

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/04-01/05

Date: 11 May 2006

THE APPEALS CHAMBER

Before: Judge Philippe Kirsch
Judge Erkki Kourula
Judge Georgios M. Pikis
Judge Sang-Hyun Song
Judge Navanethem Pillay

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Under Seal, Ex parte

**Application for Appeals Chamber to Give Suspensive Effect to Prosecutor's
Application for Extraordinary Review**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Christine Chung, Senior Trial Lawyer

The Office of the Prosecutor respectfully requests the Appeals Chamber to suspend or stay the consideration by Pre-Trial Chamber II of an application for leave to appeal pending in that Chamber, until after the Appeals Chamber renders a decision on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal (filed in the situation of the Democratic Republic of Congo) (hereinafter "Prosecutor's Application for Extraordinary Review").

Request that This Submission be Filed Under Seal and *Ex parte*

1. The Office of the Prosecutor respectfully requests that this filing be received under seal and on an *ex parte* basis because it refers to a filing in Pre-Trial Chamber II that is currently classified as "under seal, *ex parte*."¹

Procedural Background

2. On 15 March 2006, the Office of the Prosecutor sought from Pre-Trial Chamber II leave to appeal a decision rendered on 10 March 2006 and entitled "Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission filed by the Registry on 5 December 2005" (hereinafter "Application for Leave to Appeal").
3. Attached to this application as Annex A is the Application for Leave to Appeal.² In this application, in footnotes 33, 35, and 51, the OTP noted its

¹ By submission dated 2 May 2006, the OTP has requested that the filing in the Pre-Trial Chamber be reclassified and made public with minor redactions, and that request is under consideration.

² The OTP would not ordinarily affix an application which is already a matter of record, but it does not know whether this Chamber otherwise has access to the application, because of its classification as "under seal, *ex parte*."

disagreement with the Pre-Trial Chamber II's construction of Art. 82(1)(d), as previously adopted by that Chamber in a prior decision denying discretionary leave to appeal, dated 19 August 2005. *See* 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, dated 19 August 2005.

4. On 24 April 2006, the OTP filed in this Chamber an application seeking extraordinary review of a decision of Pre-Trial Chamber I denying leave to appeal, dated 31 March 2006. In this application, the OTP requested that the Appeals Chamber review Pre-Trial Chamber I's endorsement of an inappropriately restrictive interpretation of Art. 82(1)(d) – an interpretation which had first been adopted by Pre-Trial Chamber II, in its 19 August 2005 Decision. Each of the remedies sought by the OTP in its Application for Extraordinary Review includes a request that the Appeals Chamber consider the propriety of the legal standard adopted in both Pre-Trial Chambers for granting discretionary appeal under Art. 82(1)(d).
5. The Application for Leave to Appeal is the only application for leave to appeal pending in any of the Pre-Trial Chambers.

**Request that Suspensive Effect Be Given to Prosecutor's Application for
Extraordinary Review**

6. The Office of the Prosecutor respectfully requests that this Chamber consider granting suspensive effect to the Prosecutor's Application for Extraordinary Review, by ordering that Pre-Trial Chamber II await the

disposition of that application before deciding the application for leave to appeal which is pending in the Pre-Trial Chamber.

7. It is respectfully submitted that it would be inappropriate for Pre-Trial Chamber II to apply the same test that the Appeals Chamber has currently been asked to review, before the Appeals Chamber has completed its own consideration. It is possible that the Appeals Chamber will render a ruling regarding the legal standard for permitting discretionary appeal. In this circumstance, a suspension of the matter pending in Pre-Trial Chamber II preserves the advantage of ensuring coherence and consistency in the legal standards applied in this Court.³ Suspension also avoids the potential inefficiency and duplication of efforts which would result if the Pre-Trial Chamber were to either grant or deny the pending Application for Leave to Appeal, based on a legal standard later altered by the Appeals Chamber. Finally, if the Pre-Trial Chamber were to proceed and issue a decision without awaiting the outcome of the Application for Extraordinary Review, the Appeals Chamber would arguably be deprived of the full measure of its review power.

8. The OTP notes that it has simultaneously requested the suspension or stay of any determination of the Application for Leave to Appeal from Pre-Trial Chamber II. The reason for the filings in both Chambers is

³ See e.g., *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-A, Judgment of the Appeals Chamber, 1 June 2001, para. 21 (noting role of the Appeals Chamber in “unifying the applicable law” and “provid[ing] guidance to the Trial Chambers in interpreting the law.”) See also, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14-A, Judgment of the Appeals Chamber, 24 March 2000, para. 113 (“The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons: (i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers...”.)

uncertainty about the proper venue for this request. The Rome Statute appears to envision that suspensive effect of any matter pending in the Appeals Chamber should be ordered by the Appeals Chamber. Article 82(3) and Rule 156(5), which are the only governing texts expressly addressed to the "suspensive effect" of an appeal, require that requests be directed to the Appeals Chamber. Still, the matter is not free from doubt. Among other things, the Appeals Chamber has not yet determined whether it will accept the Application for Extraordinary Review, and Rule 156 is not explicit as to whether an appeal within the meaning of sub rule 5 also applies to applications for leave to appeal.

