

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original : English

No.: ICC-02/05  
Date: 4 February 2009

**PRE-TRIAL CHAMBER I**

**Before:** Judge Akua Kuenyehia, Presiding Judge  
Judge Anita Ušacka  
Judge Sylvia Steiner

**SITUATION IN DARFUR, SUDAN**

**Public**

**Decision on Application under Rule 103**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
Mr Essa Faal, Senior Trial Lawyer

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**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**  
Sir Geoffrey Nice, QC  
Rodney Dixon

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER I** of the International Criminal Court (“the Chamber” and “the Court”, respectively);

**NOTING** the “Prosecutor’s Application under Article 58”<sup>1</sup> (“the Prosecution Application”), regarding a request for a warrant of arrest against Omar Hassan Ahmad Al Bashir (“Omar Al Bashir”), filed on 14 July 2008, and the supporting and other information submitted by the Prosecution;

**NOTING** the Prosecution Application under Article 58 whereby a request was made for the issuance of a warrant of arrest for three alleged commanders of organised armed groups named therein (“the Prosecution Second Application”)<sup>2</sup> filed on 20 November 2008.

**NOTING** the “Application on behalf of Citizens’ Organisations of The Sudan in relation to the Prosecutor’s Applications for Arrest Warrants of 14 July 2008 and 20 November 2008” (“the Application”),<sup>3</sup> filed on 11 January 2009 by the Sudan Workers Trade Unions Federation and the Sudan International Defence Group (“the Applicants”), whereby:

The Applicants request that no arrest warrants are issued by the Pre-Trial Chamber at this time on grounds that (1) issuing such warrants would have grave implications for the peace building process in Sudan and that deference must be given to considerations of national interest and security; (2) that the interests of justice will not be served particularly in light of the Prosecutor’s conduct in bringing these applications; (3) that such warrants could entrench the negative perceptions of the ICC and thus contribute to a deterioration of the situation in Sudan; and, (4) that alternative means of transitional justice and resolution are being and will pursued without the need for any consideration of involvement of the ICC at this stage.<sup>4</sup>

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<sup>1</sup> ICC-02/05-151-US-Exp and ICC-02/05-151-US-Exp-Anxs1-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxs1 & 2; ICC-02/05-161 and ICC-02/05-161-Conf-AnxsA-J.

<sup>2</sup> ICC-02/05-163-Conf-Exp

<sup>3</sup> The Application, ICC-02/05-170.

<sup>4</sup> The Application, para. 8.

**NOTING** the “Supplement to the Application and Annexes to the Application on behalf of Citizens Organisations of The Sudan in relation to the Prosecutor’s Applications for Warrants of 14 July 2008 and 20 November 2008”,<sup>5</sup> filed by the Applicants on 4 February 2009, in which the Applicants provide further information in support of the Application;

**NOTING** Articles 53 and 58 of the Rome Statute (“the Statute”) and rule 103 of the Rules of Procedure and Evidence (“the Rules”);

## **I. Introduction**

1. In the Application, the Applicants request that their submissions be considered by the Chamber pursuant to rule 103 of the Rules.<sup>6</sup> They also request the Chamber to convene a hearing pursuant to rule 103 of the Rules so that they can be heard before the Chamber renders a decision on the Prosecution Application and the Prosecution Second Application.<sup>7</sup>

2. In support of their requests, the Applicants submit that:

[...] the terms of Rule 103 are broadly couched to permit the Chamber to receive submissions at *any* stage of the proceedings, including applications for arrest warrants, providing that such submissions could assist in the proper determination of the matter before the Chamber.<sup>8</sup>

3. As a result, according to the Applicants:

The jurisprudence of the ICC has made clear that the central matter to be determined on an application under Rule 103 “is whether the Chamber will be assisted in its ‘proper

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<sup>5</sup> ICC-02/05-182.

<sup>6</sup> The Application, paras. 46-54.

<sup>7</sup> The Application, paras. 55-57.

