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PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

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

Public Document

**Prosecution's Observations on 8 Applications for
Victims' Participation in the Proceedings**

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Pre-Trial Chamber I is considering eight applications by purported victims who seek to participate in the pending proceedings related to the Al Bashir case.
2. The Prosecution opposes the applications and also the representation of these applicants by counsels Geoffrey Nice and Rodney Dixon. On the merits of the applications, none of the applicants claims to have suffered harm on account of any of the acts alleged to be crimes in this case. In most cases, the applicants state that they or family members suffered bodily injury (including death of some family members) and/or property damage and/or loss as a result of battles; their own terms suggest that the harm they suffered resulted from, in effect, collateral damage during what are described as military engagements. Only one of the applicants attributes the damage he suffered to unjustified crimes by persons he believes to be Janjaweed, but he distinguishes that force from government forces that, he suggests, opposed the Janjaweed forces. The remaining applicants do not attribute the injuries they claim to government soldiers or government-backed militia, and several state that the government forces brought peace and roused the aggressors.
3. In short, only one of the applicants identifies injury that he suffered with alleged criminal acts charged in the pending matter, but even his application divorces the persons responsible for the injury from the suspect's government forces, and thus does not link the harm he suffered to the crimes alleged against the suspect, President Al Bashir.
4. An additional factor that corroborates the Prosecution's position about the applications is the identity of the intermediary that assisted the applicants in applying for victim status. It is a civil organisation, the Citizen's Organisation for the Sudan, which is comprised of the Sudan Workers Trade Unions

Federation (SWTUF) and the Sudan International Defence Group (SIDG).¹ The SWTUF and SIDG on their own behalf previously applied unsuccessfully, and are again applying, to participate as an amicus in order to dispute the criminal charges and, in the most recent effort, to press the case that the Chamber should not issue a warrant on genocide charges. As the Prosecution has previously argued, this organization appears to be a proxy for the suspect himself, who has declined to recognize the Court or make an appearance in this case.

5. Moreover, the Legal Representatives of these applicants, Geoffrey Nice and Rodney Dixon, are also representing the intermediary/would-be amicus SIDG and SWTUF. Even putting aside the apparent conflict of interest, which is the subject of a separate submission to be filed by the Prosecution, the fact that the victims are represented by the same counsels who are simultaneously contesting the factual and legal basis for the criminal charges substantiates that these persons should not be considered victims as contemplated by the Rome Statute.

Background

6. On 19 August 2009, Pre-Trial Chamber I appointed Judge Sanji Mmasenono Monageng as Single Judge “responsible for all issues related to victims’ applications to be authorized to participate as victims in the proceedings relating to the Al Bashir case”.²
7. On 26 May 2010, the Single Judge rendered the *Decision Setting a Time Limit for the Parties’ Replies to 8 Applications for Victims’ Participation in the Proceedings*.³ In her Decision, the Single Judge ordered the Registry, *inter alia*, to provide the

¹ See ICC-02/05-01/09-88 at paras 1 and 36.

² ICC-02/05-01/09-31.

³ ICC-02/05-01/09-85.

Prosecution by 28 May 2010 with non-redacted copies of the Applications and Annex 1 and granted parties until 18 June 2010 to reply to the Applications.⁴

8. On 28 May 2010, the Registry notified the Prosecution of the reclassification of annexes, which allowed the Prosecution to access the Applications.⁵ The Prosecution was further notified of a consolidated version of Application a/0781/10, containing also the Supplementary Information that was submitted after the application had been filed.⁶ The Prosecution hereby submits its observations on the eight applications for participation in the proceedings as victims.⁷

Legal criteria for victims' participation in the proceedings

9. As has been established through jurisprudence, the Court will authorize participation as a victim under Article 68(3) of the Statute if the applicant meets the following criteria: a) the applicant qualifies as a victim pursuant to Rule 85 of the Rules of Procedure and Evidence (the "Rules"); b) the applicant's personal interests are affected by legal or factual issues raised in the proceedings at hand; c) the applicant's participation is appropriate at that particular stage of the proceedings; and d) the manner of participation is not prejudicial or inconsistent with the rights of the accused and a fair and an impartial trial.⁸
10. For an applicant to be granted the status of a victim under Rule 85, (i) he or she must be a natural person as set forth in Rule 85(a) or an organization or institution as set forth in Rule 85(b); (ii) he or she must have suffered harm; (iii) the crime from which the harm resulted must fall within the jurisdiction of

⁴ ICC-02/05-01/09-85, at pages 5 - 6.

