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No.: ICC-02/05-01/07

Date: 24 May 2010

PRE-TRIAL CHAMBER I

Before: Judge Sanji Mmasenono Monageng, Single Judge

**SITUATION IN DARFUR, SUDAN
IN THE CASE OF THE PROSECUTOR *v.* AHMAD MUHAMMAD HARUN
("AHMAD HARUN") and ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI
KUSHAYB")**

**Level of Confidentiality
Public Document**

**Defence Counsel's Observations of the 6 Applicants' Petitions for Victim-
Participant Status**

Source: Mr. Ahmad Assed, Ad Hoc Counsel for the Defence

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

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Legal Representatives of Victims

Legal Representatives of Applicants

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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REGISTRY

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Ms. Silvana Arbila & Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms. Fiona McKay

Other

I. PROCEDURAL BACKGROUND

1. On 27 April 2007, the Chamber issued arrest warrants for Ahmad Harun and Ali Kushayb ("Arrest Warrants").¹ To date, neither Harun, nor Kushayb have responded to these warrants, and both remain at-large and not in custody.
2. On 19 August 2009, Pre-Trial Chamber I appointed Judge Sanji Mmasenono Monagenge as Single Judge with responsibility for all matters concerning "victims' applications to be authorized to participate as victims in the proceedings relating to the Harun and Kushayb case."²
3. On 26 April 2010, undersigned was appointed *ad hoc* counsel for defence for "the purposes of the proceedings concerning the Applications" of victim-applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, and a/0448/09 ("6 Applications").³

A. Since this appointment, *ad hoc* counsel has not communicated with Harun or Kushayb. Moreover, based solely on *ad hoc* counsel's review of the "Prosecution request for a finding on the non-cooperation of the Government of the Sudan..."⁴ it appears that the Government of Sudan does not intend to cooperate with any phase of these proceedings.

4. The Single Judge's 26 April 2010 Decision sets out that *ad hoc* Counsel would receive redacted versions of the 6 Applications, and that Counsel would have three weeks from receipt of the 6 Applications to submit responses.

¹ ICC-02/05-01/07-2; ICC-02/05-01/07-3

² ICC-02/05-01/07-46

³ ICC-02/05-01/07-49

⁴ ICC-02/05-01/07-48

5. On 28 April 2010, the Registrar transmitted the redacted 6 Applications to Counsel,⁵ which was received on 3 May 2010.
6. Concomitantly, on 10 December 2010, in *the Prosecutor v. Omar Hassan Ahmad Al-Bashir* ("Al-Bashir Case"), the Single Judge determined that applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09, and a/0448/09 *prima facie* fulfilled the necessary requirements for victim participation under rule 85(a) of the *Rules of Procedure and Evidence* ("the Rules") and satisfied the technical requirements of regulation 86(2) of the *Regulations of the Court* ("the Regulations").⁶

II. ARGUMENT & ANALYSIS

i. The Defence stipulates that the 6 Applicants prima facie meet the requirements of Regulation 86(2) and Rule 85.

7. In granting a victim-applicant the status of victim-participant, the Single Judge must conclude that the applicant is a victim within the definition of this term in rule 85 of the Rules, that the personal interests of the applicant are affected by the proceedings at hand as prescribed in article 68(3) of the Rome Statute ("Statute"), and that the application is complete.
8. Under the Rule 85(a) analysis, The Single Judge determines whether (i) the applicant is a natural person; (ii) the applicant suffered harm; (iii) the crime from which the harm resulted is within the jurisdiction of the Court; and (iv) there must be a causal link between the crime and the harm.⁷ The third

⁵ ICC-02/05-01/07-51

⁶ ICC-02/05-01/09-62. See also ICC-02/05-01/09-72.

⁷ ICC-01/04-01/07-579, para. 65.

element must relate to the charging document, either the arrest warrant or summons.⁸

9. Under the Regulation 86(2) analysis, the Single Judge must be satisfied that the 6 Applications satisfy eight technical requirements.⁹
10. To the extent that the 6 Applications in the present matter are the same applications reviewed in the Al-Bashir Case, and considering that the Single Judge has deemed the 6 Applications as satisfying the technical requirements of Regulation 86(2), *ad hoc* Counsel stipulates that the 6 Applications are complete.
11. As it relates to the individual applications analyzed under Rule 85 criteria, *ad hoc* Counsel notes:
 - A. **Application a/0443/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic and emotional injuries and identifies both Harun and Kushayb. The alleged harm is confined to the spatial and temporal circumstances within various Counts of the Arrest Warrants. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates that a/0443/09 meets

⁸ ICC-01/04-01/06-1432

⁹ These requirements include : i) the identity of the applicant; (ii) the date of the crime(s); (iii) the location of the crime(s); (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court; (v) proof of identity; (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim; (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship; and (viii) a signature or thumb-print of the applicant on the document, at the very least, on the last page of the application. ICC-02/05-02/09-255, para 4.

the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case.

