



Original: **French**

No.: **ICC-02/05**
Date: **7 August 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

**Registrar's Observations pursuant to Rule 20(1)(d) of the *Rules of Procedure and Evidence* concerning the
"Request under Regulation 135(2) of the *Regulations of the Registry* and
Regulation 83 of the *Regulations of the Court* for Review of the Registrar's
Decision of 26 June 2007 Denying Payment of Fees for November 2006" filed on 27
July 2007 by Mr Hadi Shalluf**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Former Ad Hoc Counsel for the Defence
Mr Hadi Shalluf

On 27 July 2007, Mr Hadi Shalluf (the “Applicant”) filed a “Request under regulation 135(2) of the *Regulations of the Registry* and regulation 83 of the *Regulations of the Court* for review of the Registrar’s decision of 26 June 2007 denying payment of fees for November 2006” before Pre-Trial Chamber I (“the Request for Review”);¹

The Applicant requests Pre-Trial Chamber I to rule on his November 2006 fees and to order the Registry to pay them;

THE REGISTRAR hereby submits to Pre-Trial Chamber I the following observations based on rule 20(1)(d) of the *Rules of Procedure and Evidence*, pursuant to which he may, on his own initiative, assist the Chamber on defense-related issues.

DISCUSSION

1.0. *Res judicata*

1. The entire Request for Review must be rejected for contravening the principle of *res judicata*.² The Registrar submits that by his Request for Review, the

¹ ICC-02/05-86.

² The principle of *res judicata* establishes the basic tenet that the finality of judicial decisions is predicated on a presumption of an indisputable truth (*res judicata pro veritate habetur*). Pursuant to an irrebuttable legal presumption, an irrevocable decision is held to be the expression of the “truth”. According to the French Court of Cassation, [TRANSLATION] “the principle of *res judicata* only applies when the cause of action, subject matter and parties in two successive proceedings are identical”. See Court of Cassation, Criminal Division, 23 May 1995, *Gazette du Palais*, 1995, II, 440. Hence, when these three elements are identical, no new proceedings or appeals can be instituted. Likewise, for public policy reasons, German case-law considers that a court seized of a second case must strike it *proprio motu* on the ground that it is *res judicata*. This ruled is aimed at preventing a dispute between the same parties on which a court has passed final judgment from being relitigated. See Federal Court of Justice (BGH), 4th Civil Chamber, 14 February 1962, BGHZ, 36, 365. The Spanish constitution enshrines the principle of *res judicata* as an essential safeguard for the fundamental right of the public to effective protection from judicial authority (article 24.1 SC). The principle of *res judicata* prevents trials from continuing indefinitely and prevents contradictory decisions or judgments from being issued in the same case. Once all avenues of redress have been exhausted, the requirement to ensure the security and stability of legal situations imposes what was decided on the parties as a binding truth. As stated by the European Court of Human Rights, [TRANSLATION] “Execution of a judgment must therefore be regarded as an integral part of the “trial” for the purposes of Article 6 § 1 of the Convention and (...) the right to a court would be illusory if a

Applicant is trying to obtain a decision from Pre-Trial Chamber I on the payment of his fees for work carried out beyond the scope of his mandate, even though this Chamber which had already been seized of the matter had issued a decision in the same case involving the same parties. The Registrar adds that since Pre-Trial Chamber I rendered its decision of 15 March 2007³ there has been no new fact concerning the payment of the Applicant's fees for the work carried out beyond the scope of his mandate;

2. The Registrar recalls that the Applicant's mandate as former Ad Hoc Counsel responsible for representing and protecting the general interests of the Defence in the situation in Darfur, Sudan, was clearly defined in Pre-Trial Chamber I's decision of 24 July 2006 entitled "*Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence*", which refers to the Registrar's decision of 25 August 2006;⁴

Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party." ECHR, Judgment of 28 June 2005, *Virgil Ionescu v. Romania*, Application No. 53037/99, 1999-VI.

Likewise, under English law, according to the principle of estoppel, a judgment is not only conclusive as to the issue adjudicated, but also as to the other collateral issues which arose during the proceedings (*Heptulla Bros v. Thakore* (1956) 1 WLR p. 28), or as to any issue which may be inferred from the arguments contained in the judgment (*Sanders v. Sanders* (1952) 1 ALL ER p. 767.).

Once a judgment has become irrevocable, the *res judicata* cannot be affected even by the subsequent discovery of pre-existing facts which could possibly have changed the outcome of the trial. Grounding itself on the principle of *res judicata*, the jurisprudence of the French Court of Cassation is firmly against any such attempt to disturb an irrevocable judgment. The Second Civil Chamber, in a judgment of 21 March 1979, considered that an application for review is only admissible if the applicant had been unable, for reasons beyond his control, to raise the matter in question before the decision became irrevocable. Court of Cassation, 2nd Civil Chamber, 21 March 1979, *Bulletin Numéro 92*.

