

The First Decision of the ICC Pre-Trial Chamber

International Criminal Procedure
Under Construction

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Abstract

By its decision of 17 February 2005 to convene a status conference on the situation in Democratic Republic of Congo, the ICC Pre-Trial Chamber I broadened its role by referring to and interpreting the general provision contained in Article 57(3)(c) of the ICC Statute. It resorted to the status conference in order to exercise general control over the work of the Prosecutor that is not related to a specific occasion, with a view to obtaining information about the investigations seven months after their initiation. During this time, the Prosecutor had not let the Chamber know anything about his progress and results. Arguably, the main reason behind the Chamber's decision was its intention to both speed up the investigations and to take care of the rights of the 'prospective suspects' — a special aspect of the 'interest of justice' — to whom the delay could, obviously, be prejudicial. Thus, the Chamber somewhat shifted the 'equilibrium' between legal traditions reached in Rome, arguably taking on a role more closely resembling an investigating judge than provided for in the Statute and ICC Rules of Procedure and Evidence.

1. Introduction

On 17 February 2005, Pre-Trial Chamber I of the International Criminal Court (ICC) issued the first decision in the history of the ICC, activating the judicial 'construing process' of the ICC Statute (ICCSt.) and of the Rules of Procedure and Evidence (ICC RPE).

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Pre-Trial Chamber I¹ decided to convene a status conference on the situation in the Democratic Republic of Congo (DRC),² into which the Chief Prosecutor of the ICC had opened the first investigation of the Court in June 2004.³ Pre-Trial Chamber I made its decision after meeting with representatives of the Office of the Prosecutor on 9 November 2004, in which they discussed the progress of the investigation of the situation in the DRC. Previously, the Pre-Trial Chamber requested that the Prosecutor submit documents concerning the abovementioned situation. The Prosecutor refused to transmit these, citing concerns about the confidentiality of some of the requested documents.

Having considered all of these elements, the Pre-Trial Chamber, applying Article 57(3)(c) ICCSt.,⁴ decided to hold a status conference in order 'to provide *inter alia* for the protection of victims and witnesses and the preservation of evidence'.⁵

2. The Role of the Pre-Trial Chamber in ICC Proceedings

The establishment of Pre-trial Chambers in the ICC procedural framework is a meaningful example of the overall trend which informed the rule-making process of the Rome Statute and the Rules of Procedure and Evidence.⁶

- 1 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 (Decision Assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I (ICC-01/04), Presidency, 5 July 2004). All ICC official decisions are available online at <http://www.icc-cpi.int/cases.html> (visited 24 November 2005).
- 2 Decision to Convene a Status Conference, *Situation in the Democratic Republic of Congo* (ICC-01/04), Pre-Trial Chamber I, 17 February 2005.
- 3 After having received several communications from individuals and non-governmental organizations about crimes committed within the jurisdiction of the ICC on the territory of the Democratic Republic of Congo (DRC), the Prosecutor of the Court, in September 2003, informed the Assembly of the States Parties of his intention to seek authorization from a pre-trial chamber to start an investigation *proprio motu*. In March 2004, the President of the DRC formally referred the situation in his own country to the Prosecutor, who announced in June his decision to open the first investigation of the ICC on crimes committed anywhere on the territory of the DRC since 1 July 2002.
- 4 See *infra* note 9.
- 5 Decision to Convene a Status Conference, *supra* note 2, at 2.
- 6 See O. Fourmy, 'Powers of the Pre-Trial Chamber', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 1207–1230, at 1208. In general, for role and powers of the Pre-Trial Chamber, see M. Bergsmo and J. Pejić, 'Article 15', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 359–372; M. Bergsmo and P. Krueger, 'Article 53', *ibid.*, 701–714; F. Guariglia, 'Article 56', *ibid.*, 735–741; F. Guariglia and K. Harris, 'Article 57', *ibid.*, 743–752; A. Schlunk, 'Article 58', *ibid.*, 753–763.

The way in which the process is a compromise between different proposals brought into negotiations by the delegates⁷ represents a novel solution compared with the ones adopted in the traditional procedural models: Pre-trial Chambers are to act as an organ of judicial scrutiny and review, not as an investigating judge (*juge d'instruction*).⁸

