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No.: ICC-02/05  
Date: 7 November 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**

**Prosecutor's response to "Requête sollicitant l'autorisation d'interjeter appel  
à l'encontre de la décision rendue le 02/11/2006 sur les conclusions  
*in limine litis sursis à statuer*"**

**The Office of the Prosecutor**

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

**Counsel for the Defence**

Mr Hadi Shalluf

**Other Participants**

Ms Louis Arbour  
Mr Antonio Cassese

## Introduction

1. On 24 July 2006 Pre Trial Chamber I issued a “Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence”, inviting Professor Antonio Cassese and Ms Louis Arbour, United Nations High Commissioner for Human Rights, to submit observations on issues concerning the protection of victims and the preservation of evidence in Darfur (“Observations”), and inviting the Prosecutor and ad hoc counsel for the defence to provide a written response to the observations within 10 days of the notification thereof.<sup>1</sup>
2. Professor Antonio Cassese submitted his observations on 1 September 2006,<sup>2</sup> and the Prosecution filed its response on 11 September 2006.<sup>3</sup>
3. Ms Louis Arbour submitted her observations on 10 October 2006,<sup>4</sup> and the Prosecution filed its response on 19 October 2006.<sup>5</sup>
4. Ad hoc Counsel for the Defence (“the Applicant”) filed “Conclusions aux fins d’exception d’incompétence et d’irrecevabilité” on 13 October 2006.<sup>6</sup> In these conclusions, the Applicant did not address the Observations but rather raised a challenge to the jurisdiction of the Court and admissibility of the situation in Darfur. The Prosecution sought leave to reply,<sup>7</sup> which was granted by the Pre-Trial Chamber on 31 October 2006.<sup>8</sup>
5. On 1 November 2006, the Applicant filed “Conclusions aux fins d’*in limine litis* sursis à statuer”.<sup>9</sup>

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<sup>1</sup> ICC-01/05-10 (“Decision Inviting Observations”).

<sup>2</sup> ICC-01/05-14.

<sup>3</sup> ICC-01/05-16.

<sup>4</sup> ICC-01/05-19.

<sup>5</sup> ICC-01/05-21.

<sup>6</sup> ICC-01/05-20.

<sup>7</sup> Prosecutor’s Expedited Application for Leave to reply to Ad Hoc Counsel’s “Conclusions Aux Fins D’Exception D’Incompétence et D’Irrecevabilité”, ICC-01/05-22.

<sup>8</sup> Decision on the Prosecutor’s request to file a reply, ICC-01/05-23.

<sup>9</sup> ICC-02/05-24 (“initial Application”). The Prosecution notes that the Applicant filed this initial Application, arguing for the first time that a response to the Observations could only properly be filed by the Defence and considered by the Chamber after a ruling on the challenge to jurisdiction and

6. On 3 November 2006, the Pre-Trial Chamber issued its “Decision relative aux ‘Conclusions aux fins d’*in limine litis* sursis à statuer’ déposées par le conseil ad hoc de la Défense”.<sup>10</sup>
7. On 6 November 2006, the Applicant requested leave to appeal the Decision in his “Requête sollicitant l’autorisation d’interjeter appel à l’encontre de la décision rendue le 02/11/2006 sur les conclusions *in limine litis* sursis à statuer”.<sup>11</sup>
8. The Prosecution hereby files its response to the Request for leave.

### Discussion

9. Any application for leave to appeal must meet the criteria set out in Article 82(1)(d). The Applicant 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).<sup>12</sup>
10. The Applicant, in his Request, has brought no arguments seeking to demonstrate how any issue involved in the Decision affects the fairness of the proceedings, the expeditiousness of the proceedings, the outcome of any future trial, nor how immediate resolution of any such issue by the Appeals

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admissibility, on the final day for making his response to the Observations (pursuant to the extension granted in the Decision on the Request for an Extension of Time, ICC-02-05-18, 22 September 2006), despite having ample prior opportunity to do so.

<sup>10</sup> ICC-01/05-25 (“the Decision”).

<sup>11</sup> ICC-01/05-26 (“the Request”).

<sup>12</sup> 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.

Chamber could materially advance the proceedings. The Request is limited to a series of assertions regarding the merits of the Decision,<sup>13</sup> many of which merely repeat submissions made to the Pre-Trial Chamber in the initial Application, and a sole assertion that the Applicant considers that the Decision could affect the fair conduct of the proceedings.<sup>14</sup>

11. The Prosecution further notes that the Applicant alleges that the observations of Professor Cassese and High Commissioner Arbour concern “le fond de l’affaire” and constitute “témoignages à charge”.<sup>15</sup> The Prosecution submits that the Applicant cannot create a basis for leave to appeal by misrepresenting or inappropriately recharacterising the Observations, without foundation, and presented for the first time in the Request for leave to appeal. The Prosecution emphasizes that the Observations were submitted at the invitation of the Pre-Trial Chamber, pursuant to Rule 103, for the purpose of assisting the Court in realizing the objectives in Articles 57(3)(c) and 68(1) of the Statute;<sup>16</sup> the Observations have not been submitted as evidence, nor do they relate to the substance of any potential case.
12. The Prosecution recalls that mere disagreement with a decision does not meet the requirements for granting leave to appeal.<sup>17</sup> In this case, the Prosecution submits that the Applicant 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).

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<sup>13</sup> The Prosecution will not address any of the submissions of the Applicant relating to the merits of the Decision, and expressly reserves its position in this regard.

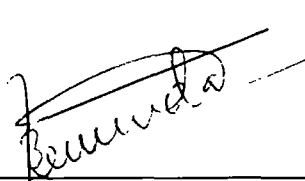
<sup>14</sup> Request, p. 3.

<sup>15</sup> See e.g. Request, paras. 2, 3, 5 and 7.

<sup>16</sup> Decision Inviting Observations, p. 4.

<sup>17</sup> See authorities cited at footnote 12, 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.

13. The Prosecution therefore respectfully requests that the Pre-Trial Chamber dismiss the Request.



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**Luis Moreno-Ocampo**  
**Prosecutor**

Dated this 7<sup>th</sup> of November 2006  
At The Hague, The Netherlands