

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/09 OA

Date: 9 November 2009

THE APPEALS CHAMBER

Before:

Judge Erkki Kourula, Presiding Judge

Judge Sang-Hyun Song

Judge Ekaterina Trendafilova

Judge Daniel David Ntanda Nsereko

Judge Joyce Aluoch

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

Public document

Reasons for “Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply”

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Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Amicus Curiae
Mr Geoffrey Nice
Mr Rodney Dixon

REGISTRY

Registrar
Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,


In the appeal of the Prosecutor pursuant to the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” of 24 June 2009 (ICC-02/05-01/09-21),

In the matter of the “Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” dated 20 July 2009 (ICC-02/05-01/09-27) and the “Application for Leave and Reply to the Prosecution’s Response to the Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” of 24 August 2009 (ICC-02/05-01/09-33),

Provides the following reasons for its decision entitled “Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply” of 18 September 2009 (ICC-02/05-01/09-43):

I. PROCEDURAL HISTORY

1. On 6 July 2009, the Prosecutor filed the “Prosecution Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (ICC-02/05-01/09-25), having been granted leave to appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” of 4 March 2009 (ICC-02/05-01/09-3) in the “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” of 24 June 2009 (ICC-02/05-01/09-21).

 2. The Sudan Workers Trade Unions Federation (SWTUF) and the Sudan International Defence Group (SIDG) (hereinafter: the “Applicants”) filed the “Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” dated 20 July 2009 (ICC-02/05-01/09-27) (hereinafter:

“Application”). On 11 August 2009, the Prosecutor filed the “Prosecution’s Response to Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (ICC-02/05-01/09-29) (hereinafter: “Prosecutor’s Response”). On 24 August 2009, the Applicants submitted the “Application for Leave and Reply to the Prosecution’s Response to the Application under Rule 103 in respect of Prosecution Appeal against ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” (ICC-02/05-01/09-33) (hereinafter: “Application for Leave and Reply”).

3. In the “Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply” of 18 September 2009 (ICC-02/05-01/09-43) (hereinafter: “Decision of 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 thereto, and rejected the Application for Leave and Reply¹. It stated that the reasons for its decision would be filed in due course².

II. SUBMISSIONS BEFORE THE APPEALS CHAMBER

A. Submissions of the Applicants

4. The Applicants state that they make their filing “under Rule 103 for leave to be (i) participants in the present appeal proceedings or (ii) *amici curiae* [...]”³. They submit that the “SWTUF is the union of all trade unions of Sudan with affiliates from 25 state unions and 22 professional federations” and that the “SIDG is a non-governmental committee of Sudanese citizens established out of concern for the negative effects that ICC arrest warrants could have for the peace process in Sudan and for the ordinary people of this country”⁴. They ask the Appeals Chamber “to

¹ Decision of 18 September 2009, p. 3.

² Decision of 18 September 2009, p. 4.

³ Application, para. 1.

⁴ Application, para. 8.

take into consideration their written submissions and materials, as set out in [the Application], in support of the Majority of the Pre-Trial Chamber's decision of 4 March 2009 refusing the Prosecution's application for an arrest warrant for President Al Bashir on charges of genocide" and they "request to be heard at an oral hearing by the Appeals Chamber"⁵. They state that "[i]f leave is granted, [...], [they] invite the Appeals Chamber to uphold the findings of the Majority that the materials relied upon by the Prosecution do not establish reasonable grounds to believe in the existence of genocidal intent as required by Article 58 [...]. These findings, it will be argued, follow from a proper analysis by the Majority of the facts and the law, misunderstood or incorrectly represented by the Prosecutor and notwithstanding that the Applicants [...] do *not* challenge many parts of the Prosecutor's legal analysis"⁶. They submit that "[i]n the absence of argument from any other party, the Appeals Chamber could benefit from submissions contrary to the Prosecution's arguments which seek, in an adversarial setting, to highlight flaws in the Prosecution's submissions"⁷. They argue that the Appeals Chamber could "try to find experienced lawyers to act as *amici curiae* to argue the position in support of the other view. Given the Applicants' filings to date (that have dealt with the proposed genocide charges and gathered expert opinion for the record), and the representative character of the Applicants in Sudanese society, there is no reason *not* to turn to them as participants or *amici curiae* on the legal and factual issues that arise in this appeal"⁸. They also ask the Appeals Chamber to take into consideration material they have submitted⁹ stating that the materials "support the findings of the Majority that there is no reasonable basis for genocide charges"¹⁰. They make, "[a]n alternative submission"¹¹, arguments regarding what the Appeals Chamber should do in the event that it decides against the majority, including that it should remand the matter back to the Pre-Trial Chamber¹².

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⁵ Application, para. 2.

⁶ Application, para. 4.

⁷ Application, para. 16.

⁸ Application, para. 19.

⁹ Application, paras. 20 - 29 and 31.

¹⁰ Application, para. 21.