Hence, in the case of a final judgment, *res judicata* justifies, pursuant to the authority of the judgment and except in very exceptional cases, that the decisions set out in the operative part of the judgment be enforced and precludes litigating the matter again under the same conditions.

³ ICC-02/05-66.

⁴ ICC-02/05-12.

3. Moreover, Pre-Trial Chamber I has, *inter alia*, in its decision of 2 February 2007,⁵ stated that: (i) the Applicant's mandate is strictly restricted to proceedings under rule 103 of the *Rules of Procedure and Evidence*, (ii) that the mandate of Ad Hoc Counsel does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules, and (iii) that the Request falls outside the parameters of his legally assigned responsibilities;
4. Likewise, in its decision of 21 February 2007,⁶ the same Chamber stated that the Applicant's mandate is restricted to proceedings under rule 103 of the *Rules of Procedure and Evidence* and that the Applicant is attempting to extrapolate the specificity, the limits and the scope of his mandate;
5. The Chamber defined the Applicant's mandate under rule 103 of the *Rules of Procedure and Evidence* and decided that Ad Hoc Counsel for the Defence had ten (10) days to file in the record of the situation in Darfur, Sudan a written response to the observations submitted by the *amici curiae*.⁷ As stated by the Chamber, the Applicant waived the right to respond to these observations by failing to submit his response thereto;
6. The Registrar recalls that the Applicant was appointed on 26 August 2006 and that, in view of the ongoing proceedings before the Chamber as a result of the observations he had filed, the Applicant's fees were paid in full for work carried out in August, September and October 2006, as noted in the Registry's observations of 6 March 2007.⁸
7. The Registrar points out that the Applicant acted beyond the scope of his mandate during all the following months, including in November 2006, and

⁵ "Decision on the Ad Hoc Counsel for Defence Request of 18 December 2006" (ICC 02/05-47).

⁶ ICC-02/05-66, p. 4.

⁷ ICC 02/05-10, p. 5.

⁸ ICC-02/05-60.

submitted statements of hours worked to the Registry requesting payment for his work;

8. The Registrar submits that as of November 2006 his services stopped paying the Applicant the fees claimed, on the ground that the work in question went beyond the scope of his mandate as defined by Pre-Trial Chamber I in its decision of 24 July 2006, *supra*. With respect to the fees for November 2006 in particular, the Registrar notes, first, that this information was expressly given to the Applicant who, in passing, confirms being aware of this position in his letter dated 14 March 2007 (Annex 1), and to Pre-Trial Chamber I through his observations of 6 March 2007,⁹ as a result of which the same Chamber issued its decision of 15 March 2007 on the payments requested by the Applicant;¹⁰
9. Likewise, the Registrar recalls Pre-Trial Chamber I's comments on the work carried out by the Applicant beyond the scope of his mandate and according to which:
 - i. the continuous filings of Ad Hoc Counsel (the Applicant) are frivolous and vexatious and that, in the view of the Chamber, such filings extrapolate the limits and scope of Ad Hoc Counsel's specific mandate and, as such, can be considered an abuse of procedure;
 - ii. given the fact that he has been acting beyond the scope of his mandate, the Applicant is in no position to demand payment of fees for the vexatious and frivolous claims instituted;¹¹
10. From all of the foregoing and contrary to the Applicant's claims at paragraph 9 of his Request for Review, the Registrar submits that the work carried out beyond the scope of his mandate, including in November 2006 and

⁹ ICC-02/05-60, p. 3, par.4.

¹⁰ ICC-02/05-66.

¹¹ ICC-02/05-66, pp. 6-8.

for which he is again requesting payment, has been taken into consideration by the Chamber,¹² which issued a decision on the matter. As such, by filing his Request for Review of 27 July 2007 requesting payment of the November 2006 fees, the Applicant is clearly attempting to reopen a matter which has already litigated, which goes against the doctrine of *res judicata*;

1.1. The proceedings initiated by the Registrar before the Legal Aid Commissioner pursuant to regulation 136 of the *Regulations of the Registry*

11. Furthermore, as indicated above, the Registrar submits, first, that the Applicant exhausted all available procedural remedies for claims for payment of fees for work carried out beyond the scope of his mandate, including for November 2006, and, second, that the letter of 26 June 2007 impugned by the Applicant is the fruit of his own persistent requests concerning fees for work carried out beyond the scope of his mandate, despite Pre-Trial Chamber I's decision on the matter. This letter is actually an exceptional initiative by the

¹² The Registrar reiterates his position concerning the request for payment for November 2006, which was communicated to Pre-Trial Chamber I in his observations of 6 March 2007 (ICC-02-05-60, p. 3, par.4), and that this Honourable Chamber was aware of this information before issuing its decision of 15 March 2007 on the fees claimed in which it rejected the Applicant's requests.

