



Original: French

N°.: ICC-02/05
Date: 04/02/2007

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

**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 Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Mr Andrew Cayley

Ad Hoc Counsel for the Defence
Mr Hadi Shalluf

Other Participants
Professor Antonio Cassese
Ms Louise Arbour

MAY IT PLEASE PRE-TRIAL CHAMBER I

WHEREAS on 18/12/2006, the Ad Hoc Counsel for the Defence filed, pursuant to the Statute, the Regulations of the Court and the Rules of Procedure and Evidence, an application requesting his presence and participation during the proceedings that the Office of the Prosecutor will undertake on Sudanese territory,¹

CONSIDERING that the application was filed following the Fourth Report of the Prosecutor to the United Nations Security Council pursuant to Resolution 1593 (2005),²

WHEREAS in fact the Prosecutor reported to the United Nations Security Council that he would request the cooperation of the Government of the Sudan to facilitate a visit by a team from his Office to the Sudan in January 2007 to meet individuals in custody,

WHEREAS the Prosecutor stated that he had already requested an update from the Government of the Sudan about national judicial proceedings and that in a formal reply the Government of Sudan had informed him that 14 individuals had been arrested for violations of international humanitarian law and human rights abuses,

WHEREAS the Ad Hoc Counsel for the Defence considers that any meeting between the Office of the Prosecutor and detainees in the Situation in Darfur must be conducted in the presence of the Defence, and that this is a necessity and an obligation under the rules of procedure,

WHEREAS by its response notified on 22/12/2006, the Office of the Prosecutor requested Pre-Trial Chamber I to reject the Defence application,³

¹ ICC-02/05-41

² ICC-OTP-2006-1215-193 -En ICC Prosecutor Ready with Evidence Against Darfur War Criminals - Fourth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005) – See also the interview granted by the Prosecutor to the BBC in Arabic on 14/12/2006 concerning the Darfur case.

WHEREAS the Office of the Prosecutor considers that the mandate of the Ad Hoc Counsel for the Defence is limited and that he may only respond to the observations of Professor Antonio Cassese, President of the International Commission of Inquiry on Darfur, Sudan, and to those of Ms Louise Arbour, United Nations High Commissioner for Human Rights,

WHEREAS the Ad Hoc Counsel for the Defence in the Situation in Darfur considers that the decision of Pre-Trial Chamber I⁴ clearly distinguishes the role of the defence from that of the *amicus curiae*; see article 103 of the Rules of Procedure and Evidence,⁵

WHEREAS, in fact, in its decision rendered on 24/07/2006, Pre-Trial Chamber I ordered the Registrar to appoint an ad hoc counsel for the defence to represent and protect the general interests of the defence in the Situation in Darfur, Sudan,

CONSIDERING that the role and mandate of the Ad Hoc Counsel for the Defence are to represent and protect the general interests of the defence in the Situation in Darfur, Sudan, and that his obligations and duties are identical to those of all defence counsel, whether they are chosen, appointed or act as duty counsel,

WHEREAS the Ad Hoc Counsel for the Defence considers that in view of his professional obligations and **in order to safeguard and guarantee the rights of the Defence**, he must represent and protect the general interests of the Defence in the Situation in Darfur in all proceedings within or outside the Court or abroad,

³ ICC-02/05-42

⁴ ICC-02/05-10 “Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence”

⁵ See The role of the Amicus Curiae before international criminal tribunals and international criminal court, in International Criminal Law Review, August 2006, Volume 6, number 2, pages 151-189 (Sarah Williams and Hannah Woola ver –Durham university).

WHEREAS by a decision⁶ rendered on 02/02/2007, Pre-Trial Chamber I decided to reject the application of the Ad Hoc Counsel for the Defence in the Situation in Darfur, entitled "**Application 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**" on the ground that the mandate of the Ad Hoc Counsel for the Defence is strictly restricted and that he may only respond to the observations of Ms Louise Arbour, United Nations High Commissioner for Human Rights, and to those of Mr Cassese, President of the International Commission of Inquiry on Darfur, Sudan.

The Ad Hoc Counsel for the Defence considers that the decision must be appealed on the following grounds:

1- **The inviolability of enactments:** according to the general rule of law, the courts, the defence and the Prosecution have an obligation to respect the application of enactments and case law.

The appointment of counsel for the defence in the Situation in Darfur, Sudan, is properly based on article 56(2)(d) of the Statute which reads: "**Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;**"

The decision of 02/02/2007 violated the text by considering that the role and mandate of the Ad Hoc Counsel for the Defence are strictly restricted and that he may only respond to observations as provided under rule 103 of the Rules of Procedure and Evidence.

⁶ ICC-02/05-47(Decision on the Ad hoc Counsel for Defence Request of 18 December 2006)

Article 56(2)(d) of the Statute clearly states that the role of counsel is to represent the interests of the Defence without setting any limits or restrictions.

In fact, any restriction or limitation of the role of counsel is inconsistent with the Statute and with the principle of the independence of counsel.