The Rome Statute outlines the functions and powers of the Pre-Trial Chamber, defining at the same time the relationship and interplay between it and another organ of the Court: the Prosecutor. The first task of the Pre-Trial Chamber is to decide whether or not to authorize any investigation, when the Prosecutor is acting on his *proprio motu* power (Article 15(3) ICCSt.). Secondly, the Pre-Trial Chamber decides on challenges to the Court's jurisdiction or on the admissibility of a case prior to confirmation of the charges (Article 19(6) ICCSt.). Thirdly, it reviews the Prosecutor's decision not to initiate an investigation or not to prosecute; thus, it directly narrows the prosecutorial discretion of the investigation — whether at the request of the state or of the Security Council making a referral, or on its own initiative when the decision is justified only by the lack of the interest of justice (Article 53(3)(a)(b) ICCSt.). The Pre-Trial Chamber plays a critical role when the Prosecutor considers that a specific investigative activity represents a unique opportunity to collect evidence which may not be available in the future for the trial. The Pre-Trial Chamber may take all the necessary measures, both at the request of the Prosecutor or on its own initiative, to ensure the efficiency and the integrity of the proceeding and to protect the rights of the defence (Article 56(1)(b) and (3)(a) ICCSt.). In addition to such powers, Article 57 provides that the Pre-Trial Chamber, at the request of the Prosecutor, may issue all the orders and warrants necessary for the investigation and that it is up to Pre-Trial Chamber to authorize the Prosecutor 'to take specific investigative steps within the territory of a State Party' (Article 57(3)(a) ICCSt.). Similarly, the Pre-Trial Chamber 'assists' those who have been arrested, or who have appeared in Court pursuant to a summons, in preparing their defence; in order to achieve this goal, it issues the necessary orders or seeks the necessary cooperation pursuant to Part 9 of the Statute (Article 57(3)(b) ICCSt.). Moreover, the Pre-Trial Chamber retains the general (*proprio motu*) powers listed in Article 57(3)(c), related to preservation of evidence and protection of victims, witnesses, arrested or summoned persons and national security.⁹

Furthermore, the Pre-Trial Chamber issues arrest warrants, summons to appear upon the application of the Prosecutor (Article 58 ICCSt.) and decides

7 See E. Guariglia, 'International Criminal Law Procedure (Investigation and Prosecution)', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 227–238, at 238.

8 E. Guariglia, *supra* note 6, at 738.

9 Article 57(3)(c) ICCSt. provides as follows: '3. In addition to its other functions under this Statute, the Pre-Trial Chamber may: ... (c) 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, and the protection of national security information.'

on all the questions *de libertate*, such as applications for *interim* release (Article 60(2) ICCSt.). The Pre-Trial Chamber holds the confirmation hearing, at the end of which it may decide to confirm the charges, having determined that there are substantial grounds to believe that the person committed the alleged crimes, or, if not, to adjourn the hearing and request the Prosecutor to provide more evidence, to conduct further investigation or to amend a charge (Article 61 ICCSt.).

The abovementioned powers are explicitly provided for by the Statute and show that the role of the Pre-Trial Chamber is akin to an ‘umpire’ that should intervene only to a very limited extent in the merits of investigations and prosecutions.

Moreover, through the reading of the aforementioned provisions, it appears that the Pre-Trial Chamber, leaving aside the mentioned occasions when it can act on its own initiative, has mainly a ‘passive’ role — one related to very specific moments of the pre-trial phase — that has to be stimulated by a request submitted, or act performed by the Prosecutor (or the defence). By the same token, Article 57(3)(c) ICCSt. envisions very general *proprio motu* powers that the Pre-Trial Chamber can exercise over the course of the pre-trial phase, paving the way for a more active and ‘interventionist’ attitude, beyond the minimum limits specified by the other provisions of the Statute.

3. Pre-Trial Chamber’s First Decision: Textual and ‘Hidden’ Meanings

Going back to the short and rather plain 17 February 2005 decision, we should ask whether it was simply a ‘routine decision’ or should instead be considered the first strategic move in the *actio finium regundorum* whose goal is to define the boundaries of the Pre-Trial Chamber’s powers in its interplay with the Prosecutor.

Before drawing such a conclusion, we must clarify when a status conference can be held according to the provisions contained in the Statute and the ICC RPE.

Only Rules 121¹⁰ and 132¹¹ ICC RPE explicitly refer to this kind of conference. These provisions provide that a status conference can be held on two different

10 Rule 121 ICC RPE provides in part as follows: ‘2. In accordance with article 61, paragraph 3, the Pre-Trial Chamber shall take the necessary decisions regarding disclosure between the Prosecutor and the person in respect of whom a warrant of arrest or a summons to appear has been issued. During disclosure: (a) . . . (b) The Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the Person.’

11 Rule 132 stipulates that: ‘1. Promptly after it is constituted, the Trial Chamber shall hold a status conference in order to set the date of the trial. . . . 2. In order to facilitate the fair and expeditious conduct of the proceedings, the Trial Chamber may confer the parties by holding status conferences as necessary.’

specific occasions: (i) before the confirmation hearing in order to ensure that the disclosure between the Prosecutor and the defence takes place under satisfactory conditions, and (ii) before the trial in order to set its date or to facilitate the fair and expeditious conduct of the proceedings, respectively.

