



Original: **English**

No.: **ICC-02/05-01/09**

Date: **27 August 2009**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, President
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Daniel David Ntanda Nsereko
Judge Joyce Aluoch

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

***THE PROSECUTOR v.
OMAR HASSAN AHMAD AL BASHIR ("Omar al-Bashir")***

Public Document

Request for an Extension of the Time Limit Prescribed in the Regulations of the Court and Observations on the Victims' Right to Participate in the Prosecution's Appeal against the Decision on the Application for a Warrant for the Arrest of Omar Hassan Ahmad al-Bashir

Source: Legal Representative of Victim Applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09

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

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Nicholas Kaufman

Unrepresented Victims

**The Office of Public Counsel for
the Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Pereira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Background

1. On 4 March 2009, Pre-Trial Chamber I declined to issue a warrant for the arrest of Omar Hassan Ahmad al-Bashir ("Omar al-Bashir") for the crime of genocide with the majority ruling that the Prosecution had failed to provide reasonable grounds to substantiate the existence of genocidal intent ("the Decision").¹
2. On 13 March 2009, the Prosecution filed an application for leave to appeal the Decision of 4 March 2009 ("the Appeal").²
3. On 6 July 2009, the Prosecution filed its document in support of the Appeal.³
4. On 6 August 2009, applications for participation in the case ("Applications") were submitted to the Victims Participation and Reparation Section on behalf of applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09 ("the Applicants").
5. On 20 August 2009, the Legal Representative of the Applicants ("the Legal Representative") met with Applicant a/0443/09 and Applicant a/0445/09 and took supplementary information from them which, it is alleged, provides *prima facie* evidence of genocidal intent attributable to Omar al-Bashir.
6. On 21 August 2009, the Legal Representative wrote to the Prosecutor offering him the opportunity to interview Applicants a/0443/09 and a/0445/09 thereby

¹ ICC-02/05-01/09-3 at para. 206.

² ICC-02/05-01/09-12.

³ ICC-02/05-01/09-25.

permitting him to reapply to Pre-Trial Chamber I for an amendment to the warrant for the arrest of Omar al-Bashir pursuant to Article 58(6) of the Rome Statute.⁴

7. On 26 August 2009, simultaneously with the filing of this document, the Legal Representative submitted an application to the Single Judge of Pre-Trial Chamber I requesting that an expedited decision be taken on whether or not the Applicants are entitled to victim status.

The Application to Extend the Time Limit for Filing a Response

8. The 8 Applicants are all currently resident in the State of Israel where their interests are safeguarded and promoted by a non-governmental organization called the "Bnai Darfur Organization in Israel". The process of identifying suitable victim applicants for the case against Omar al-Bashir was initiated in April 2009 with interviews and the preparation of the Applications being conducted by students of the law faculty at Tel Aviv University. After the information was taken from the Applicants in Tel Aviv, the Applications were reviewed for legal consistency and thereafter sent by registered post to the Netherlands for further review by the Legal Representative and subsequent submission by hand to the Victims Participation and Reparation Section ("VPRS"). Inevitably, the Applications were only finalized and submitted in hard copy format to VPRS after the expiry of all relevant time limits for the filing of a response in the present proceedings.⁵

9. The Legal Representative notes that once applications for victim status are submitted to VPRS, the Applicants exercise no control over the time taken to propose redactions to the Applications and subsequently forward them to the Single Judge of the Pre-Trial Chamber. Nor do the Applicants exercise any control over the time taken

⁴ *c.f.*; ICC-02/05-01/09-3 at para. 207.

⁵ *c.f.*; Regulations 65(3) and 65(5) of the Regulations of the Court.

by the same Single Judge to render a decision on the grant of victim status. It is respectfully submitted, therefore, that the prejudice to the Applicants - who will otherwise lose the opportunity to present their views on the issue of genocidal intent - will far outweigh the inconvenience caused to the Appeals Chamber and the Prosecution as a result of extending applicable time limits to allow a request for victim participation in the Appeal and the subsequent submission of substantive submissions by the Legal Representative.

Observations on the Applicants' Right to Participate in the Appeal

10. On the assumption, therefore, that the Single Judge of Pre-Trial Chamber I will accord victim status to all or some of the Applicants, the Legal Representative requests that the Appeals Chamber fix a fresh time limit for the Applicants to submit substantive observations on the Appeal for the reasons which will be set out below.

11. The Legal Representative stresses that each and every one of the Applicants meets all the criteria for participation in the case against Omar al-Bashir. Six of the Applicants have, in particular, demonstrated a direct causal nexus between the injury that they have suffered and the specific charges leveled at Omar al-Bashir's hierarchical inferiors – Ahmad Muhammad Haroun ("Ahmad Haroun") and Ali Muhammad Ali Abd-al-Rahman ("Ali Kushayb").

