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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DARFUR, THE SUDAN

Public Document

Application for Leave to Appeal Against Decision on Application under Rule 103

Source: Applicants, represented by Sir Geoffrey Nice QC and Rodney Dixon

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Introduction

1. The Applicants, being the Applicants in the Application under Rule 103 (hereinafter “the Application”), file this application for leave to appeal against the Pre-Trial Chamber’s Decision on the Application under Rule 103, dated 4 February 2009, and notified to the Applicants on 5 February 2009 (hereinafter “the Decision”).
2. The application for leave to the Pre-Trial Chamber is made pursuant to Article 82(1)(d) of the Statute, Rule 155, and Regulations 33 and 65.
3. The Decision raises clear issues of legal principle which the Applicants submit are appealable issues that satisfy the requirements for leave to appeal to be granted under the provisions of Article 82(1)(d) for the reasons set out below.

Errors in the Decision

Applicants’ grounds not addressed by the Pre-Trial Chamber

4. The Pre-Trial Chamber refused leave to the Applicants pursuant to Rule 103 on the basis that the Chamber has no power under the Statute to review the Prosecutor’s implied assessment that the issuance of an arrest warrant would not be detrimental to the interests of justice.
5. This was only one of four grounds relied on by the Applicants to justify the Chamber’s refusing the Prosecutor’s applications for arrest warrants; the grounds being:
 - (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 be pursued without the need for any consideration of involvement of the ICC at this stage.

Although the Pre-Trial Chamber identified the other three grounds relied on by the Applicants (at p. 3 of the Decision), the Chamber failed to deal with them at all in the Decision.

6. The Chamber's Decision refusing leave under Rule 103 determined (at para. 10) that "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".
7. This is completely to misstate or misunderstand a large part of the Applicants' case. Grounds (1), (3) and (4) of the Application (as set out at p. 3 of the Decision) do not fall naturally *or at all* within an "interests of justice" rubric and are independently capable of justifying refusal of the Prosecutor's applications. At no stage in the Application or in the Supplemental filing did the Applicants limit their argument to considerations of the interests of justice.
8. It may be thought self-evident that reasons other than the interests of justice *could* justify refusing an arrest warrant to a Prosecutor. Suppose, not at all inconceivable although not this case and entirely hypothetical, that a State being investigated threatened to unleash an atomic bomb in retaliation in the event of an arrest warrant being issued as requested by a Prosecutor. If the court determined to refuse the warrant in the circumstances, the court would inevitably find it had the power to do so, but any such refusal would have nothing to do with the interests of justice. It would reflect a national security interest of the country at risk of being bombed. Indeed, the long term interests of justice might, arguably, be served by *issuing* the warrant but that possibility would never stay the hand of the court if it determined to refuse the warrant. The UK House of Lords recognised exactly this reality in the recent leading case at Annex 21 of the Application: even though "[i]t is extremely distasteful that an

independent public official should feel himself obliged to give way to threats of any sort” (at para. 52), the decision not to prosecute due to the real risk to British lives was held to be lawful.

9. It is inconceivable that any international court or tribunal taking any such threat of nuclear attack seriously would not, at the very least, *consider* exercising a power, whether or not *expressly* granted, to save life in these circumstances. A court faced with such a dilemma *would* find that it had a power to address the issue - even if that power was not expressly articulated in founding documents - by reading the power into its statute or by determining that the power fell within its inherent powers (see below paras. 29-31 for discussion of the legal basis for inherent powers). To suggest, as the Decision does, that a statute could deprive a court of such a power is unrealistic.
10. Expressed differently, this ultimately extreme and - again - entirely hypothetical example remote from the facts of this case, nevertheless shows that a Pre-Trial Chamber’s dealing with an application for a warrant of arrest made by a Prosecutor is not, and cannot be, an entirely mechanical exercise determined and limited by a simple reading of the Statute.
11. In this case, as outlined in the Application, the genuine concerns of the Applicants about the potential violence that could erupt as a result of arrest warrants stem from the disruptive effect that warrants could have on the intricate web of peace agreements and arrangements in Darfur and between the north and south of Sudan, and from various other factors but not from threats. These are all factors that could be beyond the control of the parties to these agreements, including the Government, opposition groupings and rebel forces.
12. The Applicant’s arguments under ground (1) in particular, bolstered as to risk by ground (3), although not of the same character or as extreme as in the hypothetical example, are within this general category of risk that demands consideration by reference to national security interests. And yet, the Pre-Trial has not addressed these grounds in the Decision.
13. Further, in respect of ground (4) the Chamber did not address at all the arguments of the Applicants, as supported by reliable international and local opinion, concerning the

inflammatory nature, and the harmful and dangerous effects, of an ICC imposed solution to the exclusion of local initiatives, particularly in light of the Security Council referral of a non-State party to the Rome Statute (see paras. 26-33 of the Application).