<sup>8</sup> The Application, para. 47.

determination' of the issues in the case", explained further as whether "information and assistance of direct relevance on certain issue that otherwise will not be available to the Court can be supplied? The Appeals Chamber has held that Rule 103 gives the Chamber discretion to permit submissions to be made which "may assist the Appeals Chamber in the proper determination of the case".<sup>9</sup>

4. The Applicants also submit that this test is met in the present case as:

[...] the information provided in this Application is of direct relevance to the issue before the Pre-Trial Chamber of whether there is a reasonable and proper basis to grant arrest warrants in light of all the information before the Chamber.<sup>10</sup>

5. Finally, the Applicants clarify that the Application does not seek to challenge at this stage the admissibility of "any of the present or proposed Sudan cases."<sup>11</sup>

6. At the outset, the Chamber highlights that, according to the consistent case law of the Chamber,<sup>12</sup> as well as of Pre-Trial Chamber II<sup>13</sup> and the Appeals Chamber,<sup>14</sup> rule 103 of the Rules requires an applicant to secure the leave of the competent Chamber prior to submitting any observations pursuant to the said rule.

7. As a result, prior to considering the observations submitted in the Application, as well as the appropriateness of convening a hearing to hear further observations from the Applicants, the Chamber will entertain the issue of whether the requirements under rule 103 of the Rules for the granting of leave are met by the Application.

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<sup>9</sup> The Application, para. 46.

<sup>10</sup> The Application, para. 49.

<sup>11</sup> The Application, para. 51.

<sup>12</sup> ICC-01/04-373; and ICC-01/04-01/06-919-tEN.

<sup>13</sup> ICC-02/04-01/05-342.

<sup>14</sup> ICC-01/04-01/06-1289.

8. The Chamber notes that, as provided for in the consistent case law of the Chamber,<sup>15</sup> as well as of Pre-Trial Chamber II<sup>16</sup> and the Appeals Chamber,<sup>17</sup> the first and foremost factor for leave to be granted pursuant to rule 103 of the Rules is whether the relevant application relates to an issue that is actually before the competent Chamber.
9. In this regard, the Chamber observes that the Application is based on the premise that, according to articles 53 and 58 of the Statute, one of the factors that the Chamber must take into consideration when deciding on a Prosecution's request to initiate a case by issuing an arrest warrant or a summons to appear is whether the granting of such request would be prejudicial to the interests of justice.
10. Hence, in the Chamber's view, only if the interests of justice are a factor to be taken into consideration at this stage, would the matters to which the Application refers be related to an issue currently before the Chamber, and therefore, could the Chamber consider whether to grant leave pursuant to rule 103 of the Rules.

## **II. The role of the Pre-Trial Chamber in relation to the interests of justice in the initiation of a case through the issuance of an arrest warrant or summons to appear**

### **A. Preliminary remark**

11. At the outset, the Chamber highlights that the issue of whether the interests of justice are a factor to be considered by the Chamber prior to the initiation of a

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<sup>15</sup> ICC-01/04-373; and ICC-01/04-01/06-919-tEN.

<sup>16</sup> ICC-02/04-01/05-342.

<sup>17</sup> ICC-01/04-01/06-1289.

case is an issue which goes to the heart of the division of functions and responsibilities between the Prosecution and the Chamber pursuant to the Statute and the Rules.

**B. Prosecution's discretion to request the initiation of a case through the issuance of an arrest warrant or summons to appear**

12. The Chamber observes that, once the investigation into a situation has been initiated, the Prosecution is, according to article 54 of the Statute, the organ of the Court primarily entrusted with the investigation of those crimes within the jurisdiction of the Court allegedly committed in the relevant situation.<sup>18</sup>
13. If as a result of the materials gathered during the investigation, the Prosecution considers that there are reasonable grounds to believe that a person is criminally liable under the Statute, the Prosecution may, pursuant to article 58(1) and (7) of the Statute, request the Chamber to initiate a case against the said person through the issuance of an arrest warrant or a summons to appear.<sup>19</sup>
14. The Chamber observes, nevertheless, that neither article 58 (1) nor article 58 (7) of the Statute require the Prosecution to request the issuance of an arrest warrant or a summons to appear whenever there is reasonable grounds to believe that a person is criminally liable under the Statute.
15. This, in the Chamber's view, is consistent with the fact that, under article 53(2) of the Statute, the Prosecution may conclude that there is not a sufficient basis for prosecution for reasons other than the "lack of factual or legal basis to seek a

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<sup>18</sup> ICC-01/04-01/07-428-Corr, para.13(iii) , ICC-01/04-01/06-1-US-Exp, para. 20.

