

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 July 2010

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser

SITUATION IN DARFUR, SUDAN

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

Public Document

Notification of Public Statement by the Prosecutor

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:

The Office of the Prosecutor
Luis Moreno-Ocampo

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants
Sir Geoffrey Nice QC
Rodney Dixon

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

A. Introduction

1. The Pre-Trial Chamber will be aware of the identities of the Applicant organisations filing this Notification - the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) - and of the views and interests of Sudanese citizens that they represent.
2. In particular, the Chamber will know that these organisations have consistently questioned the sufficiency of the evidence presented in support of genocide allegations made by the Prosecutor in the case against President Al Bashir. They have argued, by presentation of a substantial body of materials that includes the reports of reputable experts on the subject, that the Prosecutor's approach needed to be corrected to reflect such material and to recognise arguments properly made on *all* the evidence available to him. The Applicant organisations have requested close scrutiny of the Prosecutor's case in light of the conclusions he has expressed in the press about the crime of genocide and the 'celebrity' status he has chosen to afford it. They have raised concerns about the detrimental consequences flowing from the making of these genocide allegations, if unfounded, for the country as whole as well as for the region. The issue, they have argued, goes far beyond the concerns of the particular Head of State. In addition, they have submitted in previous filings that there may be consequences for international law itself given that the parameters of a serving Head of State's immunity are not without controversy.
3. Immediately following the Pre-Trial Chamber's decision to add genocide charges to the arrest warrant against President Al Bashir, the Prosecutor authored an article that appeared in the Guardian newspaper on 15 July 2010, in which he stated that the court had found that genocide had been committed and continues to be committed by President Al-Bashir. A copy of the full article is attached hereto as Annex 1.
4. SWTUF and SIDG have noted that the propriety of these public statements (and earlier similar ones) by the Prosecutor have not been raised or considered by the Pre-Trial Chamber in any public proceedings. They appear on their face to require judicial consideration, particularly in light of the recent decision by Trial Chamber I in the *Lubanga* case, "Decision on the press interview with Ms Le Fraper du Hellen" of 12 May 2010 (ICC-01/04-01/06-2433).

5. For the reasons set out below, the Pre-Trial Chamber is respectfully requested to review the Prosecutor's statements of 15 July 2010 and decide on an appropriate course of action in all the circumstances. Having been alerted by this filing to what has occurred the Chamber may, of course, decide *proprio motu* on the correct approach to be taken. The public statements made in respect of the *Lubanga* case, referred to above, were considered by the Trial Chamber without any application from any parties, the Trial Chamber itself determining that it needed to ensure that the interests of justice are upheld in the proceedings before it (para. 36).

B. The Prosecutor's statements

6. It is evident from the article of 15 July 2010 that the Prosecutor may be seeking to gain support from the international community for his case or to be building public momentum and backing for his allegations that might render dispassionate adjudication by the Trial Chamber more difficult. He explains that his mandate is "to ensure justice for ... the victims of genocide" in Darfur. Leaving aside the scope of the Prosecutor's mandate under the Statute (which could not justify impropriety of the kind suggested here), it is noteworthy that the Prosecutor cites to the findings of the court on two occasions:

- (i) "For example [as an example of the genocide continuing], the court found that Bashir's forces have raped on a mass scale in Darfur. They raped thousands of women and used these rapes to degrade family and community members. Parents were forced to watch as their daughters were raped."
- (ii) "The court also found that Bashir is deliberately inflicting on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction. Millions of Darfuris are living in camps for displaced persons and, at the disposal of Bashir's forces, experiencing an ongoing genocide ... The court's recent decision could provide a last chance for the world to react properly, to transform 'never again' from a promise into a reality."

