

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-01/09
Date: 28 January 2010

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

SITUATION IN DARFUR, SUDAN

***IN THE CASE OF THE PROSECUTOR V. OMAR HASSAN AHMAD AL-BASHIR
("OMAR AL-BASHIR")***

Public Document

**Decision on the Observations Submitted by the *ad hoc* Counsel for the Defence in
relation to Applications a/0443/09 to a/0450/09 for Participation in the Proceedings**

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
Ms Fatou Bensouda
Mr Essa Faal

Counsel for the Defence

Ms Michelyne C. Saint -Laurent

Legal Representatives of Victims

Mr Nicholas Kaufman
Ms Wanda M. Akin
Mr Raymond M. Brown

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Daniel Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Ms Fiona McKay

Others

I, **Judge Sanji Mmasenono Monageng**, Judge of Pre-Trial Chamber I (the “Chamber”) of the International Criminal Court (the “Court”);

NOTING the “Decision on the Designation of a Single Judge on Victims’ Issues”, issued on 19 August 2009, whereby I was designated Single Judge responsible for all issues relating to victims’ participation in the proceedings in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (“the Omar Al-Bashir Case”);¹

NOTING the “Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case” (“the Decision of 10 December 2009”) issued by the Single Judge on 10 December 2009;²

NOTING the “Requête en prorogation de délai”³ filed by the *ad hoc* Counsel on 14 December 2009, wherein she requested an extension of the time limit for the submission of observations on Applications a/0443/09 to a/0450/09 until 20 January 2010 or another date set by the Chamber and submitted that she was not served with copies of the “Decision Ordering the Parties to Submit their Observations on Applications a/0443/09 to a/0450/09 for Participation as Victims in the Proceedings”⁴ and the Applications;

NOTING the “Decision on the *ad hoc* Counsel for the Defence Request Regarding Victims’ Participation in the Case” issued by the Presiding Judge of Pre-Trial Chamber I on 17 December 2009, whereby the Presiding Judge granted an extension of the time limit for the submission of observations by the *ad hoc* Counsel for the

¹ ICC-02/05-01/09-31.

² ICC-02/05-01/09-62.

³ ICC-02/05-01/09-60.

⁴ CC-02/05-01/09-50.

Defence with respect to Applications a/0443/09 to a/0450/09 for victims' participation in the proceedings;⁵

NOTING the "Observations de la Défense sur les demandes de Participation des Victimes a/0443/09 à a/0450/09" ("the *ad hoc* Counsel Observations") filed by the *ad hoc* Defence Counsel on 19 January 2010, whereby she requests the Single Judge to dismiss the Applications, or, alternatively, to order that the Defence be provided with non-redacted copies of the Applications, to grant her time for making additional observations and to suspend the Decision of 10 December 2009;⁶

NOTING articles 57(3)(c) and 68 of the *Rome Statute* ("the Statute"), rules 86, 87, 89 and 91 of the *Rules of Procedure and Evidence* ("the Rules") and regulations 86(8) of the *Regulations of the Court* ("the Regulations");

HEREBY RENDER THIS DECISION

1. The arguments raised by the *ad hoc* Counsel for the Defence ("the *ad hoc* Counsel") can be grouped into the following: (1) the causal link between the alleged incidents and the crimes referred to in the warrant of arrest for Omar Al-Bashir; (2) assistance in filling application forms; and (3) redactions of identifying information from the Applications.

1) ***The causal link between the alleged incidents and the crimes referred to in the warrant of arrest for Omar Al-Bashir***

2. In relation to this issue, the *ad hoc* Counsel states that the Single Judge has to base her decision solely on the facts, dates and places referred to in the Decision on

⁵ ICC-02/05-01/09-64.

⁶ ICC-02/05-01/09-69.

the Prosecution's Application for a Warrant of Arrest against Omar Hassan Al-Bashir ("Decision on the Warrant of Arrest for Omar Al-Bashir")⁷. The Single Judge notes that the scope of the present case is delineated by the Decision on the Warrant of Arrest for Omar Al-Bashir, which stated *inter alia* that the crimes with which Omar Al-Bashir is charged "took place across large swathes of the territory of the Darfur region"⁸ "from soon after the April 2003 attack on El-Fasher airport until 14 July 2008".⁹ In addition, specific locations were listed in the Decision on the Warrant of Arrest for Omar Al-Bashir.¹⁰

3. The *ad hoc* Counsel states that a person cannot be accused of crimes committed in an entire territory of a country and supports her arguments with a decision of the Appeals Chamber of the International Criminal Tribunal for Rwanda in the case of *The Prosecutor v Casimir Bizimungu*,¹¹ whereby the Prosecution was not allowed to lead more evidence relating to certain acts because it did not specifically identify the location where they were allegedly committed. The Single Judge is of the view that the facts of that case are materially different from those of the present case, because in the present case the Applicants referred to specific locations, which are all linked to the locations where the crimes listed in the Decision on the Warrant of Arrest for Omar Al-Bashir were allegedly committed.¹² Therefore, the argument of the *ad hoc* Counsel concerning the lack of specificity of the Applications cannot be sustained.

