



Original: **French**

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

Date: **23 September 2007**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Akua Kuenyehia, Presiding Judge  
Judge Anita Ušacka  
Judge Sylvia Steiner

**Registrar:** Mr Bruno Cathala

**SITUATION IN DARFUR, SUDAN**

**Public Document**

**Request for Leave to Appeal the Decision of 18 September 2007**

**The Office of the Prosecutor**

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Andrew Cayley

**Former Ad Hoc Counsel for the Defence**

Mr Hadi Shalluf

Pursuant to regulation 135(2) of the *Regulations of the Registry* and regulation 83 of the *Regulations of the Court*, the former Ad Hoc Counsel for the Defence in the Situation in Darfur lodged a request for review of the decision of the Registry, dated 26 June 2007 and notified on 14 July 2007, denying him payment of his fees for November 2006. **Decision of the Registry of 26 June 2006.**

The Registrar submitted his response to the Chamber in August 2007. The **response was neither transmitted nor notified** to the former Ad Hoc Counsel for the Defence. This is a violation of the all rules of law.

By decision issued on 18 September 2007, the judges of Pre-Trial Chamber I rejected the requests of the former Ad Hoc Counsel for the Defence in the Situation in Darfur.

Pursuant to article 82(1)(d) of the Statute and rule 155 of the *Rules of Procedure and Evidence*, the former Ad Hoc Counsel for the Defence in the Situation in Darfur requests leave to appeal on the following grounds:

**1- The judges of Pre-Trial Chamber I violated the adversarial principle**

The judges of Pre-Trial Chamber I were wrong in deciding and ruling on the appeal by former Ad Hoc Counsel for the Defence in the Situation in Darfur without the least bit satisfying themselves that the adversarial principle had been respected between the parties.

In fact, the judges have a duty to ascertain whether there has been transmission and notification of materials and submissions between the parties before issuing their decision.

By simply reading and reviewing the record, the judges can see that the Registrar's response of August 2007 was not transmitted and notified to the former Ad Hoc Counsel for the Defence in the Situation in Darfur. This is a breach of the rules of law.

The judges based their decision of 18 September 2007 solely on the Registrar's response of 7 August 2007, which was neither transmitted nor notified to the former Ad Hoc Counsel for the Defence in the Situation in Darfur.

This failure to follow the procedure is a breach of the rules of law that must be sanctioned by the Appeals Chamber of the Court.

Accordingly, in keeping with the rules of law, the judges of Pre-Trial Chamber I cannot deny the request for leave to appeal.

**2- The judges of Pre-Trial Chamber I violated the principle of impartiality**

Article 6(1) of the *European Convention on Human Rights*, known to all jurists, enshrines the guarantees of the fair administration of justice, that is, the right to an independent and impartial court as well as procedural guarantees, fairness, the publicity of proceedings, expeditiousness and secularism.

The judge must satisfy this requirement of article 6(1) of the *European Convention on Human Rights* and article 14(1) of the *International Covenant on Civil and Political Rights*. As the legal expression of the judge's neutrality, this provides the guarantee of his or her credibility. The Strasbourg Court further elevates this guarantee in a judgment issued on 1 March 1990 in which is stated that: "a restrictive interpretation of Article 6 para. 1 (art. 6-1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society". **Impartiality is the very foundation of a democratic society.**

**Two points must be borne in mind: subjective impartiality, which is to be presumed until there is proof to the contrary, means that the judge must be free of personal prejudice or bias; objective impartiality means that the court must offer sufficient guarantees to exclude any legitimate doubt arising from the organisation of the judicial institution or from a judge's intervention, owing to his or her previous involvement which could have afforded him or her some knowledge of the case.**

**The obligation of impartiality is inherent to the function of judge and the exercise of judicial power. The judge must be neutral to the parties.**

The judges of Pre-Trial Chamber I violated this principle of impartiality:

- I- by favouring the Registrar;
- II- by their lack of neutrality;
- III- by the failure of the judges of the International Criminal Court to exercise reserve when they accused Counsel of making vexatious and frivolous submissions;
- IV- by expressing their personal feelings, **having already expressed their opinion in a decision dated 2 February 2007 (5) on the mandate of the applicant and in their decision of 15 March 2007.** Consequently, they should have referred this civil matter to another chamber of the Court in accordance with the principle of impartiality and the jurisprudence of the European Court of Human Rights. Indeed, the European Court of Human Rights has previously sanctioned similar decisions from several countries for failing to respect the principle of impartiality (see *Morel v. France*, judgment of 6 June 2000 - concerning an insolvency judge who had taken various measures affecting certain companies during the observation period and subsequently presided over the bench which decided the fate of these companies – is significant and provides some elements for dealing with a great many issues. See also the judgements in *Hauschildt v. Denmark* of 24 March 1989 and *Rojas Morales v. Italy* of 16 November 2000).

In keeping with this jurisprudence of the European Court of Human Rights and the principle of impartiality, the judges of Pre-Trial Chamber I have the obligation to refer the applicant's civil appeal **to the consideration of another chamber** given that they have previously expressed their opinion in their decisions of 2 February 2007 and 15 March 2007.

**3- The judges of Pre-Trial Chamber I violated the principle of fair trial**

In a controversial ruling issued on 23 November 1993 (*Poitrimol v. France*), since upheld in *Omar v. France* and *Guérin v. France* judgments of 29 July 1998 and the *Lala v. The Netherlands* and *Pelladoah v. The Netherlands* judgments of 22 September 1994, the European Court of Human Rights found against France because the Criminal Division of the Court of Cassation had declared inadmissible the appeal of the counsel of an absconding convict who had failed to surrender to a warrant of arrest.

The judges of Pre-Trial Chamber I should have satisfied themselves that the procedure for the transmission and notification of materials and submissions had been followed.

The failure to transmit and notify the Registrar's materials and submissions to the former Ad Hoc Counsel for the Defence in the Situation in Darfur is a violation of the principle of fair trial.

Accordingly, it has been demonstrated herein that the applicant did not have a fair and impartial trial.

The flawed decision of 18 September 2007, tainted as it is by breaches of the fundamental principles of law, must be set aside by the Appeals Chamber.

The judges of Pre-Trial Chamber I cannot reject this application for leave to appeal since their decision of 18 September 2007 following an administrative and civil request for review pertaining to the applicant's fees will not in any way affect the criminal proceedings in the Situation in Darfur.

Conversely, the refusal to grant leave to appeal will be prejudicial to, and a violation of, the right of the applicant.

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/signed/

**Mr Hadi Shalluf**  
**Former Ad Hoc Counsel for the Defence**

Dated this 23 September 2007

At Paris, France