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THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Daniel David Ntanda Nsereko

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF
THE PROSECUTOR
*v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL BASHIR")***

Public Document

**Prosecution Response to the Victims' "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: Office of the Prosecutor

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The Office of the Prosecutor

Counsel for the Defence

Ms. Michelyne C. St-Laurent

Legal Representatives of Victims

Mr. Nick Kaufman

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution has appealed against the Pre-Trial Chamber I's Decision that refused to issue a warrant of arrest against President Omar Al Bashir for three charges of genocide.¹
2. The Legal Representative of victims authorized to participate in the case seeks to participate in the current appeal proceeding.² The Legal Representative argues that the grant of victim status by the Pre-Trial Chamber accords an automatic and *a fortiori* right to participate in the present appeal proceedings.³ In the alternative, if the Appeals Chamber considers that a separate application is required, the Legal Representative submits that the victims whom he represents fulfill the criteria for participation in this instance.⁴
3. Consistent with the established jurisprudence of the Appeals Chamber, victims do not have an automatic right to participate, but instead must apply for leave to participate in an interlocutory appeal. The Prosecution has considered the victims' personal interests as described in their Observations and assesses that they are affected. The Prosecution therefore does not object to the Appeals Chamber granting the victims leave to submit their views and concerns.
4. The Legal Representative incorporates the victims' substantive submissions into their request for participation,⁵ despite the Appeals Chamber's disapproval of including substantive arguments in a leave request. However, the Legal Representative raises the particular features of the current situation, where the appeal proceedings are in an advanced stage and the victims have not been in a position to provide substantive submissions earlier because of factors outside their control.

Procedural Background

5. On 4 March 2009, Pre-Trial Chamber I issued the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir."⁶

¹ ICC-02/05-01/09-3, 4 March 2009 ("the Appealed Decision"). The Prosecution's Document in Support of Appeal against the Decision was filed on 6 July 2009, ICC-02/05-01/09-25 OA.

² ICC-02/05-01/09-65 Red OA ("Victims' Observations").

³ Victims' Observations, paras. 20-21. The Legal Representative endorses the preliminary submissions made by the Legal Representatives in the Bemba case on 18 August 2009. These submissions were dismissed by the Appeals Chamber on 3 September 2009 (ICC-01/05-01/08-500 OA2) and 20 October 2009 (ICC-01/05-01/08-566 OA2, paras. 12-16) that reiterated the need for a separate application.

⁴ Victims' Observations, paras. 22-23.

⁵ Victims' Observations, paras. 24-32.

⁶ ICC-02/05-01/09-3, 4 March 2009 ("the Appealed Decision").

6. On 10 March 2009, the Prosecution applied for leave to appeal against that Decision pursuant to Article 82(1)(d).⁷ After the Pre-Trial Chamber authorized the appeal, the Prosecution filed its Document in Support of Appeal on 6 July 2009.⁸
7. On 6 August 2009, eight victims (“the Victims”) submitted applications for participation in the current case (“the Applications”) to the Victims Participation and Reparation Section (“VPRS”).⁹
8. On 20 August 2009, the Registrar submitted to the Appeals Chamber a confidential *ex parte* report informing the Appeals Chamber of the eight Applications and seeking guidance “as to which *extraordinary circumstances* may require the Registry to transmit applications directly to the Appeals Chamber in order that it may make such determinations”.¹⁰ The Registrar explained that “given the advanced state of proceedings in the appeal” she has “reflected carefully on the question of where the applications should be filed”.¹¹
9. On 26 August 2009, the Legal Representative of the Victims filed applications to Pre-Trial Chamber I¹² and to the Appeals Chamber to expedite the proceeding.¹³
10. On 23 October 2009, the Appeals Chamber recalled its “Decision on Victims’ Participation” of 16 May 2008 where it stated that the Appeals Chamber will not make first-hand determinations with respect to the status of the victims¹⁴ and remitted the Applications to Pre-Trial Chamber I.¹⁵

⁷ 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).

⁸ ICC-02/05-01/09-25 OA.

⁹ In particular victims a/0443/09 to a/0450/09. These victims are represented by the same Legal Representative, Mr. Nicholas Kaufman.

¹⁰ ICC-02/05-01/09-32-Conf-Exp. (“The Report”). See para. 9, quoted in ICC-02/05-01/09-48, para. 4.

