial Chamber of its judicial obligation and of the prosecutor's authority for the conduct of investigations, in a number of scenarios the Pre-Trial Chamber still remains in control of prosecutorial activities. As we noted earlier, matters relating to the designation of powers between the Pre-Trial Chamber and the prosecution still remain unsettled. Questions such as; whether a status conference may be held by the Pre-Trial Chamber on its own initiative at the early stage of proceedings or whether the prosecutor's right to make cooperation requests and request for arrest and surrender are subject to "specific and compelling circumstances" remain unanswered. The prosecutor remains "controlled" to a certain extent with no recourse.

#### **4.2 Impact of the quasi judicial relationship between the prosecutor and the Pre-Trial Chamber**

The impacts of the quasi-judicial relationship between the prosecutor and the Pre-Trial Chamber are far reaching. They do not only affect the two respective organs of the court and the pre-trial phase of proceeding but they affect activities of the ICC at large. The most visible impact is raised by the 'participation of victims at the investigation' scenario. The Pre-Trial and Trial Chambers have endorsed a broad approach to permitting victims' participation, while failing to reach a resolution on the boundaries of Victim participation at the early stage of investigations. In a comprehensive review of the operations of the ICC victim participation; conducted by the War Crimes Research Office of American University Washington College of Law (WCRO)<sup>1</sup>, it was observed that, the ICC system has "consumed

---

<sup>1</sup> War Crimes Research Office, Am. Univ. Washington Coll. of Law, 'Victim Participation before the International Criminal Court' (2007) available at [http://www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf?rd=1](http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1) [accessed on 29.Oct.2008]

a substantial portion of the Court's resources since January 2006," while delivering "largely hypothetical" participation to a "limited number of victims," making it "questionable whether the Pre-Trial Chambers have struck a reasonably effective balance between the restorative goals of the ICC victim participation scheme and the [Rome Statute] drafters' concerns about efficiency and fairness."<sup>2</sup> Truly requests of victim participation at the investigation stage have in a large part occupied the pre-trial phase activities with back and forth submissions and responses from all corners—victims, defence and the prosecution. A research conducted on Victim Participation before the Pre-Trial Chamber of the ICC mid last year shows that, there were over a total of 509 Applications filed with the registry and a over a total of 256 application in consideration by the Pre-Trial Chamber.<sup>3</sup> While the Pre-Trial Chamber is busy assuming its investigative role, it fails to effectively conduct pre-trial proceedings and thus leaving the credibility of the ICC at risk.

Additionally, the response of the chamber in the Confirmation of charges of Thomas Lubanga Dilyo scenario leaves its efficiency and interests in question. The chamber in dismissing the parties leave to appeal in part the decision on confirmation of charges, observed that "there is nothing to prevent the Prosecution or the Defence from requesting the Trial Chamber to reconsider the legal characterisation of the facts." Surely, the role of the Pre-Trial Chamber is to inter alia speed the proceedings before the ICC were an issue can be settled at the pre-trial phase there is no need to carry it forward to the Trial phase. If the parties are to make such a request with the trial chamber, the procedure will be much longer and cause unwarranted delay for as stipulated in Regulation 55, the chamber will have to consider whether on the basis of the evidence provided there are substantial grounds to believe that the accused committed the charged crime.

The quasi-judicial relationship between the chamber and the prosecutor also endanger the fairness of proceedings before the Pre-Trial Chamber. As observed by the Pre-Trial Chamber itself, fairness of proceedings includes "respect for procedural rights of the

---

<sup>2</sup> Ibid at p.5

<sup>3</sup> Christine H. Chung 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (Spring 2008) 63 *Northwestern Journal of International Human Rights* 459 at 499

prosecutor.”<sup>4</sup> The fact that contentious procedural matters relating to the designation of powers between the prosecutor and the Pre-Trial Chamber have no recourse, it is likely that they will keep on coming up at different stages of the pre-trial proceedings and equally cause unwarranted delay by the endless unsuccessful motions to appeal. Additionally, where the Pre-Trial Chamber plays a supervisory or investigative role, it is most likely to fail in duly protecting the interest of the defence and victims from a sober judicial perspective.

