

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/05
Date: 8 February 2007

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

**Prosecutor's response to «REQUETE SOLLICITANT L'AUTORISATION
D'INTERJETER APPEL A L'ENCONTRE DE LA DECISION RENDUE LA 02/02/2007
SUR LA REQUETTE DEPOSEE PAR LA DEFENSE SOLLICITANT "la présence et la
participation du conseil ad hoc pour la défense dans la procédure qui sera entamée
par le Bureau du Procureur sur le territoire soudanais"»**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Andrew Cayley, Senior Trial Lawyer

Counsel for the Defence

Mr Hadi Shalluf

Other Participants

Mr Antonio Cassese
Ms Louise Arbour

Introduction

1. On 18 December 2006, Ad Hoc Counsel for the Defence ("Ad Hoc Counsel") filed "Requête sollicitant la présence et la participation du conseil ad hoc pour la défense dans la procédure qui sera entamée par le Bureau du Procureur sur le territoire soudanais" ("the initial Application").¹
2. In the Application, Ad Hoc Counsel noted that the Prosecutor had mentioned in his Report to the Security Council of the United Nations on 14 December 2006 that he had sought the cooperation of the Government of Sudan in order to enable the travel of a team from the Office of the Prosecutor to the Sudan in January 2007 to encounter 14 individuals in custody, suspected of violations of international humanitarian law.²
3. Ad Hoc Counsel, in his initial Application, relied on Article 56 of the Rome Statute ("the Statute") for the purposes of claiming the competence of the Pre-Trial Chamber for the Application. Ad Hoc Counsel argued that any encounter between the Office of the Prosecutor and any individuals in custody in the situation in Darfur requires the presence of the Defence. Ad Hoc Counsel requested that the Pre-Trial Chamber authorise him to attend any proceedings, provided for in the Statute, the Regulations of the Court and the Rules of Procedure and Evidence ("the Rules"), related to the situation in Darfur which are carried out at the seat of the Court, outside it, as well as abroad.
4. Ad Hoc Counsel also requested that the Pre-Trial Chamber order that the Office of the Prosecutor inform him about any envisaged proceedings and invite him to attend and participate in any proceedings pursuant to Articles 54 and 55 of the Statute and rules 111, 112, 113 and 115 of the Rules.³

¹ ICC-02/05-41.

² ICC-02/05-40 and ICC-02/05-40 Annex A.

³ ICC-02/05-41, pp. 2 and 3.

5. On 21 December 2006, the Prosecution filed the « Prosecutor's response to "Requête sollicitant la présence et la participation du conseil ad hoc pour la défense dans la procédure qui sera entamée par le Bureau du Procureur sur le territoire soudanais" » ("the Prosecution's Response of 21 December 2006").⁴ In its response, the Prosecution requested that the Pre-Trial Chamber reject the initial Application and deny the relief requested because the "Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence" ("the Pre-Trial Chamber Decision of 24 July 2006")⁵ expressly limited the role of Ad Hoc Counsel to the "issues concerning the protection of victims and the preservation of evidence in Darfur, Sudan".
6. On 26 December 2006, Ad Hoc Counsel filed « Demande pour répliquer à la réponse du Bureau du Procureur concernant la requête déposée par la défense sollicitant "la présence et la participation du conseil ad hoc pour la défense dans la procédure qui sera entamée par le Bureau du Procureur sur le territoire soudanais" ».⁶ In his submissions, Ad Hoc Counsel requested leave to reply to the Prosecution's Response of 21 December 2006.
7. On 2 February 2007, Pre-Trial Chamber I issued its "Decision on the *ad hoc* Counsel for Defence Request of 18 December 2006" ("the Decision").⁷ In its decision, the Pre-Trial Chamber rejected the initial Application noting *inter alia* that Ad Hoc Counsel, as per its order, was appointed by the Registrar, to represent and protect the general interests of the Defence in the situation in Darfur, Sudan, during particular proceedings, pursuant to rule 103 of the Rules, namely: inviting observations on issues concerning the protection of victims and the preservation of evidence in Darfur; and that, accordingly, the mandate of Ad Hoc Counsel is strictly restricted to those proceedings and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules.

⁴ ICC-02-05-42.

⁵ ICC-02-05-10.

⁶ ICC-02/05-44.

⁷ ICC-02/05-47.