14. The Chamber appears to criticise the Applicants for not raising any arguments pertaining to “admissibility” of the cases (see para. 27 of the Decision). Any such arguments could, of course, be included at some stage in a separate application on admissibility, something the Chamber acknowledges that the Applicants have not raised in this Application. Having noted this the Chamber then proceeds - illogically - in the following paragraph 28 to find that “*In this regard*, the Chamber observes that the Applicants highlight in their Application that their submissions are *confined* ... to the interests of justice” (emphasis added). The position of the Applicants is again misstated or misunderstood. The footnote to this paragraph refers to paragraphs 7 and 8 of the Application in support of the Chamber’s finding, but these paragraphs explicitly make reference to all four grounds listed above.

15. Another hypothetical illustration of the same point that the “interests of justice” rubric does not cover all of the grounds relied upon by the Applicants would be if a Prosecutor - not this case - acted with an agenda designed to serve a purpose so adverse to the ICC’s reputation that to grant an otherwise justified application for an arrest warrant would bring the court into disrepute. A Pre-Trial Chamber refusing an application in such circumstances would not be on grounds of the interests of justice but on the basis of inherent powers the Chamber would find it had, powers that could appropriately be called on to deal with the situation covered in ground (3) of the Application.

16. The Applicants’ submission is that the Pre-Trial Chamber does have powers to take paramount considerations of these sorts into account. It is the Chamber seized with adjudicating upon absolutely fundamental applications by the Prosecutor and if necessary such powers would have to be read into the Statute and/or derived from the court’s inherent powers.

17. Further and in any event, as set out below, the provisions of Rule 103 provide an *express* basis for the Chamber to invite submissions on such issues.

18. Accordingly, the Applicants argue that leave to appeal must be granted in order that all of these grounds are considered by the Appeals Chamber or by the Pre-Trial Chamber if so directed by the Appeals Chamber. The resolution of these grounds is plainly essential to the outcome of the present applications as they could constitute grounds to refuse the warrants of arrest.
19. By deciding that it *cannot* consider materials, which may be accurate and reliable, the Chamber's Decision places the ICC in a position in which it could be viewed as responsible in part for any of the potentially grave consequences that could follow the issuance of warrants, not on the basis of balanced and reasoned consideration of the materials but because it refused even to review the materials.

Interests of justice is an issue before the court

20. Furthermore, the interests of justice argument *is* an issue before the Pre-Trial Chamber in respect of the applications for the arrest warrants. As with the other grounds relied upon by the Applicants, there are situations in which it is inconceivable that the court would not use its powers, whether express or inherent and necessary for its proper judicial function, to refuse to issue an arrest warrant in the interests of justice.
21. Suppose an organisation sought to make available to the Pre-Trial Chamber some evidence which could fundamentally undermine factual allegations made by a Prosecutor in his/her application, completely exonerating a potential accused. An application to receive this evidence would be based on an interests of justice argument. Again, and assuming that the Prosecutor declined to attend to the new evidence, it is inconceivable that an international court would refuse to receive such vital evidence simply on the mechanistic basis of there being no express provision in its statute to do so given that the consequences of disregarding the proffered evidence could be to issue an arrest warrant on false grounds.
22. The Applicants respectfully submit that the Pre-Trial Chamber's interpretation of the particular provisions of the Statute and Rules, and as a whole, is erroneous. Even though Article 53(3)(b) and Article 58(1) and (7) make no express provision for the Pre-Trial Chamber to review the Prosecutor's assessment of the interests of justice

when the Prosecutor decides to proceed with an application for an arrest warrant, this is not an end to the matter.