### **4.3 Recommendations**

The maintenance of a judicial relationship between the Pre-Trial Chamber and the OTP is of central importance. The pre-trial phase of the ICC is the key to the realisation of the achievements of the world’s battle against impunity. It ought to be dealt with, with at most care and efficiency not only for the sake of bringing the perpetrators of mass atrocities to justice but also to do so in a manner that upholds international human rights standards and set example. Whereas the prosecutor is at the centre of the current international criminal justice system; charged with the duty to investigate effectively, and accurately, situations referred to him for investigation under Article 13(a) or (b) of the Statute or which he initiates with approval of the Pre-Trial Chamber under Articles 13(c) and 15 of the Statute, the Pre-Trial Chamber is charged with an even greater role of judicial scrutiny and review ensuring that the prosecutor is ‘in check’ and of guarding against the infringement of the rights of the defence and victims. It hence remains essential that the Pre-Trial Chamber does not substitute itself for the Prosecutor and strive to become the investigatory arm of the Court and for the prosecutor to be given at most freedom with no unwarranted constraints so as to effectively and accurately conduct his prosecutorial duties.

For that matter, the current quasi-judicial relationship established by the judges of the pre-trial division needs to be revised. Judges of the pre-trial division need to be reminded of their judicial role and of the intentions of the negotiators of the Rome Statute. In doing so, the presidency should arrange round circles or seminars whose purpose is to review the provisions of the statute in relation to how they are carried out in practice. Such circles

---

<sup>4</sup> Pre-Trial Chamber I, "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 [ICC-01/04-135-IEN], on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS3, VPRS4, VPRS5 and VPRS 6, 31 March 2006", 31 March 2006, para. 38

should also be adopted by the prosecutor so as to analyse whether the office is in line with the provisions establishing it or there is need for adjustment. Such circles will help the respective organs of the court stay with their statutory boundaries.

In relations to procedural matters relating to the designation of power between the Pre-Trial Chamber and the prosecutor, there is a need to give such matters first track attention. Instead of such matters going through the determination of the Pre-Trial Chamber under Article 82, they should be directed straight to a specialised chamber of the appeals division whose duty is to particularly deal with such procedural matters. This will lessen the delay the pre-trial division has been worrying about and will ease the workload of the appeals chamber. Additionally, the ability to effectively full both prosecutorial duties and the Pre-Trial Chamber's judicial role is subject to proper designation of powers between the two organs. The specialised appeals chamber should have no more or less than three judges. The specialised chamber should not only wait for submissions from the prosecutor or the Pre-Trial Chamber but should have *proprio motu* powers to intervene whenever it deems fit. Submissions made before the specialised chamber should be strictly in writing and should not take more than seven days without the chamber rendering its decision. Additionally, submissions made to the specialised chamber should strictly relate to procedural matters relating to the division of power between the prosecutor and the Pre-Trial Chamber such as the case of the arrest warrants and the confirmation of charges. In so doing, there will be immediate and effective resolution to procedural errors which are likely to unnecessarily slow down the pre-trial phase proceedings. In turn, this would keep the Pre-Trial Chamber 'in check' and within its statutory boundaries. Additionally, it would speed the proceedings hence in part fulfilling the purpose of having the pre-trial phase within the ICC system.

## BIBLIOGRAPHY

### Cases

*The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06

*The Prosecutor v. Bosco Ntaganda* ICC-01/04-02/06

*The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07

*The case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05

*The case the Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* ICC-02/05-01/07

*The case of the Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/051/08

### ICC Court Decisions, prosecution's motions and Transcripts

Presidency: Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I [ICC-01/04], 5 July 2004 available at <http://www.icc-cpi.int/cases.html> [accessed 18Dec 2008]

Pre-Trial Chamber I: Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo [ICC-01/04], 17 February 2005 available at [http://www.icc-cpi.int/library/cases/ICC-01-04-9\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-9_English.pdf) [accessed 28 Nov 2008]

Prosecutor; Prosecutor's Position on Pre-trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, Situation in the Democratic Republic of Congo (ICC-01/04) 8 March 2005. 'Redacted version' of the position, available at [www.icc-cpi.int/libraryorgans/otp/ICC0104Anx\\_2005March08-e.pdf](http://www.icc-cpi.int/libraryorgans/otp/ICC0104Anx_2005March08-e.pdf) [accessed on 28.Nov 2008]