⁵ See Reclassification of ICC-02/05-01/09-82-Conf-Exp-Anx3~ICC-02/05-01/09-82-Conf-Exp-Anx10 & ICC-02/05-01/09-84-Conf-Exp-Anx1 pursuant to Decision ICC-02/05-01/09-85, dated 26 May 2010.

⁶ ICC-02/05-01/09-86-Conf-Exp-Anx.

⁷ Applications a/0774/10 to a/0781/10.

⁸ See e.g. *Prosecutor v. Thomas Lubanga Dyilo*, 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, 16 May 2008, para. 36.

the Court; and (iv) there must be a causal link between the crime and the harm.⁹

11. The Appeals Chamber has recognised that material, physical and psychological harm are all forms of harm within the scope of Rule 85(a) if suffered personally by the victim.”¹⁰ It held that such harm may be both personal and collective in nature.¹¹ The Appeals Chamber also confirmed that in the case of natural persons, both direct and indirect victims may suffer harm, provided it is “personal to the individual”.¹²

12. The jurisprudence also has held that for the purposes of participation in the pre-trial or trial proceedings in a particular case, the harm suffered by a victim must be linked with the charges: i.e. the charges confirmed against the accused or, at earlier stages in the proceedings, the offences alleged in the warrant of arrest or summons to appear or the document containing the charges.¹³ Accordingly, persons who were not conscripted children or family members of such children, but instead claimed to be victims of war crimes committed by child soldiers, were not sufficiently linked to the crimes charged to qualify for victim recognition in the Lubanga proceeding.¹⁴ The charges

⁹ See ICC-01/04-01/06-228-tEN, p. 7; ICC-01/04-101, para. 94; ICC-02/05-111, para. 2; See also at ICC-02/04-01/05-252, para. 12 to 14.

¹⁰ ICC-01/04-01/06-1432 OA9 OA10, at para 32.

¹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, para. 35.

¹² See ICC-01/04-01/06-1432 OA9 OA10, at para 32, in which the Appeals Chamber provides the following example for a close personal relationship, “such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.”

¹³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’s Participation of 18 January 2008, ICC-01/04-01/06-1432, 11 July 2008, paras. 2 and 62 to 64; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’, ICC-01/04-01/07-579, 10 June 2008, paras. 66-67; *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-121, 25 September 2009, paras. 12-13.

¹⁴ ICC-01/04-01/06-1634 para.52

brought forward against the suspect are spelled out in the “Warrant of Arrest for Omar Hassan Ahmad Al Bashir”.¹⁵

13. Applicants must provide adequate proof of identity to prove their status as natural persons. All Chambers impose this requirement as a minimum safeguard to guaranteeing the accuracy of the applications.¹⁶

14. In addition, Pre-Trial Chamber I established criteria for completeness in its 17 August 2007 Decision,¹⁷ which serves as further guidance in assessing victim applications.

The Prosecution’s Observations

15. The Prosecution supports the participation of victims in proceedings before the Court, including at the current stage of these proceedings, when the legal requirements are met.

16. In this instance, all Applicants are natural persons pursuant to Rule 85(a). All applicants also have submitted proof to establish their identities.¹⁸ However,

¹⁵ ICC-02/05-01/09-1

¹⁶ PTC I, ICC-01/04-374; PTC II, ICC-02/04-01/05-252, paras 16 to 21 and TC I, ICC-01/04-01/06-1119, para 87.

¹⁷ ICC-01/04-374, para 12; see also ICC-02/05-111-Corr, at para 26 to 28;

¹⁸ Application a/0774/10 (ICC-02/05-01/09-82-Conf-Exp-Anx3) contains copies of a picture ID. The handwritten translation indicates that the ID card was issued by the Civil Registry Administration of the Republic of the Sudan. It certifies that the applicant is a citizen of the Sudan. While it indicates a place of birth, it does not provide information on the applicant’s date of birth. Application a/0775/10 (ICC-02/05-01/09-82-Conf-Exp-Anx4) contains a copy of what could be a photo ID (however the photograph is not visible). The handwritten translation indicates that the Passports, Immigration and Nationality Department of the Sudanese Ministry of Interior confirm that the applicant is a Sudanese citizen. A place or date of birth is not indicated. Application a/0776/10 (ICC-02/05-01/09-82-Conf-Exp-Anx5) contains a copy of what could be a photo ID (however the photograph is not visible). According to the handwritten translation, the Civil Registry Administrator confirms that the applicant is a Sudanese citizen by birth. No place or date of birth is listed. The photograph is not visible. Application a/0777/10 (ICC-02/05-01/09-82-Conf-Exp-Anx6) contains a photocopy of what appears to be a picture ID certified by the Sudanese Ministry of Interior and more specifically from the Passports, Immigration and Nationality Department confirming that the applicant is a Sudanese citizen. The handwritten translation mentions neither date nor place of birth. Application a/0778/10 (ICC-02/05-01/09-82-Conf-Exp-Anx7) contains a photocopy of what appears to be a picture ID certified by the Sudanese Ministry of Interior and more specifically from the Passports, Immigration and Nationality Department confirming that the applicant is a Sudanese citizen. The handwritten translation contains neither date nor place of birth. Application a/0779/10 (ICC-02/05-01/09-82-Conf-Exp-Anx8) contains a