It is important to mention that the International Criminal Tribunals for the former Yugoslavia and Rwanda consider that the discovery of a *new fact* which was unknown during the trial or appeal may constitute a ground on which to request the revision of a sentence or decision. As stated previously, the Registrar submits that this rule is not applicable in this case, as there is no *new fact* (the information on the month of November was known when this Honourable Chamber issued its decision of 15 March 2007): In the *Prosecutor v. Duško Tadić*, the Tribunal for the Former Yugoslavia notes that "*the moving party must satisfy four preliminary criteria: there must be a new fact; that new fact must not have been known by the moving party at the time of the original proceedings; the lack of discovery of the new fact must not have been through the lack of due diligence on the part of the moving party; and the new fact could have been a decisive factor in reaching the original decision.*" ICTY, *Prosecutor v. Duško Tadić*, "Decision on Motion for Review", 30 July 2002, Case No. IT-94-1-R. See also ICTR, *The Prosecutor v. Barayagwiza*, "Order (Prosecutor's Request for Review or Reconsideration)", 31 March 2000, Case No. ICTR-97-19-AR72, par. 41; ICTY, *Prosecutor v. Hazim Delić*, "Decision on Motion for Review", 25 April 2002, Case No. IT-96-21-R-R119, p.5; ICTY, *Prosecutor v. Goran Jelišić*, "Decision on Motion for Review", 2 May 2002, Case No. IT-95-10-R, p. 3.

Registrar based on the invitation of the Second Vice-President of the Court to provide the Applicant with information on the possible options that might be available concerning his requests for payment (see Annex 1 of the Applicant's Request for Review);

12. The Registrar recalls that in his letter of 17 April 2007 annexed to the Request for Review, the Applicant had indeed sought the intervention of the Second Vice-President of the Court, the Honourable Judge Blattmann, on the issue of the November and December 2006 and January, February and March 2007 fees. In his response of 11 May 2007, the Second Vice-President reminded the Applicant that his claims had been the subject of judicial decisions rejecting his requests for payment and appeal,¹³ and then invited the Registrar to provide him with information on possible options that might be available concerning his requests for payment, as noted above;
13. Likewise, the Registrar points out that the Head of the Division of Victims and Counsel had previously addressed correspondence to the Applicant (DSS/2007/110/am-ss) dated 16 April 2007 in which he expressly indicated that with respect to work carried out beyond the scope of his mandate he could request a review by the Registrar under regulation 135(1) of the *Regulations of the Registry*;
14. The Registrar submits, first, that he never received any reaction from the Applicant concerning the correspondence of 16 April 2007 which actually laid down the possible options concerning his claims and, second, that in his letter dated 26 June 2007 (DVC/0081/2007/DDP) further to the Honourable Judge's invitation, the Applicant was informed that "unless expressly otherwise indicated by 3 July 2007 at the latest, (the Registrar) would consider the correspondence of 20 June 2007 (the Applicant's) as an implicit request for the

¹³ See the "Decision on the Request for Leave to Appeal to the Decision Issued on 15 March 2007" of 27 March 2007 (ICC-02/05-70).

Registrar to decide on a dispute, and would therefore exceptionally refer the matter to one of the legal aid commissioners for his or her advice before making a final decision on the requests for payment“. As the Applicant did not react, the Registrar, in good faith and in the spirit of the Second Vice-President’s invitation, referred the matter to one of the legal aid commissioners by his letter of 12 July 2007 (annex 2) in order to obtain his informed and detailed advice on the dispute concerning the Applicant’s requests for payment and, to this end, transmitted all the documents relating to this matter in order to ensure that the funds allocated by the Assembly of States Parties to the Court’s Legal Assistance Programme are managed objectively, economically and transparently. The Registrar notes that the Applicant was informed of the above letter of 12 July 2007 before requesting a review by Pre-Trial Chamber I (annex 3);

15. Against this background, the Registrar is of the opinion that the Request for Review must be considered as part of an ongoing corollary proceeding before the Legal Aid Commissioner, that should, in this exceptional proceeding, lead to a decision by the Registrar on a dispute, and that it is premature and pointless to refer the matter to the Chamber at this stage;
16. From the foregoing, the Registrar submits, first, that by seizing Pre-Trial Chamber I prematurely with a request for payment of fees for November 2006 despite the fact that the Registrar had referred the matter to the Legal Aid Commissioner for advice in order to enable him to decide on the dispute concerning his requests for payment, including for work in November 2006, the Applicant did not give him the opportunity to decide on the dispute in this exceptional proceeding, and, second, that the Request for Review brought before Pre-Trial Chamber I before any decision by the Registrar on a dispute shows that the Applicant does not intend to comply with the Court’s texts and that he is attempting to mix applicable procedures;

17. Hence, the Registrar respectfully requests Pre-Trial Chamber I to dismiss the Request for Review for inadmissibility.

FOR THESE REASONS,

THE REGISTRAR respectfully requests Pre-Trial I:

- I. **TO DECLARE** the Request for Review inadmissible, and
- II. **TO INVITE** the Applicant to comply with the texts and procedures applicable before the Court.

[SIGNATURE]

Ralph Martens
On behalf of the Registrar

Dated this 7 August 2007

At The Hague, The Netherlands