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No.: ICC-02/05-01/09  
Date: 03 September 2010

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN DARFUR, SUDAN**

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

**Public Document  
With Public Annex A**

**OPCD Request for Authorization to Submit Observations Concerning Guardian  
Article Dated 15 July 2010**

**Source:** Office of Public Counsel for the Defence

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

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**Amicus Curiae**

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## 1. Introduction

1. Article 66(1) of the Statute proclaims that “everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law”. The notion of the presumption of innocence is of central importance to the proceedings before the International Criminal Court (ICC). Conflicts tend to be marked by ethnic, religious, and political distrust and propaganda. It is not, however, possible to determine the truth of the matter in the tribunal of public opinion – the rights of victims and the international community at large are better served by ensuring that the judicial record accurately reflects the experiences of all persons involved in the conflict – as opposed to media speculation. To achieve this, it is necessary to subject public allegations and beliefs regarding innocence or guilt to a vigorous and fair trial process. As observed by the Appeals Chamber, “a fair trial is the only means to do justice”;<sup>1</sup> the converse of this is that it is not possible to judge a person’s guilt before they have had a fair trial.
2. The presumption of innocence is of particular importance during the early stages of the proceedings, when the Prosecutor is in the course of executing its preeminent duty to search for the truth, and in so doing, investigate incriminating and exonerating circumstances equally. This raises the question as to whether the defendant or the international community has faith that the Prosecutor will execute this duty in good faith if he has issued public statements which proclaim the guilt of the defendant.
3. Public statements concerning the guilt of a defendant or which mischaracterize the nature of the proceedings before the International Criminal Court can also deter potential witnesses, who have exculpatory information, from either approaching the Prosecutor to disclose such information, or from agreeing to be interviewed by the Prosecutor. Such statements could also discourage persons or entities in the field from cooperating with the future defence team. Neither the rights of the defendant nor the rights of alleged victims would be served by legal proceedings which were marred by faulty perceptions or a failure to obtain all relevant information which is necessary to determine the truth.

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<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, ICC-01/04-01/06-772 14 December 2006, at para. 37.

4. The Office of Public Counsel for the Defence (OPCD) respectfully submits that the issue as to whether the article published by the Prosecutor, Luis Moreno Ocampo, in the Guardian on 15 July 2010 (the Guardian article)<sup>2</sup> infringes the presumption of innocence or affects the fairness and impartiality of the proceedings falls squarely within its mandate under regulation 77(4) of the Regulations of the Court to represent and protect the rights of the defence during the initial stages of the investigation. The OPCD therefore requests the authorization of the Honourable Pre-Trial Chamber to submit observations concerning the impact of the Guardian article on the rights of the defendant, and possible measures which could ameliorate this prejudice.
5. In the alternative, the OPCD notes that the Pre-Trial Chamber has a positive duty to ensure the fairness and impartiality of the proceedings. In fulfilling this duty, the Pre-Trial Chamber can *proprio motu* take notice of the Guardian article, and order an appropriate remedy.

## 2. Procedural History

6. On 12 July 2010, the Pre-Trial Chamber issued its ‘Second Decision on the Prosecution's Application for a Warrant of Arrest’, in which the Pre-Trial Chamber found that there were reasonable grounds to believe that President Omar Hassan Ahmad Al Bashir was allegedly responsible under article 25(3)(a) of the Statute for:
  - i. genocide by killing, within the meaning of article 6(a) of the Statute;
  - ii. genocide by causing serious bodily or mental harm, within the meaning of article 6(b) of the Statute;
  - iii. genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction, within the meaning of article 6(c) of the Statute.<sup>3</sup>
7. This decision complements the ‘Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, dated 4 March 2010, in which the Pre-Trial Chamber found that there were reasonable grounds to believe that

<sup>2</sup> The Guardian article is attached as Public Annex A to this filing.

<sup>3</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Second Decision on the Prosecution's Application for a Warrant of Arrest”, ICC-02/05-01/09-94, 12 July 2010.