<sup>19</sup> ICC-01/04-01/06-1-US-Exp, paras. 8, 14, 20.

warrant or a summons under article 58”.

16. In this regard, the Chamber notes that article 53(2) of the Statute makes express reference to two additional criteria on which the Prosecution may base its conclusion that there is not a sufficient basis for prosecution:

- i. matters relating to admissibility under article 17 of the Statute; and
- ii. matters relating to the interests of justice.

17. Moreover, the Chamber observes that article 53(2) of the Statute does not provide for a definition of the expression “interests of justice”. It only refers by way of example to some issues which are part of the notion of interests of justice. They include the gravity of the crime, the interests of victims, the age or infirmity of the relevant person and his or her role in the commission of the alleged crimes.

18. As a result, in accordance with the analytical framework set out in the Vienna Convention on the Law of Treaties, the literal interpretation of article 58 of the Statute, as well as its contextual interpretation in light of article 53(2) of the Statute, lead to the following two conclusions:

- i. the Prosecution has been granted by the States Parties discretion to decide whether to request the initiation of a case through the issuance of an arrest warrant or a summons to appear.<sup>20</sup> One of the factors that the Prosecution must take into consideration at that stage is whether such a way of proceeding is detrimental to the interests of justice; and
- ii. the States Parties have not established in the Statute or in the Rules a

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<sup>20</sup> ICC-01/04-01/06-1-US-Exp, para.150.



closed list of criteria, according to which the Prosecution must exercise its discretion to request, or not to request, the issuance of an arrest warrant or a summons to appear.

**C. The scope of the Chamber's power to review the Prosecution's exercise of its discretion**

19. The question then arises as to what extent States Parties have provided the Chamber with the power to review the Prosecution's exercise of its discretion.
20. The Chamber observes that article 53(3)(b) of the Statute expressly provides for the Chamber's *proprio motu* review of any Prosecution's decision "not to proceed" which is solely based on the interests of justice.
21. No matter whether the Chamber's review power under this provision is only applicable in relation to the Prosecution's decision to put an end to the investigation of a given situation, or whether it is also applicable in relation to each Prosecution's decision not to prosecute a specific individual, the Chamber emphasises that article 53(3)(b) of the Statute only confers upon the Chamber the power to review the Prosecution's exercise of its discretion when it results in a decision not to proceed.
22. In the view of the Chamber, article 53(3)(b) of the Statute does not entrust the Chamber with the power to review the Prosecution's assessment that the initiation of a case against a given individual through the issuance of an arrest warrant or a summons to appear would not be detrimental to the interests of

justice.<sup>21</sup>

23. Nor is such a power granted by either article 58(1) and (7) of the Statute, which provide that the Chamber “shall” issue a warrant of arrest or a summons to appear whenever it is satisfied that there are reasonable grounds to believe that the person subject to the Prosecution’s request is criminally liable under the Statute.

24. This interpretation, which has already been endorsed by the Appeals Chamber in the case of *The Prosecutor v. Bosco Ntaganda*,<sup>22</sup> leads to the conclusion that, while States Parties have granted the Prosecution discretion to decide whether to request the initiation of a case through the issuance of an arrest warrant or a summons to appear, the Chamber is bound to grant the Prosecution’s request, if, after the examination of the supporting materials presented by the Prosecution, it is satisfied that there are reasonable grounds to believe that the relevant person is criminally liable under the Statute .

25. In the Chamber’s view, the only exception to this rule is the Chamber’s discretion, pursuant to article 19(1) of the Statute, to analyse, *proprio motu*, prior to deciding upon the Prosecution’s request to initiate a case, whether such case is, indeed, admissible.<sup>23</sup> In this regard, the Chamber has already held that:

[...] the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1)(a) to (c), 2 and 3 of the

<sup>21</sup> The Annex 7 of the Application, para. 50.

