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No. ICC-02/05-01/09 OA
Date: 23 October 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
PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR**

Public

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

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Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Legal Representative of Applicants

Mr Nicholas Kaufman

Amicus Curiae

Mr Rodney Dixon
Mr Geoffrey Nice

REGISTRY

Registrar

Ms Silvana Arbia

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor pursuant to the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecutions Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’” of 24 June 2009 (ICC-02/05-01/09-21),

Having before it the “Report on applications to participate in the proceedings” of 20 August 2009 (ICC-02/05-01/09-32-Conf-Exp), and the “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” of 27 August 2009 (ICC-02/05-01/09-35),

Renders unanimously the following

DECISION

1. The Registrar is instructed to file the “Report on applications to participate in the proceedings” with Pre-Trial Chamber I and to transmit the applications of applicants a/0443/09 to a/0450/09 to that Chamber.
2. The “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’” is rejected.



REASONS

I. THE “REPORT ON APPLICATIONS TO PARTICIPATE IN THE PROCEEDINGS”

A. Relevant procedural history and summary of the submissions

1. On 6 July 2009, the Prosecutor filed the “Prosecution Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’”.¹
2. On 20 August 2009, the Registrar submitted to the Appeals Chamber the “Report on applications to participate in the proceedings”² (hereinafter: “Report”). The Report was filed as “confidential, *ex parte*, Registry only”. In the Report, the Registrar informs the Appeals Chamber that applicants a/0443/09 to a/0450/09 (hereinafter: “Applicants”) have applied for participation in the proceedings as victims.
3. The Registrar submits that the legal representative of the Applicants has the “stated intention to seek participation in the current appeal on behalf of his clients”.³ The Registrar explains that “given the advanced state of proceedings in the appeal” she has “reflected carefully on the question of where the applications should be filed.”⁴ The Registrar notes that neither the Rules of Procedure and Evidence nor the Regulations of the Court provide a clear indication as to the Chamber before which applications for participation as victims should be filed.⁵ She recalls a previous decision of the Appeals Chamber on the participation of victims, in which the Appeals Chamber held that “ordinarily, for interlocutory appeals it would not itself make first hand determinations with respect to the status of victims”.⁶
4. The Registrar seeks guidance from the Appeals Chamber “as to which *extraordinary circumstances* may require the Registry to transmit applications

¹ ICC-02/05-01/09-25.

² ICC-02/05-01/09-32-Conf-Exp.

³ Report, para. 5.

⁴ Report, para. 5.

⁵ Report, para. 5.

⁶ Report, para. 7.

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directly to the Appeals Chamber in order that it may make such determinations.”⁷ The Registrar lists several factors which, in her view, the Appeals Chamber may wish to consider in determining this issue.⁸ The relevant passage of the Report reads as follows:

(a) At least in some cases, such an approach [where the Appeals Chamber itself determines victim status] may allow victims to participate in appeal processes on an expedited basis, since this will not require them to wait for a determination of victim status to first be made by the relevant Trial or Pre-Trial Chamber.

(b) However the possibility of filing new applications directly to the Appeals Chamber may increase procedural uncertainty if clear standards are not set in order to determine in which circumstances this step should be taken. For example, questions could arise as to whether new applications should be filed with the Appeals Chamber in respect of a current appeal where applicants have a clear apparent interest in the outcome of the appeal but have not had the benefit of a legal representative who could explain the relevant procedures to them and bring to the Registry's attention the applicant's desire to participate in the appeal (as occurred in the present instance). It is possible that a very large number of applicants would fall into this category.

(c) A discrepancy might arise between the situation of new applicants who are able to apply directly to the Appeals Chamber, and thereby be considered for participation in the appeal, and the situation of those applicants who had recently had their applications submitted to the relevant Trial or Pre-Trial Chamber. On the basis of the Appeals Chamber's decision of 16 May 2008 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* it appears that the latter applicants would be precluded from participation in the appeal because their applications are still pending.

(d) Applicants who had their victim status determined by the Appeals Chamber would likely retain this status for the purpose of participating in other stages of the proceedings before the Pre-Trial or Trial Chamber, at least unless and until a Chamber decided to reopen the question of victim status. This may give rise to a further question of fairness and consistency if victim status was determined by the Appeals Chamber using standards other than those which had been used by the relevant Pre-Trial or Trial Chamber in respect of other applications in the same case or situation. This would likely be the case, given the current lack of harmony between the approaches of the various Chambers.

(e) Conversely, it is possible that the determination of victim status by the Appeals Chamber may have the effect of contributing to the harmonization of

⁷ Report, para. 9.

⁸ Report, para. 10.

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the relevant standards, as other Chambers follow the approach taken by the Appeals Chamber.⁹ [Footnotes omitted.]

5. The Registrar states furthermore that “[s]hould the Appeals Chamber decide to determine victim status in respect of these applications itself, the Registry additionally requests the Chamber’s guidance on the circumstances under which future newly-received applications should be filed with the Appeals Chamber.”¹⁰

6. The Appeals Chamber recalls that the Registrar filed her Report as “confidential, *ex parte*, Registry only”. In addition to information on the details of the eight applications, the Report contains legal observations of a general nature. The Appeals Chamber considers that it is important for a proper understanding of the procedural situation that gave rise to the present decision to recount some of these legal observations in the present decision. None of this information discloses any details of the applications received. The remainder of the Report is devoted to an explanation of the information contained in the applications and is irrelevant to the issue at hand.

B. Determination by the Appeals Chamber

7. Article 68 (3) of the Statute provides for the participation of victims in the proceedings before the Court, subject to certain conditions. Rule 89 (1) of the Rules of Procedure and Evidence stipulates, in relevant part, that:

In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber.

