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

Date: 4 September 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
THE PROSECUTOR *v.*
OMAR HASSAN AHMAD AL BASHIR (“OMAR AL BASHIR”)**

Public Document

**Prosecution’s Response to Victims’ Request for Extension of Time and
Observations on their Right to Participation in the Prosecution’s
Appeal against the “Decision on the Prosecution’s Application for a
Warrant of Arrest against Omar Hassan Ahmad Al Bashir”**

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

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Nicholas Kaufmann

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

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Defence Support Section

Ms Silvana Arbia & Mr Dider Pereira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Ms Fiona McKay

Introduction

1. The Applicants have submitted applications to participate in the case of *The Prosecutor v Omar Al Bashir* (“the Applications”). On 27 August 2009, the Legal Representative of the Applicants requested the Appeals Chamber to extend the time limit for filing a response to the Prosecution’s document in support of its Appeal and to grant to those Applicants subsequently given victims participants status by Pre-Trial Chamber I an automatic and *a fortiori* right to participate in the current appellate proceedings (“the Request”).¹
2. The Prosecution agrees that victims’ participation is a right afforded by the Statute; it is a right to express their views and concerns independently in proceedings where their personal interests are affected.
3. The framework established by jurisprudence of the Appeals Chamber for granting an application to participate in appellate proceedings requires that:
 - a) The individual seeking participation is a victim in the case (an assessment to be made by a Pre-Trial or Trial Chamber);
 - b) The individual has personal interests which are affected by the issues on appeal;
 - c) The individual’s participation is appropriate;
 - d) The manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²
4. In this case, the decision of the Single Judge of the Pre-Trial Chamber on the Applicants’ victim status is pending, but the other conditions are fulfilled. The Applicants are expressing that they are direct victims of the genocide as alleged by the Prosecutor. Therefore, they have personal interests in seeing the genocide charges maintained.
5. The Prosecution submits that it in light of the fact that applications for participant status in this case are currently pending before the Single Judge of the Pre-Trial Chamber, the Appeals Chamber may properly defer any determination on the Applicant’s participation in the current appeal until the Single Judge decides on the Applicants’ status as victims in this case.
6. Alternatively, and in order to avoid that the lack of decision on the Applicants’ status as victims affects their right established by the Statute, the Appeals Chamber can also decide to seek their views in accordance with Rule 93 of the Rules of Procedure and Evidence.

¹ ICC-02/05-01/09-35 OA (“Victims’ Request”), paras. 8, 9, 12, 15.

² “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I’s Decision entitled “Decision on Victims’ Participation”, ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May, 2008, para. 36

Procedural Background

7. On 4 March 2009, the Chamber issued the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”.³ In that Decision, the Majority issued a warrant of arrest for President Al Bashir, but declined to include charges of genocide.
8. On 10 March 2009, the Prosecution sought leave to appeal the Decision pursuant to Article 82(1)(d).⁴ On 24 June 2009, the Pre-Trial Chamber granted leave to appeal one issue, regarding the proper standard for drawing inferences at the arrest warrant stage.⁵
9. On 6 July 2009, the Prosecution filed its Document in Support of Appeal.⁶
10. On 27 August 2009, the Legal Representative of victim Applicants requested an extension of the time limit for filing a reply to the Prosecution’s Document in Support of Appeal, and presented observations on the right of those Applicants to participate in this appeal.⁷
11. On 1 September 2009, the Pre-Trial Chamber ordered the Prosecution and the counsel for the defence to file their observations on the Applications for participation by 29 September 2009.⁸
12. The Prosecution hereby responds to the Victims’ Request.

The Applicants have no automatic right to participate in an interlocutory appeal

13. The first requirement that a victim must demonstrate in applying for leave to participate in an interlocutory appeal is that he or she is a victim within the meaning of Rule 85, in relation to the case or situation in which the appeal arises.⁹ Here, the Court has not yet determined that the Applicants are victims in relation to this case; their applications are currently pending before the Single Judge of the Pre-Trial Chamber.

³ ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.

⁴ ICC-02/05-01/09-6-Conf. A public redacted version of the Application for Leave to Appeal was filed on 13 March 2009 (ICC-02/05-01/09-12).

⁵ ICC-02/05-01/09-21 (“Decision Granting Leave to Appeal”).

⁶ ICC-02/05-01/09-25 OA.

⁷ ICC-02/05-01/09-35 OA. On the same day, the Legal Representative lodged a filing before the Single Judge of the Pre-Trial Chamber requesting expedited consideration of the victims’ applications for participation – see ICC-02/05-01/09-34.

⁸ ICC-02/05-01/09-38.

⁹ *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, paras. 37-40; *Situation in Uganda*, ICC-02/04-164 OA, 27 October 2008, para. 7; *Prosecutor v. Kony et. al.*, ICC-02/04-01/05-324 OA2, 27 October 2008, para 8. See also *Prosecutor v Lubanga*, ICC-01/04-01/06-1335 OA9 and OA10, 16 May 2008, para. 36; *Prosecutor v Lubanga*, ICC-01/04-01/06-1452 OA12, 6 August 2008, para. 7; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1453 OA 13, 6 August 2008, para. 7.

14. The Appeals Chamber has rejected applications to participate in appellate proceedings from persons who had not been granted participant status by the relevant Chamber.¹⁰ It explained that it “will not embark on determining the status of these victims as ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims”.¹¹ Indeed, it is inhibited from making determinations under Rule 85 by “(i) the fact that their applications for victim status and authorisation to participate in the trial proceedings are *sub judice* before the [Pre-]Trial Chamber, and (ii) no applications have been transmitted to the Appeals Chamber by the Registrar in terms of Rule 89(1) of the Rules of Procedure and Evidence nor has the Appeals Chamber been provided with any of the information required under Regulation 86 of the Regulations of the Court.”¹²
15. Because the Single Judge has not yet ruled on the Applicants’ victim status, the Prosecution submits that the Appeals Chamber may properly defer a decision on their Request. If the Single Judge finds that any of the Applicants are victims prior to the resolution of this appeal, their application could properly be considered by the Appeals Chamber at that stage.
16. Alternatively, the Prosecution notes that under Rule 93, the Chamber has an exceptional power and may affirmatively seek the views of “other victims”, including persons not found by the Pre-Trial Chamber to be victims, “as appropriate”.¹³ If the Appeals Chamber considers it appropriate to seek the views of the Applicants under Rule 93, then the Prosecution should be given an opportunity to respond, much as parties have a right to respond to analogous submissions by participating victims under Rule 91(2) and to *amicus curiae* or other submissions under Rule 103(2).¹⁴

¹⁰ *Prosecutor v Lubanga*, ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2008, paras. 39-40, 51; *Situation in Darfur*, ICC-02/05-138 OA OA2 OA3, 18 June 2008, para. 54(b); *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, paras. 39, 93(b).

¹¹ *Prosecutor v Lubanga*, ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2008, para. 40.

¹² *Ibid.*

¹³ Rule 93.

¹⁴ See further Prosecution’s submissions in *Situation in the DRC*, ICC-01/04-483 OA4 OA5 OA6, 4 March 2008, para. 34.

Conclusion

17. For the reasons set out above, the Prosecution submits that the Appeals Chamber may defer issuing a decision on the Applicants' Request to participate in the present appeal until the Single Judge rules on their status.. The Appeals Chamber may alternatively decide to seek their views under Rule 93. In the event that the Appeals Chamber solicits the views of the Applicants, the Prosecution will respond to the properly-submitted views.



Luis Moreno-Ocampo,
Prosecutor

Dated this 4th day of September 2009

At The Hague, The Netherlands