The Prosecutor's view of the 17 February 2005 decision is expressed in a Position Paper.¹² He writes that 'a status conference is a procedural device which aims at efficiently organizing imminent or ongoing judicial proceedings'.¹³ This appears to be correct from a formal point of view. Neither the Statute nor the ICC RPE directly authorize the holding of a status conference at the present early stage of the proceedings. On the contrary, the Rules allow for this procedural mechanism to be resorted to on the eve of the confirmation hearing and of trial.

Moreover, even if we do not find in the Statute and in the Rules any explicit provision forbidding the holding of an *ex parte* status conference, we must note that usually (referring to the common-law systems, the birthplace of the procedural device), this kind of conference is conceived of as an *inter partes* hearing.¹⁴

Thus, it may be contended that Pre-Trial Chamber I broadened its role by referring to and interpreting the general provision contained in Article 57(3)(c) ICCSt: it resorted to the status conference in order to exercise a general control over the work of the Prosecutor not related to a specific occasion (such as, for example, the decision not to prosecute provided for in Article 53 ICCSt.). More specifically, the status conference was arranged in order to obtain information about the progress of investigations during a very early stage of the process. The Pre-Trial Chamber, it may be submitted, broadened its role from a procedural viewpoint beyond the minimum explicit normative limits. Furthermore, it also shifted the 'equilibrium' between legal traditions reached

12 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), Prosecutor, 8 March 2005. Our comments relate to the 'redacted version' of the position, available online at www.icc-cpi.int/libraryorgans/otp/ICC0104Anx_2005March08-e.pdf (visited 24 November 2005).

13 *Ibid.*, § 13. The Prosecutor touches upon three other points in the Position Paper: first, he complains because the decision has been taken without consulting him, the relevant and only party at this stage of the proceedings; secondly, he argues that the decision to hold the status conference broadens the scope of the interaction between the Pre-Trial Chamber and the Prosecution pictured in the Statute and the Rules: this can affect the 'compromise reached in Rome between different legal traditions' (*ibid.*, § 3). Finally, he claims that this kind of interpretation can reduce the impartiality of the Pre-Trial Chamber, influencing 'any subsequent trial proceedings against the accused' (*ibid.*, § 21).

14 O. Fourmy, *supra* note 6, at 1228, appears to state that even the need for an *ex parte* hearing has to be discussed during an *inter partes* conference.

in Rome, arguably getting closer to being an investigating judge than provided in the Statute and the ICC RPE.¹⁵

We are now in a position to answer the question asked above. The 17 February 2005 decision could be considered more than a 'routine act' and could represent the first step of the Pre-Trial Chamber toward defining its powers in relation to the Prosecutor. We have highlighted the textual meaning of the Pre-Trial Chamber I's decision (i.e. holding a status conference to obtain information about the investigations and to control the Prosecutor's work). We can, however, dig deeper, behind the 'simple' written words and try to find out whether that decision also has a 'hidden' meaning.

The role of a Pre-Trial Chamber in the procedure of the ICC is aimed at 'supervising' the Prosecutor, principally, but not exclusively, when he decides to investigate *proprio motu*. This control, from a strict procedural point of view, should be strongly exercised in order to protect the 'suspect'¹⁶ and balance the Prosecutor's and the defence's positions during the investigations. The Statute and the ICC RPE give this organ of the Court very few occasions to intervene and perform this specific task during the first part of this phase of the procedure (i.e. from the starting of the investigation to the issuance of a warrant or a summons to appear).

Pre-Trial Chamber I decided to intervene using the general powers provided for in Article 57(3)(c) ICCSt. and the status conference procedural device after seven months of investigations during which the Prosecutor had not let the Chamber know anything about their progress and results. Thus, it could be assumed that this decision was made both to speed up the investigations and also to take care of the rights of the 'prospective suspects' — a special aspect of the 'interest of justice' — to whom the delay could, obviously, be prejudicial.

Subsequent events support this view and should be considered a positive result of the Pre-Trial Chamber's action. Only one month after the status conference (19 April 2005), the Prosecutor informed Pre-Trial Chamber I of the existence of a unique investigative opportunity, asking for measures under Article 56.¹⁷ Pre-Trial Chamber I, having recognized the effective existence of

15 Pre-Trial Chamber I refers to Regulation 30 of the Regulations of the Court. This Regulation does not state in which cases a status conference can be held, but only the procedure that has to be followed in holding such a conference. Regulation 30 provides that: 'A Chamber may hold a status conference by way of hearings, including by way of audio- or video- link technology or by way of written submissions. The Chamber may require use of standard forms at a status conference as appropriate. Such standard forms shall be approved in accordance with regulation 23, sub-regulation 2.'