Pre-Trial Chamber I, "Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference", 9 March 2005 [ICC-01/04], available at [http://www.icc-cpi.int/library/organs/chambers/Decision\\_PTCI\\_20050309.pdf](http://www.icc-cpi.int/library/organs/chambers/Decision_PTCI_20050309.pdf) [accessed on 28 Nov 2008]

Pre-Trial Chamber I, "Decision on the Prosecutor's Application for Leave to Appeal", 14 March (ICC-01/04, available at [http://www.icc-cpi.int/library/organs/chambers/ICC\\_01-04\\_2005March14\\_e.pdf](http://www.icc-cpi.int/library/organs/chambers/ICC_01-04_2005March14_e.pdf) [accessed on 28 Nov 2008]

Prosecutor's Request for Measures under Article 56 filed on 19 April 2005 cited in: Pre-Trial Chamber I; Decision to Hold Consultation under Rule 114(Public Redacted Version) 21-April -2005 [ICC-01/04-19] 2 available at

[http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC\\_01-04\\_19\\_e%20Decision,%2021%20April%202005.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC_01-04_19_e%20Decision,%2021%20April%202005.pdf) [accessed on 29.Nov.2008]

Pre-Trial Chamber I; Decision to Hold Consultation under Rule 114(Public Redacted Version) 21-April -2005 [ICC-01/04-19] 2 available at [http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC\\_01-04\\_19\\_e%20Decision,%2021%20April%202005.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC_01-04_19_e%20Decision,%2021%20April%202005.pdf) [accessed on 29.Nov.2008]

Pre-trial Chamber I; Decision on the Prosecutor's Request for Measures under Article 56 (Public Redacted Version) 26 April 2005 [ICC-01/04] available at [http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-21\\_e%20Decision,%2026%20April%202005.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-21_e%20Decision,%2026%20April%202005.pdf) [accessed on 29.Nov.2008]

Pre-trial Chamber I; Decision on the Applications for Participation in the Proceedings of VPRS 1. VPRS 2. VPRS 3. VPRS 4. VPRS 5 and VPRS 6. (Public Redacted Version) 17 January 2006[ICC-01/04-101] available at [http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101\\_tEnglish-Corr%20Decision,%2017%20January%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/PTCI/ICC-01-04-101_tEnglish-Corr%20Decision,%2017%20January%202006.pdf) [accessed on 1.Dec.2008]

Prosecution; 'Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp'(Public document pursuant to Decision ICC-01/04-140) 15-August-2005 [ICC-01/04-84-Conf ] available at <http://www2.icc-cpi.int/iccdocs/doc/doc183749.PDF> [accessed on 2.Dec.2008] p.8

Prosecution: Prosecution's 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 (Public Document) 23-January-2006 [ICC-01/04-103] available at <http://www2.icc-cpi.int/iccdocs/doc/doc183444.PDF> [accessed on 3.Dec.2008]

Pre-trial Chamber I: Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 AND VPRS 6(Public Document) 31-March-2006 [ICC-01/04-135-tEN] available at <http://www2.icc-cpi.int/iccdocs/doc/doc183511.PDF> [accessed on 2.Dec.2008]

Pre-trial Chamber II: Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 (Public Redacted Version) 10-August-2007 [ICC-02/04-101] available at <http://www2.icc-cpi.int/iccdocs/doc/doc311236.PDF> [accessed on 4.Dec.2008]

Pre-trial Chamber I: Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07(Public) 06-December-2007 [ICC-02/05-111] available at <http://www2.icc-cpi.int/iccdocs/doc/doc366322.PDF> [accessed on 4.Dec.2008]

Pre-trial Chamber I: Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation (Public) 23-January-2008 [ICC-02/05-121] *available at* <http://www2.icc-cpi.int/iccdocs/doc/doc431983.PDF> [accessed on 4.Dec.2008]

Appeals Chamber: Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007(Public) 19-December-2008 [ICC-01/04-556] *available at* <http://www2.icc-cpi.int/iccdocs/doc/doc612293.pdf> [accessed on 4.Dec.2008]

