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2012

**Decision on Application under Rule 103,  
Situation in Darfur, Case no ICC-02/05, Pre-Trial  
Chamber I, 4 February 2009**

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## **Decision on Application under Rule 103, *Situation in Darfur*, Case n° ICC-02/05, Pre-Trial Chamber I, 4 February 2009**

This decision was rendered by Pre-Trial Chamber (PTC) I in connection with an application to submit observations in the course of the Chamber's consideration of the Prosecutor's application for warrants of arrest<sup>1</sup> against Omar Hassan Ahmad Al Bashir and three alleged commanders of organized armed groups in Sudan. The PTC's decision became definitive when the applicants were denied leave to appeal<sup>2</sup> (on the ground of the applicants' lack of standing in the 'case(s)'<sup>3</sup>). Two main legal issues can be said to arise from the decision. Firstly, the PTC clarifies to some extent the criteria to be met before the Court<sup>4</sup> would grant leave to submit observations under Rule 103 of the Rules of Procedure and Evidence and the purposes of such observations. Secondly, the PTC has confirmed the Court's practice reflecting a certain understanding of the division of power – or of functions, if one prefers – between the Office of Prosecutor and the judicial Chambers of the Court. Besides these issues, which the present decision have addressed, there is a question that remains unresolved, *viz.* whether at this stage of the proceedings the PTC is precluded from addressing, on its own motion, the issue of admissibility. But before these questions are examined in turn, some very brief comments will be made on the immediate practical effect of the Pre-Trial Chamber's decision not to grant leave to the applicants to submit observations.

### **Practical consequences of the denial to submit observation**

The applicants in the present proceeding were the Citizens' Organisations of The Sudan, the Sudan Workers Trade Unions Federation and the Sudan International Defence Group who were opposed – to say the least – to the issue of an arrest warrant against Omar Al Bashir, for genocide, crimes against humanity and war crimes according to the Prosecutor's original request. In accordance with the case law of the Court's different Chambers, leave of a Chamber is required before observations are submitted pursuant to Rule 103,<sup>5</sup> and the present decision relates merely to the issue of leave to submit observation and not the merits of the observations. Thus, the immediate legal-procedural consequence of the Pre-Trial Chamber's denial of the application was that the parties in this case would have nothing to respond to and the Registrar would have no documents to communicate to the parties pursuant to Rule 103 of the Rules of Evidence and Procedure. On a more pragmat-

<sup>1</sup> Application for an Arrest Warrant under Article 58, filed by the Prosecutor on 14 July 2008 (for full references see note 1 of the PTC's decision).

<sup>2</sup> Pre-Trial Chamber I, Decision on the Application for Leave to Appeal the Decision on Application under Rule 103, ICC-02/05-192, 19 February 2009.

<sup>3</sup> According to Article 82(1) of the Statute, the right of appeal lies with 'either party'. The applicants sought to submit observations under Rule 103 of the Rules of Evidence and Procedure; they did so thus in the capacity of *amicus curiae* and therefore are not a party to the case.

<sup>4</sup> The Rule is applicable to all Chambers of the Court and not merely to the PTC to which the present decision pertains.

<sup>5</sup> See references to the Court's case law given in para. 6 of the PTC's decision.

ic level, the applicants had not been able to achieve the propaganda effect of a ‘successful’ intervention on behalf of Al Bashir and being given the status as *amicus curiae* in the proceedings, which might wrongfully be taken to give some impression of an official endorsement of the applicants' standpoints. It may also be added that the Pre-Trial Chamber's decision was limited to that particular stage of the proceedings in the case against Al Bashir *et al.* and did not constitute an obstacle to the submission of observations at a later stage.<sup>6</sup>