23. The Applicants argue first that where no express provisions exist in the Statute, the power to review the Prosecutor's decision to proceed with an application for an arrest warrant can be read into the Statute. This is especially so since there are no provisions which expressly prohibit the Chamber performing this function if it were necessary to do so to safeguard the interests of justice (and similarly to take account of national security interests and to uphold the integrity of the proceedings). The mere fact that the Statute expressly provides for judicial review if the Prosecutor decides not to proceed in the interests of justice, and so declares, is not determinative of the matter.
24. There is nothing in the Statute or Rules that requires the Prosecutor to take into consideration these interests and factors when applying for an arrest warrant, and to verify that he has done so before a warrant is issued. There is nothing in the Prosecutor's applications or in the Decision which indicates that the Prosecutor has in fact applied his mind to these matters and performed any balancing of the interests involved. If the Pre-Trial Chamber is right, and it has no responsibility for such matters, there is no guarantee that these interests will be considered by any of the organs of the court directly concerned with the issuance of arrest warrants when it may be absolutely essential to do so.
25. The Applicants submit that the proper approach must be for both the Prosecutor and the Pre-Trial Chamber to be responsible for assessing such matters as the organs of the court mandated by the Statute to deal with the issuance of warrants of arrest. The exercise of the Prosecutor's discretion cannot be wholly beyond review by the court. In the absence of the Prosecutor actively considering these interests, the Chamber cannot be left without the power to do so itself in all of the circumstances of the case, especially since doing so may prevent the risk of loss of life.
26. Second, Rule 103 does contain express provisions that empower the Pre-Trial Chamber to intervene if required. The adoption of Rule 103 by the States Parties explicitly envisages that the Chamber may in its discretion invite submissions from parties "at *any* stage of the proceedings ... if it considers it desirable for the proper determination of the case" in relation to "*any* issue that the Chamber deems

appropriate” (emphasis added). The Chamber did not find that there is any conflict between this Rule and the provisions of the Statute, and nor is there any. In the absence of express provision in the Statute, this Rule elaborates the powers of the Chamber to undertake its primary function of determining the case before it properly and fairly. Article 21 of the Statute provides that the court shall apply “[i]n the first place, this Statute ... *and* its Rules of Procedure and Evidence” (emphasis added).

27. Further, as the Pre-Trial Chamber notes (at para. 18 of the Decision), the framework as set out in the Vienna Convention on the Law of Treaties is applicable to the interpretation of the ICC Statute. Article 31(1) of this Convention provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. In the Preamble to the ICC Statute the States Parties resolve “to guarantee lasting respect for and the enforcement of international justice”. Articles 53 and 58, together with Rule 103, must therefore be interpreted in the context of the Preamble and the object and purpose of the Statute and Rules as reflected in the resolution of the Preamble. The interpretation advanced by the Applicants is entirely consistent with ensuring respect for international justice. It guarantees that the interests of justice are an integral part of the judicial function and that the powers of the court are unfettered in the enforcement of international justice.

28. The Appeals Chamber’s decision in the *Bosco Ntaganda* case, which the Pre-Trial Chamber cites as having endorsed its interpretation of Article 58 (at para. 24 of the Decision), did not address the issue of whether the Pre-Trial Chamber can take into consideration the interests of justice when deciding on applications for arrest warrants. As set out in the Application itself (at paras. 51-52), the issue before the Appeals Chamber was only whether challenges to admissibility could form part of the Pre-Trial Chamber’s deliberations. Moreover, the Appeals Chamber was not concerned with, and did not have to consider, whether Rule 103 provided a basis for the Pre-Trial Chamber to consider observations concerned with the interests of justice and other considerations pertaining to the issuance of arrest warrants. The issues that are the subject of this application for leave have thus not been litigated before the Appeals Chamber.

29. Third, the submissions advanced by the Applicants accord with the inherent and necessary powers the court must possess to fulfil its judicial function by virtue of its existence as a judicial organ. In the absence of express provisions in the Statute, the Pre-Trial Chamber gave no consideration to the existence and scope of such inherent powers when deciding whether it could receive the Applicants' observations.