none of the applicants alleges sufficient facts to meet the requirement under Rule 85(a), because none shows that he suffered harm (of an indirect nature, due to the loss of family members or of a direct nature, due to physical injury or loss of property) as a result of a crime for which the suspect Al Bashir is charged.¹⁹ Indeed, the applications seem deliberately to avoid attributing any of the harm suffered to criminal acts alleged against the suspect in the case.

17. That the applicants' statements are not linked to the charges in the case is, under the peculiar circumstances here, not surprising. The applicants appear to be connected to entities supporting the suspect, President Al Bashir. They were located by intermediaries, SIDG and SWTUF, which themselves are linked to the Government of the Sudan and have attempted to intervene in this case to argue against the criminal charges. The SIDG, by its own admission, claims that it was established solely for the purpose of opposing the issuance of warrants of arrest for Omar Hassan Ahmad Al Bashir. In a prior filing the SIDG stated as follows: *"The SIDG was formed by a group of concerned Sudanese citizens in the wake of the filing of the Prosecutor's application for an arrest warrant for President Omar Hassan Al Bashir and the concerns that were being raised both about the consequences of this application for stability in Sudan and about the Prosecutor's motives and the nature of the charges being sought. The arrest warrants that had already been issued for Ahmad Harun and Ali Kushayb had raised major tensions in Sudan, and in forming the SIDG it was the view of the founding members that the Prosecutor's application in respect of the serving President*

copy of what appears to be a stamped picture ID card. The handwritten translation indicates that the ID card was issued by the Passports, Immigration and Nationality Department of the Sudanese Ministry of Interior. It contains a place and year of birth. Application a/0780/10 (ICC-02/05-01/09-82-Conf-Exp-Anx9) contains copies of a picture ID. The handwritten translation indicates that the ID card was issued by the Passports, Nationality, Immigration and ID cards Department of the Republic of Sudan. It certifies that the applicant is a citizen of Sudan and contains a place and year of birth. Application a/0781/10 (ICC-02/05-01/09-86-Conf-Exp-Anx) contains copies of a picture ID. The handwritten translation indicates that the ID card was issued by the Civil Registry Administration. It certifies that the applicant is a citizen of the Sudan and contains a place and year of birth.

¹⁹ The crimes for which Omar Hassan Ahmad Al Bashir is charged are spelled out in the Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1.

of Sudan would seriously aggravate the situation, creating an impending danger which urgently needed to be highlighted and addressed.”²⁰

18. In addition, the applicants are also represented by Legal Representatives who have attempted, and are continuing to attempt, to intervene as counsels for the SIDG and SWTUF. Those entities, as noted above, are pressing the case that the Chamber should not issue a warrant on genocide charges; that position is consistent with their view previously enunciated that the other charges should not be brought and, on appeal, that the Chamber’s denial of a warrant on genocide be affirmed.

19. The Prosecution does not dispute the right of persons to disagree with the decision to seek an arrest warrant or to defend the suspect. However, persons who dispute that crimes were committed as charged cannot at the same time present and support the interests of purported victims of that crime. The connection between SIDG and SWTUF, the applicants, and the Legal Representatives provides further basis to the Prosecutor’s position to reject the applications.

20. Even without regard to those considerations, it is clear that the applications on their face do not sufficiently establish entitlement to recognition of victim status.

- Applicant a/0774/10 claims to have lost relatives and livestock due to an attack on his village in South Darfur in August 2003. Although the Applicant stated in his application that the attacker’s identities were unknown to him, he described the attackers as “riding on camels and horses” and wearing “khaki”.²¹ The Prosecution, in its application for an arrest warrant against Al Bashir, made extensive reference to the commission of crimes by government agents and members of the Popular

²⁰ Footnote 2 of the Application on behalf of Citizens Organisations of The Sudan in relation to the Prosecutors’ Applications for Arrest Warrants of 14 July 2008 and 20 November 2008 – 11 January 2009 ICC-02/05-170

²¹ ICC-02/05-01/09-82-Conf-Exp-Anx3, page1.

