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No.: ICC-02/05-01/09

Date: 24 August 2009

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

SITUATION IN DARFUR, SUDAN

***IN THE CASE OF PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR***

Public Document

**Application for Leave and Reply to the Prosecution's Response to the Application
under Rule 103 in respect of Prosecution Appeal against "Decision on the
Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al
Bashir"**

Source: Applicants, represented by Sir Geoffrey Nice QC and Rodney Dixon

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

A. Application for Leave to Reply

1. The Applicants seek the leave of the Appeals Chamber, pursuant to Regulations 24(5) and 34(c), to reply to the Prosecution's Response of 11 August 2009 to the Applicant's Application of 20 July 2009.
2. The Applicants respectfully request leave to reply on the basis that there are three issues arising from the Prosecution's Response which are essential to clarify to assist the Appeals Chamber in the proper determination of the Application. The first is to make clear, lest there be any doubt, that the Applicants *have* applied for leave to make submissions before the Appeals Chamber in accordance with Rule 103 and have not "abused" the court's process (as suggested by the Prosecutor).
3. Second, the Prosecution questions the Applicants' "interest" and "expertise" to make relevant submissions pursuant to Rule 103, a wholly unconvincing assertion to which the Applicants should be entitled to respond.
4. Third, the Prosecution claims that the Applicants are by their Application "seeking to replace the Defence", a groundless claim which must be corrected.
5. The Prosecutor's determination to exclude the Applicants' submissions is surprising. The Applicants are widely representative of Sudanese society, and have sought constructively to put forward relevant legal and factual arguments. And yet the Prosecutor has chosen to reject them not with substantive arguments, but on technical grounds.
6. The Prosecutor has not sought to encourage access to the ICC by Sudanese groupings that are clearly affected and concerned by the Prosecutor's warrants. There is no good reason to seek to stifle the filing of submissions in accordance with the Rules that are genuinely aimed at contributing to the proceedings.
7. As stressed in the Application, the Prosecutor is required by Article 54(1) "[i]n order to establish the truth, [to] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute,

and, in doing so, [to] investigate incriminating and exonerating circumstances equally". Yet, the Prosecutor is not even prepared to agree to, let alone welcome, the mere filing of a contrary submission.

8. In the Applicants' submission the Prosecutor's Response could have been of assistance to the Appeals Chamber in the determination of the appeal, and in the promotion of the proper administration of justice, by addressing the merits of the Applicants' submissions, instead of labouring technical and overly restrictive arguments to attempt to shut out an alternative view. The Prosecutor appears to relish a personalised battle that pits him against the first serving head of state to be the subject of an ICC arrest warrant and against all voices of caution that doubt the legal rightness or political sense or safety in charging genocide. He arguably treats genocide as a "celebrity" among crimes - in an age attracted to and by celebrity - to harness the support of those unaware of what lies behind the events to which he refers.
9. Further, the Prosecutor disregards the obvious sensitivity - to the citizens of Sudan - in the UN referring to the ICC a country that has not ratified the Rome Statute in circumstances where the countries that referred (by positive vote or failure to veto) include three permanent and other members of the Security Council that had not ratified the treaty because they do not regard the ICC as fit to try their own subjects. The Prosecutor's actions seek to achieve regime change in a huge and complicated country that has its own democratic processes.
10. Most importantly, the Prosecutor shows no respect to those who hold views contrary to his own either on the facts, the application of the law to the facts or the broader "political" merits of other methods of resolution of present problems. Were the consequences of obtaining a warrant for genocide to be tragic the Prosecutor would then turn for responsibility to the Security Council that referred the situation to him. If, at any stage, a genocide charge was found unsupported by evidence he would turn to the Judges who issued the warrants on the basis of the evidence *he* presented feeling free to disregard the weight of contrary evidence that the Applicants would - but the Prosecutor would not - have the court consider.
11. Instead the Prosecutor seeks to smear the credibility of the Applicants. His attempts to discredit the Applicants by suggesting that they are mere Government proxies are

simplistic. The sources relied on by the Prosecution at footnote 2 are selective and unsubstantiated by any evidence submitted with the Prosecutor's Response.¹ The Prosecutor refuses to confront the merits of the arguments put forward by the Applicants, even as an alternative argument in his Response.

12. Pursuant to Regulation 24(5), the Applicants ask that they be given an opportunity to reply to the Prosecutor's arguments in order to demonstrate that those arguments offer no persuasive basis at all to reject the Applicants' Application under Rule 103.
13. Each of the three matters that the Applicants seek leave to address, as outlined above, can be dealt with succinctly by the Applicants. The Applicants' submissions on each topic are set out hereunder in the event that the Appeals Chamber does grant leave to file this reply.

