Cour
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Criminal
Court

Original: English

No.: **ICC-02/05-01/09**
Date: 4 January 2010

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 -REDACTED

Second Request for Participation and Observations on 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 Representative of Victims
Mr. Nicholas Kaufman

Legal Representatives of Applicants

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
Sir Geoffrey Nice QC
Mr Rodney Dixon

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's investigative materials failed to provide reasonable grounds to believe that the Government of Sudan acted with the specific intent required for such an offence.[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 ("Applications") in the case against Omar al-Bashir were submitted to the Victims Participation and Reparation Section ("VPRS") on behalf of victims 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 Victims'').

5. On 20 August 2009, the Legal Representative of the Victims (''the Legal Representative'') met with Victim a/0443/09 and Victim a/0445/09 and took supplementary information from them which, it will be 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 Victims a/0443/09 and a/0445/09 thereby permitting him to re-apply to Pre-Trial Chamber I for an amendment to the warrant for the arrest of Omar al-Bashir.[4]

7. On 26 August 2009, the Legal Representative filed two Applications. To Pre-Trial Chamber I, the Legal Representative submitted his "*Request to Expedite the Consideration of Applications for Victim Status*".[5] To the Appeals Chamber, the Legal Representative submitted his "*Request for an Extension of the Time Limit Prescribed in*

[1] ICC-02/05-01/09-3 at para. 206.
[2] ICC-02/05-01/09-12.
[3] ICC-02/05-01/09-25.
[4] *c.f.*; ICC-02/05-01/09-3 at para. 207.
[5] ICC-02/05-01/09-34.

the Regulations of 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".[6]

8. On 23 October 2009, the Appeals Chamber rendered its "*Decision on the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against "the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir" and on the Request for an Extension of Time*". In the context of this decision, the Appeals Chamber remitted the Applications to Pre-Trial Chamber I and rejected the request for an extension of time.[7]

9. On 6 November 2009, Pre-Trial Chamber I ordered the Prosecution and *ad hoc* Counsel for the Defence to submit observations on the Applications.[8]

10. On 1 December 2009, the Prosecution submitted its observations on the Applications expressing its satisfaction that all of the Victims meet the criteria for participation in the proceedings pursuant Article 68(3) of the Rome Statute.[9]

11. On 10 December 2009, the Legal Representative filed his "*Request for a Decision on Victim Participation*" in the absence of timely submissions on the part of *ad hoc* Counsel for the Defence.[10]

12. On 10 December 2009, Pre-Trial Chamber I rendered a decision recognizing the Victims as being entitled to participate in the pre-trial stage of the case against Omar al-Bashir.[11]

13. On 14 December 2009, *ad hoc* Counsel for the Defence requested that the Pre-Trial Chamber's decision of 10 December 2009, in so far as it accorded participation rights to the Victims, be suspended on account of the Registry's failure to notify her both of the Applications and of the Single Judge's order that she submit observations thereon.[12]

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[6] ICC-02/05-01/09-35.
[7] ICC-02/05-01/09-48.
[8] ICC-02/05-01/09-50.
[9] ICC-02/05-01/09-58.
[10] ICC-02/05-01/09-59.
[11] ICC-02/05-01/09-62.
[12] ICC-02/05-01/09-61.

14. On 17 December 2009, Pre-Trial Chamber I upheld the Victims' rights to participate in the pre-trial proceedings while extending the time limit for the submission of Defence observations on the Applications until 20 January 2010.[13]

The Second Application to Extend the Time Limit for Filing a Response

15. In rejecting their first application for an extension of the time limit for filing observations in the context of the Appeal, the Appeals Chamber stated that the Victims had not shown good cause and gave two reasons for this conclusion:

> *"The Applicants submit their request for an extension of time based on the assumption that the Pre-Trial Chamber will grant them victim status and that they will be granted the right to participate in the present appeal. Thus, their request is meant to safeguard a right that, at present, is merely hypothetical. Currently, there is no time limit that could be extended. Furthermore, in light of the above decision to instruct the Registrar to re-file the applications before the Pre-Trial Chamber, the extension sought would be for an indefinite period of time; if the Appeals Chamber were to grant the request for an extension of the time limit, the proceedings in this appeal could not be brought to an end until the Pre-Trial Chamber has rendered a decision on the eight applications for participation."*[14]

16. The Legal Representative is of the opinion that the aforementioned considerations no longer apply. The Victims no longer claim a hypothetical entitlement but enjoy an actual right to participate in the pre-trial stage of the case against Omar al-Bashir. Furthermore, the Victims' present request for an extension of the time limit is not for indefinite period of time in so far as their observations on the substantive issue at hand – for reasons justified below – are contained within the body of this filing.