¹¹ Application, para. 32.

¹² Application, paras. 32 - 36.

B. Submissions of the Prosecutor

5. The Prosecutor opposes the Application and asks that it be dismissed¹³. He contends that “[t]he Applicants would not suitably serve as ‘friends of the court’ on the issue before it”¹⁴. He states that “[i]n passing the Applicants suggest that they may also be ‘participants in the appeal’ [...]” and that “[i]f they are claiming participant status on some undefined ground, the Prosecution also opposes that position”¹⁵. He submits that the Application “should be dismissed” because “(1) by making affirmative arguments on the merits without first obtaining leave to do so the Applicants are abusing the *amicus* process; and (2) [they] do not have neither the interest of an *amicus curiae* nor the expertise to assist the Chamber on the legal issue pending before it. Rather, the arguments presented by the Applicants entail challenges to the initiation of the proceedings against the suspect, and are mostly irrelevant to the single issue pending on appeal. This substantiates that the Applicants would not suitably serve as ‘friends of the court’ on the issue before it”¹⁶. He submits that “the Application proposes to present the adversary position of the defendant, President Omar Al Bashir, without legally representing him [...]” and that “[t]hey are, in effect, seeking to replace the Defence”¹⁷. Referring to the Applicants’ arguments that the Appeals Chamber should, *inter alia*, “try to find experienced lawyers to act as *amici curiae* to argue the position in support of the other view”¹⁸, the Prosecutor argues that “[i]f the Chamber considers that it is in the interests of justice it may appoint counsel to represent the interests of the suspect”, referring to Chambers having done this in other cases¹⁹. He submits that “[t]he Applicants’ experienced lawyers, however, are representing other groups and cannot appropriately appear to represent the interests of the true party to this proceeding, the suspect himself”²⁰.


III. REASONS OF THE APPEALS CHAMBER

6. Rule 103 (“Amicus curiae and other forms of submission”) of the Rules of Procedure and Evidence (hereinafter: “Rules”) provides as follows:

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¹³ Prosecutor’s Response, para. 1.
¹⁴ Prosecutor’s Response, para. 2.
¹⁵ Prosecutor’s Response, footnote 3.
¹⁶ Prosecutor’s Response, para. 10.
¹⁷ Prosecutor’s Response, para. 5.
¹⁸ Prosecutor’s Response, para. 22.
¹⁹ Prosecutor’s Response, para. 23.
²⁰ Prosecutor’s Response, para. 24.

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.
7. Referring to rule 103 (1) of the Rules, the Appeals Chamber, in a previous decision, held that “it [was] left to the discretion of the Appeals Chamber to grant leave to any State, organisation or person to submit observations”²¹.
8. In the present appeal, as a preliminary matter, the Appeals Chamber noted that the Prosecutor had not been granted leave by the Appeals Chamber to file the Prosecutor’s Response. In this regard, the Appeals Chamber considered that under the express wording of rule 103 (1) of the Rules, the Prosecutor is not entitled to respond to an application under rule 103 (1). Therefore, in the future, such responses may not be filed without the leave of the Appeals Chamber. In the circumstances of the present appeal, although the Prosecutor had not been granted leave by the Appeals Chamber, it nevertheless decided to accept the Prosecutor’s Response as it considered it to be in the interests of justice to do so and since this is the first time that the Appeals Chamber is addressing the question of his entitlement to respond to applications under rule 103 (1) of the Rules.
9. Turning to the Application itself, the Appeals Chamber noted that the Applicants proposed putting forward another view to that of the Prosecutor²² who was the only participant to have made submissions before the Appeals Chamber on the merits of the appeal. In light of the issue on appeal, the Appeals Chamber considered it desirable for the proper determination of this appeal to grant the Applicants leave to submit observations. The Appeals Chamber granted leave to the Applicants to

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²¹ “Decision on ‘Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence’”, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1289, 22 April 2008, para. 8.

²² Application, paras. 16 and 30.

“submit observations on this appeal”²³, stating that “[t]hese observations must be 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”²⁴.

10. As for the Application for Leave and Reply, notwithstanding the fact that the Prosecutor’s Response was filed without leave, the primary reason for filing the Application for Leave and Reply was the Applicants’ wish to counter the arguments made in the Prosecutor’s Response against their participation. As the Appeals Chamber decided to grant the Applicants leave to submit observations, the Appeals Chamber saw no need to grant them leave to reply to the Prosecutor’s Response. Consequently, the Application for Leave and Reply was rejected.

11. Under rule 103 (2) of the Rules, “[t]he Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1”. Consequently, the Appeals Chamber fixed a deadline for the Prosecutor to file a response to the observations to be filed by the Applicants.

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



Judge Erkki Kourula

Presiding Judge

Dated this 9th day of November 2009

At The Hague, The Netherlands

²³ Decision of 18 September 2009, p. 3.

²⁴ Decision of 18 September 2009, p. 3.