B. The Applicants did apply for leave to file submissions under Rule 103

14. Paragraph 1 of the Application of 20 July 2009 states that it is brought under Rule 103 as an Application for leave for the Applicants to be participants or *amici curiae* in the present appeal proceedings. In Part B of the Application the Applicants outline in detail the reasons for seeking leave. In paragraph 4 of the Application, the Applicants explicitly state that "if leave is granted", the Applicants invite the Appeals Chamber to consider their substantive submissions which are set out in Part D of the Application.
15. It is plainly wrong to suggest, as the Prosecution does, that the Applicants have sought to circumvent the requirements of Rule 103. The Applicants have *first* asked for leave to be granted to have their submissions form part of the appeal. Were the Appeals

¹ The Prosecution has failed to mention that on its website SIDG has questioned the Government's decision to expel certain aid agencies from Darfur and has urged the Government to reconsider its decision so that vulnerable citizens are not affected: see SIDG comment on its website of 9 March 2009. The Prosecution also does not mention that SWTUF's positive role in the resolution of the conflicts in Sudan has been noted by the Organization of African Trade Union Unity (OATUU); for example, the Secretary-General of OATUU, Mr. Hassan Sunmonu said on the role of SWTUF in Darfur: "The Sudan Workers Trade Union Federation also took very active part in the peace process that led to the signing of the Comprehensive Peace Agreement of Naivasha in January, 2006. They are also playing the same role in the Darfur peace process that is ongoing at present." (Opening address to the regional conference of the Trade Union Federation of Eastern Africa, Asmara, Eritrea, 24-28 March 2008).

The most recent International Crisis Group (ICG) report on Sudan, entitled "Sudan: Justice, Peace and the ICC", 17 July 2009, asserts that it was the ruling party of Sudan, the NCP, that sought "indirect engagement with the ICC" through the SWTUF and SIDG, which the report claims are "affiliates" of the NCP (at p. 12) - once again, there is no evidence offered in support of this generalised assertion.

Chamber to refuse leave, it follows, of course, that the submissions would *not* be taken into account by the Appeals Chamber.

16. Moreover, the very reason for seeking leave is the manifest shortcomings in the Prosecution's appeal. The force of argument for leave is most effectively illustrated by outlining the submissions themselves. It is of course within the discretion of the Appeals Chamber whether the submissions will be accepted and taken into account.
17. It is revealingly defensive - but entirely unhelpful - for the Prosecutor to claim that the Applicants have abused the rule and disrespected the court, potentially opening the floodgates to unauthorised filings from other parties. In its own way it is an *in terrorem* submission that cannot help the court. If the Prosecutor's case were so strong (as he insists), there should be no harm in not objecting to the Applicants' submissions at least being considered by the Appeals Chamber.
18. The Pre-Trial Chamber never relied on such arguments in rejecting the Applicants' Application of 11 January 2009 under Rule 103. The Chamber considered this Application on its merits and held that the submissions were inadmissible as they related to issues that were not before the Pre-Trial Chamber.²
19. The Prosecutor's reference (at paras. 3 and 16) to SIDG's website where it is stated that the Applicants' submissions put on record a strong case against the Prosecutor's application for arrest warrants, misses the point. SIDG makes it clear on its website that the court did not accept the Applicants' Application of 11 January 2009, and thus did not take its materials into consideration, and nor were the proceedings halted. The point SIDG conveys is that at least the rules and procedures of the ICC were used (entirely properly) to challenge the Prosecutor's application.
20. Furthermore, even though the Application of 11 January 2009 was rejected, the Chamber may have been alerted by it to the existence of material contrary to the limited material presented by the Prosecutor. If so, and if that acted as a brake on momentum otherwise generated by the intended use of highly selective material then the Applicants would have served the court and the interests of justice well.

² The Chamber rejected the Application for Leave to Appeal on 19 February 2009 on different grounds, indeed on grounds that the Applicants have suggested may have been inconsistent with the first ruling. But nowhere did the Chamber reject arguments of the Applicants on grounds such as those advanced now by the Prosecutor.

21. At paragraph 15 of his Response the Prosecutor reveals his concern at the existence of credible material contrary to his stated position but to which he has made no reference in a potentially dangerously one-sided application. Had he made available to the Chamber the works of William Schabas, Alex De Waal and Mahmood Mamdani - to take three of the most famous names on the topic at hand - and been able to justify the rejection of their opinions (especially on genocide), then the application of SWTUF and SIDG might well have been made in different terms - or maybe not at all.³ It was because of the dangerous tilt of the Prosecutor - in the real world where to err in indicting serving Presidents in a way that could destabilise a government or country and possibly lead to terrible consequences - that his unfairness of presentation had to be demonstrated. And that could be done in part by showing material that countered the limited material the Prosecutor had been able, or had chosen, to produce, he never having visited the country himself.

