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PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Presiding Judge
Judge Akua Kuenyehia-----
Judge Sylvia Steiner-----

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR

Public Document

**OBSERVATIONS ON ISSUES CONCERNING THE PROTECTION OF VICTIMS
AND THE PRESERVATION OF EVIDENCE IN THE PROCEEDINGS ON
DARFUR PENDING BEFORE THE ICC**

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1. Introduction

This Amicus curiae Brief is submitted to comply with an invitation of the Pre-Trial Chamber I of the International Criminal Court, issued on 24 July 2006. I have been invited to submit “Observations on the protection of victims and the preservation of evidence in Darfur” on account of my having been the Chairman of the UN Commission of Inquiry on Darfur, established by the UN Secretary-General pursuant to Security Council resolution 1564 of 18 September 2004.

I should however point out that the Commission having been disbanded after it handed its Report to the UN Secretary-General, on 25 January 2005, I am submitting these “Observations” in my private capacity, without consulting with either the UN Secretary-General or my former colleagues on the Commission or the UN High Commissioner for Human Rights (who had kindly provided competent staff to the Commission of Inquiry). It follows that this Brief is in no way attributable to, let alone binding, the UN or its organs.

In drafting the “Observations” I have however duly taken into account my experience in Darfur as well as both the notes I wrote when on mission there, and the final Report approved by the Commission.

In contrast, I have not been able to make use of the information the ICC Prosecutor kindly offered on 16 August 2006, through one of his staff member, to let me have (he offered to send the same material he would provide to the High Commissioner for Human Rights). After I accepted his offer, and suggested that he send any non-confidential information, on 24 August 2006 the Prosecutor let me know that “such an approach may not be in conformity with the spirit of the decision of the Pre-Trial Chamber of 24 July 2006”. He instead kindly offered to provide at a convenient moment an oral briefing on “the update of the overall situation”. I consider however that an oral briefing would be both difficult to make and probably of scant utility. Moreover, arguably it would not be proper for an amicus curiae to receive from a party to the proceedings pieces of information that cannot subsequently be verified and submitted to scrutiny by the Pre-Trial Chamber.

I am therefore submitting this Amicus curiae Brief without having benefited from this source. The only information on the activities so far conducted by the ICC Prosecutor I have used, has been gathered from documents that are in the public domain, such as the Prosecutor’s Reports to the Security Council.

2. Protection of Victims – Its General Purpose

Article 68 of the ICC Statute contains some fundamental provisions, prescribing that the Court “shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” to the extent that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. It can be inferred from these provisions that the protection of victims is grounded on a twofold motivation: (i) to make sure that victims are put in a position to testify about possible crimes, if they wish to do so or at least are able to provide information to the Prosecutor on those crimes (*protection of victims as potential witnesses*); and (ii) a broader motivation that goes beyond the proper scope of trial proceedings and is more humanitarian in nature, namely to see to it that serious offences against victims are terminated and in particular such vulnerable categories as civilians, women and children are shielded from crimes, in accordance with the general purpose of criminal law and procedure, namely to forestall or impede the perpetration of crimes (*protection of victims as vulnerable human beings*).¹

3. Protection of Victims in Darfur (a) general measures

In his Third Report to the UN Security Council the ICC Prosecutor has emphasized that “The continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur, particularly in light of the absence of a functioning and sustainable system for the protection of victims and witnesses” (p.1).

It follows from this statement that (i) investigations into alleged crimes may not be undertaken on the spot, i.e. in Darfur, with the consequence that victims are not put in a position to give evidence, should they wish or be prepared to do so; and (ii) victims may not be protected from ongoing attacks, i.e. are not protected from violence and indignities.

I respectfully submit that, faced with these conditions, one can effectively come to grips with the situation only by opting for a *drastic solution*: expeditiously to establish the criminal responsibility of those who have created and continue to create instability and

¹ The Prosecutor rightly alluded to this function in his Third Report, where he stated that “The impact of ICC investigations and prosecutions of future crimes is also an important consideration [to the process of crime selection by the Prosecutor], and particular attention will therefore be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.” (p.3)

insecurity in the area by carrying out attacks on civilians and committing serious international crimes.