Justification for Filing Substantive Observations with the Application for Leave

17. The Victims are aware that the Appeals Chamber has previously expressed its disapproval of the practice of appending substantive arguments to an application for leave to submit the same arguments. In the present instance, however, the Victims respectfully submit that circumstances beyond their control have led to the loss of valuable time and to their being put at a substantial disadvantage.

[13] ICC-02/05-01/09-64.
[14] ICC-02/05-01/09-48 at para. 17.

18. The process of interviewing and preparing the Applications was initiated in April 2009 at the law faculty of Tel Aviv University. Subsequently, the Applications were reviewed for legal consistency and thereafter sent by registered post to the Netherlands for further review by the Legal Representative. Inevitably, the Applications were only finalized and submitted in hard copy format to the VPRS after the expiry of all relevant time limits for the filing of a response in the present proceedings.[15]

19. The Applications were filed on 6 August 2009 and thereafter submitted by VPRS to the Appeals Chamber. The Legal Representative was not made a party to the deliberations which led to VPRS's decision to file the applications before the Appeals Chamber. The Appeals Chamber in due course held that this decision was incorrect and ordered that the Applications be resubmitted to the Pre-Trial Chamber.[16] As a result of this procedural flaw (incurred with the best of intentions), the Single Judge ordered observations from the Parties on the Applications at a relatively late stage - 6 November 2009[17] - despite the fact that the Legal Representative, unaware of VPRS's unilateral tactical decision, had seized him of the matter on 27 August 2009.[18] Accordingly, the Victims respectfully argue that they have been prejudiced for procedural reasons without their control.

<u>Observations on the Applicants' Right to Participate in the Appeal</u>

20. The Legal Representative repeats his previously argued submission that the confirmation of victim status accords an automatic and *a fortiori* right to participate in the present Appeal proceedings. To this end, the Legal Representative endorses the preliminary submissions made by the Legal Representatives in *<u>Prosecutor v. Jean-Pierre Bemba</u>* on 18 August 2009.[19]

21. 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.[20] Additionally, regulations 24(2) and 86(8) of the Regulations of Court permit

[15] *c.f.*; Regulations 65(3) and 65(5) of the Regulations of the Court.
[16] ICC-02/05-01/09-48.
[17] ICC-02/05-01/09-50.
[18] ICC-02/05-01/09-34.
[19] ICC-01/05-01/08-479.
[20] ICC-01/04-01/06-824; Dissenting Opinion of His Honor President Sang-Hyun Song.

recognized victims to respond to any document filed with the Court throughout the whole of the legal process in the case.

22. Even if victim participation in the present Appeal is not deemed a right *a fortiori*, the jurisprudence of the Court governing intervention in interlocutory appeals militates in favor of granting the Victims leave to participate.[21]

a) **The Personal Interests of the Victims:** The Victims all belong to the Fur ethnic group and at least two of them[22], as set out hereinafter, are first-hand witnesses to incriminating admissions made by Omar al-Bashir's hierarchical inferiors – Ahmad Muhammad Haroun (''Ahmad Haroun'') and Ali Muhammad Ali Abd-al-Rahman ("Ali Kushayb''). Accordingly, all of the Victims have a vested personal interest in the outcome of the Appeal.

b) **Whether the Intervention is Appropriate:** The interests of justice 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.[23] 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 Defence is not a party to the present appeal nor, for that matter, was the Defence ever a party to the proceedings which gave rise to the impugned decision.

[21] 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-OI/06-1239 OA 9 OA 10, 20 March 2008, p. 3 and ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 88.
[22] a/0443/09 & a/0445/09.
[23] ICC-02/05-01/09-3 at para. 147.

23. Notwithstanding the aforementioned, the Legal Representative respectfully petitions the Appeals Chamber to accept the observations set out hereinafter by way of exercising its power under Rule 93 of the Rules of Procedure and Evidence to seek observations from Victims "on any issue". The Victims repeat their previously asserted belief that the prejudice which they will suffer by losing the opportunity to present their views on the issue of genocidal intent will far outweigh any potential inconvenience caused either to the Appeals Chamber or to the Prosecution.