C. The Applicants have met the requirements of Rule 103

22. The Prosecutor asserts that the Applicants fail to show an interest and expertise on the specific issue on appeal to justify their contribution (para. 18 onwards).

23. The Applicants have without doubt addressed the issue of the appeal, namely, whether the Pre-Trial Chamber applied the correct test for assessing the evidence in respect of genocide. Rule 103 does not specify that those seeking to participate must have a particular "expertise" or "interest".⁴ The terms of the Rule 103 are broad. As the Appeals Chamber has held, the touchstone of Rule 103 is that it leaves a wide discretion to the Appeals Chamber to grant leave to an organisation to submit "any

³ The fact that for the issue of a warrant of arrest the relevant threshold for the Prosecutor and Judges is lower than it is at later stages does not allow the Prosecutor to hide, obscure or eliminate from consideration other material to an effect contrary to that for which he contends. His duties under Article 54(1), as outlined above, demand otherwise. Had he candidly acknowledged the existence of this material (of which he simply must have been aware as someone reading or having read for him relevant public works of scholarship), then a more interesting issue than the present one might have fallen for deliberation - namely to what extent and to what level of proof should such "contrary" material be considered. By his desire to exclude the material altogether from the minds of the Judges the Prosecutor has denied the Pre-Trial Chamber and the Appeals Chamber the opportunity to consider this point.

⁴ The question can legitimately be asked, what expertise could they offer the court at this stage and for these purposes other than the expertise of being lawyers qualified in the relevant field?

observation” if it “may assist the Appeals Chamber in the proper determination of the case”.⁵

24. The Applicants submit that they have satisfied this test in the circumstances of the present case. In any event, they have met the requirements of all the criteria referred to by the Prosecution at paras. 19-20: “particular insight, relevant additional facts, or interest in the resolution of, or an expertise capable of offering a unique theory or perspective on, the pending issue”, or citing the ICSID rules which the Prosecutor has chosen to do, “brings a particular knowledge different from the parties, has a significant interest in the proceeding and shall not disrupt the proceeding” (footnote 27). The Prosecution has not shown in what way the Applicants fail to fulfil these criteria.
25. The Applicants have demonstrated a clear and compelling “interest” as Sudanese citizens affected in several ways *including* as tribal leaders from the very tribes alleged to be victims. It is hard to imagine a more directly affected group. It is for this reason that the Applicants have in their Application provided the Appeals Chamber with background about their organisations, their work, and who they represent, including tribal leaders from Darfur whose statements were included in the original Application of 11 January 2009.
26. The Applicants are affected by the conflict and developments in Sudan and by the ICC’s warrants creating a “special interest” in the same way as such an interest was found by the ICTR to justify the Belgium Government being granted leave to file submissions before the ICTR as *amicus*. Leave was given in this case for legal submissions on the applicability of provisions of the Geneva Conventions and Additional Protocol II (an ICTR authority relied on by the Prosecution at footnote 29 of the Response).
27. Similarly, the two ICC decisions on *amicus* submissions cited by the Prosecutor do not undermine the Applicants’ request to be granted *amici* or participant status, nor do they support the Prosecutor’s objections. In the *Bemba* case, Amnesty International was permitted to file submissions on particular legal issues on the basis that it “may be

⁵ *Prosecutor v Lubanga*, “Decision on Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/04-01/06-1289, 22 April 2008, para. 8.

useful”, and in the *Kony* case, victim’s organisations were granted leave to provide factual information (see footnote 19 of the Response).

28. To the extent that the Prosecution questions what status the Applicants are seeking (see footnote 3), Rule 103 provides both for *amicus curiae* “and other forms of submission”. It is thus envisaged that organisations can apply to be “friends of the court” or participants in other forms. Indeed, the Applicants’ Application of 11 January 2009 was not to be *amici curiae* but to be participants in the proceedings representing the interests of Sudanese citizens directly affected by the Prosecutor’s application for an arrest warrants for the President of Sudan and other Sudanese citizens.⁶
29. As to the Prosecutor’s argument that the Applicants merely parrot the view of the Majority and offer no “substantive contribution” (see paras. 4 and 20), the Applicants observe that where Judges of goodwill differ, or seem to as here, there must be a reason. The Majority can not have intended to apply an incorrect standard (and in the argument of the Applicants have not done so) or to have disregarded the view of the Minority that they will have had in draft to consider before giving judgement. Accordingly, it is necessary to attempt to understand the different processes or apparently different processes of ratiocination applied by the three Judges. That is what the Applicants have sought to do. The Prosecutor has approached the Majority without respect for their, no doubt sincerely-held and arguably correct, belief that they applied the law appropriately. The Applicants have respected the Minority and tried to show how the seemingly divergent reasonings actually fit together. It is for this sort of problem that lawyers with relevant experience are needed, as *amici curiae* or otherwise.
30. Of course, the Applicants’ interest is contrary to that of the Prosecutor, and they have been entirely open about it. The Prosecutor is, however, accurately characterised as to his approach by the words *he* uses of the *Applicants* for he has made no acknowledgement as of the presumption of innocence or of the existence of another side to his allegations, for which there is, in fact, much material. Indeed, the Prosecutor’s own extreme views (implying that SWTUF and SIDG are mere