Defence Forces, including mounted horsemen commonly referred to as Militia/“Janjaweed”.²² In other circumstances, therefore, one might conclude that the description by Applicant a/0774/10 refers to harm from a crime for which the suspect was charged. However, the Applicant suggests that the government forces protected the village from the attackers, thus signifying that the attackers on horses and camels were not government forces. The information provided by the applicant suggests that the attackers may have belonged to those group of men who raid villages in Darfur on camel or horseback whom the GoS often refer to as ‘bandits’ or ‘outlaws’. The Prosecution does not believe that all unidentified groups on horseback are members of the Militia/Janjaweed whom the Prosecution alleges to have been mobilized, trained, armed, funded and directed by the Suspect. As such, the application does not demonstrate that the harms suffered were a result of the crimes charged.

- Applicant a/0775/10 witnessed the killing of two of his children in what he describes as the government’s liberation of his village from cruel rebels who took over the village in early 2004. Government forces arrived in December 2004 to liberate his village from the rebel forces. During the ensuing battle a rebel vehicle approached him and his family and a Government plane bombed that vehicle, causing the death of his nearby children. The Application thus describes collateral damage resulting from what the applicant describes as a legitimate military action undertaken to defend the village against enemy rebels. He also states that he lost his property, presumably through abandonment when he fled his village on account of the fighting initiated by the Government to liberate his village from the rebels. Because he states that the government forces arrived to liberate the village and restore its peace, there is no specific or even implied allegation that the harm suffered is attributable to the crimes charged against the suspect.

²² ICC-02/05-157-AnxA, page 8, 32, 66, 80 – 85.

- Applicant a/0776/10, from the same village as Applicant a/0775/10, explains that he was living well under government rule until rebel forces took over the village. Government forces arrived in December 2004 and fierce fighting erupted. The Applicant fled in fear for his life and claims that as a result, he lost his house and belongings. Nothing in his statement suggests that he suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.
- Applicant a/0777/10 describes hostilities in his village after armed people on camels and horses (presumably not allied with the government, since they were subsequently chased out by government forces) arrived in November 2003, killed civilians, burned villages, and caused people to flee. The Government army routed the attackers and the villagers felt safe again. He returned to his village. Thereafter, rebel forces came to his village and fighting broke out in early 2004 between the rebel forces and other unidentified armed persons on camels and horses. He and other villagers fled and resettled in another village. Rebels then entered that village and people fled. Three years later, in a third village, armed persons on camels and horses came again and threatened them. They chased his father, who fell off his donkey, broke his hip, and died two months later. The Applicant also state that his son died of an unspecified cause and he lost his cash, his crops, his camels, and his sheep. Nothing in this statement, however, suggests that he suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.
- Applicant a/0778/10 lost his three brothers during fighting that erupted on a single day in his village in February or March 2004 between rebels and “armed people on camels and horses”. His brothers were killed during the

fighting, and he was shot in the leg. His house was burnt, he lost camels, cows, sheep, crops, produce, and money, and fled the village. Nothing in the Application suggests that the Applicant suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.

- Applicant a/0779/10 describes how, in the area of his village in West Darfur, people on camels and horses (and some on foot) attacked rebel forces in November 2003. He was shot in the back, his grandfather was one of six persons killed during the attack, and he left his village, losing his house and livestock. Nothing in this statement, however, suggests that the Applicant suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.
- Applicant a/0780/10 claims to have lost all his possessions including his house due to an attack on his village by armed men later identified to him as Janjaweed in February 2004. According to the Applicant, during the attack the attackers fired randomly, killing seven or eight persons in the village, and looted houses. One month later, government forces arrived to protect them against the Janjaweed. As a result of the attack, the Applicant lost his house, crops, and possessions. Sometime thereafter he left his village. Nothing in this statement, however, suggests that he suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.
- Applicant a/0781/10 states that one morning in April 2003 armed rebel forces and militia groups fought in his village. He stated that villagers caught in the middle of the battle fled for their lives. Fleeing the battle, the Applicant abandoned his home and lost all his belongings and cows.

Nothing in this statement, however, suggests that he suffered harm because of crimes committed by the government forces. He therefore does not claim that he suffered harm as a result of any crime alleged against the suspect in this case.

Conclusion

21. For the reasons outlined above, the Prosecution submits that none of the Applicants meet the criteria for participation spelled out by Rule 85(a), since the information provided by these applicants does not establish, or even allege, that applicants suffered harm as the result of a crime for which the suspect is charged.



Luis Moreno-Ocampo

Prosecutor

Dated this 18th day of June 2010

At The Hague, The Netherlands