12. The Legal Representative, furthermore, submits that should the victim status of the Applicants be confirmed in the case against Omar al-Bashir, then they ought to be accorded the automatic and *a fortiori* right to participate in the Appeal proceedings. To this end, the Legal Representative endorses the preliminary submissions made by the Legal Representatives in *The Prosecutor v. Jean-Pierre Bemba* on 18 August 2009.⁶

⁶ ICC-01/05-01/08-479.

13. Regulation 65 of the Regulations of Court ("the Regulations") provides for the submission of observations by "participants" – a definition which has been held to include victims.⁷ Additionally, regulations 24(2) and 86(8) of the Regulations of Court permit recognized victims to respond to any document filed with the Court throughout the whole of the legal process in the case.

14. In any event, even if victim participation in the present Appeal is not deemed a right *a fortiori*, the jurisprudence of the Court governing the participation of victims in interlocutory appeals militates in favor of granting the Applicants leave to participate:⁸

a) **The Personal Interests of the Applicants**

The Applicants – all of whom belong to the Fur ethnic group - are of the firm conviction that Omar al-Bashir committed the crimes with which he has been charged with the specific intent of ensuring their partial or total destruction. One of the Applicants⁹ relates how members of the Janjaweed militia would kill not just men of fighting age but also babies snatched from their mothers' arms. Moreover, two of the Applicants¹⁰ are first-hand witnesses to incriminating admissions made by Ali Kushayb and Ahmad Haroun to the effect that the Fur should be wiped out. Accordingly, the Applicants have a vested interest in the issue at stake in the Prosecution's appeal.

⁷ ICC-01/04-01/06-824; Dissenting Opinion of His Honor President Sang-Hyun Song.

⁸ ICC-01/04-01/06-824 at paras. 38 & 39; ICC-01/04-01/06-1335 where the Appeals Chamber set out the four criteria for participation in appeals brought under article 82(1) of the Rome Statute: "(i) whether the individuals seeking participation are victims in the case, (ii) whether they have personal interests which are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly (iv) that the manner of the participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial". *c.f.* also; ICC-01/04-01/06-1239 OA 9 OA 10, 20 March 2008, p. 3 and ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 88.

⁹ a/0445/09.

¹⁰ a/0443/09 and a/0445/09.

b) **Whether the Intervention is Appropriate**

The interests of justice, it is respectfully submitted, mandate the intervention of the Applicants even at this late stage of the proceedings. The Prosecutor has admitted that the evidence on which he relies in support of his assertion of genocidal intent is circumstantial in nature.¹¹ As mentioned above, two of the Applicants, in addition to suffering personal harm, also provide direct *prima facie* evidence of genocidal intent attributable to Omar al-Bashir. Given the importance of this evidence, therefore, and in light of the fact that the Applicants have no power to petition Pre-Trial Chamber I *proprio motu* pursuant to Article 58(6) of the Rome Statute, the Appeals Chamber is the only forum presently available to them to voice their concerns.

c) **Potential Prejudice to the Defence**

No prejudice to the Defence will result from the present application for the simple reason that the Rome Statute does not envisage a role for the Defence at the present stage of the proceedings. Nor, for that matter, was the Defence ever a party to the proceedings which gave rise to the impugned decision. In any event, it is submitted that procedural safeguards exist to ensure that the candidacy of the Applicants for victim status in the case is examined from the perspective of a suspect by way of appointing *ad hoc* defence counsel to respond to the Applications.¹²

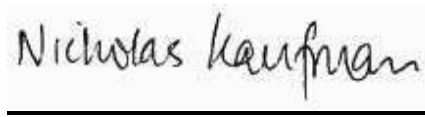
¹¹ ICC-02/05-01/09-3 at para. 147.

¹² *c.f.* by way of example the "Decision on legal representation, appointment of counsel for the defence, protective measures and timelimit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), ICC-02/04-01/05-134, 1 February 2007.

Relief Sought

15. In light of all the above, the Legal Representative respectfully requests the Appeals Chamber to order as follows:

- a) that the time limit for filing a response to the document supporting the Appeal be extended so as to allow the Single Judge of Pre-Trial Chamber I to rule on whether or not the Applicants are entitled to victim status;
- b) that those Applicants subsequently awarded victim status be granted leave to participate in the Appeal proceedings, and;
- c) that a fresh time limit be fixed for the submission of the Legal Representative's substantive submissions on the issues raised in the Prosecution's document supporting the Appeal.



Nicholas Kaufman

Legal Representative of Victim Applicants a/0443/09, a/0444/09,
a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 & a/0450/09

Done this 26th Day of August 2009

Jerusalem, Israel.