

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-02/05
Date: 21 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

**Decision on the Ad hoc Counsel for the Defence's Request for leave to Appeal the
Decision of 2 February 2007**

The Office of the Prosecutor
Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
M. Andrew Cayle

Ad hoc Counsel for the Defence
Mr Hadi Shalluf
**The Office of Public Counsel for the
Defence**
Mr Xavier-Jean Keita

PRE-TRIAL CHAMBER I (“the Chamber”) at the International Criminal Court (the “Court”);

NOTING the “Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence”¹, filed on 24 July 2006, by which the Pre-Trial Chamber I (“the Chamber”) assigned an Ad hoc counsel for the purpose of protecting the general interests of the defence in the proceedings established by Rule 103 of the Rules of Procedure and Evidence (“the Rules”) and, therefore, to respond to the observations submitted by the Amicus Curiae;

NOTING the “Application requesting the presence and the participation of the Ad hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan”(“the Initial Application for Participation”)², filed on 18 December 2006, in which the Ad hoc Counsel for the Defence (“the Ad hoc Counsel”) requests the Chamber to: i. authorize him to attend any proceedings, provided in the Statute, the Rules and the Regulations of the Court, concerning the Situation of Darfur, being carried out at the seat of the Court, outside of it, as well as abroad; ii. order the Prosecutor to notify and invite him to participate in any proceedings according to Article 54 and 55 of the Rome Statute (“the Statute”), and rules 111, 112, 113, and 115 of the Rules³;

¹ ICC-02/05-10.

² ICC-02/05-41-tEN.

³ Ibid p.3.

NOTING the Prosecution response to the Initial Application for Participation, filed on 21 December 2006, in which it was requested that the Chamber reject and deny the relief sought in the initial Application (“the Prosecutor’s First Response”);⁴

NOTING the “Decision on the Ad hoc Counsel for Defence Request of 18 December 2006” (“the Decision”), filed on 2 February 2007, in which the Chamber expressly rejected the Ad hoc Counsel’s Initial Application for Participation stating *inter alia* that the said request falls outside the parameters and limited scope of his legally assigned mandate⁵;

NOTING the Ad hoc Counsel’s “Application Requesting Leave to Appeal from the Decision Rendered on 02/02/2007 on the Application filed by the Defence requesting ‘the presence and participation of the Ad Hoc Counsel for the Defence during the proceedings that the Office of the Prosecutor will undertake in Sudan’” (“the Defence Request for Leave to Appeal”), whereby the Ad hoc Counsel requests leave to appeal the Chamber’s decision on his Initial Application for Participation;⁶

NOTING the “Prosecutor’s response to the Request for Leave to Appeal” (the “Prosecution Second Response”), filed on 8 February 2007, whereby the Prosecutor requests the Chamber to reject the leave to appeal of the Ad hoc Counsel;

NOTING the “*Demande pour répliquer à la réponse du Bureau du Procureur concernant la requête déposée par la defense sollicitant l’ autorisation d’interjeter appel à l’encontre de la*

⁴ ICC-02/05-42

⁵ ICC-02/05-47

⁶ ICC-02/05-48-tEN

⁷ ICC-02/05-49.

decision rendue le 02/02/2007” filed by the Ad hoc Counsel on 11 February 2007 (“the Ad hoc Counsel’s Request for Leave to respond to the Observations of the Prosecutor”)⁸;

NOTING the Ad hoc Counsel’s Corrigendum « *Requête sollicitant l’autorisation d’interjeter appel a l’encontre de la décision rendue le 02/02/2007 sur 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’* » (“the Corrigendum of the Request for Leave to Appeal”) filed on 12 February 2007⁹;

NOTING the Prosecutor’s “Request that the Pre-Trial Chamber Disregard the Corrigendum to « *Requête sollicitant l’autorisation d’interjeter appel a l’encontre de la décision rendue le 02/02/2007 sur 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’* »” filed on 15 February 2007¹⁰;

NOTING article 82(1)(d) of the Statute, rule 103 of the Rules and regulations 24(5) and 77 of the Regulations of the Court;

CONSIDERING that article 82(1)(d) of the Statute provides:

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;

⁸ ICC-02/05-50.

⁹ ICC-02/05-48-Corr.

¹⁰ ICC-02/05-51.

CONSIDERING that it has been repeatedly stated in the jurisprudence of the Court that in order to grant leave to appeal under article 82(1)(d) of the Statute, the issue(s) raised by the appellant must:

(i) have been dealt with the relevant decision; and (ii) meet the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.¹¹

CONSIDERING that, according to the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” rendered on 13 July 2006 in the Situation of the Democratic Republic of the Congo, the Appeals Chamber, *inter alia*, gave an elaborate interpretation on the requirements provided for in article 82(1)(d) of the Statute; and that, among other rulings, it was concluded that the “object of the paragraph (d) of article 82(1) of the State is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”;¹²

CONSIDERING that, in light of the aforementioned precedent on the interpretation of article 82(1)(d) of the Statute, it is necessary to assess whether the arguments adduced by the Ad hoc Counsel¹³ necessitate leave to Appeal to be granted;

CONSIDERING that the Ad hoc Counsel in his Request for Leave to Appeal lays down the following arguments: i. the Decision of the Chamber violates article

¹¹ These guidelines have been applied in *inter alia*, ICC-02/04-01/05-20-US-Exp, para. 20, ICC-01/04-01/06-338, pg 5, ICC-01/04-01/06-168.