### **The nature of observations by an *amicus curiae* and criteria for submission**

Under the heading of ‘miscellaneous provisions’, Rule 103 of the Rules of Evidence and Procedure provides that a Chamber of the Court may at any stage of the proceedings invite or grant leave to a State, organization or person to submit any observation on any issue that the Chamber deems appropriate.<sup>7</sup> A person, an organization or a State making such submissions is known as *amicus curiae*, a term also mentioned expressly in the descriptive heading of Rule 103. As noted by Schabas, *amici curiae* in international criminal proceedings “have played a variety of role, sometimes offering what amounts to expert testimony, and often participating as advocates for one position or another rather than as more neutral ‘friends’ without an axe to grind”.<sup>8</sup> Thus, it is in no way out of the ordinary that persons *etc.* friendlier disposed towards the suspect offer themselves as *amici curiae*. Schabas noted, however, that the case law of the ICC suggested that submission of observations by *amici curiae* had been limited to legal issues. Among the cases referred to by Schabas is the decision by PTC I, in which the Chamber stated:

... the rationale for admitting *amicus curiae* in the proceedings is to have the opportunity to get experts' information on relevant issues of legal interest for the proceedings in order to provide the Chamber with a contribution to the proper determination of the case.<sup>9</sup>

Further examples showing support for the view that *amicus curiae* observations should be limited to matters of legal interest are provided for by the declaration of a Single Judge at a Pre-Trial Chamber that the submission by Amnesty International must confine to “the legal aspects outlined in the Request” and that the *amicus curiae* must “refrain from making any indication or link to the specific facts of the case”<sup>10</sup> and the statement in a similar

<sup>6</sup> The Sudan Workers Trade Unions Federation and the Sudan International Defence Group were indeed successful in a subsequent application to submit observations, *viz.* in the appeal process relating to the Pre-Trial Chamber's decision of 24 June 2009 on the Prosecutor's application for an arrest warrant (ICC-02/05-01/09-21), see decision of the Appeals Chamber of 18 September 2009 (ICC-02/05-01/09 OA).

<sup>7</sup> Rule 103(1), Rules of Evidence and Procedure.

<sup>8</sup> William A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute*, Oxford University Press, Oxford 2010, p. 772.

<sup>9</sup> ICC-01/04, Situation in the Democratic Republic of The Congo, Decision of PTC I of 17 August 2007 on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, para. 4; cited in Schabas *ibid.*

<sup>10</sup> ICC-01/05-01/08, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision of 9 April 2009 of Single Judge E. Trendafilova (PTC II) on Application for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, para. 12; cited in Schabas *ibid.*

vein made by a Pre-Trial Chamber in connection with the submissions of the United Nations Special Representative on Children and Armed Conflict.<sup>11</sup> However, this line of case law should not be construed so narrowly as to imply that *amicus curiae* submissions may only address legal questions. Even if one accepts that submissions should be limited to ‘issues of legal interests’, observations of a factual nature<sup>12</sup> too may be of legal interests.

However, as Rule 103 is formulated, the wording ‘any observation on any issue’ gives a Chamber complete discretion over what observations it seeks/receives. Against the background of this clear textual support according to the Rules of Procedure and Evidence, there is in principle no reason for attaching an additional restriction on the character of the submission simply on the basis of the case law cited above. Ultimately, what matters is whether a Chamber considers the submission ‘desirable for the proper determination of the case’. Therefore, in the present case, the observations that the applicants intend to submit should not be ruled out merely because they would address the ‘interest of justice’, which can be described as being political *lato sensu* rather than as being strictly legal in nature.

What remains to be determined by the Trial Chamber is the relevance of the intended observations in relation to the proper determination of the matter before the Chamber. In this respect, the term ‘case’ in ‘proper determination of the case’ must be interpreted as to mean the particular stage of the proceedings and not the case as such against a suspect or accused, such as when a distinction is made between a case and a situation. Thus, the relevant question that any submission should provide assistance to the Chamber is, here, whether the Prosecutor's application for warrants of arrest against Al Bashir and others should be granted.