⁶ Neither decision of the Pre-Trial Chamber rejected this possibility or reality. Each proceeded on a technical ground that was applied without challenge to the possibility of Rule 103 working in the way contended for by the Applicants.

Government agents who have turned a blind eye to the crimes committed in Darfur) make *him* an unreliable friend of the court, heightening the need for *amici curiae*.

31. Furthermore, the Applicants do not hide that a central point of the Applicants' submission (over and above their arguments on the correct standard for inferences) is that there is no evidence of genocide, a position widely supported by expert opinion and materials - thus, a substantiated submission which the Applicants argue should be taken into consideration by the court.
32. By a near sleight of hand the Prosecutor obscures his real argument, namely that an *amicus* could *never* be needed in any case where there is only a theoretically straightforward issue of fact and law such as: "does this evidence support that finding". According to paragraph 20 of the Response there could never be justification for an *amicus* being appointed in such circumstances. By suggesting that expertise of any intended *amici curiae* has to be material to the precise issue before the court it might be inferred that only lawyer psychologists with a special ability to work out what the judges meant and had in mind could qualify! Such people do not exist. In reality it is on exactly such issues - what a judgement means and whether the judgement has fairly reflected the available evidence - that further argument by lawyers is helpful. The wisdom and experience of the adversarial system is that the best resolution of such issues is often teased out by presentation of contrary arguments presented by lawyers versed in the relevant law and facts.
33. Contrary to the Prosecutor's assertion, as emphasised above, the Applicants in no way seek to abuse the court by presenting affirmative arguments. Affirmative arguments supported by material that has been kept from the Chamber by a Prosecutor regarded by some as over-politicised and publicity-seeking, underline the need for an independent voice, whether or not the voice of the lawyers acting for SWTUF and SIDG. Those representing SWTUF and SIDG may present arguments on facts in line with instructions - *supported by cogent and independent evidence* - but their arguments on law, if received by the Appeals Chamber, will simply be those arguments that lawyers experienced in this kind of work will be able to present *to assist* the court.

D. The Applicants do not seek to replace the Defence

34. The Applicants' point is that as there is no Defence or other representation in this matter, the Appeals Chamber could benefit from hearing a view different from that of the Prosecution. It is *not* the view of any particular suspect or accused that the Applicants seek to bring to the attention of the Appeals Chamber; it is the submissions made on behalf of the organisations represented and those who they represent in Sudan.
35. As the Applicants have stated in the Application of 20 July 2009, it may be appropriate for *amici curiae* to be appointed in any event: "The Appeals Chamber might ... in any event, try to find experienced lawyers to act as *amici curiae* to argue the position in support of the other view" (para. 19). This is especially so given that the Pre-Trial Chamber has found that the Prosecutor has overstated his case in the application for an arrest warrant of President Bashir (see paras. 17-18 of the Application of 20 July 2009).
36. With this Prosecutor it is important to provide a counter balance to the approach he takes. His manifest refusal to see that there is another side and his determination to present the Chamber with a single view has made it essential to highlight imbalance as part of the Application to have an *amicus* appointed. It may be thought fitting to ask whether the suppression of opinion or argument the Prosecutor seeks could be regarded as undemocratic in modern terms.⁷
37. The Applicants are not requesting to be *amici* for any accused or as a "front" for any accused (bearing in mind that their Application of 11 January 2009 was for the stay of all applications for arrest warrants of Sudanese citizens on all sides of the conflict). The Applicants's submission is that as representative organisations from the territory, including of tribal leaders and victims of the alleged victim groups, and in the absence of any alternative view, they can assist the Appeals Chamber in the determination of this appeal and thereby serve the interests of justice.

⁷ Would it be unfair to think of the Prosecutor's approach as being contrary to Voltarian Age of Reason principles of freedom of thought and expression? These principles may yet usefully restrain excess in an age of decision-making driven or facilitated by sometimes insidious, underlying notions of modern political correctness.

E. Conclusion

38. The Applicants respectfully request the Appeals Chamber to grant leave to file this Reply to the Prosecutor's Response, and to grant leave to accept the submissions of the Applicants on the issue under appeal.



For Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Applicant

Dated this 24th day of August 2009

London, United Kingdom