<sup>22</sup> ICC-01/04-02/06-20-Anx2, paras. 77-89, pp. 34-39; ICC-01/04-169, paras. 42-45, pp. 10-11.

<sup>23</sup> ICC-01/04-169, para. 48.

Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.<sup>24</sup>

26. Moreover, the Chamber observes that the Appeals Chamber, in its 13 July 2006 Judgment, has held that, when the Prosecution's request is made on a *confidential* and *ex parte* basis, and for the purpose of preserving the interests of the relevant person, the Chamber must exercise its discretion under article 19(1) of the Statute in only exceptional circumstances.<sup>25</sup>

**D. Lack of review powers by the Chamber and full responsibility of the Prosecution for its assessment that the initiation at this stage of cases against Omar Al Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice**

27. The Chamber observes that, in the Application, the Applicants expressly state that they do not seek to raise any admissibility issue at this stage.<sup>26</sup> In particular,

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<sup>24</sup> ICC-01/04-01/06-8-Corr 17, Annex I, para. 29. In its 10 February 2006 Decision, the Chamber put forward the only existing definition of article 17 (1)(d) gravity threshold provided for to date in the jurisprudence of the Court. According to such definition (ICC-01/04-01/06-8-Corr-Annex I, para. 63):

any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17 (1)(d) of the Statute if the following three questions can be answered affirmatively:

1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct);
2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and
3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?

Nevertheless, the Appeals Chamber, in its *opinio iuris* provided for in its 13 July 2006 Decision, stated that this definition of article 17 (1)(d) gravity threshold was flawed ( ICC-01/04-169, para. 82.).

<sup>25</sup> ICC-01/04-169, para. 52.

<sup>26</sup> The Application, para. 51.

the Chamber notes that, at no point in the Application, do the Applicants make (i) reference to national proceedings relating to those crimes and individuals that are the subject to the Prosecution Application and the Prosecution Second Application; and (ii) submissions in relation to whether the article 17(1)(d) gravity threshold is met by the cases whose initiation is requested by the Prosecution in the Prosecution Application and the Prosecution Second Application.

28. In this regard, the Chamber observes that the Applicants highlight in their Application that their submissions are confined to the issue of whether, under the existing circumstances in Sudan, the initiation of a case against the current president of Sudan, Omar Al Bashir, and three alleged commanders of organised armed groups would be prejudicial to the interests of justice.<sup>27</sup>

29. Nevertheless, as explained in the previous subsection, the Chamber neither has the power to review, nor is it responsible for, the Prosecution's assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organised armed groups would not be detrimental to the interests of justice.

30. In this regard, the Chamber emphasises that it was the States Parties' express will that the power to, and responsibility for, carry out such assessment, lies with the Prosecution.

31. Finally, the Chamber highlights that, by referring the Darfur situation to the Court pursuant to article 13(b) of the Statute, the Security Council of the United

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<sup>27</sup> The Application, paras 7 and 8.

Nations has also accepted that the investigation into the said situation, as well as any prosecution arising from it, will take place in accordance with the division of functions and responsibilities between the Prosecution and the Chamber provided for in the Statute and set out in the present decision.

#### **E. Conclusion**

32. In light of the above-mentioned, the Chamber concludes that the matters to which the Application refers are unrelated to any issue currently before the Chamber.

33. As a result, the Chamber considers that the first and foremost criterion for granting leave pursuant to rule 103 of the Rules has not been met.

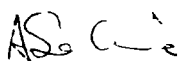
**FOR THESE REASONS,**

**DECIDES:**

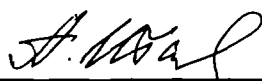
(i) not to grant leave to the Applicants pursuant to rule 103 of the Rules; and consequently,

(ii) not to take into consideration the observations included in the Application, and to reject the Applicants' request for a hearing.

Done in both English and French, the English version being authoritative.



**Judge Akua Kuenyehia  
Presiding Judge**



**Judge Anita Ušacka**



**Judge Sylvia Steiner**

Dated this Wednesday 4 February 2009

At The Hague

The Netherlands