Pursuant to Article 58(1) of the Statute, the Pre-Trial Chamber *shall* grant the Prosecutor's application for an arrest warrant for a person if it is satisfied (i) that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” and (ii) that the arrest of the person appears necessary according to the criteria set out in Article 58(1)(b). The clear wording of Article 58 suggests that the two criteria mentioned above are exhaustive and there is no reason to depart from a literal interpretation of the Article. Thus, on purely textual grounds, the Pre-Trial Chamber would be acting contrary to the express requirement of the Statute if it were to take into consideration ‘the interests of justice’ as an additional criterion when determining the Prosecutor's application.<sup>13</sup> As the application to submit *amicus curiae* observations is based on grounds related to the implication for the peace building process in Sudan, the conduct of

<sup>11</sup> ICC-01/04-01/06, *Prosecutor v. Thomas Lubanga Dyilo*, Decision of Trial Chamber I of 18 February 2008 Inviting Observation from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, para. 8; cited in Schabas *ibid*. In that case, it was in fact argued by the defence that *amicus curiae* observations should be admitted only on legal questions, but the Trial Chamber did not find it necessary to resolve that issue.

<sup>12</sup> Suffice it to say that factual matters are often determinative of the legal qualification of a situation, *e.g.* whether attacks have been widespread or systematic.

<sup>13</sup> Cf. Christoffer K. Hall, Commentary on Article 58, in O. Triffterer *et al.* (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2<sup>nd</sup> edn, C.H.Beck–Hart–Nomos, München–Oxford–Baden Baden 2008, esp. the following remarks: “The Pre-Trial Chamber is legally bound by the *Statute* in the sense that if the requirements of paragraph 1 are fulfilled, the Pre-Trial Chamber is obliged to issue the warrant of arrest. There is no room for discretion for political or ideological reasons ...” (at p. 1138, margin number 8).

the Prosecutor, negative perceptions of the ICC and alternative means of transitional justice,<sup>14</sup> the intended observations would clearly fall outside the exhaustive criteria stipulated in Article 58(1). Such observations cannot, therefore, be relevant for the proper determination of the case and, *a fortiori*, cannot be considered by a Chamber to be desirable. Thus the Pre-Trial Chamber is *prima facie* correct in rejecting the application for leave to submit observations on the above-mentioned grounds.<sup>15</sup>

However, it may be argued that ‘the interests of justice’ may influence the assessment of factors such as reasonableness or necessity in the above-mentioned criteria, and therefore relevant even though it is not specified in the Statute as an explicit independent criterion. This is, arguably, a means through which the interests of justice may be taken into account at this stage of the proceedings. However, such an approach is also rejected by the Pre-Trial Chamber and is motivated by reasons pertaining to a proper division of power between the Prosecutor and the judicial Chambers of the Court, a matter to be discussed in the next section of the present commentary.

Before analysing – in the next section – why the interests of justice are not factors to be considered at this stage, albeit indirectly, a final remark on Article 58 can be made. The Pre-Trial Chamber does not appear to have put much weight on the condition ‘having examined the application and the evidence or other information submitted by the Prosecutor’. Taken literally and interpreting the scope of ‘submitted by the Prosecutor’ as extending to both ‘the evidence’ and ‘other information’, Article 58 only requires the Pre-Trial Chamber to examine the material provided by the Prosecutor. In cases where the Prosecutor's application for an arrest warrant is made under Seal, the information provided by the Prosecutor would indeed be all that the Pre-Trial Chamber has to resort to for its determination on the issuance of the arrest warrant.

In this context, the qualification ‘submitted by the Prosecutor’ may be taken simply to mean that the PTC has a duty to examine the material by the Prosecutor, but an alternative reading is that the PTC is precluded from taking into account of any other material. There is undoubtedly a point in structuring the proceedings at the ICC in such a way that evidence and information from persons than other the Prosecutor be examined not already at the issuance stage, but first when the arrest warrant issued is challenged. This interpretation is supported by the fact that Article 58(2) enumerates the details to be contained in the Prosecutor's application<sup>16</sup> and the fact that Article 58(5) provides for the treatment of provisional arrest or the arrest and surrender of the person as separate proceedings. If this is a correct interpretation of Article 58, there are strong textual grounds to reject, at this stage, any *amicus curiae* observation at all, irrespective of the argument based on the division of power.