President Omar Hassan Ahmad Al Bashir was allegedly responsible under article 25(3)(a) of the Statute for:

- i. intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities as a war crime within the meaning of article 8(2)(e)(i) of the Statute;
  - ii. pillage as a war crime within the meaning of article 8(2)(e)(v) of the Statute;
  - iii. murder as a crime against humanity within the meaning of article 7(1)(a) of the Statute;
  - iv. extermination as a crime against humanity within the meaning of article 7(1)(b) of the Statute;
  - v. rape as a crime against humanity within the meaning of article 7(1)(g) of the Statute;
  - vi. torture as a crime against humanity within the meaning of article 7(1)(f) of the Statute;
  - vii. forcible transfer as a crime against humanity within the meaning of article 7(1)(d) of the Statute.
8. On 15 July 2010, the Prosecutor, Luis Moreno Ocampo, wrote an article under his own name in the Guardian newspaper titled ‘Now end this Darfur denial’.<sup>4</sup> The Prosecutor writes that the Pre-Trial Chamber “found that Bashir's forces have raped on a mass scale in Darfur”, and that 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”.
9. The article also makes several references to President Bashir committing crimes, for example, President Bashir “expels humanitarian aid workers, cutting off subsistence from millions of victims. He is also laying the groundwork for new crimes against Darfuris and against the south of Sudan.” The Prosecutor does not clarify whether these conclusions derive from the Chamber’s decision, from evidence within his control, or are simply his opinions – although the article does not contain a disclaimer to the effect that the views presented therein are those of the author alone and not the Prosecution of the ICC. Indeed, some of his allegations exceed the mandate of the ICC (for example, the reference to crimes against South Sudan).

<sup>4</sup> <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur>

10. On 6 August 2010, the Pre-Trial Chamber dismissed “The Notification of Public Statement by the Prosecutor” dated 30 July 2010, in which the Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) had requested pursuant to rule 103 of the Rules of Procedure and Evidence to participate as an *amicus curiae* in connection with the Guardian article.<sup>5</sup> The Pre-Trial Chamber held that the SWTUF and SIDG had failed to identify an issue which was pending before the Chamber and failed to request authorization to submit observations. As such, the request fell outside the ambit of Rule 103 of the Rules of Procedure and Evidence.

11. On 24 August 2010, the Pre-Trial Chamber rejected a request by the ad hoc counsel for the defence, Michelyn St Laurent, for the Chamber to take appropriate measures in relation to the Guardian article on the grounds that her mandate was limited to issues concerning victim participation, and as such, this issue exceeded her mandate.<sup>6</sup>

12. The original version of the Guardian article has not been corrected, nor has the Prosecutor issued any press-releases to clarify his statements.

### 3. Legal Basis for the Request

#### ***3.1. It would be appropriate to authorize the OPCD to submit observations concerning the impact of the Guardian article on the presumption of innocence, and the fairness and impartiality of the proceedings***

13. Regulation 77(4) of the Regulations of the Court vests the OPCD with the responsibility for “representing and protecting the rights of the defence during the initial stages of the proceedings, in particular for the application of article 56, paragraph 2(d), and rule 47, sub-rule 2”.

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<sup>5</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision on ‘Notification of Public Statement by the Prosecutor’”, ICC-02/05-01/09-105, 6 August 2010.

<sup>6</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Decision on the ‘Requête pour l’obtention d’une ordonnance condamnant les déclarations du Procureur en date du 15 juillet 2010’”, ICC-02/05-01/09-106, 24 August 2010 at pages 3-4.

14. The words ‘in particular’ make clear that the mandate of the OPCD is not limited to article 56(2)(d) and rule 47(2) proceedings, but may include any proceedings which affect the rights of the defence.
15. It is also notable that article 56(2)(d) and rule 47(2) proceedings may occur within the context of a case; thus, the phrase ‘initial stages of the investigation’ does not limit the mandate of the OPCD to proceedings prior to the issuance of an arrest warrant. For example, Pre-Trial Chamber II has appointed the OPCD to respond to the Notification of the Trust Fund, which was filed in both the Uganda situation and the Kony et al. case.<sup>7</sup>
16. Regulation 77(5)(b) of the Regulations of the Court further provides that, where appropriate, the OPCD may appear before a Chamber in respect of specific issues. The term ‘appear’ can include both personal appearance before the Court, and the filing of written submissions on a specific issue.<sup>8</sup>
17. With respect to the propriety of granting the OPCD authorization to submit observations, the OPCD observed that in the aforementioned decision of Pre-Trial Chamber II, the Chamber held that it was appropriate to receive observations from the perspective of the general interests of the defence concerning whether the proposed activities potentially impacted on the presumption of innocence, or would be prejudicial to or inconsistent with the rights of the defence or a fair and impartial trial.<sup>9</sup>
18. As the OPCD will elaborate, if granted the right to file observations, the contents of the Guardian article directly raise issues concerning the presumption of innocence, the rights of the defendant, and the fairness and impartiality of the proceedings.
19. Concerning the presumption of innocence, the Prosecutor is very aware of the differences between the standards of proof which apply to the arrest warrant procedure as compared to the confirmation stage, or the trial stage, as demonstrated by the fact

