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No.: ICC-02/05-03/09
Date: 6 December 2010

PRE-TRIAL CHAMBER I

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

SITUATION IN DARFUR, THE SUDAN

***IN THE CASE OF THE PROSECUTOR
V.***

***ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO
JAMUS***

URGENT

Public Document

**Prosecution Objection to the Continued Representation of Victims a/1646/10 and
a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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Legal Representatives of Victims

Legal Representatives of Applicants

Mr Brahim Koné
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Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Prosecution objects to the representation of victims a/1646/10 and a/1647/10 by Messrs Geoffrey Nice and Rodney Dixon at the upcoming confirmation hearing and in any subsequent proceedings.
2. Messrs Geoffrey Nice and Rodney Dixon represent the Sudan International Defence Group (“SIDG”) and the Sudan Workers Trade Unions Federation (“SWTUF”), two groups that are a proxy for the Sudanese government and, more particularly, for the interests of President Al Bashir. The SWTUF and the SIDG (represented at all times by Messrs Geoffrey Nice and Rodney Dixon) have persistently tried to intervene in multiple proceedings arising out of the Situation in Darfur, the Sudan. This Chamber and the Appeals Chamber have largely rebuffed these efforts. It now appears that the organizations have found new proxies through which to make their submissions; two persons granted victim status are also represented by Messrs. Nice and Dixon, and the SIDG and SWTUF pay the legal fees.
3. Counsel proposes to make submissions at the upcoming confirmation hearing contesting the legitimacy and appropriateness of the Court’s exercise of jurisdiction in any criminal matter arising out of the referred Situation. The Prosecution suggests that counsel may be intending to use these proceedings, despite its repeated failed attempts, as a vehicle to express the views of the Government of the Sudan (“GoS”) and its President, who is currently refusing to recognize the authority and jurisdiction of this Court.
4. Article 16 of the Code of Professional Conduct for Counsel places an obligation on counsel not to put the interests of states or other organizations or persons before the interests of his/her client. The Prosecution submits that the interests of these victims should not therefore be subordinated to or used to present the views of President Al Bashir or its proxies. The Prosecution is further concerned that continued representation of victims a/1646/10 and a/1647/10 by Messrs. Nice and Dixon may

result in their access -- which may be shared with their other clients and the entities that are funding this representation -- to confidential information and a consequential risk to persons and to the proceedings.

5. On this basis the Prosecution requests that the Pre-Trial Chamber issue an order terminating the representation of the victims by Messrs. Nice and Dixon and appointing alternative counsel. Alternatively, in the event that such a step cannot be taken before the confirmation hearing itself, the Prosecution requests that the Court limit the scope of observations that Messrs. Nice and Dixon may make on behalf of these victims.

II. REQUEST FOR FILING TO BE RECEIVED AS URGENT

6. The Prosecution request that this filing be received on an urgent basis on the ground that it pertains to a confirmation hearing which occurs on Wednesday 8 December 2010 and a response from the parties may be required for these issues to be resolved as soon as possible, and in any event prior to the confirmation hearing.

III. STATEMENT OF FACTS

Preliminary Statement

7. The SIDG was formed in the wake of the Prosecutor's Application for an Arrest Warrant to be issued for President Omar Al Bashir. In a public statement, the President of SIDG Rasheed Mohamed Kheir Abdel Gadir is quoted to have said "*We are asking the Judges to reject the Prosecutor's request to issue arrest warrants against the Sudanese president and three [Darfur] rebel leaders*"¹.