Pre-trial Chamber II: Decision on the Prosecutor's Application for Unsealing of the Warrants of Arrest (Public document) 13-October-2005[ICC-02/04-01/05-52] *available at* [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010552\\_English%20Decision,%2013%20October%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010552_English%20Decision,%2013%20October%202005.pdf) [accessed on 8.Dec.2008]

Pre-Trial Chamber II: Decision on the Prosecutor's Application for Warrants of Arrest under Article 58(Under Seal, Ex Parte, Prosecutor Only) 8-July-2005[ICC-02/04-01/05-1-US-Exp] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) *available at* [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC020401051USExp\\_English%20Decision,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC020401051USExp_English%20Decision,%208%20July%202005.pdf) [accessed on 8.Dec.2008]

Prosecution: 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 Article 58" of the Statute of the Court (Under Seal)18-July-2005[ICC-02/04-01/05-23] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) *available at* <http://www2.icc-cpi.int/NR/exeres/611E2EAA-C5C5-48F0-A345-C82452E1FCB2.htm> [accessed on 8.Dec.2008]

Pre-Trial Chamber II: 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 Article 58(Under Seal; Ex Parte, Prosecutor Only) 19-August-2005[ICC-02/04-01/05-20-US-Exp ] (Unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13-Oct-2005) *available at* [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010520USExp\\_English%20Decision,%2019%20August%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC0204010520USExp_English%20Decision,%2019%20August%202005.pdf) [accessed on 8.Dec.2008]

Pre-Trial Chamber I: Warrants of Arrest (Under Seal) 10-February-2006[ICC-01/04-01/06-2-tEN] (Unsealed Pursuant to decision ICC-01/04-01/06-37) *available at* [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC010401062\\_tEnglish%20Warrant%20of%20Arrest,%2010%20February%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC010401062_tEnglish%20Warrant%20of%20Arrest,%2010%20February%202006.pdf) [accessed on 9.Dec.2008]

Pre-Trial Chamber I: ICC-01/04—Situation in Democratic Republic of the Congo ‘Procedural matters hearing’ 2-February-2006: Transcript [ICC-01/04-T-8-EN[2Feb2006 WT]1-1 SZ PT] *available at* <http://www2.icc-cpi.int/iccdocs/doc/doc236274.PDF>

Pre-Trial Chamber I: ICC-01/04-01/06— The Prosecutor v. Thomas Lubanga Dyilo ‘hearing on disclosure matters’ 24-April-2006: Transcript: [ICC-01/04-01/06-T-4-EN[24APR2006 WT] 1-88 SZ PT] available at <http://www2.icc-cpi.int/iccdocs/doc/doc215746.PDF> [accessed on 15.Dec.2008]

Pre-Trial Chamber I: Decision on the Final System of Disclosure and the Establishment of a Timetable (Public Document) 15-May-2006 [ICC-01/04-01/06-102] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106102\\_English%20Decision%20on%20the%20Final%20System%20of%20Disclosure%20and%20the%20Establishment%20of%20a%20Timetable,%2015%20May%202006..pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106102_English%20Decision%20on%20the%20Final%20System%20of%20Disclosure%20and%20the%20Establishment%20of%20a%20Timetable,%2015%20May%202006..pdf) [accessed on 15.Dec.2008]

Prosecution: Prosecution's Final Observations on Disclosure (Public Document) 02-May-2006 [ICC-01/04-01/06-91] available at <http://www2.icc-cpi.int/NR/exeres/6F2E2A93-17EA-4CDA-8624-E7B2DFE2DF63.htm> [accessed on 15.Dec.2008] p.5-6

Pre-Trial Chamber I: Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence (Public Document) 19-May-2006 [ICC-01/04-01/06-108-Corr ] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106108Corr\\_English%20Decision%20Establishing%20General%20Principles%20Governing%20Applications,%2019%20May%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106108Corr_English%20Decision%20Establishing%20General%20Principles%20Governing%20Applications,%2019%20May%202006.pdf)

Prosecution: Prosecution's Motion for Reconsideration (Public Redacted Version) 22-May-2006 [ICC-01/04-01/06-120] available at <http://www2.iccpi.int/NR/exeres/A4304CBE7B46485888ECE033EAD70.htm> [accessed on 16.Dec.2008]

