



Original: **French**

No.: ICC-02/05
Date: 25/10/2006

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

Submissions requesting a stay of proceedings *in limine litis*

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

Ad Hoc Counsel for the Defence

Mr Hadi Shalluf

Other Participants

Professor Antonio Cassese
Ms Louise Arbour

MAY IT PLEASE PRE-TRIAL CHAMBER I

1 - REQUEST TO STAY THE PROCEEDINGS

- Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, requests a stay of these proceedings *in limine litis* pending the outcome of the criminal proceeding on the challenge to jurisdiction and admissibility (ICC-02/05-20) currently before the judges of Pre-Trial Chamber I.¹
- Considering that, pursuant to rule 103 of the *Rules of Procedure and Evidence* governing *amicus curiae* submissions, by a decision of 24 July 2006, Pre-Trial Chamber I invited the Office of the Prosecutor and Counsel for the Defence to respond to the observations of Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan and Ms Louise Arbour, United Nations High Commissioner for Human Rights, concerning the protection of witnesses and the preservation of evidence in Darfur. (ICC-02/05-10)
- Considering that Professor Antonio Cassese filed his observations on 1 September 2006. (ICC-02/05-14)
- Considering that Ms Louise Arbour, United Nations High Commissioner, filed her observations on 11 October 2006. (ICC-02/05-19)

¹ Cour d'Appel de Cotonou - Chambre correctionnelle - Cour d'appel: Judgment No. 62 of 2 May 1986 – 02-05-1986, SIJIP - *Système d'informations juridiques, institutionnelles et politiques* (A.I.F.). *Ministère Public v. BEDJI Thomas* – Jurisdiction of criminal courts - Who characterises offences? () – Nullity of a criminal judgment raised *in limine litis* () – Jurisdictional challenge to this Court of Appeal () – Interlocutory judgment () – **rejection by the Court of Appeal which was absolutely unable to quash a criminal judgment which had allegedly not ruled on an alleged challenge when no evidence could be found that the said challenge had been considered.**

This decision shows that in criminal proceedings an “*in limine litis*” must be raised and dealt with at the very beginning of the criminal trial.

- Considering that on 12 September 2006, Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, filed a request for extension of time to respond to the observations of Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan and Ms Louise Arbour, United Nations High Commissioner for Human Rights. (ICC-02/05-17).
- Considering that by decision of 22 September 2006, Pre-Trial Chamber I decided to grant Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, 21 days from the date of notification of the observations of Ms Louise Arbour, United Nations High Commissioner for Human Rights. (ICC-02/05-18).
- Considering that it should be specified here that the parties were notified of Ms Louise Arbour's observations on 11 October 2006.
- Considering that pursuant to the decision rendered on 22 September 2006 by Pre-Trial Chamber I, Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, has until 1 November 2006 to exercise his right to respond.
- Considering that on 12/09/2006, the Prosecutor of the Court responded to the observations of Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan. (ICC-02/05-16).
- Considering that the Prosecutor of the Court also responded to the observations of Ms Louise Arbour, United Nations High Commissioner for Human Rights on 20/10/2006. (ICC-02/05-21).
- Considering that on 09/10/2006, Ad Hoc Counsel for the Defence filed submissions challenging jurisdiction and admissibility under the Statute and the *Rules of Procedure and Evidence*, which were notified to the parties on

13 October 2006. This proceeding is pending before Pre-Trial Chamber I of the Court. (ICC-02/05-20)

- Considering that, for the proper administration of justice, criminal procedure requires a criminal court to rule on a challenge to jurisdiction and admissibility prior to any other proceeding.
- Considering that for the proper administration of criminal justice, this requirement is defined by criminal procedure rules and relevant precedents in this matter.
- Considering that issues of jurisdiction and admissibility must be raised *proprio motu* or by Counsel for the Defence or by the parties.
- Considering that consideration of challenges to jurisdiction and admissibility is a matter of public policy which must be dealt with in the interests of the proper administration of justice, in order to avoid proceedings from being quashed on appeal.²
- Considering, therefore, that Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, must request Pre-Trial Chamber I to grant him a further time limit of one month to submit his response to the observations of Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, and to those of Ms Louise Arbour, United Nations High Commissioner for Human Rights.

² See judgment No. 481 of 10 December 2001, rendered by the French Court of Cassation in Appeal No. 01-84.922 – **Criminal responsibility of the President of the Republic**. In this judgment, the Court of Cassation criticises the investigating magistrates for not having **considered the inadmissibility of the complaint filed by the *partie civile***: “[TRANSLATION: Considering that, if instead of finding the application of the *partie civile* inadmissible, the Chamber erred by declaring that the investigating magistrates lacked jurisdiction to hear Mr Jacques Chirac, the judgment nevertheless does not warrant quashing, since the investigating magistrates, who have the power to investigate any other person, did not have the power to proceed with such an investigation’’. Accordingly, the criminal court must consider inadmissibility *proprio motu*.”

- Considering that this time limit will run from the date of notification of the final decision on the challenge to jurisdiction and admissibility.

2 - APPLICATION FOR PERMISSION TO TRAVEL TO SUDAN

- Considering that the other participants in the proceedings, Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan, and Ms Louise Arbour, United Nations High Commissioner for Human Rights, have already travelled to Sudan on several occasions and therefore have in-depth knowledge of the case, and that Ad Hoc Counsel for the Defence considers that their observations as to the merits of the case must be reviewed and analysed in accordance with the adversarial principle.
- Considering that the Office of the Prosecutor has also made trips to Sudan and that the criminal proceedings initiated by the Prosecutor must be reviewed and analysed by the Defence in accordance with the adversarial principle and the principle of equality of arms.³
- Considering that Ad Hoc Counsel for the Defence considers that it is necessary for him to travel to Sudan to talk to the Sudanese authorities and gather legal information in order to be able to respond to the observations of Professor Antonio Cassese and Ms Louise Arbour, as well as to the proceedings initiated by the Office of the Prosecutor.
- Consequently, Mr Hadi Shalluf, Ad Hoc Counsel for Defence, has a sound basis for respectfully requesting *in limine litis* Pre-Trial Chamber I to stay the proceedings until notification of the final decision on the challenges to jurisdiction and admissibility, and respectfully requests Pre-Trial Chamber I to grant him permission to travel to Sudan.

³ See "Principle of "Equality of Arms" in *Criminal Procedure Under Article 6 of the European Convention on Human Rights & its Function in Criminal Justice of Selected European Countries* by Malgorzata Wasek-Wiaderek, December 2000, Leuven University Press. See also "Opinio Juris" 2006 "(In)equality of Arms at the International Tribunals".

FOR THESE REASONS,

In the interest of the proper administration of justice, Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, has the honour to respectfully request Pre-Trial Chamber I of the Court to:

- declare the request of Ad Hoc Counsel for the Defence to stay the proceedings admissible and well-founded;
- order that the proceedings be stayed until the Court renders a final decision on the challenges to jurisdiction and admissibility;
- grant Mr Hadi Shalluf, Ad Hoc Counsel for the Defence a time limit of one month from the date of notification of the final decision on the challenges to jurisdiction and admissibility to file his responses to the observations of Professor Antonio Cassese and those of Ms Louise Arbour;
- grant Mr Hadi Shalluf, Ad Hoc Counsel for the Defence, permission to travel to Sudan.

[signed]

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

Dated this 25/10/2006

At Paris, France