### **Division of power between the OTP and the judicial Chambers of the Court**

Although the case in question only deals with the submission of *amicus curiae* observations, the reasoning of the Pre-Trial Chamber reveals a certain understanding of the role

<sup>14</sup> See extract from the application reproduced in the preliminary notes to the PTC's decision.

<sup>15</sup> See the declaration by the PTC 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” (para. 10 of the PTC's decision).

<sup>16</sup> Thus, this will be the material on which the PTC's decision will be based.

of the Chamber vis-à-vis that of the Prosecutor. As the PTC itself has stated, “the issue of whether the interests of justice are a factor to be considered by the Chamber prior to the initiation of a case is an issue which goes to the heart of the division of functions and responsibilities between the Prosecution and the Chamber”.<sup>17</sup>

The possibility, or otherwise, of the PTC to review the decision of the Prosecutor on whether to initiate a case against a specific suspect through the application for a warrant of arrest serves as a good illustration of how the system created by the ICC Statute strikes the balance in question of the division of power/functions of its organs. In arriving at its conclusion, the PTC's argument has been based mainly on an ordinary literal interpretation of the Statute and a contextual reading of the relevant provisions.

Quite logically the PTC begins by stating that the provisions in Article 58 of the Statute do not require the Prosecution to request the issuance of an arrest warrant whenever there are reasonable grounds to believe that a person is criminally liable under the Statute.<sup>18</sup> This establishes, so to speak, the default position that it is the prerogative of the Prosecutor whether to request an arrest warrant and the Pre-Trial Chamber's function to determine whether the request should be granted if such a request has been made. In other words, Article 58 is triggered off only after the Prosecutor has in fact applied for an arrest warrant.

The next step of the PTC's reasoning is based on an *e contrario* reading of Article 53(3) of the Statute. This Article gives the PTC the power to review a ‘negative’ decision of the Prosecutor, *i.e.* a decision not to proceed with an investigation or a decision not to prosecute. In cases where the negative decision is based on the lack of sufficient legal or factual basis for an investigation or prosecution, or is based on reasons of inadmissibility, the PTC's review presupposes a request from the Security Council or a State, which referred the situation to the ICC. The PTC may also review a negative decision *proprio motu* if the Prosecutor's decision is based on consideration of interests of justice. Incidentally, it is in such cases that observations by *amici curiae* may be particularly valuable as they may supply the Prosecution with points of view and information that were missed during the Prosecutor's own investigation. The power of the PTC is, however, limited to that of review: in the case of referrals by a State or the Security Council, the PTC ‘may request the Prosecutor to reconsider’ the decision not to proceed, and in the case of review undertaken by the PTC solely on the basis of interests of justice the PTC may refuse to ‘confirm’ the Prosecutor's decision not to proceed. None of these outcomes constitute, however, a positive power to order an investigation or prosecution.<sup>19</sup>

The PTC's review power of the Prosecutor's negative decision has thus only a limited effect. Yet it cannot be called into question that this power exists and is clearly defined in the Statute. A corresponding provision for review – *i.e.* a form of preliminary review – does not exist for a positive decision to initiate prosecution. Thus, the only relevant applicable provision with regard to a positive prosecutorial decision would be Article 58 of the Statute. As discussed above, the interests of justice is not a ground to be taken into consideration in the PTC's determination of whether to grant the Prosecutor's application for

<sup>17</sup> Para. 11 of the PTC's decision.

<sup>18</sup> Para. 14 of the PTC's decision.