2) Assistance in Filling Application forms

4. The *ad hoc* Counsel argues that although some Applicants are not familiar with the English language and do not indicate that they were assisted by an intermediary, the application forms are filled out in English. The *ad hoc* Counsel submits that these

⁷ ICC-02/05-01/09-1.

⁸ ICC-02/05-01/09-1, p. 5.

⁹ ICC-02/05-01/09-1, p. 6.

¹⁰ See ICC-02/05-01/09-3, para. 4, footnote 109. See also ICC-02/05-01/09-1, p. 5, footnote 6.

¹¹ *The Prosecutor v Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.2, Decision on the Prosecution's Interlocutory Appeals against Decisions of the Trial Chamber on Exclusion of Evidence, 25 June 2004.

¹² See ICC-02/05-01/09-3, para 94, footnote 109. See also ICC-02/05-01/09-1, p. 5, footnote 6.

applications are thus incomplete, inaccurate and false. The Single Judge is of the view that such conclusion is untenable because the failure to complete Part I of the form titled "Information about a person assisting in filling in this application form" does not automatically make it incorrect or false. While no information regarding intermediaries was provided in Part I of the application forms, this information was included in Paragraph 15 of Part A of the application forms titled "Where would you like to be contacted?". In accordance with rule 87 (1) of the rules and as requested by the Applicants, this information was redacted before the transmission of the applications to the Defence.

5. For these reasons, the Single Judge finds no merits in the *ad hoc* Counsel submissions.

3) Redaction of identifying information from the applications

6. The Single Judge notes the *ad hoc* Counsel's argument that redactions that were made to the application forms violate the general obligation to ensure fairness of the proceedings. The *ad hoc* Counsel also raises specific objections to Applications a/0446/09 to a/0450/09. The Single Judge recalls that the paramount principle governing redactions is the need to protect victims and witnesses. The Single Judge reiterates the precedents of the Chamber setting out the principles concerning the adoption of specific measures to ensure and maintain the confidential status of applicants' identity, at this stage of the proceedings.¹³

7. The Single Judge recalls, "[w]ith respect to the issue of redaction of confidential information from the applications, [...] the Chamber's previous findings setting out the principles pertaining to and the reasons justifying the transmission of redacted applications to the Defence. [...] the issue of redacting confidential information from the applications before transmitting them to the Prosecution and/or to the Defence necessitates the balancing of competing obligations: (i) the obligation under article

¹³ ICC-02/05-02/09-62; ICC-01/04-374; See also other Pre-Trial Chambers' decisions ICC-01/05-01/08-320; ICC-02/04-01/05-134.

57(3)(c) and 68(1) of the Statute to protect *inter alia* the safety, privacy, physical and psychological well-being of victims and witnesses and rule 86 of the Rules to take into account the needs of victims and witnesses; (ii) the general obligation to ensure fairness of the proceedings; and (iii) the requirement under rule 89(1) of the Rules to transmit copies of the applications to the Prosecution and to the Defence, who shall be entitled to reply.”¹⁴

8. Applicants a/0443/09 to a/0450/09 requested non disclosure of identifying information to the Defence, the State, other participants, the public in general and/or the Prosecution. These Applicants, who are now refugees, allege that they fear for their own security and/or for that of their family members, who still live in the Sudan and who may be put at risk on account of the Applicant’s involvement with the Court.

9. The Single Judge further recalls that redactions may cover the name and contact details of the intermediary assisting the victim in completing the application and might be extended to cover any detail, including the specific place of the alleged incident, which might lead to the identification of the victim,¹⁵ as is the case for the redactions in Applications a/0449/09 and a/0450/09.

10. For these reasons, the Single Judge finds that the arguments advanced by the *ad hoc* Counsel cannot be sustained.

4) Conclusion

11. The Single Judge therefore decides not to depart from her ruling in the Decision of 10 December 2009 and reiterates that Applicants a/0443/09 to a/0450/09 fulfil the necessary requirements to participate in the proceedings as victims.

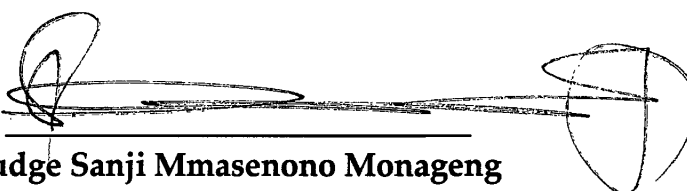
¹⁴ ICC-02/05-01/09-62.

¹⁵ Pre Trial Chamber II, ICC-02/04-01/05-134, paras 21 and 22.

FOR THESE REASONS I HEREBY:

REJECT the requests made in the *ad hoc* Counsel's Observations.

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



Judge Sanji Mmasenono Monageng
Single Judge

Dated this Thursday, 28 January 2010

At The Hague, the Netherlands