



Original: English

No.: ICC-02/04-01/05
Date: 9 November 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi
Judge Hans-Peter Kaul
Judge Ekaterina Trendafilova

**SITUATION IN UGANDA
IN THE CASE OF
THE PROSECUTOR
*v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN***

Public Document

Request for leave to appeal the *Decision on Defence Counsel's "Request for conditional stay of proceedings"* from 31 October 2008

Source: Jens Dieckmann, Counsel for the Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr. Louis Moreno Ocampo
Ms. Fatou Bensouda

Counsel for the Defence

Mr. Jens Dieckmann
Ms Michelyne C. St. Laurent
Mr Michiel Pestman

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

The Government of the Republic of
Uganda

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Outline of the Procedure

1. On 21 October 2008, in its “Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence” (“Decision of 21 October 2008”), Pre-Trial Chamber II appointed the undersigning Counsel as Counsel for the Defence (“Counsel”), “within the context and for the purposes of the present proceedings”¹. Further, the Chamber invited the Republic of Uganda, the Prosecutor, the Counsel and the victims who have already communicated with the Court with respect to the Case, or their legal representatives, to submit their observations on the admissibility of the Case by 10 November 2008.
2. On 28 October 2008, Counsel requested the Presidency to review and clarify the mandate of Counsel (“Request for Review”). Additionally, Counsel requested an order for a conditional stay/suspension of the proceedings.²
3. On the same day, Counsel submitted his “Request for conditional stay of proceedings” (“Request”) to Pre-Trial Chamber II.³
4. In its decision from 31 October 2008, Pre-Trial Chamber II rejected Counsel’s request for stay or suspension of the proceedings.⁴ On Counsel’s alternative request, the Chamber decided to re-classify the transcripts of the hearings held on 3 and 6 October 2005 as “confidential *ex parte*” and ordered the Prosecution

¹ *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Decision initiating proceedings under article 19, requesting observations and appointing Counsel for the Defence, 21 October 2008.

² *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Request for review of Counsel’s appointment by the Registrar in accordance with Pre-Trial Chamber’s Decision of 21 October 2008 and request for additional stay/suspension of the proceedings, 28 October 2008.

³ *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Request for conditional stay of proceedings, 28 October 2008.

⁴ *Prosecutor v. Kony et al.*, Case No. ICC-02/04-01/05, Decision on Defence Counsel’s “Request for conditional stay of proceedings” (“Decision”, “impugned Decision”), 31 October 2008.

to disclose specific material.⁵ Furthermore, the Chamber extended until 18 November 2008 the time limit for the Republic of Uganda, the Prosecutor, the Defence and the victims having communicated with the Court with respect to the Case to submit observations in the proceedings.⁶

II. The Law

5. Article 82(1)(d) of the Statute provides that

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(...)

(d) 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.

6. The criteria for being granted leave to appeal under article 82(1)(d) of the Statute were initially stated by Pre-Trial Chamber II, and subsequently cited with approval by Pre-Trial Chamber I.⁷ Thus, the

application for leave to appeal must be guided by three principles, namely: (i) the restrictive character of the remedy provided for in article 82, paragraph 1 (d), of the Statute; (ii) the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of

⁵ Ibid, p. 4.

⁶ Ibid.

⁷ *Situation in the Democratic Republic of Congo*, Case No. ICC-01-04, 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, 31 March 2006, at para. 19.

or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.⁸

7. In terms of the threshold for appealing a decision pursuant to article 81(1)(d) of the Statute, the Appeals Chamber has determined that the moving party must firstly identify an appealable issue,⁹ and defined an issue as a subject the resolution of which is essential for the judicial determination in question.¹⁰ In setting out the appealable issues, it is not necessary for the party seeking leave to address the merits of the appeal, nor indeed, is it feasible to do so within the limited time frame for filing a request for leave to appeal.¹¹
8. Article 82(1)(d) of the Statute does not give the Pre-Trial Chamber any discretion to refuse a request for leave to appeal if the criteria under article 82(1)(d) of the Statute are met.

⁸ *Situation in the Democratic Republic of Congo*, Case No. ICC-01-04, Decision on 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 article 58, No. ICC-02/04-01/05-US-EXP, 19 August 2005, at para. 15.