Prosecution: Prosecution's Motion for Reconsideration and, in the Alternative, Leave to Appeal (Public Redacted version) 24-May-2006[ICC-01/04-01/06-108] available at <http://www2.icc-cpi.int/NR/exeres/6F2E2A93-17EA-4CDA-8732-e8b2df2d24.htm> [accessed on 16.Dec.2008]

Pre-Trial Chamber I: Decision on the Prosecution Motion for Reconsideration and, in the Alternative, Leave to Appeal (Public Redacted Version)(23-June-2006) [ICC-01/04-01/06-166] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106166\\_English%20In%20Decision%20on%20the%20prosecution%20motion%20for%20reconsideration,%2023%20June%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106166_English%20In%20Decision%20on%20the%20prosecution%20motion%20for%20reconsideration,%2023%20June%202006.pdf) [accessed on 16.Dec.2008]

Appeals Chamber: Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"(Public document) 13-October-2006 [ICC-01/04-01/06-568] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/ICC01040106568\\_English%20Judgment,%2013%20October%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/Appeals/ICC01040106568_English%20Judgment,%2013%20October%202006.pdf) [accessed on 16.Dec.2008]

Pre-Trial Chamber I: Decision on the confirmation of charges (Public Redacted Version with Annex I) 29-January-2007 [ICC-01/04-01/06-803-tEN] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106803tEN\\_English%20Decison%20on%20the%20confirmation%20of%20charges,%2029%20January202007.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106803tEN_English%20Decison%20on%20the%20confirmation%20of%20charges,%2029%20January202007.pdf)

Prosecution: Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges (Public Document) 5-February-2007 [CC-01/04-01/06-806.]

Pre-Trial Chamber I: Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges (Public Document) 24-May-2007 [ICC-01/04-01/06-915] available at [http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106915\\_English%20Deci sion,%2024%20May%202007.pdf](http://www.iclklamberg.com/Caselaw/DRC/Dyilo/PTCI/ICC01040106915_English%20Deci sion,%2024%20May%202007.pdf) [accessed on 18.Dec.2008]

Appeals Chamber: Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (Public Document) 13-July-2006[ICC-01/04-168] available at [http://www.iclklamberg.com/Caselaw/DRC/Appealschamber/ICC-01-04-168\\_English%20Judgment,%2013%20July%202006.pdf](http://www.iclklamberg.com/Caselaw/DRC/Appealschamber/ICC-01-04-168_English%20Judgment,%2013%20July%202006.pdf) [accessed on 22.Dec.2008]

## **Statutes and Rules of the Court**

ICC: RULES OF PROCEDURE AND EVIDENCE (2002) ICC-ASP/1/3; Adopted by the Assembly of States Parties First session (3-10 September 2002) New York

ICC: REGULATIONS OF THE COURT (2004) ICC-BD/01-01-04; Adopted by the judges of the Court on 26 May 2004(Fifth Plenary Session The Hague, 17- 28 May 2004)

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

## **Books**

Arbour L., Eser A., Ambos K., Sanders A., (eds) *The Prosecutor of a Permanent International Criminal Court* (2000) Iuscrim, Freiburg im Breisgau

Emily H, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in McGoldrick, Dominic; Rowe, Peter and Donnelly, Eric (eds) *The Permanent International Criminal Court: Legal and Policy Issues*. (2004) Portland, Oxford

Fabricio G, 'Investigation and Prosecution' in Lee R. S. (ed) *The International Criminal Court: The making of the Rome statute—Issues, Negotiations, Results* (1999) Kluwer Law International, The Hague

Fernández de Gurmendi S. A. 'The Role of the International Prosecutor' in Lee R.S, (ed) *The International Criminal Court: The making of the Rome statute—Issues, Negotiations, Results* (1999) Kluwer Law International, The Hague

Fourmy O. 'Powers of the Pre-Trial Chambers' in Cassese A., Gaeta P. and Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court, Volume I* (2002) Oxford University Press; Oxford , New York