¹ IslamOnline.net, 14 January 2009, "Sudanese Petition ICC Against Darfur Arrests" http://www.islamonline.net/servlet/Satellite?c=Article_C&pagename=Zone-English-News/NWELayout&cid=1231926492936

8. The SWTUF is a government-funded umbrella organization of Sudanese trade workers unions. Its President, Professor Ibrahim Ghandour, is also the Secretary General/Political Secretary of President Omar Al Bashir's ruling party – the NCP.²
9. Recently, Ibrahim Ghandour publicly praised what he says are “strong efforts” by countries to resist pressure from the (ICC) to arrest indicted Sudanese President Omar Hassan al-Bashir.³
10. The SIDG and SWTUF have publicly affirmed support to President Al Bashir and the Sudanese leadership on the issue of the ICC. They publicly outlined a plan to frustrate the efforts of the ICC to prosecute Sudanese charged with crimes committed in Darfur.⁴ The positions they argue exactly mirrors the position of President Al Bashir on the issue of the ICC.⁵ Their actions make them surrogates of President Al Bashir.⁶
11. Both organizations, publicly and persistently, attempted by multiple means to contest the authority of the ICC and attempt to frustrate the work of the ICC to prosecute any Sudanese citizen as a consequence of the Security Council referral. In support of these efforts they retained two attorneys, Sir Geoffrey Nice and Rodney Dixon. The President of the SWTUF has stated publicly that his organization pays Nice's legal fees.⁷
12. SIDG and SWTUF through Messrs. Nice and Dixon previously made an effort to intervene as amicus in proceedings before this Court in order to challenge the

² Sudan Views, 18 January 2010 “Ghandour: Informs Representative of UN Secretary General on Arrangements for Holding the Elections” http://sudanviews.net/index.php?option=com_content&task=view&id=2311&Itemid=2

³ Peter Clotey, “Sudan Governing Party Rules Out Cooperation With ICC”, October 27, 2010, Voice of America, Copyright 2010 Federal Information & News Dispatch, Inc

⁴ Sudan Vision Daily Newspaper, Thursday 31 July 2010, “Sudan International Defence Group to collect 10m Signatures against Ocampo's Dec” <http://www.sudanvisiondaily.com/modules.php?name=News&file=article&sid=37242>

⁵ ICC-02/05-72-US-Exp-Anx A

⁶ Fighting to keep genocide out of the Bashir arrest warrant, 28 July 2009 http://ijcentral.org/article/fighting_to_keep_genocide_out_of_the_bashir_arrest_warrant/

⁷ Africa Confidential, 23 July 2010, Vol. 51, No. 15 “Sudan/Britain : Khartoum's Most Wanted” (Annex “1”)

legitimacy of the Court. When that effort failed, they tried another route –victims’ participation and attempted to assist persons seeking victim recognition in the Al Bashir case. This Chamber denied those requests put forward by Messrs. Nice and Dixon on the ground that the applicants did not meet the statutory qualifications for victim status.

13. In the instant case, the Prosecution received the two victims’ applications without indications that the victims were represented by Messrs. Nice and Dixon. Thereafter, the representation was revealed after the applications were granted. Counsel have also expressed their intention to express the victims’ views and concerns at the confirmation hearing.

Filings in the Darfur Situation

14. On 11 January 2009 the SWTUF and the SIDG, represented by Messrs. Nice and Dixon, filed an "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".⁸ They requested 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.”*⁹

⁸ ICC-02/05-170

⁹ ICC-02/05-170, para 8

15. On 4 February 2009, SWTUF and SIDG, again represented by Messrs. Nice and Dixon, filed a Supplement to their Application, along with extended annexes.¹⁰
16. The Pre-Trial Chamber concluded¹¹ that the Application of 11 January 2009 referred to matters that were unrelated to any issue before the Chamber. As a result, the Chamber declined to grant leave to the applicants to submit their application; instead, it determined that it would not take into consideration the observations included in the Application and rejected SWTUF and SIDG's request for a hearing. Notwithstanding that the application was rejected, the organizations thereafter boasted that they had successfully presented factual materials to the Chamber – through the annexes filed on 4 February – and thereby influenced the Chamber's consideration.¹²
17. On 11 February 2009 the SWTUF and SIDG, again represented by Messrs. Nice and Dixon applied for leave to Appeal the decision denying them leave to submit their application.¹³ The Pre-Trial Chamber denied leave to appeal: it noted that neither the SWTUF nor SIDG were “part[ies] to the proceedings relating to the investigation into the Darfur situation and accordingly they had no standing to appeal the Decision.”¹⁴