Observations on the Prosecution's Appeal

24. The Pre-Trial Chamber certified the following issue for the purpose of the Appeal:

> "*Whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court*".

25. The Victims endorse the general thrust of the Prosecution's appeal and respectfully submit that the learned Pre-Trial Chamber unnecessarily complicated the evidential standard to be applied when considering a request for an arrest warrant.

26. The wording of Article 58(1)(a) is straight-forward; all the Court is required to consider is whether "there are reasonable grounds to believe that an offence within the jurisdiction of the Court has been committed". By subjecting this evidentiary test to a *quasi*-threshold condition – stipulating that such reasonable grounds be the "only reasonable conclusion to be drawn from the evidence" - the Pre-Trial Chamber rendered the evidential standard unduly stringent. Such stringency is not supported by the language or the intent of the Rome Statute. Nor is such stringency supported by the precedent of Pre-Trial Chamber I itself which, in an earlier decision on the Prosecution application for arrest warrants against *Ahmad Haroun & Ali Kushayb*, held that the evidentiary standard was akin to the "reasonable suspicion" standard under Article 5(1)(c) of the European Convention on Human Rights.[24] Logic dictates that a "reasonable suspicion" is more than a mere hunch but less, of course, than the "substantial grounds" standard required by Article 61(7) of the Rome Statute for the confirmation of charges.

[24] ICC-02/05-01/07-1 *corr*. at para. 28.

27. Although the issuance of an arrest warrant is designed to ensure appearance at trial, it is also the means whereby the integrity of an ongoing investigation can be ensured.[25] The evidentiary test at this preliminary stage of the criminal process, therefore, should ensure the degree of flexibility required to continue an ongoing investigation. It should enable the examination of a number of incriminating scenarios and the elimination of those without the potential to form charges capable of confirmation. The standard fixed by the Pre-Trial Chamber in the impugned decision does not allow for such flexibility.

28. The Victims respectfully submit that customary international law on this issue is reflected in the statutory provisions and practice of the *ad hoc* criminal tribunals. The Rules of Procedure and Evidence at the **International Criminal Tribunal for the Former Yugoslavia** ("ICTY"), for example, provide for the confirmation of an indictment on the basis of the same evidentiary standard contained in Article 58(1)(a) of the Rome Statute.[26]

29. In its review of the indictment filed in the case of *Prosecutor v. Milan Martić*, the ICTY Trial Chamber was obliged to consider whether or not the investigative material supplied could support the Prosecution's contention that rocket attacks on the city of Zagreb were pre-planned:

> "*Furthermore, the facts submitted by the Prosecutor* ***permit the inference*** [emphasis added – N.K.] *that the shelling of Zagreb was an operation which had been planned or prepared. Admitting that he was under orders from Milan Martić, General Čeleketić announced to the press on 24 March 1995, more than a month prior to the events on which the charges are based, that should a Croatian offensive be launched, he expected to respond by targeting the "weak points", that is, "the parks of the Croatian cities". General Čeleketić added: "we know who the people in the parks are – civilians*".[27]

30. The passage cited above clarifies that the mode of liability imputed to Martić was an inferential conclusion. The ICTY Trial Chamber, it is submitted, was thereby acknowledging that "reasonable suspicion" had been established despite the fact that it was not the only reasonable conclusion which could have been drawn from the evidence.

31. The Victims argue that ICTY precedent even supports the contention that proving *mens rea* and/or intent is not a necessary prerequisite for establishing reasonable suspicion. In the case of *Prosecutor v. Milan Kovačević*, the Defence argued that the mere fact of the accused's *de jure* membership of the Prijedor Crisis Staff did not constitute reasonable grounds

[25] Article 58(1)(b)(ii) of the Rome Statute.
[26] ICTY Rules of Procedure & Evidence, r.47(B), r. 47(E), r.47(H), r.54(A), r. 55(A) & r. 61(C).
[27] IT-95-11-R61, 8 March 1996.

for attributing to him specific knowledge of and intent to commit the crimes organized by that body. The ICTY Trial Chamber rejected this argument holding as follows:

> *"There is, in our view,* ***no requirement that the Prosecution prove mens rea at this pre-trial stage of proceedings to establish the existence of a reasonable suspicion*** [emphasis added – N.K.] *In the Delalic Decision, it was noted that having a reasonable suspicion presupposes the "existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence."*
>
> *There is no requirement that "the existence and nature of the offence of which the person concerned is suspected be established since that is the aim of the investigation, the proper conduct of which is facilitated by detention".*
>
> *Similarly, we hold that, in this context, there is no requirement that the Prosecution prove mens rea or intent to secure the confirmation of an indictment. Confirmation of indictment is not trial on the merits. The confirmation of an indictment requires that there be "sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal". In the confirmation of the indictment in the case Prosecutor v. Rajic, Judge Sidhwa noted that "[t]o constitute reasonable grounds, facts must be such which are within the possession of the Prosecutor which raise a clear suspicion of the suspect being guilty of the crime". Judge Sidhwa added that "[t]he evidence, therefore, need not be overly convincing or conclusive; it should be adequate or satisfactory to warrant the belief that the suspect has committed the crime".*[28]

32. To conclude, the Victims do not presume to argue that Pre-Trial Chamber I should have avoided deliberating on the issue of genocidal intent. Nevertheless, by assigning itself the task of isolating the only reasonable grounds for establishing genocidal intent, the Pre-Trial Chamber was involving itself in an overly critical evaluation of the evidence which, in the circumstances, was premature.

Conclusion

33. In light of the aforementioned, the Victims support the Prosecution's submission that the evidence presented to Pre-Trial Chamber I was sufficient to establish reasonable grounds for the purpose of issuing an arrest warrant for genocide.

34. Should the Appeals Chamber accept the Prosecution's arguments as to the correct evidentiary standard to be applied at this stage of the proceedings yet determine that its

[28] IT-97-24, 20 January 1998, Decision on Defence Motion for Provisional Release at para.20.

presented evidence does not establish reasonable grounds for the existence of genocidal intent, then the Legal Representative respectfully requests that the matter be remitted to Pre-Trial Chamber I for reconsideration of the issue in light of the information supplied by Victims a/0443/09 and a/0445/09.

35. Both Victims a/0443/09 and a/0445/09 testify that they heard incriminating admissions from Omar al-Bashir's hierarchical inferiors – Ahmad Haroun and Ali Kushayb - from which an intention to bring about their partial or total destruction may be discerned:

(i) **Victim a/0443/09** [REDACTED].

(ii) **Victim a/0445/09** [REDACTED].

36. The Victims have taken particular note of the fact that the majority of Pre-Trial Chamber I found that there were reasonable grounds to believe that Omar al-Bashir exercised full control over all branches of the state apparatus in the Sudan, including Ali Kushayb's Janjaweed militia, and that his orders were directly transmitted, *inter alia*, to Ahmad Haroun.[29] In these circumstances, the incriminating admissions attributed to high ranking officials in the Sudanese state apparatus such as Ali Kushayb and Ahmad Haroun merit consideration, at the very least, as a reflection of knowledge attributable to Omar al-Bashir. More pertinently, these incriminating admissions comprise evidence from which it may reasonably be inferred that the same high ranking officials were expressing the genocidal agenda conveyed to them by their hierarchical superior.

Confidentiality

37. The Legal Representative is mindful of the order of the learned Single Judge of Pre-Trial Chamber I who reminded the Legal Representative of his obligation "to keep any information relating to the victims confidential and to ensure that it is not passed on to the public".[30] While it is not believed that the public disclosure of the redacted information can endanger Victims a/0443/09 and a/0445/09, given the general nature of the Single Judge's instruction, the Legal Representative has erred on the side of caution and, within the context of

[29] ICC-02/05-01/09-3 at para. 222 and *fn*. 247.
[30] ICC-02/05-01/09-62 at p. 26.

this filing, does not make public any information other than that previously disclosed to the Court or to the Prosecution.

Relief Sought

38. In light of all the above, the Legal Representative respectfully requests as follows:

a) that given the extenuating circumstances, the Appeals Chamber receive the Victims' observations contained herein;
b) that the Appeals Chamber allow the Prosecution's Appeal and;
c) that if the Appeals Chamber should decline to amend the arrest warrant to include a count of genocide, the matter be remitted to Pre-Trial Chamber I for reconsideration in light of the evidence supplied by Victims a/0443/09 and a/0445/09.

Nicholas Kaufman

Nicholas Kaufman
Legal Representative of Victims 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 3rd Day of January 2010
Jerusalem, Israel.