It is apparent from the Report of the UN Commission of Inquiry that attacks on civilians are chiefly made by military authorities, or orchestrated by them through the use of the armed militias of some local tribes, although attacks are also carried out, but not on the same scale, by rebels. Therefore, it would be crucial to collect evidence about the possible criminal responsibility attributable to military forces of Sudan (as well as to armed militias) on the one side, and to rebels, on the other. This, I submit, *would be the most effective way of protecting present and prospective victims of crimes in Darfur.*

One way of speeding up the process of pinpointing possible criminal responsibilities of military authorities might reside in *identifying the military chain of command*, with a view to establishing any superior responsibility of the higher ranks of the Sudanese military. The chain of command, I submit, might be identified through interviews with members of the armed forces, or former military officials (in his Third Report the Prosecutor stated that the Sudanese authorities had promised to allow in August 2006 the conduct of interviews with Sudanese military officials; this could indeed prove to be a golden opportunity to collect evidence about the chain of command and the responsibilities of those in power for the conduct of military operations in Darfur). Also, interviews of some foreign military authorities that happen to be in daily contact with the Sudanese higher military echelons, could prove helpful. In addition, interviews of some members of the African Union's forces in the Sudan would be of crucial importance.

Other elements for establishing superior responsibility would also have to be proved, i.e. knowledge by the superior authorities of the crimes being committed and effective control over the troops or militias perpetrating the crimes. To this effect, evidence might be collected through interviews with the relevant persons. In addition, presumptions might be relied upon where direct or circumstantial evidence does not prove sufficient.

Another *general measure*, albeit somewhat more specifically geared to the purpose of protecting victims, could reside in the Prosecutor asking (either directly or through a request issued, upon his request, by the Pre-Trial Chamber) that the relevant Sudanese officials appear before the Chamber to report on the specific measures for the protection of victims they have adopted or intend to take or are in the process of taking.

Moreover, the Prosecutor could request, through the Chamber, the *Court's President* to take steps with the Sudanese authorities in Khartoum to draw their attention to the urgent need to protect victims (it is submitted that such task would be encompassed by the sweeping wording of Article 38 (3) and (4) of the ICC Statute).

4. (b) Specific Measures

Furthermore, the Prosecutor could consider the advisability of requesting the Pre-Trial Chamber to take measures to protect victims, as envisaged in Article 68 (1) of the ICC Statute.

In particular, the Prosecutor could ask the Chamber

- (i) to request the authorities of the Sudan to take the necessary measures for enabling the Prosecutor's investigators to interview victims of crimes in Darfur.

In his Third Report the Prosecutor states that interviews or investigations may not be undertaken in Darfur owing to the insecurity prevailing there. This, it is respectfully submitted, applies to large-scale and lengthy investigations including digging out mass graves, which require time, the possibility of searching for and interviewing many persons as well as the availability and use of sophisticated technical equipment; it stands to reason that these activities could easily be imperilled by ongoing fighting. In contrast, undertaking *targeted and brief interviews* of victims and witnesses in the capital cities of the three States of Darfur (El Fashir, El Geneina and Nyala) could prove to be safe. Indeed, these cities are under the control of the Sudanese authorities.

It is therefore suggested that the Prosecutor could request (via a request to the Pre-Trial Chamber) the Sudanese authorities to allow his investigators to interview a number of pre-selected victims and witnesses in one or more of these cities (the pre-selection could be made on the basis of interviews already conducted in Chad or in Khartoum as well as through information provided by NGOs or to be found in the copious materials gathered by the Commission of Inquiry and handed over to the Prosecutor). In addition, the Prosecutor could ask the Sudanese authorities to provide a military or police escort to ICC investigators who go to IDP (Internally Displaced Persons) camps, or to small towns or villages in Darfur designated by the Prosecutor. Furthermore, the Prosecutor (always via the Pre-Trial Chamber) could request the Sudanese authorities to refrain from any subsequent harassment of, or unlawful interference with, victims interviewed by the ICC investigators. In addition, the Chamber could also ask the numerous Human Rights Monitors (present in the

area upon appointment by, and under the control of, the UN High Commissioner for Human Rights) to report to the Chamber any non-compliance with the order to refrain from harassment or unlawful interference (subject of course to the UN Secretary-General and the High Commissioner for Human Rights authorising the Human Rights Monitors to fulfil this task). Moreover, should multiple cases of non-compliance be reported, the Court could then request the Prosecutor to report to the UN Security Council for action to be taken against the relevant persons or authorities who did not comply with the Chamber's orders.

Finally, to ensure that during the conduct of interviews in the three States of Darfur no armed action is underway likely to imperil the ICC investigators and the interviewees, the Prosecutor could (if necessary through the competent bodies of the African Union) request the rebel leaders operating in the area temporarily to suspend armed activities.

- (ii) To request the Sudanese authorities to allow third States' entities or organizations as well as NGOs operating in Darfur to provide full assistance (medical, humanitarian and psychological) to victims of such crimes as armed attacks on civilian villages, extermination, forced displacement of civilians.

That the above requests would be made by the Pre-Trial Chamber is very important because any non-compliance or deliberate breach of the Chamber's orders could be the object of separate proceedings in contempt.

Were the Pre-Trial Chamber to issue such requests, it could also decide that, if the Sudanese authorities refuse or fail to comply, it would order the Prosecutor to report the matter to the UN Security Council, asking that body to take any appropriate remedial action.

