

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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, SUDAN

Public Document

**Prosecutor's response to Arbour's observations of the United Nations High
Commissioner for Human Rights invited in Application of Rule 103 of the Rules
of Procedure and Evidence**

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Counsel for the Defence
Mr Hadi Shalluf
Other Participants
Ms Louise Arbour

Introduction

1. On 24 July 2006 Pre Trial Chamber I ("Chamber") issued a decision inviting observations in Application of Rule 103 of the Rules of Procedure and Evidence ("Decision"). The Decision invited Louise Arbour, United Nations High Commissioner for Human Rights ("High Commissioner Arbour") and Professor Antonio Cassese, Chairperson of the International Commission of Inquiry on Darfur, Sudan ("Professor Cassese") to submit in writing their observations concerning the protection of victims and the preservation of evidence in Darfur within 45 days of the Decision. The Decision further invited the Prosecutor of the International Criminal Court ("Court") to provide a written response to the observations within 10 days of the notification thereof.
2. On 18 August 2006 High Commissioner Arbour applied for an extension of 30 days in which to file her observations under Regulation 35 of the Regulations of the Court. On 28 August 2006 the Chamber granted both High Commissioner Arbour and Professor Cassese an additional 30 days in which to file their observations. On 31 August 2006 Professor Cassese filed his observations concerning the protection of victims and the preservation of evidence in Darfur in Sudan.¹ On 11 September 2006 the Prosecutor submitted his response to the observations filed by Professor Cassese ("Cassese Response").²

¹ Antonio Cassese: Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC (filed with Pre-Trial Chamber 1 on 31st August 2006).

² Prosecutor's response to Cassese's observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC (filed with Pre-Trial Chamber 1 on 11 September 2006).

3. On 10 October 2006 High Commissioner Arbour filed her observations concerning the protection of victims and the preservation of evidence in Darfur in Sudan ("Arbour Observations").³
4. The Prosecutor joins in acknowledging High Commissioner Arbour's wide experience as both an international jurist and as United Nations High Commissioner for Human Rights.

Legal Background

5. The Decision notes articles 57(3) (c) and 68(1) of the Rome Statute ("Statute") and rule 103 of the Rules of Procedure and Evidence ("Rules"). Articles 57(3)(c) and 68(1) of the Statute construed together give both the Chamber and the Prosecutor an obligation to protect victims and witnesses during the investigation and expressly provide for the Chamber to preserve evidence where the Prosecutor so applies in accordance with the provisions of article 56 of the Statute. Rule 103 of the Rules gives the Chamber the right to invite submissions on any issue from a state, organisation or person at any stage of the proceedings, when the invitation might be desirable "for the proper determination of the case."
6. The Chamber by invoking articles 57(3)(c) and 68(1) of the Statute has confined both the written observations of High Commissioner Arbour and Professor Cassese and the responses of the Prosecutor to the protection of victims and to the preservation of evidence.

Summary of Arbour Observations and Prosecutor's Response

7. Much of the High Commissioner's submission is a summary of the experiences of the Office of the High Commissioner for Human Rights ("OHCHR") in protecting victims and witnesses in Darfur and other locations in the context of human rights monitoring and investigations. High

³ Louise Arbour: Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence (filed with Pre-Trial Chamber 1 on 10 October 2006) (hereinafter "Arbour Observations").

Commissioner Arbour makes two observations which might be deemed to summarize her submission:

- a) That it is possible to conduct investigations in Darfur without imposing an unreasonable risk of reprisal on victims and witnesses cooperating with in investigations of serious human rights violations.⁴ High Commissioner Arbour states that United Nations (“UN”) human rights officers have been investigating human rights abuses in Darfur since 2001 and have not to date documented any case of killing as a suspected form of reprisal for interacting with the ‘international community’ although other forms of reprisal such as death threats, arbitrary arrest, extreme physical violence and threats of the same have been documented.⁵
 - b) That a consideration of the potential positive impact on victims should not be overlooked when considering risks to witnesses and victims. Noting a recent study indicating that unarmed international presence in a conflict zone is more effective than often assumed for the protection of civilians,⁶ High Commissioner Arbour states that an essentially cautious approach to individual victims’ protection “cannot and should not” be dissociated from a fair assessment of the potential positive impact that an investigation in Darfur by the Court would have on victims generally.⁷
8. The methods outlined and recommended by High Commissioner Arbour to protect victims and witnesses and preserve evidence in Darfur go beyond the scope of article 68(1) of the Statute, because currently the Office of the Prosecutor (“OTP”) is not taking statements in Darfur; therefore there are no witnesses to protect there. The OTP is successfully carrying out an investigation without exposing or endangering any victims or witnesses in

⁴ *Ibid.*, at paragraph 64.

⁵ *Ibid.*, at paragraph 45

⁶ *Ibid.*, at paragraph 70.

⁷ *Ibid.*, at paragraphs 78.