¹² ICC-01/04-168 para. 19.

¹³ ICC-02/05-51.

56(2)(d) of the Statute because it restricts the role and mandate of the Ad hoc Counsel only to proceedings under rule 103 of the Rules; ii. the Decision of the Chamber is inconsistent with rule 103(2) of the Rules, since the Ad hoc Counsel for the Defence has the discretion to respond or not to the observations of the Amicus Curiae, as provided in the Chamber's decision of 24 July 2006 ; iii. the Chamber, by not allowing him the necessary access to the information gathered by the Prosecutor, and by denying him the opportunity to visit Darfur, Sudan, in order to participate in any proceedings concerning legal information, in particular materials on victims, witnesses and evidence, violates the rights of the defence to a fair trial;

CONSIDERING that, with regards to the first argument put forward by the Ad hoc Counsel which suggests that the Decision violates article 56(2)(d) of the Statute, the Chamber is of the view that the Ad hoc Counsel's mandate is restricted to particular proceedings under rule 103 of the Rules and, as such, is clearly not related to article 56 (2) (d) of the Statute; that, accordingly, no issues related to article 56 of the Statute were dealt with nor even impliedly considered by the Decision; and hence it cannot be regarded as an appealable issue pursuant to article 82(1)(d) of the Statute;

CONSIDERING that the second argument put forward by the Request for Leave to Appeal, namely that the Decision is inconsistent with rule 103(2) of the Rules since the Ad hoc Counsel has the discretion on whether or not to respond to the observations of the Amicus Curiae, does not pass the test of an appealable issue because it introduces an entirely new element;¹⁴ that the issue was not dealt with by the Decision and hence it cannot be regarded as an appealable issue pursuant to article 82(1) (d);

¹⁴ This new element of whether or not Ad hoc Counsel has the discretion to respond to the observations of the Amicus Curiae, was not part of the submissions of the Ad hoc Counsel in his Initial Request for Participation in filing ICC-02/05-41-tEN, nor consequently part of the Chamber's decision rejecting the Ad hoc Counsel's Initial Application for Participation, in filing ICC-02/05-47.

CONSIDERING that, in response to the third issue raised by the Ad hoc counsel, to the effect that the said Decision violates the rights of the defence to a fair trial, the Chamber is of the view that this particular issue was not dealt in the said Decision; and it introduces a new argument not encompassed by the issues dealt with in the Decision; and that for this reason the Chamber is not satisfied that this issue falls under the category of an appealable issue as per Article 82(1)(d);

CONSIDERING furthermore that at this stage of the investigations, the Office for the Public Counsel for Defence (the OPCD) – and not the Ad hoc Counsel appointed for the purpose of specific proceedings under rule 103 - is, as per Regulation 77(4) of the Regulations of the Court, the body of the Court which has been assigned the task of representing and protecting the rights of the Defence during the initial stages of an investigation;

CONSIDERING therefore that, Ad hoc Counsel's reliance on Articles 5 and 6 of the Code of Conduct is misconceived as it is in flagrant disregard of the provisions of the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, and suggests that the Ad hoc Counsel attempts to extrapolate the specificity, the limits and the scope of his mandate;

CONSIDERING that the Chamber is not satisfied that the arguments entertained by the Ad hoc Counsel would significantly affect the fair and expeditious conduct of the proceedings, or that it would affect the outcome of the trial; and that, since the first

requirement of the criteria to grant a leave to appeal has not been met, the Chamber needs not consider the second requirement;¹⁵

CONSIDERING that the Chamber is not convinced that a further reply to the Prosecutor's Response is necessary;

CONSIDERING finally that the Corrigendum of the Request for Leave to Appeal filed by the Ad hoc Counsel is not in fact a "corrigendum" but an "addendum" to the Request for Leave to Appeal, since it only brings a new argument to the previous motion which was not considered by and factored into the Chamber's decision rejecting the Ad hoc Counsel's Initial Application for Participation; and that therefore it cannot be considered for the purpose of analyzing the requirements under article 82(1)(d) of the Statute;

FOR THESE REASONS

DECIDES to deny the Ad hoc Counsel's request for leave to reply to the Prosecution's Second Response;

DECIDES to deny the Ad hoc Counsel's Request for Leave to Appeal;

¹⁵ Hence the Chamber need not consider whether or not an immediate resolution by the Appeals Chamber may materially advance the proceedings.

DECIDES to dismiss *in limine* the Corrigendum to the Request for Leave to Appeal.

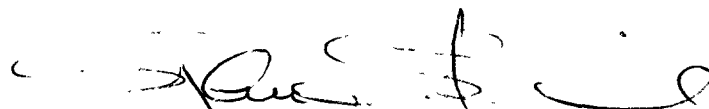
Done in both English and French, the English version being authoritative.



Judge Claude Jorda
Presiding Judge



Judge Akua Kuenyehia



Judge Sylvia Steiner

Dated this Wednesday 21 February 2007

At The Hague

The Netherlands