Filings in the Bashir Case

18. On 24 June 2009, the Pre-Trial Chamber issued a decision on the Prosecution's application for an arrest warrant against President Al Bashir. It thereafter granted leave to the Prosecution to appeal the decision declining to authorize arrest for

¹⁰ CC-02/05-182

¹¹ ICC-02/05-185

¹² <http://sidgsudan.org/>

¹³ CC-02/05-187

¹⁴ ICC-02/05-192

genocide.¹⁵ On 6 July 2009, the Prosecution filed its document in support of the appeal.¹⁶

19. On 20 July 2009 the SWTUF and the SIDG, represented by Messrs Nice and Dixon, applied again under Rule 103 to participate as amicus in the appeal.¹⁷ The Prosecution responded.¹⁸ On 24 August 2009, the SWTUF and SIDG applied for leave to reply to the Prosecution's response.¹⁹
20. On 18 September 2009 the Appeals Chamber permitted the Applicants to submit observations on the appeal, *"limited to the issue of whether the Pre-Trial Chamber applied the correct legal test under article 58 of the Statute to determine whether there are reasonable grounds to believe that Omar Hassan Ahmad Al Bashir is criminally responsible for genocide"*, granted the Prosecutor leave to respond, and rejected the Application for Leave and Reply.²⁰ It issued the reasons for its decision on 9 November 2009.²¹
21. On 3 May 2010 the Registry filed a "Report on applications a/0774/10 to a/0781/10 to participate in the proceedings" together with eight applications of persons seeking qualification as victims to participate in the pre-trial stage, in particular in the consideration by the Pre-Trial Chamber of the request for an arrest warrant against President Al Bashir for genocide.²² On 18 June 2010 the Prosecution filed observations²³ that noted, inter alia, that the SWTUF and SIDG acted as intermediaries for the applicants and that the two organizations appeared to be a proxy for the suspect himself, who declines to recognize the Court. On 23 June 2010

¹⁵ ICC-02/05-01/09-21

¹⁶ ICC-02/05-01/09-25

¹⁷ ICC-02/05-01/09-27

¹⁸ ICC-02/05-01/09-29

¹⁹ ICC-02/05-01/09-33

²⁰ ICC-02/05-01/09-43

²¹ ICC-02/05-01/09-51

²² ICC-02/05-01/09-82-Conf-Exp; supplemented on 26 May 2010 by ICC-02/05-01/09-84-Conf-Exp; ICC-02/05-01/09-84-Conf-Exp-Anxl.

²³ ICC-02/05-01/09-90

the Applicants requested leave to respond and provide additional information on the alleged conflict of interest arising from the Legal Representatives' involvement in the representation of the Applicants and two organisations in the present case.

22. Subsequently, the Single Judge denied authorisation to the eight applicants to participate as victims and rejected the Request of the Legal Representatives.²⁴

Filings in the Garda case

23. On 11 September 2009 the Registry filed the "Second report on applications to participate in the proceedings"²⁵ in which it submitted, as annexes, 52 applications for participation in the pre-trial phase of the Case. On 8 October 2009 the Single Judge denied authorization to participate in the proceedings as victims to Applicants a/0581/09 to a/0586/09.²⁶ On 9 October 2009, Messrs. Nice and Dixon, the Legal Representatives of these applicants, made a filing requesting relief in this regard,²⁷ which the Single Judge rejected.

Filings in the Banda and Jerbo case

24. On 12 August 2010 the VPRS filed the "Report on eight applications to participate in the proceedings" together with the eight applications.²⁸ The Prosecution²⁹ and Defence³⁰ made submissions on 10 September 2010. The Pre-Trial Chamber

²⁴ ICC-02/05-01/09-93

²⁵ ICC-02/05-02/09-97-Conf-Exp, Anx3-Anx54.

²⁶ ICC-02/05-02/09-147.