16 The drafters chose not to use the word 'suspect' in the ICC Statute and the ICC RPE. Article 55 generally refers to 'persons during investigation'; § 2 lists specific rights for persons about whom 'there are grounds to believe' they have committed a 'crime within the jurisdiction of the Court'. See S. Zappalà, 'Rights of Person During an Investigation', in A. Cassese, P. Gaeta and J. Jones (eds), *supra* note 6, 1181–1203, at 1196.

17 The request was related to the carrying out of a forensic examination.

the unique investigative opportunity on the basis of the Prosecutor's request and having held an *ex parte* consultation with the Prosecutor himself,¹⁸ adopted all of the necessary measures in order to make sure that the collection of evidence prior to trial would be conducted in as impartial and adversarial a manner as possible. It allowed among these measures the participation in the operations of an *ad hoc* counsel, appointed by the Registrar. This counsel (whom we would define 'counsel of the defence') is called upon to 'assist' not a specific client, who has not been identified yet, but 'the general interests of the defence'.¹⁹

In trying to control the Prosecutor's work and appointing the 'counsel of the defence', i.e. utilizing the most protective measure among those listed in Article 56,²⁰ Pre-Trial Chamber I showed great concern about the 'inequality of arms' during the investigation phase and its willingness to take care of the protection of defence rights, especially when the Prosecutor is working only on a 'situation', i.e. when a 'suspect' is not yet formally identified such that his or her counsel has not entered into the proceedings and cannot act as a 'watchdog'.

The decisions analysed above seem to have exposed another myth. Article 54(1)(a) ICCSt. states that 'The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'. This provision does not make the Prosecutor a *super partes* organ. Furthermore, it is not sufficient to protect defence rights during investigations. In fact, the object of the investigative opportunity was a forensic examination of items considered not available at subsequent stages of the procedure. Although the Chamber had ascertained the independence and impartiality of the proposed body (Netherlands Forensic Institute) in charge of the examination itself, it nevertheless deemed the presence of the Defence Counsel necessary. It would appear that it implicitly considered the provisions of Article 54(1)(a) as insufficient to protect the rights of the 'prospective suspects'. Similarly, it saw the Prosecutor as an 'organ of justice', not a *super partes* organ.

4. Concluding Remarks

The first judicial decision of the ICC should be greatly appreciated. Pre-Trial Chamber I has used the general powers provided for in Article 57 in order to speed up the investigations and to offer more protection to defence rights.

18 Decision to Hold Consultation Under Rule 114, *Situation in the Democratic Republic of Congo* (ICC-01/04), Pre-Trial Chamber I, 21 April 2005, at 4.

19 Decision on the Prosecutor's Request for Measures Under Article 56, *Situation in the Democratic Republic of Congo* (ICC-01/04), Pre-trial Chamber I, 26 April 2005.

20 The measures listed in Art. 56(2) ICCSt. are not exhaustive.

In addition, through the procedure of Article 56 (which could have been stimulated by the status conference), the Pre-Trial Chamber enabled a Defence Counsel to participate in the proceedings, thereby making the pre-trial phase more fair. At the same time, as we mentioned above, the Pre-Trial Chamber would appear to have used the status conference device at a very early stage of the investigations and outside the specific occasion explicitly mentioned in the ICC RPE, exposing itself to possible, but perhaps short-sighted, criticism regarding prosecutorial independence in conducting investigations.

Moreover, it would seem that the decision has slightly changed the shape of ICC procedure, making it different from the one that we would otherwise have found 'on the books'.

Furthermore, the decision could open the door to other interpretative decisions (and, consequently, to other problems) which could, in turn, further change that original shape by themselves. For example, from a mere textual reading of the Statute and the ICC RPE, one could conclude that the Pre-Trial Chamber may not on its own initiative ask the Prosecutor to collect evidence prior to trial in presence of the situation described in Article 56. There seem to be two grounds for this contention. The Pre-Trial Chamber is not a *juge d'instruction*. Additionally, from a technical point of view, it would appear to be unable to evaluate the status of the investigation and the occurrence of a unique opportunity, as it is a 'judge without dossier' and, consequently, without tools to ask for investigative operations. Now, however, after Pre-Trial Chamber I's decision and its consequent knowledge of some details about the investigations at a very early stage, this kind of initiative, in accordance with the general provision of Article 57(3)(c) ICCSt., may not be excluded.

We have witnessed only the first steps of the judicial interpretation in the ICC system: now, the scholars' duty is to pay attention to all of the next steps, aware that although we are faced with a coherent procedural system, it is one that is still under construction. As pointed out above, the 17 February 2005 decision may have shifted the balance reached in Rome that underlies the interplay between the Prosecutor and the Pre-Trial Chamber. However, it may also have given more overall equilibrium to the system, better balancing the Prosecutor's and the suspect's (or the prospective suspect's) position during the investigations.