In addition to the issuance of the above requests the ICC could (i) envisage making agreements with the relevant States for the protection of the victims that are likely to appear as witnesses, as well as (ii) set up programmes or schemes for psychological assistance to those victims. To this purpose the Prosecutor could be asked by the Pre-Trial Chamber confidentially to provide to the Unit for the Protection of Victims and Witnesses the names of those victims who are more in need of psychological help. Plainly such assistance would *also* make it more likely for those victims to then testify in court.

Finally, whether or not victims have already decided to take part in the ICC proceedings, it would be important for any victims' association to be invited to take part in pre-trial proceedings. To this effect, if no such association has been set up yet, victims could

be called upon to establish one. In addition, a defence lawyer should be appointed by the Court so that he or she could submit to the Chamber motions on behalf of the victims.

5. In Particular: Protection of Victims of Rape

(a) General Measures

The UN Commission of Inquiry concluded, based on first-hand and reliable information it had collected, that numerous women, mostly of young age, are raped by militiamen and members of the Sudanese armed forces either during attacks on civilian villages, or in the aftermath of such attacks, or else when they leave IDP camps to collect wood. It is apparent from subsequent reliable reports issued by the UN High Commissioner for Human Rights or by such NGOs as Human Rights Watch that the practice of rape has continued unabated.

The UN Commission of Inquiry also concluded that the Sudanese authorities lack any will seriously to tackle the problem by either prosecuting the authors of rape or taking effective measures to prevent the recurrence of such crime. It would seem that this official attitude has not changed since the Commission of Inquiry issued its report.

I should add that the Commission found that while there was copious and reliable evidence, or at least serious and credible information, about the perpetration of rape, it was extremely difficult to collect reliable evidence about specific *perpetrators* of such crime. Often victims were unable to identify the rapist or rapists. Witnesses also were frequently not in a position to identify the perpetrators, and in addition the authorities as a rule did not step in rapidly so as to arrest the suspects and collect the necessary evidence. Unique factual conditions (the circumstance that often armed hostilities were underway while rape was being perpetrated; the inherent difficulty for the victim to distinguish one militiaman or soldier from the other in time of armed clashes or in their immediate aftermath; the vastness of camps for displaced persons and the fact that victims of rapes committed outside those camps normally move around by themselves or with a few other women) contribute to explain the difficulty of collecting evidence about the perpetrators.

This being so, I submit that the only way of stopping rape in Darfur, a heinous crime of vast magnitude, that is, to *protect victims of rape*, is to hold accountable under the notion of command responsibility those who would be in a position to prevent or punish its authors.

One is thus taken back to the notion mentioned in paragraph 3 above. It is my submission that, to protect victims of rape, one should try to identify the *chain of command*

and establish the criminal responsibility of those who are in a position to forestall or stop rape. It would be of no avail for a military commander to argue that he cannot identify the specific authors of rape under his command and control. In other words, he may not claim that, although he knows that rape has been or is being committed by members of his troops or by militias under his control, he cannot report those crimes for he is not in a position to identify each specific perpetrator. Under international law a commander or any superior authority is required to put an end to crimes perpetrated by his subordinates. It is for him to find means of identifying the perpetrators. If he is not able to do so, he must as a minimum report to any investigating authorities that crimes have been, or are being, or are likely to be, committed, so that those authorities will duly take remedial action.

6. (b) Specific Measures

Less general measures could also be envisaged.

First, the Pre-Trial Chamber could be asked by the Prosecutor to issue to the Sudanese authorities, with specific regard to rape victims, the requests mentioned above, sub § 5.

Secondly, the Sudanese authorities should be called upon to direct or at least pressurize national police and judicial authorities to punish the direct perpetrators (in this way Sudanese authorities could prove their willingness to investigate and prosecute at least some of the most abhorrent crimes committed in Darfur). To this effect, the Pre-Trial Chamber, upon request of the Prosecutor, could request the Sudanese authorities urgently to take the necessary measures to bring to trial the perpetrators, and to report thereon to the ICC Prosecutor.

Thirdly, the Prosecutor could invite the military commanders and civilian superiors to The Hague for interviews on specific incidents. Should they fail to appear, they could be summoned by the Pre-Trial Chamber. If necessary the matter should be reported to the UN Security Council.

Finally, to protect victims from re-traumatization should they be heard before the Court only in two, three or more years, one could explore the possibility given by the ICC Statute to hear them at this stage and preserve their testimony ready for trial (for more details see below § 8).