²⁷ ICC-02/05-02/09-154

²⁸ ICC-02/05-03/09-60-Conf-Exp

²⁹ ICC-02/05-03/09-69

³⁰ ICC-02/05-03/09-70-Conf

recognized certain applicants, including a/1646/10 and a/1647/10, as victims for the purpose of participating during the pre-trial stage.³¹

25. On 12 November 2010 the victims represented by Messrs Geoffrey Nice and Rodney Dixon filed “Observations on behalf of Victims a/1647/10 and a/1648/10”.³² In their observations, counsel stated (emphasis added):

“As the Trial Chamber will be aware from the covering letter submitted with the applications of these two victims for participation in the present case, they were assisted in the preparation of their applications by the Sudan International Defence Group (SIDG) and this work has been supported and funded by the Sudan Workers Trade Unions Federation (SWTUF). The legal representatives of the two victims have acted and continue to act on behalf of these two organisations and victim applicants who they have assisted, in other cases in the Sudan Situation before the ICC.”³³

[...] The legal representatives have not been able to meet with the two victims since the Chamber's decision of 29 October 2010 in which they were recognised as victims in the present case. In light of this decision, SIDG members are now assisting them and will be advising [...] Members of SIDG are planning to meet the two victims with the relevant court documents next week in the Haskanita area for this purpose [...] Further meetings will be arranged with Counsel as necessary and when possible.

From the first meeting with the victims, both of them sought to apply to be recognized as victims in the case, inter alia, because of the harm and suffering that they endured in the attack on the AMIS base in Haskanita

³¹ ICC-02/05-03/09-89

³² ICC-02/05-03/09-96. The Prosecution assumes that counsel meant to refer to victims a/1646/10 and a/1647/10).

³³ ICC-02/05-03/09-96, para 4

on 29 September 2007. On the basis of the initial instructions taken from them about what issues they might wish to raise before the ICC, they stated that nothing had been done to investigate and acknowledge what had happened to them and other ordinary villagers at the hands of rebel forces in Haskanita on that day. They raised questions about the legitimacy and true motivations of the proceedings when those who reside in Haskanita had seemingly been completely overlooked. Put in straightforward terms, they wanted the ICC Judges to be informed of their concerns, for the truth to be known, and for appropriate action to be taken. They had hoped that the authorities in Darfur would provide a remedy in the courts or through traditional methods of offering compensation, and questioned whether it was appropriate for an international court to be involved, particularly for a case of this kind.”³⁴

26. Messrs. Nice and Dixon also asked on behalf of the two victims to “participate in the Confirmation hearing by making short written and oral submissions on the issues outlined above, and in accordance with any orders made by the Chamber.”³⁵

IV. PROSECUTION’S SUBMISSIONS

27. As noted previously, the SIDG and the SWTUF – the entities that share representation with the two victims in this case and also pay the legal fees of Messrs Nice and Dixon -- are indeed surrogates or proxies for President Al Bashir. President Al Bashir has refused to recognize the jurisdiction of the Court. The entities and counsel also have previously tried several times to inject themselves into this Court’s proceedings to make their political statements against its jurisdiction, speaking ultimately on behalf of President Al Bashir.

³⁴ ICC-02/05-03/09-96, para 7

³⁵ ICC-02/05-03/09-96, para 12

28. The circumstances of the relationship between counsel and the two victims further substantiate their joint alliance with President Al Bashir. For example, Messrs Nice and Dixon state that they “*met in person with both victims on one occasion in Darfur for the purpose of consulting with them about their possible victim applications to the ICC.*”³⁶ The fact that they have been given such access, when the Defence (as evidenced by their recent filings)³⁷, and the Prosecution have been denied access within Darfur, additionally substantiates that President Al Bashir is using his authority to support and promote the participation of Messrs Nice and Dixon in the representation of these victims.
29. Moreover, the submissions made so far by counsel confirm (a) that through them President Al Bashir and his supporters have been attempting different ways to access the Court’s process in a covert manner; and (b) the attempted interventions are designed to inject arguments in favor of President Al Bashir’s position.
30. President Al Bashir has ample opportunity to make known his disagreement with the existence of the Court, its processes, and its decisions. He can appear before the Court and make such submissions, but the Court should not allow him to present them through the victims. The PTC has an inherent duty to protect the integrity of its proceedings and proper administration of justice to and to prevent actions that will lead to an abuse of its process.
31. Of equal concern, by representing the victims in this case, counsel potentially will have access to sensitive materials. These particular lawyers have multiple loyalties to the victims whose participation has been authorized as well as the organizations that counsel represent and that pay their fees to represent the two victims. And if in fact the interests of victims and organizations are legitimately congruent – accepting for