30. These powers are widely recognised in the jurisprudence of the ICJ and other international criminal courts. For example, in the *Nuclear Tests* case before the ICJ, the court held that it

“possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute ... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purpose indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded”.¹

31. The Appeals Chamber of the ICTY held that in addition to the primary jurisdiction described in the Statute of the ICTY, the Tribunal has “an ‘incidental’ or ‘inherent’ jurisdiction which derives automatically from the exercise of the judicial function”.² The Appeals Chamber emphasised at para. 11 that “[i]n international law, every tribunal is a self-contained system (unless otherwise provided). Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardise its ‘judicial character’”. In a separate opinion to this decision it was noted that “where an objection is raised as regards its own powers, the Tribunal cannot refuse to hear such request ... What it has to decide it must decide, even if it is against its own interests, it must do so fearlessly”.³

32. The Applicants submit that all of these matters must be placed before the Appeals Chamber. As with the other grounds of the Application, referred to above, the

¹ ICJ Reports 1974, pp. 259-260, para. 23; also see *Northern Cameroons* case, ICJ Reports 1963, p. 29.

² *Prosecutor v Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 14. Also see, *Prosecutor v Erdemovic*, Judgement, Appeals Chamber, 7 October 1997, para. 16; and, *Prosecutor v Delalic et al*, Decision on Motion to Preserve and Provide Evidence, Separate Opinion of Judge Hunt, Appeals Chamber, 22 April 1999, para. 3.

³ Separate Opinion of Judge Sidhwa, paras. 33-34.

resolution by the Appeals Chamber of whether the Pre-Trial Chamber can review the Prosecutor's assessment of the interests of justice when the Prosecutor decides to proceed with an application for an arrest warrant is plainly essential for the determination of Prosecutor's applications. The outcome will define the scope of the Pre-Trial Chamber's very powers in deciding on whether to issue arrest warrants. As the Chamber itself noted, this is "an issue which goes to the heart of the division of functions and responsibilities between the Prosecution and the Chamber" (para. 11 of the Decision).

33. The issue, as with the others above, also clearly affects in a significant way the outcome of the proceedings and its resolution may materially advance the proceedings. The Applicants' observations and those of the tribal leaders would have to be considered by the Pre-Trial Chamber before any decision is made about the issuance of arrest warrants. The observations would thus have a direct bearing on whether warrants were issued at all given the very serious dangers that could arise in the event of the Prosecutor's applications being granted, as set forth in the Application under Rule 103 with substantial supporting materials.

34. As the Pre-Trial Chamber has expressed no view on the merits of the Applicants' observations, for the purposes of this application for leave the Applicants argue that the Chamber must take its submissions on the merits at their highest. It must therefore be assumed that the issuance of arrest warrants could very seriously impair the peace process and detrimentally affect the lives of many millions of ordinary Sudanese citizens in Darfur and the country as a whole.

Legal requirements for leave to appeal

35. Article 82(1)(d) provides that a decision may be appealed "that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

36. The Appeals Chamber, Trial Chambers and Pre-Trial Chambers have consistently interpreted Article 82(1)(d) to require that (i) only an issue that concerns a subject

the resolution of which is essential for the determination of matters arising in the judicial cause under examination, is appealable; (ii) the issue must significantly effect i.e. in a material way either (a) the fair and expeditious conduct of the proceedings or (b) the outcome of the trial; and, (iii) the issue must be one for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁴

37. In respect of (ii)(a) the Appeals Chamber stated that the provision extends to pre-trial proceedings as well as the investigation of crime: “Purging the pre-trial process of errors ... is designed as a safeguard for the integrity of the proceedings” (para. 11).

38. In respect of (ii)(b) the Appeals Chamber held that the Pre-Trial Chamber or Trial Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case” (para. 13).

39. As for the requirement in (iii), the Appeals Chamber noted that its purpose is to ensure that “the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings” (para. 15).

Reasons why legal requirements for leave to appeal are met

40. The import of the Decision is to find that the Pre-Trial Chamber has no power at all to consider whether the Prosecutor’s applications for arrest warrants should be refused on the basis of national security issues, the interests of justice, or on any other basis advanced by the Applicants. The Chamber is thus barred from inviting States, organisations and individuals to provide it with submissions under Rule 103 that could be relevant to these issues.

41. It follows that even if the issuance of an arrest warrant would cause great danger to the lives and well-being of the citizens of the country affected or another country, the Chamber would have no authority to act.