7. Protection of children

In addition to women, children make up a vulnerable group in the Sudan. The recent report of the UN Secretary-General to the Security Council of 17 August 2006 (S/2006/662) provides a chilling account of the violence visited upon children in many areas of the Sudan and in particular in Darfur: children are systematically abused, killed, maimed, recruited and used as soldiers, made the object of grave sexual violence, abductions and denial of access to humanitarian assistance. The Report also identifies the parties to the conflict in Darfur that must be held accountable for such crimes and makes recommendations for, among other things, the prosecution and punishment of those responsible for such crimes (see in particular §§ 54-64).

Since most of the egregious breaches of the human rights of children reported by the Secretary General constitute crimes falling under the ICC jurisdiction, I submit that measures could be taken similar or akin to those suggested above with regard to women (see §§ 5 and 6), to protect the victims of child abuse in Darfur.

8. Preservation of Evidence

The armed conflict is still underway on Darfur, although armed clashes have slightly diminished as a result of the agreement recently signed by the Khartoum Government with one faction of the various rebellious groups.

This condition cannot but have a serious impact on the evidence of crimes potentially available in Darfur. Clearly, passage of time tends to make eye-witnesses' testimonies fade or become blurred. Documents are destroyed. Sites that have been the object of attacks and devastation gradually deteriorate with the consequence that the marks of those attacks tend to disappear. Mass graves become more and more difficult to identify.

In addition, it should be stressed that in Darfur, because of the widespread illiteracy in the population, the victims' evidence potentially available almost exclusively consists of *testimonies*. These however not only undergo the usual fading or blurring process just mentioned, but also tend to become fuzzy and consequently unreliable because of a specific factor: persons in IDP camps repeatedly talk to one another about their personal experiences, with the result that in the end accounts of different persons tend to merge or to change or to blur, thereby becoming subject to deformation.

Documentary evidence chiefly emanates from governmental authorities. These, however, are understandably loath to deliver, or at least rather parsimonious in handing over to outside bodies any official document that might prove the commission of crimes. Also, with the passage of time such documentary evidence runs the risk of being destroyed or deliberately altered.

Faced with this difficult condition, in order to (i) avoid any further degradation of testimonial evidence available in Darfur and establish the responsibility of those accountable for the crimes, as well as (ii) prevent a possible further deterioration of the security conditions in Darfur from impeding the taking of evidence, a possible way out could reside in:

- (i) *expeditiously interviewing* as many persons in IDP camps in Darfur as possible (subject to the necessary measures for ensuring security being taken). If such action is not allowed by the Sudanese authorities, the Prosecutor might consider requesting the Pre-Trial Chamber to issue an order (“request”), pursuant to Article 57(3)(d) of the ICC Statute and Rule 115, to those Sudanese authorities enjoining them to grant the Prosecutor’s investigators access to potential witnesses; should the Sudanese authorities fail or refuse to comply, the Prosecutor might report the facts to the UN Security Council pursuant to his general (albeit perhaps implicit) obligation to keep the Council advised of his own and the Sudanese authorities’ action.
- (ii) *endeavouring to obtain as soon as possible some official Sudanese documents* that might appear relevant to the commission of crimes. In particular, it would be crucial for the Prosecutor to get hold of
 - (a) minutes of the meetings of the Security Committees at the locality and State levels in each of the three regions of Darfur, at least to the extent that such minutes concern the use of armed forces and the taking of measures concerning the civilian population;
 - (b) flight records of the aircraft (airplanes and helicopter gunships), and any other record concerning the deployment of military aircraft in Darfur in the last three years;
 - (c) copy of the orders issued by the central military authorities in Khartoum to the military authorities in Darfur, as well as copy of the responses provided, or follow-up given, by the military authorities in Darfur.

Should the Sudanese authorities refuse to comply, the Prosecutor could consider applying Article 57(3)(d), as suggested above, and then in case of non-compliance

with a request by the Trial Chamber, report such non-compliance to the Security Council.

- (iii) Furthermore, the Pre-Trial Chamber could apply Article 56 of the ICC Statute (*unique investigative opportunity*).

To this effect the Prosecutor could ask the Pre-Trial Chamber to decide measures for taking the testimony of victims of rape, which may not be available subsequently at trial either (i) because the victims is likely to be harassed or intimidated by other persons including militias or State officials, or (ii) because the victims' account is most likely gradually to fade or blur with the passage of time, or (iii) because the possible further deterioration of the security conditions in Darfur might make it impossible to present the evidence in court.

For this purpose, upon request of the Prosecutor the Chamber could summons the victim concerned and take all the appropriate measures for the giving of evidence either in Darfur or in any other appropriate location in the Sudan, or at The Hague. By the same token the Chamber could request the Sudanese authorities (i) to refrain from hampering the taking of evidence as well as (ii) to facilitate the task of the Prosecutor and the Court. Should those authorities refuse to cooperate, the Court could report this refusal to the Security Council.



Antonio Cassese

Dated this 25 August 2006

At Florence, Italy