Darfur, after having determined that the investigation can progress on the basis of statements taken from victims (including victims of crimes committed in Darfur) who currently reside in areas where meaningful protective measures can be provided.

9. While all recommendations and observations by High Commissioner Arbour are beyond the scope of article 68(1) of the Statute the Prosecutor will nevertheless outline and discuss for the purposes of transparency and accountability:
 - a. The Security situation in Darfur related to witness security;
 - b. High Commissioner Arbour's broad construction of the Court's obligations in respect of witnesses in Darfur;
 - c. Distinction in the mandates of the Prosecutor and High Commissioner Arbour.

Security Situation in Darfur related to witness security.

10. In Darfur itself, despite numerous resolutions passed by the Security Council⁸ and decisions by the African Union ("AU")⁹, the security situation remains extremely volatile.¹⁰ There has been a recent upsurge in violence which has now placed even UN and humanitarian workers at risk and threatens to destabilise the entire region.¹¹ This security situation continues to render it impracticable for the OTP, which subjects witnesses with whom it interacts to different and more grave risks than human rights organizations, to carry out investigations inside Darfur. High Commissioner Arbour herself states that members of the Sudanese community who have interacted with various parts

⁸ SC Res 1564 (18 September 2004); SC Res 1574 (19 November 2004); SC Res 1590 (24 March 2005); SC Res 1591(2005).

⁹ AU Decision 54 (2004); AU Decision 68 (2005).

¹⁰ UNSC Resolution 1706 (2006): the Preamble determines that 'the situation in the Sudan continues to constitute a threat to international peace and security.'

¹¹ UNHCR, 08 September 2006 – Statement by High Commissioner for Refugees António Guterres: 'Deteriorating security has left us unable to provide even minimal help across wide areas of Darfur, and resources in neighbouring Chad have been stretched to the limit. An already bad situation is worsening by the day,' <http://www.unhcr.org/cgi-bin/textvis/nw/news/opendoc.htm?tbl=NEWS&id=45015c104>

of the international community, including humanitarian groups, have been subjected to death threats, arbitrary arrest and extreme forms of physical violence.

High Commissioner Arbour's broad construction of the Court's obligations in respect of witnesses in Darfur.

11. Underlying the Arbour Observations is a broad construction of the legal duties of the Prosecutor to protect witnesses and victims. In High Commissioner Arbour's view, it should not be overlooked that the mere presence of the Prosecutor on the ground in Darfur may lead to the increased protection of vulnerable groups in Darfur.¹²
12. The OTP has expressed on many occasions the firm belief in the deterrent power of ICC investigations and prosecutions and the objective of maximizing the deterrent effects of its activities. Still, the OTP's mandate cannot reasonably be expanded to encompass a duty to protect the security of civilians in areas in which it has chosen not to investigate. As the Preamble acknowledges, deterrence is a consequence of prosecution and accountability, not an independent objective. The OTP believes that the primary responsibility for security in Darfur rests with the Government of Sudan and, where appropriate, with the Security Council.¹³ High Commissioner Arbour has herself confirmed that it is the Government of Sudan which bears the primary responsibility for ensuring the protection of the people of Darfur.¹⁴

¹² See para 67. of Arbour observations

¹³ See para 16 of Cassese Response.

¹⁴ *Ibid.*, at paragraph 37. See also Louise Arbour, Address by the United Nations High Commissioner for Human Rights on the Occasion of the 2nd session of the Human Rights Council, 18 September 2006: "The Secretary-General has reminded the Government of Sudan that it can not escape accountability for atrocities perpetrated against the people of Darfur, the very people that the Government of Sudan has the primary responsibility to protect." See also: UNSC Resolution 1564 (2004); the Preamble recalls that "the Sudanese Government bears the primary responsibility to protect its population within its territory, to respect human rights, and to maintain law and order." The Security Council has also addressed the security situation in several other resolutions, namely: UNSC Resolutions 1556 (2004), 1574 (2004), 1590 (2005), 1591 (2005), 1593 (2005), 1663 (2006), 1665 (2006), 1679 (2006), 1706 (2006); AU Decision 54 (2004), AU Decision 68 (2005).

13. The OTP cannot reasonably be expected to ensure or enhance the protection of the greater civilian population of Darfur, particularly when there is no OTP investigation in Darfur. Although judicial efforts play an important role in the protection of civilians and the prevention of future crimes, the Court has neither the obligation nor the authority directly to enhance security in Darfur.
14. Furthermore, any principle that the presence of investigators, or international personnel, can be expected to increase security, on balance, as applied in Darfur, would seem to be counterfactual. Increased international presence in Darfur has not had the effect of reducing the level of violence in the region. In spite of the visible presence of non-governmental organisations, humanitarian agencies, the AU and UN agencies (including the OHCHR), there has been an escalation in violence and an increase in human rights violations. Following her second mission to Sudan in May 2006, High Commissioner Arbour reported that the situation was just as critical, and in some respects worse.¹⁵ She concluded that there was no apparent minimum level of protection for the communities of the conflict.¹⁶ In July 2006, eight humanitarian aid workers were killed in Darfur.¹⁷
15. High Commissioner Arbour properly acknowledges that the security situation in Darfur is critical and that reprisals, in various forms, are carried out against local civilians who co-operate with the international community.