9. The OTP ordinarily would seek exclusively from the Pre-Trial Chamber a suspension or stay of consideration of the Application for Leave to Appeal,⁴ relying on article 57(3)(a) and the proposition that the Pre-Trial Chamber, which has the authority to issue a decision, also has the inherent authority to suspend consideration of that decision.⁵ A prior decision of Pre-Trial Chamber II, however, casts doubt on whether Pre-Trial Chamber

⁴ This is analogous to the approach that the Prosecution took before Pre-Trial Chamber I in Prosecutor's Application for Leave to Appeal, dated 11 March 2005. In that application, the Prosecution requested that the Pre-Trial Chamber suspend the decision for which leave to appeal had been sought, explaining that it would seek suspensive effect of that same decision from the Appeals Chamber if leave was granted (at para. 32.)

⁵ Regarding the potential applicability of article 57(3)(a), see e.g., *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision on the Defence "Extremely Urgent Motion Seeking a Ruling that Appeals from Orders Ruling on the Trial Chamber's Lack of Jurisdiction and Request for Dismissal of Counts are Suspensive", 15 November 1999. In this decision the Appeals Chamber noted the Trial Chamber's authority to issue a stay of proceedings under ICTR rule 54, which contains similar wording to article 57(3)(a) of the Statute. Regulation 108(3), which provides that a Chamber may suspend its own order relating to the legality of request for cooperation under article 93, suggests strongly that the Pre-Trial Chamber has the inherent authority to suspend its decisions during the period when leave to appeal is pending. Regarding the inherent authority of a Chamber, see also, *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, 13 December 2005, paras. 61, 63, 65 (Trial Chamber finds that it is in the interests of the fairness of the overall proceeding to grant the Prosecution's request to withdraw the pending motion to amend the indictment, to permit the Prosecution to assess the impact of the finding in the other Trial Chamber judgment on the proposed amendments to the indictment.)

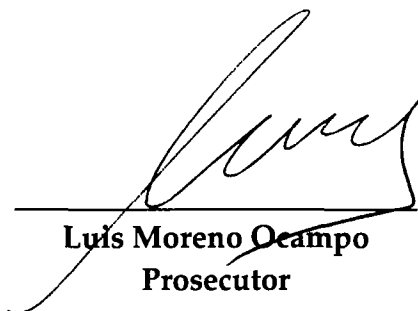
II would accept that legal proposition. Pre-Trial Chamber II previously has stated that it will not recognize any application for a procedural remedy which is not expressly identified in the Statute. *See* Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, dated 28 October 2005, paras. 18-27 (rejecting precedents of ICTY and ICTR, *inter alia*, and finding that the Pre-Trial Chamber has no authority, inherent or otherwise, to re-consider or clarify its own decisions, because the Statute, Rules or Regulations do not explicitly allow motions for reconsideration or for clarification).⁶

10. The prior determination of Pre-Trial Chamber II that it has no authority to re-consider its own decisions provides further justification for suspending the consideration of the Application for Leave to Appeal. If the Pre-Trial Chamber denies leave to appeal, and the Appeals Chamber later rules that the Pre-Trial Chamber's interpretation of Art. 82(1)(d) was incorrect, the OTP will have been irreparably prejudiced, because it will have been deprived of any possibility of seeking application of the correct standard in the Pre-Trial Chamber.

⁶ The OTP continues to disagree with this determination. In addition, it is arguably inconsistent with a prior precedent of the same Chamber. *See* Decision on the Prosecutor's Motion for Clarification and Urgent Request for Variation of The Time-limit Enshrined in Rule 155, dated 18 July 2005. In that decision, Pre-Trial Chamber II, in response to the motion for clarification, confirmed various aspects of a prior decision and implied that the Chamber would entertain a motion for clarification if a "degree of vagueness" existed which under "existing international practice" would permit the Chamber to "entertain" the motion. *See id.*, page 3, 5, 7.

CONCLUSION

For the foregoing reasons, the Office of the Prosecutor respectfully requests the Appeals Chamber to suspend or stay the consideration by Pre-Trial Chamber II of an application for leave to appeal pending in that Chamber, until after the Appeals Chamber renders a decision on the Prosecutor's Application for Extraordinary Review.



Luis Moreno Ocampo
Prosecutor

Dated this 10th day of May 2006
At The Hague, The Netherlands

Index of authorities

JURISPRUDENCE

(a) ICTY

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14-A, Judgment of the Appeals Chamber, 24 March 2000

<http://www.un.org/icty/aleksovski/appeal/judgement/index.htm>

Prosecutor v. Rasim Delic, Case No. IT-04-83-PT, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, Trial Chamber, 13 December 2005

<http://www.un.org/icty/delic/trialc/decision-e/051213.htm>

(b) ICTR

Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-A, Judgment of the Appeals Chamber, 1 June 2001

<http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/Arret/index.htm>

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, Decision on the Defence "Extremely Urgent Motion Seeking a Ruling that Appeals from Orders Ruling on the Trial Chamber's Lack of Jurisdiction and Request for Dismissal of Counts are Suspensive", Appeals Chamber, 15 November 1999

<http://trim.unictl.org/webdrawer/rec/5249/view/SEMANZA%20-%20DECISION%20ON%20THE%20DEFENCE%20EXTREM~HAMBERS%20LACK%20OF%20JURISDICTION%20AND%20REQUEST%20FOR%20DISMISSAL%20OF%20COUNTS%20ARE%20SUSPENSIVE.pdf>