8. In the Decision, the Pre-Trial Chamber also noted that Articles 54, 55 and 56 of the Statute and rules 111, 112, 113 and 115 of the Rules do not, in any way, apply to his mandate as spelt out in the "Decision of the Registrar Appointing Mr Hadi Shalluf as *ad hoc* Counsel for the Defence" filed by the Registrar on 28 August 2006⁸. Finally, the Pre-Trial Chamber noted that it had not been convinced that a further reply to the Prosecution's Response of 21 December 2006 was necessary.
9. On 4 February 2007, Ad Hoc Counsel requested leave to appeal the Decision in his «Requête sollicitant l'autorisation d'interjeter appel à l'encontre de la décision rendue le 02/02/2007 sur la requête sollicitant "la présence et la participation du conseil *ad hoc* pour la défense dans la procédure qui sera entamée par le Bureau du Procureur sur le territoire soudanais"» ("the Request").⁹
10. Ad Hoc Counsel, in his Request, argues that the Decision is incompatible with Article 56(2)(d) of the Statute and the Pre-Trial Chamber Decision of 24 July 2006, as the former decision restricts his mandate only to the proceedings pursuant to rule 103 of the Rules.
11. Ad Hoc Counsel claims that the Decision is also incompatible with rule 103(2) of the Rules and the Pre-Trial Chamber Decision of 24 July 2006 as they both provide him with the opportunity to respond to *Amicus curiae* observations but only if he deems it necessary.
12. Ad Hoc Counsel also argues that the Decision affects the fair conduct of the proceedings as he is not in a position to respond to *Amicus curiae* observations since he does not have access to the materials gathered by the Prosecution and has been denied the possibility to visit Sudan in order to meet with the Sudanese authorities and to collect information of a legal nature regarding victims, witnesses and the evidence.

⁸ ICC-02/05-12.

⁹ ICC-02/05-48.

13. The Prosecution hereby files its response to the Request for leave.

Discussion

14. Any application for leave to appeal must meet the criteria set out in Article 82(1)(d) of the Statute. Ad Hoc Counsel must demonstrate that the decision “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”. As both Pre-Trial Chambers have repeatedly stated: the merits of the underlying decision are not in issue in determining whether to grant leave to appeal, the only question before the Chamber is whether the decision meets the requirements of Article 82(1)(d) of the Statute.¹⁰

15. The Prosecution emphasises that the principal subject-matter the Pre-Trial Chamber addressed in its Decision was the role of Ad Hoc Counsel during particular proceedings; the Pre-Trial Chamber clearly noted that the role of Ad Hoc Counsel is strictly limited to the issues of protections of victims and the preservation of evidence in Darfur, Sudan, pursuant to rule 103 of the Rules. In his Request, Ad Hoc Counsel raises the issue of compatibility of the Decision with Articles 56(2)(d) of the Statute, rule 103(2) of the Rules, the Pre-Trial Chamber Decision of 24 July 2006, as well as the issue of impossibility to respond to *Amicus curiae* observations due to lack of access to the materials gathered so far or being gathered by the Prosecution in the course of the investigation into the situation in Darfur.

16. Ad Hoc Counsel, in his Request, has therefore brought no arguments seeking to demonstrate how any issue involved in the Decision affects the fairness of

¹⁰ See e.g. PTC-II, 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, ICC-02/04-01/05-20, 19 August 2005, paras. 15, 22-23; PTC-I, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS1-6, ICC-01/04-135-tEN, 31 March 2006, paras. 25-26, 29-31; PTC-I, Decision on Defence Motion for Leave to Appeal, ICC-01/04-01/06-338, 18 August 2006, pp. 6-7.

the proceedings, the expeditiousness of the proceedings, the outcome of any future trial, nor how immediate resolution of any such issue by the Appeals Chamber could materially advance the proceedings. The Request is limited to a series of assertions regarding the merits of the Decision,¹¹ many of which merely repeat submissions made to the Pre-Trial Chamber in the initial Application, and a sole assertion that Ad Hoc Counsel considers that the Decision could affect the fair conduct of the proceedings.¹²

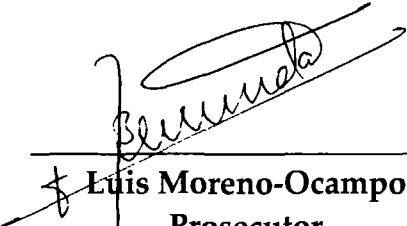
17. The Prosecution recalls that mere disagreement with a decision does not meet the requirements for granting leave to appeal.¹³ In this case, the Prosecution submits that Ad Hoc Counsel has manifestly failed to provide any arguments capable of demonstrating that the Decision meets the criteria for granting leave to appeal under Article 82(1)(d) of the Statute.
18. The Prosecution also emphasises that in its Decision of 24 July 2006, the Pre-Trial Chamber, *inter alia*, appointed Ad Hoc Counsel to represent and protect the general interests of the Defence in the situation in Darfur, Sudan during the proceedings pursuant to rule 103 of the Rules.
19. Since Pre-Trial Chamber I expressly limited Ad Hoc Counsel's role in the Darfur situation to these issues alone, he had no *locus standi* in making the initial Application under the Statute. Indeed his initial Application was rejected by the Pre-Trial Chamber on this very basis, and now Ad Hoc Counsel applies for leave to appeal that Decision.

¹¹ The Prosecution will not address any of the submissions of Ad Hoc Counsel relating to the merits of the Decision, and expressly reserves its position in this regard.

¹² Request, pp. 9-10.

¹³ See authorities cited at footnote 11, above. See further Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 9.

20. For all the reasons adumbrated above the Prosecution therefore respectfully requests that the Pre-Trial Chamber dismiss the Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 8th of February 2007
At The Hague, The Netherlands