7. These assertions of facts, it should be recalled, are in an article 'signed' by the Prosecutor - who is a lawyer - and no doubt carefully reviewed by him before publication. They are not words spoken in an interview that might have been inaccurately recorded by a journalist lacking appreciation of the law.
8. The Pre-Trial Chamber will have in mind the *dicta* of Trial Chamber I in the *Lubanga* case in the aforementioned decision that "respecting the Chamber, the judicial process and the other participants involves speaking publicly about the proceedings in a fair and accurate way, and avoiding any comment about issues that are for the Chamber to determine" (para. 40).
9. The Chamber will also have in mind that the Prosecutor appealed the Chamber's initial finding against the inclusion of genocide charges on the basis that it was not necessary at the stage of issuing an arrest warrant for genocide to be established with the certainty of the "beyond reasonable doubt" standard; it need only be one of many reasonable inferences to be drawn from the evidence without excluding the possibility that genocidal intent did *not* exist.
10. The Chamber is well aware that it did not find that genocide *had* been committed in the present case, but only that there were reasonable grounds to believe that this offence had been committed, sufficient to issue an arrest warrant as required by Article 58 of the Statute. The Chamber also did *not* find that the genocide was *continuing* – the charges requested by the Prosecutor only extend until 14 July 2008, the date of the Prosecutor's application for an arrest warrant.
11. The Prosecutor must have been aware that what he asserted as facts found by the Chamber had *not* been so found and that what he was asserting was contrary to the very arguments he had deployed to the Appeals Chamber and to this Chamber in order to have the genocide counts added.
12. The genocide charges have not been confirmed pursuant to Article 61 of the Statute, which requires a higher standard of proof, namely whether there is sufficient evidence to establish substantial grounds to believe the person committed the offences charged. It is only at trial that the Trial Chamber may determine whether the offences have in fact been committed or not, based on all of the evidence and arguments presented.

13. The evidentiary standards for proof of offences are thus clearly set out in the Statute, as is the presumption of innocence as a cornerstone of the rights conferred under the Statute in Article 66.
14. These gradations in the standards of proof are of critical significance in legal proceedings before the ICC as well as for any understanding by the wider public receiving information about the work of the ICC. As noted by Trial Chamber I in the *Lubanga* case, when considerable parts of the proceedings take place *in camera* (as has been the case for the proceedings leading up to the issuance of the genocide warrant in the present case), this “has increased the need for responsible and balanced comments and reporting of the case” and “increased the responsibility of the parties to be scrupulously accurate and balanced in public interviews” (para. 38). In such circumstances “the public needs to be able to trust the published statements of those involved in the case, as reflecting, in a suitably balanced way, the evidence that has been heard and the decisions that have been made”. Consequently, it is “important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still unresolved” and “most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence” (para. 39).

C. Request

15. The Pre-Trial Chamber is respectfully requested to accept this filing as being appropriately brought under Rule 103 by the Applicants herein who have the interests identified above. No other party has publicly raised this matter before the Chamber to date.
16. The Chamber is invited to review the public statement made by the Prosecutor as recorded in the Guardian Newspaper article and to determine what order should be made in the circumstances. The Chamber’s attention is drawn to Trial Chamber I in *Lubanga* noting that repeated similar statements in that case would not be countenanced (para. 53). The Prosecutor is, of course, entitled to respond to any filing under Rule 103.

17. In any event, the Prosecutor's statements are a matter of public record. They can be addressed by the Chamber seized of this case without any filing. In the *Lubanga* case, the Presiding Judge had on his own volition firmly indicated that the Judges "did not expect to see satellite litigation in the press" with the issues the Judges were considering "being the subject of some kind of debate", and that it was particularly inappropriate for the Prosecutor to undertake such activities (para. 15).
18. Similarly, it is submitted that the Pre-Trial Chamber in the present case may act on its own accord to ensure that the interests of justice and the integrity of its proceedings are safeguarded, and that it is seen to take the matter under serious consideration.
19. The Applicants would, of course, be willing to assist the Chamber on this topic through their counsel by more detailed representations on the law, or otherwise, as the Chamber might decide.



For Sir Geoffrey Nice QC
Rodney Dixon
Counsel on behalf of SWTUF and SIDG

Dated this 30th day of July 2010
London, United Kingdom