2- The decision of Pre-Trial Chamber I of 02/02/2007 is inconsistent with rule 103(2) of the Rules of Procedure and Evidence: “The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1”. The rule states that the defence shall have the opportunity to respond, it does not say that it has an obligation to do so.

In fact, in its decision of 24/07/2006, Pre-Trial Chamber I decided to invite the parties – the Prosecutor and the Defence – to respond to the observations of the *amicus curiae*, but never required the Defence to respond since the text of rule 103(2) itself leaves the decision to respond or not to the discretion of the Defence.

After his appointment, the Ad Hoc Counsel for the Defence considered:

- I – in accordance with his professional obligations and his duties as a lawyer, that he had to challenge jurisdiction and the admissibility of the case.⁷
- II – in view of the principle of independence of counsel and his professional obligations, pursuant to articles 5 and 6 of the Code of Professional Conduct for counsel and to rule 103(2) of the Rules, and after due consideration of the record, that Ms Louise Arbour and Mr Cassese are Prosecution witnesses, and that any response to their observations prior to the decision on his IN LIMINE LITIS application,^{8,9} would prejudice the case and would presume

⁷ ICC-02/05-20

⁸ ICC-02/05-20

the responsibility of the defence as Professor Antonio Cassese, President of the International Commission of Inquiry on Darfur, Sudan, initiated the case and compiled the list of accused.

Consequently, and in accordance with the general rules of criminal procedure, Mr Cassese is integral to the Prosecution and is a Prosecution witness.

3- **The decision of Pre-Trial Chamber I of 02/02/2007 is inconsistent with the decision of 24/07/2006:** No. ICC-02/05-10, page 5,¹⁰ “orders the Registrar to appoint an *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.”

The decision in no way limits the role of counsel for the defence only to responding to observations as the text of rule 103(2) which covers counsel grants counsel the opportunity to respond and only if he or she deems it necessary.

The decision of Pre-Trial Chamber I of 02/02/2007 is inconsistent with the decision of 24/07/2006 which orders the Registrar to appoint an *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.

4- **The inviolability of a fair trial:** the decision of Pre-Trial Chamber I of 02/02/2007 is inconsistent with the principle of a fair trial.

In fact, Pre-Trial Chamber I based its decision of 24/07/2006, No. ICC-02/05-10, page 4,¹¹ on article 57(3)(c) of the Statute which states that: “**Where necessary, provide for the**

⁹ ICC-02/05-24

¹⁰ ICC-02/05-10

¹¹ ICC-02/05-10

protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information.”

Consequently, it applied rule 103(1) of the Rules of Procedure and Evidence by inviting Ms Louise Arbour, United Nations High Commissioner for Human Rights and Mr Cassese, President of the International Commission of Inquiry on Darfur, Sudan, to submit their observations.

The Chamber also applied rule 103(2) by offering the opportunity to the Prosecutor and the defence to respond to the observations.

However, the fair trial principle is not being upheld since the Ad Hoc Counsel for the Defence has had no access to the material in the Prosecutor’s file “ Prosecution file ” concerning victims, witnesses and the evidence (Article 57(3)(c) of the Statute).

As a result, the Ad Hoc Counsel for the Defence is unable to respond to the observations.

The Ad Hoc Counsel for the Defence has filed an IN LIMINE LITIS application¹² and has requested to travel to Sudan in order to collect legal information concerning the case and to enable him to respond to the observations of Mr Cassese and Ms Arbour^{13, 14}, and the responses of the Prosecutor.^{15, 16}

Pre-Trial Chamber I dismissed the Defence application to stay the proceedings and the Defence request to travel to Sudan.¹⁷

¹² ICC-02/05-24

¹³ ICC-02/05-14

¹⁴ ICC-02/05-18

¹⁵ ICC-02/05-16

¹⁶ ICC-02/05-21

¹⁷ ICC-02/05-25

The Ad Hoc Counsel for the Defence considers that the fair trial principle is not being upheld as he has no legal information concerning the file and, in particular, concerning victims, witnesses and the evidence.

In fact, all actions taken by the Ad Hoc Counsel for the Defence before the Court since his appointment as Counsel for the Defence are based on public information which is in no way part of the legal elements of the case file.

5- **The inviolability of the right of the Defence:** Counsel for the Defence is free and independent and is required to act in accordance with articles 5 and 6 of the Code of Professional Conduct for counsel.

Not only does the decision of Pre-Trial Chamber I of 02/02/2007 violate the text of rule 103(2), it violates articles 5 and 6 of the Code of Professional Conduct for counsel by imposing limitations and restrictions on the defence.

Consequently, the Ad Hoc Counsel for the Defence considers that the decision to reject rendered on 02/02/2007 by Pre-Trial Chamber I will affect the conduct of a fair trial.

The Ad Hoc Counsel for the Defence submits that the decision to reject rendered on 02/02/2007 meets all the necessary criteria for leave to appeal to be granted.

Consequently, the Ad Hoc Counsel for the Defence respectfully requests Pre-Trial Chamber I to grant him leave to appeal from the decision.

The Ad Hoc Counsel for the Defence

Mr Hadi Shalluf

Dated this 04/02/2007

At Paris, France