Distinctions in mandates between the Prosecutor and High Commissioner Arbour and the issue of protection of witnesses.

16. The mandates of the Prosecutor of the Court and the mandate of the High Commissioner for Human Rights are discrete and distinct. The Prosecutor's role is to investigate and establish criminal responsibility under the Statute. The ultimate legal consequence of his work may be a criminal trial. The mandate of High Commissioner Arbour includes promoting and protecting

¹⁵ Arbour Observations, at paragraph 36.

¹⁶ *Ibid.*

¹⁷ Sudan Tribune, "Eight aid workers killed in Darfur during July- UN," 8 August 2006.

the effective enjoyment of all civil, cultural, economic, political and social rights.¹⁸ In contrast to the powers of the Prosecutor the enforcement mechanisms available to the High Commissioner are weak as she has publicly acknowledged herself.¹⁹

17. The ultimate legal consequences of an investigation by the Prosecutor, as opposed to an investigation by the High Commissioner, impacts heavily on the issue of witness protection in Darfur. It is widely known both in Sudan and Darfur that the Court's investigation will have far reaching consequences for those who have been involved in serious criminal conduct in Darfur since July 2002.²⁰ Witnesses who speak with representatives of the Court are at far higher risk than those who speak to human rights observers or those who spoke to members of the UN International Commission of Inquiry in Darfur ("UNCOI").

18. Moreover while the Prosecutor acknowledges that the OHCHR and the members of the UNCOI took such measures as they thought appropriate, based on experience and circumstances, to protect victims and witnesses in Darfur, the Prosecutor must protect witnesses in accordance with his legal obligations set out within the framework of the Rome Statute.²¹ Interviews of witnesses are conducted according to standard internal protocols which incorporate the protective standards imposed by the Statute. Initial and secondary response mechanisms must be put in place in all locations where the Court is actively investigating crimes. This cross-court initiative provides witnesses and victims within the scope of the investigation with a level of protection deemed sufficient under the Rome Statute, which in the Prosecutor's view requires planning for the eventualities of a threat or risk as

¹⁸ Arbour Observations, at para 4.

¹⁹ United Nations High Commissioner for Human Rights, "The OHCHR Plan of Action: Protection and Empowerment," May 2005, at paragraph 4.

²⁰ Individuals involved in the conflict have expressed concern about the possibility of being transferred to The Hague for criminal prosecution by the Court. See, e.g. Samantha Power, "Court of First Resort," New York Times, 10 February 2005.

²¹ Articles 54(1) (b), 54(3) (f) and 68(1) of the Statute.

a result of contact with staff from the Court. The Prosecutor has regularly consulted with the relevant agencies of the UN and the AU since June 2005 before the Prosecutor concluded that it would not be possible to put in place, in Darfur, the standard protective measures employed by the OTP and the Court. The Prosecutor continues to credit this assessment and continues to consult with the relevant agencies in the UN and the AU. Effective witness protective measures have been put in place in locations outside Darfur and continue to remain in force.

Progress of the Investigation

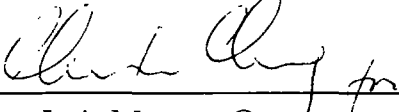
19. Finally, a factor which the High Commissioner is not in a position to weigh is the ability to carry out meaningful investigation and prosecution *without* potentially exposing witnesses and victims in Darfur. The Prosecutor has stated, in the Cassese Response and in other public statements, that the OTP continues to successfully pursue investigative activities outside of Darfur.²² Under the balancing approach recommended by the High Commissioner, the ability of the OTP to conduct successful investigations and prosecutions outside Darfur is certainly relevant, because the avoidance of unnecessary risks in any investigation or prosecution would likely be a principle upon which there would be consensus.

Conclusion

20. As the Prosecutor has consistently stated he maintains ongoing respect for the mandates and efforts of other international organisations, all of which are making significant contributions to international peace and security. He continues to monitor the security situation in Darfur in light of the need to constantly re-evaluate the feasibility of establishing safe and sustainable contact with victims and witnesses. Part of this monitoring includes consultations with the relevant agencies of the UN and with the AU. At present the Prosecutor in the exercise of his discretion under the Statute has

²² Cassese response para. 20-22

determined that the continuing insecurity in Darfur prevents the establishment of an effective system of victim and witness protection inside Darfur.²³



Luis Moreno Ocampo
Prosecutor

Dated this 19th of October 2006

At The Hague, The Netherlands

²³ Third Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593 (2005), 14 June 2006, at page 6.