8. The legal instruments of the Court do not expressly state which of the Chambers is the “relevant Chamber” in terms of rule 89 (1) of the Rules of Procedure and Evidence, and therefore the addressee of applications for participation transmitted by the Registrar.

9. In the appeal of the Prosecutor and of Mr Thomas Lubanga Dyilo against Trial Chamber I’s “Decision on Victims’ Participation”, several applicants for victim status whose applications under rule 89 (1) of the Rules of Procedure and Evidence were, at

⁹ Report, para. 10.

¹⁰ Report, para. 11.

that time, pending before Trial Chamber I, applied separately and directly to the Appeals Chamber for participation in that appeal. In the “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’”¹¹ of 16 May 2008 (hereinafter: “Decision of 16 May 2008”), the Appeals Chamber rejected the applications for participation in the appeal. The Appeals Chamber 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.”¹² In accordance with this practice, the Appeals Chamber also rejected on another occasion applications for participation in appeals because the victim status of the applicants had not yet been determined.¹³

10. The Decision of 16 May 2008 concerned a situation in which the applications for participation submitted under rule 89 (1) of the Rules of Procedure and Evidence were pending before a Trial Chamber and had not been transmitted to the Appeals Chamber, whereas in the present case, the Registrar decided to transmit the applications of the eight applicants directly to the Appeals Chamber. However, the principle developed in the Decision of 16 May 2008 applies to the present case as well. In proceedings under article 82 (1) (d) of the Statute, the role of the Appeals Chamber is to review decisions rendered by the Pre-Trial or Trial Chambers in the course of the pre-trial and trial proceedings. Thus, the intervention of the Appeals Chamber during the pre-trial and trial phases is limited; the majority of the proceedings – and therefore the main opportunities for victims’ participation – takes place before the Pre-Trial or Trial Chambers. Furthermore, the Pre-Trial or Trial Chambers will, depending on the stage of the proceedings, often have an in-depth familiarity with the facts underlying the case and therefore are in a better position to assess whether an applicant is a victim. It follows that during the pre-trial and trial

¹¹ ICC-01/04-01/06-1335.

¹² Decision of 16 May 2008, para 40.

¹³ *Situation in the DRC*, ‘Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007’, ICC-01/04-503, 30 June 2008, para 93.

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phases of the proceedings the Pre-Trial or Trial Chambers should ordinarily make the determination of victim status, and not the Appeals Chamber.

11. Turning to the case at hand, the Appeals Chamber notes that the Applicants request to participate in *all* proceedings, present and future, in relation to the case against Mr Al Bashir. It follows that Pre-Trial Chamber I, where the case against Mr Al Bashir is currently pending, is best placed to decide whether applicants a/0443/09 to a/0450/09 are victims in terms of article 68 (3) of the Statute and rule 85 of the Rules of Procedure and Evidence. It is for that reason that the Appeals Chamber instructs the Registrar to file the eight applications as well as her Report before Pre-Trial Chamber I.

II. THE REQUEST FOR AN EXTENSION OF TIME

A. Relevant procedural history and submissions

12. On 27 August 2009, the Applicants filed a “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’”¹⁴ before the Appeals Chamber (hereinafter: “Request for Extension of the Time Limit”). The Applicants argue that if the Pre-Trial Chamber grants their applications for participation as victims, they have an automatic right to participate in the current appeal,¹⁵ or should at least be granted leave to do so.¹⁶ On the assumption that the Pre-Trial Chamber will grant them victim status, the Applicants request the Appeals Chamber to fix a fresh time limit for the Applicants to submit observations in the appeal.¹⁷ In support of their request, the Applicants argue that they cannot control how long the Pre-Trial Chamber will take to determine their applications for victim status.¹⁸ In the Applicant’s view, if time is not extended, they will “lose the opportunity to present their views on the issue of genocidal intent”.¹⁹

¹⁴ ICC-02/05-01/09-35.

¹⁵ Request for Extension of the Time Limit, para 12.

¹⁶ Request for Extension of the Time Limit, para 14.

¹⁷ Request for Extension of the Time Limit, para 15.

¹⁸ Request for Extension of the Time Limit, para. 9.

¹⁹ Request for Extension of the Time Limit, para. 9.

13. On 4 September 2009 the Prosecutor filed the “Prosecution’s Response to Victims’ Request for an Extension of the 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’”²⁰ (hereinafter: “Response”). The Prosecutor submits that it would be proper for the Appeals Chamber to defer its decision on the application of the Applicants to participate in the present appeal until after the Pre-Trial Chamber’s decision on their victim status.²¹ He submits that in the alternative, the Appeals Chamber could seek the views of the Applicants under the second sentence of rule 93 of the Rules of Procedure and Evidence.²²

B. Determination by the Appeals Chamber

14. The Appeals Chamber notes that both the Request for an Extension of the Time Limit and the Response thereto are based on the assumption that the applications of the Applicants are pending before the Pre-Trial Chamber. However, as explained above, the Registrar has filed the eight applications before the Appeals Chamber. As the Registrar’s Report was filed as “confidential, *ex parte*, Registry only”, neither the Applicants nor the Prosecutor were aware of this fact. The Request for an Extension of the Time Limit, as submitted, is therefore founded on an incorrect factual basis. The Appeals Chamber has decided to consider the merits of the Request for an Extension of the Time Limit nevertheless, given that it is, with the present decision, directing the Registrar to re-file the applications before the Pre-Trial Chamber.

15. For the following reasons, the Appeals Chamber has decided to reject the application to extend the time limit.

16. The first sentence of regulation 35 (2) of the Regulations of the Court provides, in relevant part, as follows:

The Chamber may extend or reduce a time limit if good cause is shown [...].

²⁰ ICC-02/05-01/09-39.

²¹ Response, para 5 and 15.

²² Response, 6 and 16.