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<sup>7</sup> *Prosecutor v. Kony et al*, “Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims”, ICC-02/04-01/05-275, 5 March 2010.

<sup>8</sup> See for example, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol”, ICC-01/04-01/07-956, 13 March 2009.

<sup>9</sup> *Prosecutor v. Kony et al*, “Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims”, ICC-02/04-01/05-275, 5 March 2010 at page 4.

that the Prosecutor based its appeal against the first arrest warrant decision on the ground that the Pre-Trial Chamber had incorrectly applied the beyond reasonable doubt standard of proof to the arrest warrant procedure.<sup>10</sup> The Prosecutor nonetheless repeatedly states that the Court “found that” President Bashir or his force committed crimes; at no point does the Prosecutor note that the Court’s findings were a preliminary determination, issued in accordance with the lowest applicable evidential standard.

20. The Prosecutor also states that President Bashir has committed crimes for events which have not been the subject of any judicial findings before the ICC (for example, the events concerning South Sudan, and his reference to present day acts). Since these alleged acts are not the subject of any legal proceedings before the ICC, President Bashir will not have a fair opportunity to rebut these accusations, which are being made in the name of an organ of the ICC.

21. Although the Guardian article concerns specific defendants (President Bashir and Ahmad Harun), it also potentially impacts on the broader interests of the defence in terms of present and future defendants’ confidence in the integrity and impartiality of the ICC, as a Court which is dedicated to upholding the highest standards of fair trial, and the Prosecution, as an organ which is entrusted with the crucial task of searching for exculpatory evidence on their behalf.

22. In this connection, the Appeals Chamber has recently endorsed the statement of the Preparatory Committee that “[g]iven the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage to the Prosecutor over the defence”.<sup>11</sup> The resultant mechanism was the Prosecutor’s duty to search for and disclose exculpatory material. This mechanism will however be futile if potential exculpatory sources are loathe to approach the Prosecutor due to a perception concerning the partiality of the Prosecutor, or because they incorrectly believe that the

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<sup>10</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, “Prosecution Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”, ICC-02/05-01/09-25, 6 July 2009.

<sup>11</sup> United Nations General Assembly, “Draft Report of the Preparatory Committee”, 23 August 1996, A/AC.249/L.15, p. 14, cited by the Appeals Chamber in its “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled ‘Decision on the Modalities of Victim Participation at Trial’”, ICC-01/04-01/07-2288, 16 July 2010, at footnote 125.

responsibility of President Bashir or other defendants has already been determined by the Court.

23. Furthermore, it cannot be presumed that such persons would subsequently approach the defence team: the drafters of the Rome Statute were aware that the Defence “would not be able to wield similar authority [as the Prosecutor] to enlist support or assistance with a view to preparing the defence as broadly, if necessary. This is one area where the civil law approach of an investigative judge showed the way to a workable solution to this problem, which relates essentially to potential inequality of recourse between parties.”<sup>12</sup> The Prosecutor was therefore vested with strong investigative powers subject to a “clear and binding mandate for the Prosecutor to investigate both sides of the case equally”.<sup>13</sup>

24. Given the potential prejudice which could arise from the Guardian article, the OPCD respectfully submits that it is in the interests of justice to determine at the present juncture whether its contents impact on the presumption of innocence and the fairness and impartiality of the proceedings, and to determine an appropriate remedy for such prejudice. The Prosecutor has utilized the media to convey his legal position concerning the responsibility of the defendant; equality of arms requires that the defendant be accorded a legal forum to respond.