⁹ *Situation in the Democratic Republic of Congo*, Case No. ICC-01-04, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, at para. 9.

¹⁰ *Ibid.*

¹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Prosecution's application for leave to appeal the '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, 2 July 2008, para. 10 (stating "The Trial Chamber notes that the Prosecution's overview extends significantly beyond matters that need to be raised for the purposes of seeking leave to appeal at this interlocutory stage. Rather, many of these submissions go to the merits of the proposed appeal, and as such will not be considered in the Trial Chamber's analysis and conclusions on this application.")).

III. The Issues

9. The impugned Decision of Pre-Trial Chamber II raises two potential issues on which to appeal:

- (1) Whether the Chamber incorrectly determined that there was no legal basis for suspending the proceedings pending the Presidency's review of Counsel's Request for Review under Rule 21(3);¹² and
- (2) Whether the Chamber erred by finding that a conditional stay of the proceedings concerning admissibility was neither required nor appropriate at this stage of the proceedings.¹³

IV. Impact on the Fairness and Expeditionness of the Proceedings

10. For the reasons set out below, the errors of law incurred in the impugned Decision would affect the fair and expeditious outcome of the proceedings within the meaning of article 82(1)(d) of the Statute.

11. First of all, taking into account that Pre-Trial Chamber II appointed Counsel for the stated purpose of preserving the fairness of the proceedings,¹⁴ it is respectfully submitted that it would be inconsistent to state that the impugned issues concerning the need to suspend or stay the proceedings pending the resolution of serious and fundamental counsel issues, do not impact on the fairness of the instant proceedings.

¹² Impugned Decision, at p. 4.

¹³ Ibid., at p. 7.

¹⁴ Decision of 21 October 2008, pp. 7 and 8.

12. In this connection, the ICTR Trial Chamber in *Bagasora et al* based its assessment as to whether the impugned decision could impact on the fairness of the proceedings on the consequences which could ensue if the Chamber's decision was in fact incorrect.¹⁵ Hence, the underlying rationale for requesting the stay or suspension was directly linked to the fairness and expeditiousness of the proceedings.

13. The ICC Appeals Chamber¹⁶ has cited case law from the ad hoc Tribunals to the effect that pending the resolution of disputes concerning legal aid resources or the assignment of counsel, it may be necessary to stay the proceedings in order to preserve the fairness of the proceedings.¹⁷

14. The Presidency has also recognized that the right of a person to a fair and expeditious trial "may be adversely affected where the appointment of duty counsel is unreasonably refused".¹⁸ In the instant proceedings, the assignment of one counsel to all four defendants constitutes an unreasonable refusal to assign a counsel to each defendant, and thus a denial of the defendants' right to effective representation.

¹⁵ *Prosecutor v. Bagasora*, Case No. ICTR-96-7-I, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, at para. 9 (stating "The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers raised by the Defence to be remote ... [However] If the Chamber's interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound. In these circumstances, the Chamber finds that its decision involves an issue that 'would significantly affect the fair and expeditious conduct of the proceedings'").

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1486, 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", 21 October 2008.

¹⁷ *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36, Decision on Second Motion by Brdjanin to Dismiss the Indictment, 16 May 2001, at para. 5 (stating "if the Trial Chamber is satisfied that the absence of such resources will result in a miscarriage of justice, it has the inherent power and the obligation to stay the proceedings until the necessary resources are provided, in order to prevent the abuse of process involved in such a trial.."). See also *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Decision on Ngeze's Motion for a Stay of Proceedings, 4 August 2004 (the defendant asked to refile his appeal brief, and an amended notice of appeal, after his counsel had been replaced by the Registrar, and for a stay of proceedings pending the replacement. The Pre-Appeal Judge granted the request, holding that "to preserve the fairness and efficiency of the proceedings, it is necessary to stay the proceedings against Appellant Ngeze until a new lead counsel has been assigned to represent him").

¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-93, Decision on the "Demande urgente en vertu de la Règle 21-3 du Règlement Procédure et de Preuves" and on the "Urgent Request for the Appointment of a Duty Counsel" filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007, and 10 May 2007 respectively, 29 June 2007, at para. 16.