³⁶ ICC-02/05-03/09-96, para 6

³⁷ “Defence Application pursuant to Article 57(3)(b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan”. ICC-02/05-03/09-95; “Defence Application for leave to Appeal the ‘Decision on the Defence Application pursuant to article 57(3) (b) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of Sudan’ of 17 November 2010” on 19 November 2010 ICC-02/05-03/09-105

these purposes that the victims are voluntarily surrogates for the interests of the GoS and President Al Bashir – their access to sensitive information is nonetheless a risk.

32. Article 16 of the Code of Professional Conduct for Counsel (“Code of Conduct”) places an obligation on counsel not to put the interests of states or other organizations or persons before the interests of his/her client. If the victims are not in fact proxies for President Al Bashir, their continued representation by their present counsel alternatively creates a potential conflict of interest. There is a significant risk that the interests of these victims will be subordinated to those of President Al Bashir or those of the two organizations paying the legal fees of Messrs. Nice and Dixon.
33. Additionally, Article 6 of the Code of Conduct provides that Counsel shall not permit his independence, integrity or freedom to be compromised by external pressure or do anything which *may lead to any reasonable inference* that his independence has been compromised. The multiple loyalties of counsel and current funding arrangements for their representation of the victims are not conducive for independent representation of these victims which is free of any external pressure or influence.
34. For these reasons the Prosecution submits that the Chamber³⁸ should require that the two victims be represented by other counsel in this case. Such a step will protect the integrity of the processes and the interests of the victims. The Court may organize representation of victims in a manner that best suits the proper management of the case,³⁹ and victims do not have the absolute right to retain counsel of their own choosing under the Statute, the Rules or the practice of the Court.

³⁸ According to the ICTY Appeals Chamber decision in Prlic, the Chamber considers that, [...] safeguarding the interests of justice requires not only the existence of a mechanism for removing conflicts of interests after they have arisen but also the prevention of such conflicts before they arise; See Prosecutor v. Jadranko Prlic *et al*, *Appeals Chamber of the ICTY in “Decision On Appeal By Bruno Stojic Against Trial Chamber’s Decision On Request For Appointment Of Counsel”*, 24 November 2004 at para 25

³⁹ ICC-01/04-01/07-1328 “Order on the organisation of common legal representation of victims”, para 11; ICC-01/04-01/07-1328 “Order on the organisation of common legal representation of victims,” para 14; ICC-01/05-01/08-769 Decision on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team" para 40

35. Thus, the Chamber may substitute counsel for the victims in this instance to avoid an inappropriate use of the Court's process and to avert the risk that the process will be undermined or otherwise adversely affected from within. So long as another qualified counsel is provided as a replacement, such an action would be proper and consistent with the Chamber's duties. It will ensure that proceedings are fair and expeditious, while respecting the participatory rights of the victims. And it will avoid a risk that the victims' actual interests might be sidelined to favor those of President Al Bashir.

Remedy Sought

In view of the above, the Prosecution hereby requests that the Pre-Trial Chamber order as follows:

- (a) To terminate representation of Victims a/1646/10 and a/1647/10 by Messrs Nice and Dixon; and
- (b) Appoint alternative counsel for the victims.

In the alternative,

- (c) Order Messrs. Nice and Dixon to terminate their representation of SIDG and SWTUF in any matter relating to this case and to desist from receiving any further funding from these organizations or the GoS either directly or indirectly for their representation of Victims a/1646/10 and a/1647/10.

(d) To limit the observations that may be submitted by Counsel at the upcoming confirmation proceeding on behalf of the victims to matters that directly affect their personal interests.



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Luis Moreno-Ocampo
Prosecutor

Dated this 6th day of December 2010
At The Hague, The Netherlands