⁴ See ICC-01/04-168, Appeals Chamber, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, paras. 6-20; and, ICC-02/05-121, Pre-Trial Chamber I, Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation, 6 February 2008.

42. The Decision concentrates in one person, the ICC Prosecutor, unbridled and unchecked powers at a stage of proceedings which is most decisive - the issuance of a warrant can instantly transform the leader so charged into an international outcast, the leader of a pyriah State, with the crippling political and economic isolation that may result. It is logically the stage at which the powers of review of the ICC Judges ought to be most intrusive and searching to safeguard security interests, the interests of justice and the integrity of the judicial proceedings.

Appealable issue the resolution of which essential to the determination

43. The Applicants argue that the resolution of these issues must be essential to the determination of whether to issue arrest warrants in the present Situation. The Decision excludes from the Pre-Trial Chamber's deliberations all possible avenues of inquiry into whether national security interests, public interest, and international justice will be served by following the Prosecutor's proposed course of action, and into the Prosecutor's conduct in bringing these applications and the accuracy of the evidence relied on. The Chamber is prohibited by its Decision from inviting any parties to make observations on these matters, including the very leaders of tribes named as victim groups by the Prosecutor. The Chamber did not address at all the request by these tribal leaders to make oral submissions before the Chamber.

44. In this way, the express provisions of Rule 103 are rendered meaningless. Were the Appeals Chamber to take a different view, the Pre-Trial Chamber could in its discretion take account of all of these matters before making its decision, and invite submissions under the unambiguous provisions of Rule 103. These deliberations by definition could affect and change the outcome of the applications.

Significantly effect fair and expeditious conduct of the proceedings or outcome of the trial

45. As the jurisprudence of the ICC, set out above, confirms, the provisions of Article 82(1)(d) apply equally to pre-trial proceedings. The Applicants submit that in order to safeguard the integrity of the proceedings, the Appeals Chamber must determine whether there is any error in the reasoning of the Pre-Trial Chamber. The conduct of the proceedings could not be considered to be "fair", as provided for in Article

82(1)(d), were consideration of vital interests, including but not limited to the very interests of justice, erroneously excluded.

46. There is no later stage in the proceedings for the issues to be considered. Once arrest warrants were issued, if so ordered by the Pre-Trial Chamber, the potential error could not be remedied and the grave consequences that are foreshadowed by the Applicants' observations, taken at their highest for the purposes of this application for leave, could not be reversed.

47. Moreover, as stated above, the Pre-Trial Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case". The effect of the Decision being wrongly decided is plain: the Pre-Trial Chamber would have failed to consider issues that could have a direct impact on its decision and which could result in a refusal of the Prosecutor's applications.

An immediate resolution by the Appeals Chamber may materially advance the proceedings

48. As noted above, the Appeals Chamber has held that the purpose of Article 82(1)(d) is to ensure that "doubts" are removed about "the correctness of a decision or mapping a course of action" thereby providing "a safety net for the integrity of the proceedings". Given the serious risks that have been highlighted in the observations of the Applicants and the tribal leaders of Darfur (and assumed to be correct for the purposes of this application for leave), the Applicants submit that the correctness of the Decision must be tested by the Appeals Chamber.

49. This argument is underscored by the Prosecutor's apparent failure to take into account any of the observations made by the Applicants, as is evident from his latest public speech at Yale University on 6 February 2009 (which he started by saying that the "timing is perfect ... For the past 5 years no amount of negotiation has allowed the violence to abate", repeating his unsupported claim that "As of today, 5000 people are dying each month in Darfur"). In the speech the Prosecutor mentioned the three tribes that he alleges have been the victims of crimes, but nowhere says that leaders from these tribes oppose his applications for arrest warrants and have asked to be heard by the Pre-Trial Chamber before any decisions are made.

Conclusion

50. For the foregoing reasons, the Applicants submit that each of the requirements of Article 82(1)(d) are satisfied in the instant case for leave to appeal to be granted. The Applicants urge the Pre-Trial Chamber to permit the Applicants to proceed to the Appeals Chamber.



For Sir Geoffrey Nice QC

Rodney Dixon

Counsel on behalf of the Applicants

Dated this 11th day of February 2009

London, United Kingdom