15. Counsel respectfully submits that if the Presidency were to nullify his appointment to represent all four defendants in the course of the admissibility proceedings under Article 19 of the Statute, the interests of the defendants would not be properly and effectively represented. At this stage, Counsel may also have already been forced to violate his obligations under the ICC Code of Conduct, and thereby potentially attract disciplinary sanctions. The decision to continue the proceedings notwithstanding such possibilities therefore significantly affects Counsel's ability to fulfill his professional duties and, consequently, the fairness of the proceedings.
16. Moreover, the expeditiousness of the proceedings would be seriously affected in the case that the Chamber would need to reinstate the proceedings, should Counsel's appointment be nullified. In this regard, the Presidency has confirmed that even the fact that defence counsel has completed his or her mandate does not eliminate the need for the Presidency to review the legality of the initial assignment,¹⁹ which could potentially invalidate the proceedings in which the defence counsel participated.²⁰ In the instant case, this would therefore result in a need to reconvene the proceedings under Article 19 of the Statute in question, which would have a significant effect on the resources of the Court, and thus the overall expeditiousness of the proceedings.
17. It is for these reasons that the ICTY Trial Chamber in the *Prosecutor v. Seselj* recently held that the criteria for interlocutory appeal at the ICTY were met in connection with a Prosecution request to appeal a refusal to stay the

¹⁹ *Ibid.*, at para 20.

²⁰ In circumstances in which the ICTY Appeals Chamber has reversed decisions concerning the illegal or inappropriate appointment of counsel, the Appeals Chamber has ordered the Trial Chamber to reconvene any proceedings in which the impugned counsel was involved. See *Prosecutor v. Seselj*, Decision on Appeal against the Trial Chamber's Decision (No. 2) on Assignment of Counsel, 8 December 2006.

proceedings pending the resolution of the status of the legal representation of the defendant.²¹

V. An Immediate Decision of the Appeals Chamber Would Materially Advance the Proceedings

18. In addition, the immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings within the meaning of article 82(1)(d).

19. With regard to this second component of article 82(1)(d), the Appeals Chamber has held that an issue must be such

that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.²²

20. Further, it is important to note that in determining whether to grant suspensive effect to an appealed decision, the Appeals Chamber has taken into consideration whether the impugned decision would have an irreversible effect if suspension is not granted.²³

²¹ *Prosecutor v. Seselj*, Case No. IT-03-67, Oral decision of 26 August 2008, T. 9817, line 9 – 9818, line 19.

²² *Situation in the Democratic Republic of Congo*, Case No. ICC-01-04, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, at para. 14.

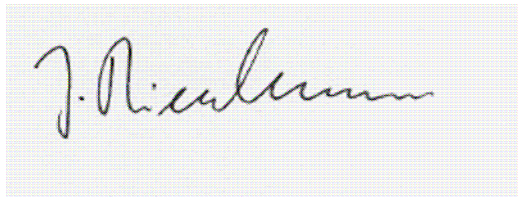
²³ *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1290, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral Decision of Trial Chamber I of 18 January 2008, 22 April 2008, para. 8.

21. If the Appeals Chamber finds in the instant case that there is in fact a legal basis for suspending the proceedings pending the Presidency's review of Counsel's Request for Review, and/or that the criteria for a conditional stay or suspension of the proceedings are met, and that therefore Pre-Trial Chamber II was incorrect in its decision not to grant the stay or suspension of proceedings, then the implementation of the impugned Decision would have an irreversible effect. Hence, an immediate decision of the Appeals Chamber concerning the accuracy of the Pre-Trial Chamber's decision not to suspend or conditionally stay the admissibility proceedings would rid the judicial process of possible mistakes that might taint the fairness of the instant proceedings and settle the manner through its authoritative determination, thereby materially advance the proceedings.

VI. Relief Sought

22. For the foregoing reasons, Counsel respectfully requests the Pre-Trial Chamber to grant him leave to appeal the Decision of 31 October 2008.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'J. Dieckmann', is centered within a rectangular box. The signature is written in a cursive, flowing style.

Counsel for the Defence, Mr. Jens Dieckmann

Dated this 9 November 2008

At The Hague, The Netherlands