Gallant K. S. 'the ICC in the System of States and International Organizations' in Flavia Lattanzi and William A. Schabas(eds) *Eassays on the Rome statute of the International Criminal Court Vol.II* (2004) Il Sirente; Ripa Fagnano Alto

Kirsh P.Q.C, 'INTRODUCTION' in Otto Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article* (2000) Baden-Baden ; Nomos Verlagsgesellschaft

Lee R. S, (ed) *The International Criminal Court: The making of the Rome statute—Issues, Negotiations, Results* (1999) Kluwer Law International, The Hague

Marchesiello M., 'Proceedings before the Pre-Trial Chambers' in Cassese A., Gaeta P. and Jones J.R.W.D. (eds), *The Rome Statute of the International Criminal Court, Volume II* (2002) Oxford University Press; Oxford, New York

Olásolo. H, *The Triggering procedure of the International Criminal Court* (2005) Martinus Nijhoff Publishers; Leiden, Boston

Rwelamira M. R 'Composition and administration of the court' in Lee R. S. (ed.) *The International Criminal Court: The making of the Rome statute—Issues, Negotiations, Results* (1999) Kluwer Law International, The Hague

Schiff B. N, *Building the International Criminal Court* (2008) Cambridge University Press, London

Turone G. 'Powers and Duties of the Prosecutor' in: Cassese A, Gaeta P and Jones J.G.W.D, *The Rome Statute of the International Criminal Court: A commentary volume 1* (2002) Oxford University Press; Oxford, New York

## **Journals**

Ambos K. 'The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports' (2000) 8/2 *European Journal of Crime, Criminal Law and Criminal Justice* 89

Arsanjani M. H. and Reisman W. M, 'The Law-in-Action of the International Criminal Court' (2005) 99 2 *American Journal of International Law* 385

Baumgartner E, 'Aspects of victim participation in the proceedings of the International Criminal Court' (2008)90 870 *International Review of the Red Cross* 409

Brubacher M. R. 'Prosecutorial discretion within the International Criminal Court' (2004) 2 *Journal of international Criminal Justice* 73

Caesius A, 'The statute of the International Criminal Court: some preliminary reflections' (1999) 10 1 *European Journal of International Law* 144

Chung C. H, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?'(Spring 2008) 6 3 *Northwestern Journal of International Human Rights* 459

Drumbl M. A. 'Collective violence and individual punishment: The criminality of mass atrocity' (2005)99 2*Northwestern university law review* 539

Gallavin C. 'Prosecutorial Discretion within the ICC: Under the Pressure of justice' (2006) 17 *Criminal Law Forum* 43

Gillette M. 'Intrepid Justice: Matthew Gillette discusses prosecutorial discretion at the International Criminal Court.'(March 2007 ) *New Zealand international Review* 14

Greenawalt .K.A. 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007)39 *NYU Journal of International Law and Politics* 583

Jacobs D 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase' (2007) 6 *The Law and Practice of International Courts and Tribunals* 317

Jérôme de Hemptinne 'The Creation of Investigating Chambers at the International Criminal Court: An Option worth Pursuing?' (2007) 5 *Journal of International Criminal Justice* 402

Jérôme de Hemptinne, Rindi F, 'ICC Pre- Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings'(2006)4 *Journal of International Criminal Justice* 342

Olásolo H 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?'(2003) 3 *International Criminal law Review* 87

Miraglia M, 'The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure Under Construction' (2006) 4 1 *Journal of International Criminal Justice* 188,

Scheffer D, 'A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence' (2008) 21 *Leiden Journal of International Law* 151

Stuart H.V 'The ICC in Trouble' (2008) 6(3) *Journal of International Criminal Justice* 409

Wouters, J; Verhoeven, S & Demeyere, B. 'The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?' (2008) 8 1-2 *International Criminal Law Review* 273

## Reports, and Web Articles

AllAfrica Global Media 'Congo-Kinshasa: Trial Chamber Orders Release of Thomas Lubanga Dyilo' (3 July 2008) available at <http://allafrica.com/stories/200807030371.html> [accessed on 16.Jul.2008]

Francis Deng 'In the Shadow of the Holocaust' Holocaust and the United Nations Discussion Paper Series: Discussion paper #7(2007) available at <http://www.un.org/holocaustremembrance/docs/paper7.shtml> [accessed on 30.Oct.2008]