<sup>19</sup> On the PTC's request to reconsider and refusal to confirm a decision not to proceed, and the effect of the Prosecutor's persistence on not proceeding, see Schabas, *op. cit.* in note 8 above, p.p. 668–670.

an arrest warrant. Seen in the light of Article 53(3), the clear conclusion to be drawn is that the PTC does not have the power to review the Prosecutor's exercise of its discretion when it determines that it is in the interests of justice to bring prosecution. The PTC is therefore correct, in the present case, to conclude that

... 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.<sup>20</sup>

The PTC did mention that "it was the States Parties' express will that the power to, and responsibility for, carry out such assessment, lies with the Prosecution".<sup>21</sup> This additional support is however not strictly necessary in light of the clear conclusion that can be drawn from the statutory text alone.

### **The PTC's *proprio motu* consideration of the issue of admissibility**

After concluding that the PTC would be bound to grant the Prosecution's request for a warrant of arrest once the conditions set out in Article 53 of the Statute were met, the PTC adumbrated an exception to this rule. It pointed to the discretion given to the Court – *i.e.* any of its Chambers – to determine on its own motion, pursuant to Article 19(1) of the Statute, the admissibility of a case.<sup>22</sup> In this context 'admissibility' is restricted to the conditions set forth in Article 17 of the Statute, *i.e.* those issues that generally related to the matter of complementarity and *ne bis in idem*,<sup>23</sup> and those that pertain to the gravity of the case.<sup>24</sup> It is only the issue of gravity that is of interest in the present case.

While it is clear that a PTC may not apply, *proprio motu*, the criterion of sufficient gravity as a substantive prerequisite in the determination whether to grant the Prosecution's request for a warrant of arrest,<sup>25</sup> it is to some extent uncertain whether a PTC may nonetheless make an initial determination of the admissibility of a case – as the Appeals Chamber has put it – as 'a separate procedural step'.<sup>26</sup> In the Ntaganda arrest warrant appeals judgment, the Appeals Chamber found that the rights of the suspect had not been protected adequately when the PTC ruled that the case was inadmissible, notwithstanding that the outcome could in some sense be seen as being favourable for the suspect since a warrant of arrest would not be issued. The Ntaganda case concerned however a request under seal for the arrest warrant, and the Appeals Chamber remarked:

<sup>20</sup> Para. 29 of the PTC's decision.

<sup>21</sup> Para. 30 of the PTC's decision; the PTC has not provided further support for this statement.

<sup>22</sup> See para. 25 of the PTC's decision.

<sup>23</sup> Article 17(1)(a)–(c), ICC Statute.

<sup>24</sup> Article 17(1)(d), ICC Statute.

<sup>25</sup> See, *e.g.* in connection with the arrest warrant against Bosco Ntaganda, ICC-01/04-169, Situation in the Democratic Republic of The Congo, Judgment of the Appeals Chamber of 13 July 2006 on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" ('the Ntaganda arrest warrant appeals judgment'), paras. 42–45.

<sup>26</sup> The Ntaganda arrest warrant appeals judgment, para. 46.

when deciding on an application for a warrant of arrest in ex parte Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion [*i.e.* the discretion to address the issue of admissibility *proprio motu*] only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants.<sup>27</sup>

In the present case concerning the arrest warrants against Al Bashir *et al.*, the PTC did ‘observe’ the findings of the Appeals Chamber cited above, but did not expand on how the Appeal Chamber’s remark should be applied in the case in question, which was not a request by the Prosecution on a confidential and *ex parte* basis. The PTC refrained from making further comments on whether it would be precluded from determining issues of admissibility *proprio motu* pursuant to Article 19(1) of the Statute. This may be explained partly by the fact that the issue of admissibility has not been raised in the present application; in fact it has been pointed out by the PTC that the applicants themselves have expressly stated that they do not seek to raise any admissibility issue at this stage.<sup>28</sup> However, the fact that the issue has not been raised by the applicant is not sufficient as a reason for the Chamber’s decision not to raise the issue *proprio motu*. The question of the precise conditions under which a PTC may determine admissibility on its own motion in the context of an application for a warrant of arrest remains thus unanswered.

<sup>27</sup> The Ntaganda arrest warrant appeals judgment, para. 52.

<sup>28</sup> Para. 27 of the PTC’s decision.