

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-02/05-01/09 OA
Date: 28 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
PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR**

Public

Decision

**on the Second Application 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”**

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

REGISTRY

Registrar

Ms Silvana Arbia

NK

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” of 4 March 2009 (ICC-02/05-01/09-2-Conf),

Having before it the “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” (ICC-02/05-01/09-Conf-Exp)¹,

Renders, by majority, Judge Song dissenting, the following

DECISION

1. Victims a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, a/0448/09, a/0449/09 and a/0450/09 are granted the right to participate in the present appeal for the purpose of presenting their views and concerns respecting their personal interests in the issue raised on appeal.
2. The Victims’ submissions on the issue raised on appeal enclosed in the “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” of 4 January 2010 are allowed.

¹ A public redacted version was filed on the same day with the number ICC-02/05-01/09-65-Red.

REASONS

I. 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’”.²

2. On 20 August 2009, the Registrar submitted to the Appeals Chamber the “Report on applications to participate in the proceedings”³ (hereinafter: “Report”). The Report was filed as “confidential, *ex parte*, Registry only”. In the Report, the Registrar informed the Appeals Chamber that applicants a/0443/09 to a/0450/09 (hereinafter: “Victims”) had applied for participation in the proceedings as victims.

3. On 27 August 2009, the Victims filed 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”.⁴ The Prosecutor responded to this filing on 4 September 2009.⁵

4. On 23 October 2009, the Appeals Chamber rendered the “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”,⁶ instructing the Registrar to transmit the applications of the Victims to Pre-Trial Chamber I and rejecting the Victims’ request for an extension of the time limit for the submission of observations in the appeal.

² ICC-02/05-01/09-25.

³ ICC-02/05-01/09-32-Conf-Exp.

⁴ ICC-02/05-01/09-35.

⁵ “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’”, ICC-02/05-01/09-39.

⁶ ICC-02/05-01/09-48.

5. On 4 January 2010, and after having been granted victim status by Pre-Trial Chamber I,⁷ the Victims filed the “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”⁸ (hereinafter: “Second Request for Participation”).

6. With respect to their application to participate, the Victims submit that they have an automatic right to participate in the present proceedings, which arises from the Regulations of the Court.⁹ In the alternative, the Victims apply for participation under rule 89 of the Rules of Procedure and Evidence. They submit that “the jurisprudence of the Court governing intervention in interlocutory appeals militates in favor of granting the Victims leave to participate”.¹⁰ They argue that the outcome of the appeal affects their personal interests, that their participation in the appeal is appropriate, and that it cannot cause prejudice to the rights of the accused person.¹¹ Furthermore, and only in the event that the Appeals Chamber does not grant their application for participation under rule 89 of the Rules of Procedure and Evidence, the Victims request¹² the Appeals Chamber to exercise its powers under the second sentence of rule 93 of the Rules of Procedure and Evidence to “seek the views of other victims, as appropriate”. In addition, the Second Request for Participation includes the Victims’ submissions on the specific issue on appeal.

7. On 6 January 2010, the Appeals Chamber issued an order, setting a time limit for the submission of a response by the Prosecutor to the Second Request for Participation.¹³

8. On 11 January 2009, the Prosecutor responded to the Second Request for Participation¹⁴ (hereinafter: “Prosecutor’s Response to Second Victims’ Request”).

⁷ See “Decision on Applications a/0011/06 to a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case”, ICC-02/05-01/09-62, dated 10 December 2009 and registered on 15 December 2009.

⁸ ICC-02/05-01/09-65-Conf-Exp; a public redacted version was filed on the same day under the number ICC-02/05-01/09-65-Red.

⁹ Second Request for Participation, paras 20, 21.

¹⁰ Second Request for Participation, para. 22.

¹¹ Second Request for Participation, para. 22.

¹² Second Request for Participation, para. 23.

¹³ “Order on the Filing of a Response to the ‘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’”, ICC-02/05-01/09-66.

He does not object to the Victims' application to participate in the appeal, submitting that the requirements for their participation are met.¹⁵

II. DETERMINATION BY THE APPEALS CHAMBER

9. The Appeals Chamber recalls its previous jurisprudence, in which it explained that in respect of victims' participation in appeals brought under article 82 (1) (d) of the Rome Statute, four cumulative criteria must be fulfilled: (i) the individuals seeking participation must be victims in the case, (ii) their personal interests must be affected by the issues on appeal, (iii) their participation must be appropriate, and (iv) the manner of participation should neither cause any prejudice to, nor be inconsistent with the rights of the accused and a fair and impartial trial.¹⁶ Furthermore, "any determination of [...] whether the personal interests of victims are affected in relation to a particular appeal will require careful consideration on a case-by-case basis".¹⁷ Thus, in the Appeals Chamber's view, there is no automatic right of participation in interlocutory appeals and victims are required to make an application.


10. In the present application for participation the Appeals Chamber notes that the Victims have been recognised as victims in the case. The Victims' personal interests are affected by the issue on appeal insofar as they claim to belong to the Fur, an ethnic group against whom Mr Al Bashir is alleged to have committed the crime of genocide.¹⁸ As the issue on appeal concerns the question of whether the Pre-Trial Chamber applied an incorrect evidentiary standard when assessing the Prosecutor's application for an arrest warrant in respect of the crime of genocide, the Victims thus have a personal interest in expressing their views and concerns.