ICC press release: 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' The Hague, 19 April 2004 ICC-OTP-20040419-50-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=19&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=19&l=en.html) [accessed of 12 Dec 2008]

ICC press release: 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' The Hague, 29 January 2004 ICC-20040129-44-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) [accessed 12 Dec 2008]

ICC press release: 'Prosecutor receives referral concerning Central African Republic' The Hague, 7 January 2005 ICC-OTP-20050107-86-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html) [accessed 12 Dec 2008]

ICC Press release; The Office of the Prosecutor of the International Criminal Court opens its first investigation, The Hague, 23 June 2004; No. ICC-OTP-20040623-59-En available at [http://www.icc-cpi.int/pressrelease\\_details&id=26&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=26&l=en.html) [accessed on 3 Dec 2008]

Institute for war & peace reporting; 'ICC: Victims to Have Greater Voice' report by Katy Glassborow in The Hague (AR No. 73, 08-Aug-06) available at [http://www.iwpr.net/?p=acr&s=f&o=322840&apc\\_state=henpacr](http://www.iwpr.net/?p=acr&s=f&o=322840&apc_state=henpacr) [accessed on 3.DEC.2008];

Institute for war & peace reporting; 'ICC Enters Uncharted Territory' Report by Janet Anderson in The Hague (TU No 445, 24-Mar-06) available at [http://www.iwpr.net/?p=tri&s=f&o=260514&apc\\_state=henh](http://www.iwpr.net/?p=tri&s=f&o=260514&apc_state=henh) [accessed on 3.DEC.2008]

Rastan R. 'The Power of the Prosecutor in Initiating Investigations' A paper prepared for the Symposium on the International Criminal Court February 3 – 4, 2007; Beijing, China available at [icclr@law.ubc.ca](mailto:icclr@law.ubc.ca) [ accessed on 6<sup>th</sup> Dec 2008],

Suzanne Akila 'The International Criminal Court – Taking Stock' (June 2008) Chatham House International Law Discussion Group 5 available at [http://www.chathamhouse.org.uk/files/11735\\_il120608.pdf](http://www.chathamhouse.org.uk/files/11735_il120608.pdf) [accessed 12.Nov.2008] quoting Professor William Schabas in the Discussion

United Nations—Department of Public Information; INTERNATIONAL CRIMINAL COURT PROMISES UNIVERSAL JUSTICE, SECRETARY-GENERAL TELLS INTERNATIONAL BAR ASSOCIATION (Press Release 12 June 1997) SG/SM/6257 available at <http://www.ngos.net/un/icc.html> [accessed on 28.OCT.2008]

UN Press Release L/ROM/22, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court", 17 July 1998, available at <http://www.un.org/law/icc> [accessed on 2.Apr.2008]

United Nations Department of Public Information; Note to Correspondents of the ceremony marking expected establishment of International Criminal Court (December 2002) available at <http://www.un.org/News/facts/iccfact.htm> [accessed on 20.Oct.2008]

United Nations Treaty Collection: Chapter xviii: Penal Matters; 10. Rome Statute of the International Criminal Court available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=372&chapter=18&lang=en> [accessed on 7.Nov.2008]

United Nations press release: 'SECURITY COUNCIL REFERS SITUATION IN DARFUR, SUDAN, TO PROSECUTOR OF INTERNATIONAL CRIMINAL COURT; Resolution 1593 (2005) Adopted by Vote of 11 in Favour To None Against, with 4 Abstentions (Algeria, Brazil, China, United States)' Press Release SC/8351 of 31/03/2005 available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [accessed on 12 Dec 2008]

War Crimes Research Office, Am. Univ. Washington Coll. of Law, 'Victim Participation before the International Criminal Court' (2007) available at [http://www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf?rd=1](http://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf?rd=1) [accessed on 29.Oct.2008]

William F. Jasper 'Courting Global Tyranny' and *William Norman Grigg* 'In Loco Parentis' in *The New International Criminal Court* (2004) available at <http://www.apfn.org/apfn/international.htm> [accessed on 13.Oct.2008]