25. Since the defendant has not appeared before the Court and has not elected to represent himself nor has he designated a counsel to represent him, authorizing the OPCD to submit observations would facilitate equality of arms, and protect the general interest of the defence.

***3.2. In the alternative, the Pre-Trial Chamber may proprio motu take notice of the Guardian article and order an appropriate remedy***

26. The Pre-Trial Chamber has an over-arching obligation to take such measures as are necessary to ensure the fairness and impartiality of the proceedings. The rights set out

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<sup>12</sup> M. Bergsmo P. Krueger, “Duties and Powers of the Prosecutor” page 715-725 in “Commentary on the Rome Statute of the International Criminal Court” (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716, para. 2.

<sup>13</sup> M. Bergsmo P. Krueger, “Duties and Powers of the Prosecutor” page 715-725 in “Commentary on the Rome Statute of the International Criminal Court” (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft at page 716, para. 2.

in articles 66 and 67 apply irrespective of whether the defendant has expressly invoked them.

27. The Pre-Trial Chamber also has an inherent interest in ensuring that its decisions and the procedures of the ICC are accurately reported by parties appearing before the Court.

28. In addition to the recent Lubanga decision referred to by the ad hoc counsel for the defence,<sup>14</sup> the OPCD observes that Pre-Trial Chamber I has actively upheld the presumption of innocence by ordering the Registry to correct the ICC webpage in order to reflect the fact that Thomas Lubanga Dyilo was a suspect at the time of the confirmation hearing, and not an accused.<sup>15</sup> Notably, the Chamber held that the Registry's attempt to minimize the impact on the defendant by distinguishing between media articles and internal documents was a "very weak" argument.<sup>16</sup>

29. Similarly, in the ICTY Popovic et al. case, the Trial Chamber issued a public oral decision to the effect that it was inappropriate for an official of the Court (in this case, the Registry spokesperson) to inform the media that it would be 'shameful' to deny the genocide in Bosnia.<sup>17</sup> The Chamber vigorously dissociated itself from this statement and emphasized that the defendants enjoyed the presumption of innocence. The conduct of the official was also reported to the President of the ICTY. In counterpoint to the ICC Prosecutor's statement in the Guardian article that there should be "[n]o more denial", the ICTY judges have underscored the point that prior to the issuance of a final judgment that the defendant is guilty beyond reasonable doubt, it is both possible and appropriate for the defendant to deny such allegations.

30. This very Pre-Trial Chamber has also recently recognized that it can *proprio motu* take notice of media articles which impact on the judicial proceedings and order that appropriate measures be taken.<sup>18</sup> If the Chamber were to take proactive steps to

<sup>14</sup> *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the press interview with Ms Le Fraper du Hellen", ICC-01/04-01/06-2433, 12 May 2010.

<sup>15</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 9 November 2006, page 18.

<sup>16</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 9 November 2006, page 18.

<sup>17</sup> ICTY, *Prosecutor v. Popovic et al.*, Transcript of 26 March 2007, T.9461-9465; <http://www.icty.org/x/cases/popovic/trans/en/070326ED.htm>

<sup>18</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya", ICC-02/05-01/09-107, 27 August 2010 at footnote 1.

facilitate the prosecution of the defendant whilst declining to act in relation to issues which infringe the rights of the defendant, it could potentially affect the perception of the impartiality of the Chamber.

31. It would therefore be in the interests of justice for the Pre-Trial Chamber to apply its considerable judicial insight to the issues arising from the Guardian article, given its potential impact on the rights of the defence.

#### **4. Relief Sought:**

32. The OPCD respectfully requests the authorization of the Honourable Pre-Trial Chamber to authorize the OPCD to submit observations concerning the impact of the Guardian article on the presumption of innocence and the fairness and impartiality of the proceedings, and any appropriate remedies. In the alternative, the OPCD respectfully requests the Honourable Pre-Trial Chamber to *proprio motu* seize itself of this issue.



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Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this Friday, 3<sup>rd</sup> Day of September 2010

At The Hague, The Netherlands