¹⁴ "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'", ICC-02/05-01/09-68.

¹⁵ Prosecutor's Response to Second Victims' Request, paras 18-22, 26.

¹⁶ *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 Victim Participation'", ICC-01/04-01/06-1335, 16 May 2008, para. 36.

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber on the joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007", ICC-01/04-01/06-925, 13 June 2007, para. 28.

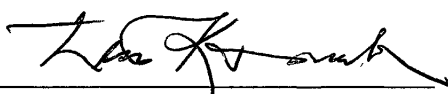
¹⁸ See "Public Redacted Version of the Prosecutor's Application under Article 58", ICC-02/05-157- AnxA, 14 July 2008 paras 76 et seq.

11. The Appeals Chamber notes that the proceedings in the present appeal are far advanced, and it will not ordinarily accept requests for participation at such a late stage. However, in light of the extraordinary circumstances of the present case, which impeded the Victims from approaching the Chamber earlier, the Appeals Chamber accepts that these circumstances were beyond the control of the Victims and accordingly deems their participation to be appropriate.

12. Finally, with regard to the manner of participation, the Appeals Chamber notes that the Second Request for Participation contains not only an application for participation in the present appeal, but also the substantive submissions of the Victims. The Victims seek to justify the filing of substantive submissions by noting that “circumstances beyond their control have led to the loss of valuable time and to their being put at a substantial disadvantage”.¹⁹ As stated in a recent decision of the Appeals Chamber²⁰, before victims may make submissions to the Appeals Chamber on the substance of an appeal, they must be granted the right to do so. Nevertheless, in the circumstances of this case and in the interests of expediting the present appeal, the Appeals Chamber has decided to allow the Victims’ substantive submissions. As the Prosecutor’s Response to Second Victims’ Request included the Prosecutor’s response to the substantive submissions of the Victims, there is no need to afford him with another opportunity to do so.

Judge Song appends a dissenting opinion to this decision.

Done in both English and French, the English version being authoritative.



Judge Erkki Kourula
Presiding Judge

Dated this 28th day of January 2010

At The Hague, The Netherlands

¹⁹ Second Request for Participation, para. 17.

²⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’”, (ICC-01/05-01/08-623), 27 November 2009, para. 20.

Dissenting Opinion of Judge Sang-Hyun Song

1. I respectfully disagree with the majority that victims a/0443/09 to a/0450/09 have the right to participate in the present appeal. In my view, the Appeals Chamber should have rejected the victims' application and their substantive submissions.

2. The majority reaches its conclusion on the basis of previous jurisprudence of the Appeals Chamber from which I have consistently dissented. According to the majority's view, victims must make an application to the Appeals Chamber for each appeal in which they wish to participate. In my view, as set out in my dissenting opinion to a judgment of 13 February 2007 in the case of *Prosecutor v. Thomas Lubanga Dyilo*¹ and elaborated in subsequent opinions,² this is not the correct interpretation of the Court's legal instruments. Victims who participated in the proceedings giving rise to an appeal under article 82 (1) (d) of the Statute are "participants" in terms of regulations 64 (4) and 65 (5) of the Regulations of the Court and therefore have an automatic right to file a response. Likewise, victims who did not participate in the underlying proceedings have no right to participate in the ensuing appeal.³

3. In the present instance, the victims did not participate in the underlying proceedings in relation to either the impugned decision or the decision granting leave to appeal. They cannot be considered "participants" in terms of regulations 64 (4) and 65 (5) of the Regulations of the Court, and they therefore have no right to participate in the appeal.

SHS

¹ Dissenting opinion of Judge Sang-Hyun Song to "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled « Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo »", ICC-01/04-01/06-824, 13 February 2007, pp. 55 et seq. (hereinafter: "Dissenting Opinion of 13 February 2007").

² See, e.g., separate opinion of Judge Sang-Hyun Song to "Decision on the participation of victims in the appeal", ICC-02/04-01/05-324, 27 October 2008, pp. 9 et seq. (hereinafter: "Separate Opinion of 27 October 2008"); partly dissenting opinion of Judge Sang-Hyun Song to "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 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 6 December 2007", ICC-02/05-138, 18 June 2008, pp. 23 et seq.; separate and partly dissenting opinion of Judge Sang-Hyun Song to "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, pp. 18 et seq. (hereinafter: "Separate and Partly Dissenting Opinion of 16 May 2008").

³ See Separate Opinion of 27 October 2008, paras 2 and 4; Separate and Partly Dissenting Opinion of 16 May 2008, paras 8 and 12-13.

4. The only avenue for the victims' views to be considered would be for the Appeals Chamber to seek their views in accordance with the second sentence of rule 93 of the Rules of Procedure and Evidence. As the Appeals Chamber has not chosen to pursue this possibility, the victims' views cannot be considered.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song

Dated this 28th day of January 2010

At The Hague, The Netherlands