¹¹ The Report, para. 5, quoted in ICC-02/05-01/09-48, paras. 2-3. Earlier, on 14 August 2009, four applications of other victims (a/0011/06 to a/0013/06 and a/0015/06) had been filed by VPRS directly to Pre-Trial Chamber I (ICC-02/05-01/09-30-Conf-Exp and ICC-02/05-01/09-30-Conf-Exp-Anxs 2-5), and the Prosecution and the Defence submitted their observations in due course pursuant to the Pre-Trial Chamber’s Order (ICC-02/05-01/09-38, Single Judge’s Order; ICC-02/05-01/09-46, Prosecution; ICC-02/05-01/09-45, Defence).

¹² “Request to Expedite the Consideration of Applications for Victim Status”, ICC-02/05-01/09-34.

¹³ “Request for an Extension of the Time Limit Prescribed in 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”, ICC-02/05-01/09-35.

¹⁴ ICC-01/04-01/06-1335, para. 40.

¹⁵ ICC-02/05-01/09-48. It also rejected the Legal Representative’s request for an extension of time because, *inter alia*, it was founded on an incorrect factual basis. The Legal Representative had assumed that the Applications were pending before the Pre-Trial Chamber when the Registrar had filed them before the Appeals Chamber as “confidential, *ex parte*, Registry only”; thus, neither the Legal Representative nor the Prosecutor were aware of this fact.

11. On 4 November 2009 VPRS filed a report on the eight Applications to Pre-Trial Chamber I.¹⁶
12. On 6 November 2009, Pre-Trial Chamber I ordered the Prosecution and *ad hoc* Counsel for the Defence to submit observations on the Applications.¹⁷ On 1 December 2009, the Prosecution submitted its observations, stating that it was satisfied that the victims meet the criteria for participation in the proceedings pursuant Article 68(3) of the Rome Statute.¹⁸
13. On 10 December 2009, Pre-Trial Chamber I granted the status of victims under Rule 85 to the 12 individuals who had submitted applications.¹⁹
14. On 14 December 2009, *ad hoc* Counsel for the Defence requested that the Pre-Trial Chamber's decision affording 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 to submit observations.²⁰
15. On 17 December 2009, Pre-Trial Chamber I upheld the victims' rights to participate in the pre-trial proceedings but also extended the time limit for the submission of Defence observations on the Applications until 20 January 2010.²¹
16. On 4 January 2010, the Legal Representative filed a request for leave to participate and submitted observations before the Appeals Chamber ("Victims' Observations").²²
17. The Prosecution hereby responds to the Victims' Observations pursuant to the Appeals Chamber's Order issued on 6 January 2010.²³

Argument

18. The Appeals Chamber has set out the requirements for victim participation in interlocutory appeals, which have been consistently applied.²⁴ According to these

¹⁶ ICC-02/05-01/09-49-Conf-Exp and ICC-02/05-01/09-49-Conf-Exp-Anxs 2-9.

¹⁷ ICC-02/05-01/09-50.

¹⁸ ICC-02/05-01/09-58.

¹⁹ ICC-02/05-01/09-62. This decision ruled on prior applications of four victims (a/0011/06 to a/0013/06 and a/0015/06) and the Applications of these eight Victims (victims a/0443/09 to a/0450/09).

²⁰ ICC-02/05-01/09-61.

²¹ ICC-02/05-01/09-64.

²² ICC-02/05-01/09-65 Red OA.

²³ ICC-02/05-01/09-66. The Order instructs the Prosecutor to file a response by 12 January 2010.

²⁴ "In order for victims to participate in an appeal under article 82 (1) (b) of the Statute, an application seeking leave to participate in the appeal must be filed." - *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 38, see also paras. 40, 43. "The Appeals Chamber finds these procedures adopted in respect of interlocutory appeals pursuant to article 82 (1) (b) of the Statute to be equally applicable to the instant interlocutory appeals arising under article 82 (1) (d) of the Statute" - *Situation in the DRC*, ICC-01/04-503 OA4

decisions, because “[a]n interlocutory appeal [...], in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings,”²⁵ Article 68(3) “mandates a specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration.”²⁶

19. The Appeals Chamber further requires that the victims demonstrate that: (i) the individual seeking participation is a victim in the case or situation out of which the appeal arises (an assessment to be made by a Pre-Trial or Trial Chamber)²⁷; (ii) the individual has personal interests which are affected by the issues on appeal; (iii) the individual’s participation is appropriate; and (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²⁸
20. The Victims represented by the Legal Representative have already been recognised as victims in the context of this case.²⁹ Victims permitted to participate in the relevant situation or case do not need to demonstrate again to the Appeals Chamber that they meet the definition of “victim” under Rule 85.³⁰
21. Victims must also demonstrate that the pending appeal affects their personal interests. Here, the Prosecution considers that the issue in this appeal – namely, the standard of

OA5 OA6, 30 June 2008, para. 37. See also, e.g., *Prosecutor v. Lubanga*, ICC-01/04-01/06-1335 OA9 and OA10, 16 May 2008, paras. 12-13; *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 23; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1452 OA12, 6 August 2008, para. 7; *Prosecutor v. Bemba*, ICC-01/05-01/08-566 OA2, 20 October 2009, para. 13.

²⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 43.

²⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 40; *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 36; *Prosecutor v. Bemba*, ICC-01/05-01/08-566 OA2, 20 October 2009, para. 14. In this sense, the Prosecution notes that the Legal Representative’s contention that mere confirmation of victim status accords an automatic right to participate in the current appeal (Observations, para. 20) disregards the clear jurisprudence of the Appeals Chamber on the issue.

²⁷ *Prosecutor v. Al Bashir*, ICC-02/05-01/09-48 OA, 23 October 2009, para. 10; see also *Prosecutor v. Lubanga*, ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2008, para. 40.

²⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1335 OA9 and OA10, 16 May, 2008, paras. 35 and 36; *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, paras. 35, 90; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1453 OA 13, 6 August 2008, para. 7; *Prosecutor v. Lubanga*, ICC-01/04-01/06-1452 OA12, 6 August 2008, para. 7; *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; *Prosecutor v. Bemba*, ICC-01/05-01/08-566 OA2, 20 October 2009, para. 8. See also *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 2, 44 and 46; *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 23.

²⁹ ICC-02/05-01/09-62. At the same time, however, the Prosecution notes that the *ad hoc* Counsel for the Defence has yet to submit observations on the victims’ Applications to participate in the case before the Pre-Trial Chamber. ICC-02/05-01/09-64, p. 6. The deadline was extended to 20 January 2010 as Counsel had not been notified of the Applications and of the Pre-Trial Chamber’s Order requesting observations. If the Defence’s observations cause the Pre-Trial Chamber to revisit its initial decision, this may entail consequences for the participation of the Victims in this appeal. However, this possibility is not a matter that can be addressed now.

³⁰ See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 44 and 45; *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 92.

proof applicable at the arrest warrant stage which led to the dismissal of three charges of genocide³¹ – affects the personal interests of the Victims.

22. The Prosecution further considers that it would be appropriate for the Victims to present their views and concerns regarding the important issue pending in this appeal. The fundamental requirements for participation are thus met.

Response to the Victims' Views and Concerns

23. The Victims' Observations include their views and concerns on the issue before the Appeals Chamber.³² The Legal Representative acknowledges that under the applicable Appeals Chamber's jurisprudence this practice is not allowed, but argues that technical or procedural factors beyond the control of the victims delayed the whole procedure and, as a result, they have not been able to provide their views to the issue on appeal at this late stage of the proceeding.³³
24. The Appeals Chamber has the discretion to accept the Victims' submissions. The Prosecution notes, however, that if the Victims are permitted to participate and if their substantive observations are accepted, "the Prosecutor and the Defence shall be allowed to reply to any filing of the victims in accordance with the provisions of rule 91(2) of the Rules of Procedure and of Evidence".³⁴ For its part, the Prosecution supports the legal arguments presented by the Legal Representative, which largely endorses the submissions advanced by the Prosecution in its appeal brief.³⁵
25. Finally, the Prosecution notes that submissions enclosed in paragraphs 34 to 36, and 38(c) have no bearing on the present appeal - which is confined to a precise legal matter - and should be disregarded. Accordingly, those paragraphs of the Legal Representative's submissions cannot be entertained by the Appeals Chamber.

Conclusion

26. For the reasons set out above, the Prosecution does not object to the participation of the Victims in this appeal. If the Appeals Chamber agrees to consider the substantive submissions advanced jointly with the application for participation, the Prosecution

³¹ ICC-02/05-01/09-21: "whether the correct standard of proof in the context of Article 58 requires that the only reasonable conclusion to be drawn from the evidences is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court."

³² Victims' Observations, paras. 24-32.

³³ Victims' Observations, paras. 17-19.

³⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 49.

³⁵ Victims' Observations, paras. 24-32.

submits that it largely concurs with them, with the exception of the factual matters addressed in paragraphs 34 to 36 and 38(c) of the Observations.



Luis Moreno-Ocampo,
Prosecutor

Dated this 11th day of January 2010

At The Hague, The Netherlands