B. **Application a/0444/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic, physical, and emotional injuries, but only identifies Kushayb. The alleged harm is confined to the spatial and temporal circumstances within various Counts, namely Count 36, within of the Arrest Warrant for Kushayb. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates that a/0444/09 meets the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case, yet asserts that in framing the modalities of participation for this applicant, the Single Judge consider that Harun is not alleged to be a participant.¹⁰

C. **Application a/0445/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic and emotional injuries, as well as familial loss, identifies both Harun and Kushayb, and the alleged harm is confined to the spatial and temporal circumstances within Counts 21 through 38 of the Arrest Warrants. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates

¹⁰ *Ad hoc* Counsel notes that the GoS may be actively prosecuting Kushayb, ostensibly putting his interests and possible defenses in these proceedings in direct conflict with those of Harun. ICC-02/05-01/07-48, para. 37.

that a/0445/09 meets the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case.

D. **Application a/0446/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic and emotional injuries, as well as familial loss, but only identifies Kushayb. The alleged harm is confined to the spatial and temporal circumstances within Counts 10 through 20 of the Arrest Warrant for Kushayb. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates that a/0446/09 meets the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case, yet asserts that in framing the modalities of participation for this applicant, the Single Judge consider that Harun is not alleged to be a participant.

E. **Application a/0447/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic, physical, and emotional injuries, but only identifies Kushayb. The alleged harm is confined to the spatial and temporal circumstances within various Counts within the Arrest Warrant for Kushayb. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates that a/0447/09 meets the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case, yet asserts that in framing the modalities of

participation for this applicant, the Single Judge consider that Harun is not alleged to be a participant.

F. **Application a/0448/09** includes identification documents satisfying the “natural person” element. The harm victim-applicant alleges includes economic and physical injuries, identifies both Harun and Kushayb, and the alleged harm is confined to the spatial and temporal circumstances within Counts 10 through 20 of the Arrest Warrants. Finally, the victim-applicant sufficiently alleges a causal link to the injuries and the alleged criminal acts. *Ad hoc* Counsel stipulates that a/0448/09 meets the *prima facie* qualification for the purposes of the Pre-Trial Stage of the Case.

ii. The Single Judge should grant provisional victim participant status until such time that Harun and Kushayb have surrendered or been obtained.

12. Article 68(3), in pertinent part, provides " where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and *in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.* (emphasis added)."

13. The Rule strives to balance the interests of those accused and those who allegedly have been victimized by the accused.

14. *Ad hoc* counsel recognizes his limited role in these proceedings. In line with this, *ad hoc* counsel finds the language from *Prosecutor v. Kony, et. al.*, instructive :

"[t]he mandate of counsel appointed to represent the interests of the defence is a *sui generis* appointment and, as such, must be understood differently from the mandate of defence counsel who has been appointed to represent a person as an individual. In circumstances where the suspects are at large and counsel is appointed to represent their interests in proceedings, such counsel cannot speak on their behalf. Counsel will have to assume the defence perspective, in particular generally to safeguard the interests of the defence. The provisions of the Code of Conduct regarding representation are therefore not directly applicable to such counsel."¹¹

15. With this in mind, the Appeals Chamber has previously addressed this issue in holding that victim participation, predicated on 68(3) of the Statute, is confined to the specific stage of the proceeding and does not carryover to other stages.¹² Moreover, in *Kony* it was further stated that those submissions made by *ad hoc* counsel, "should not prejudice the arguments which the defence may put forward at a later stage."¹³

16. In reconciling these rulings, it is clear that Harun and Kushayb would be bound by *ad hoc* counsel's submissions on the issue of victim participation until a later stage in the proceedings, whereby their chosen counsel could contest victim-applicants' desire to participate.

¹¹ ICC-02/04-01/05 OA 3 at para 56.

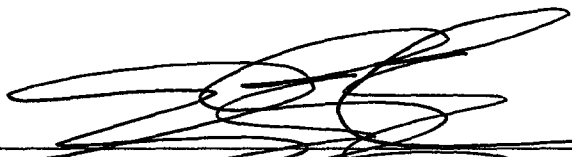
¹² "The Appeals Chamber, pursuant to article 68 (3), is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance. " Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, at para 41.

¹³ ICC-02/04-01/05 OA 3 at para 61

17. Yet, based on a strict reading of Rule 89(1), as well as its drafting history, a question arises as to whether *ad hoc* counsel can bind future counsel for Harun or Kushayb, should such counsel enter in the Pre-Trial stage. To put in another way, *ad hoc* counsel represents, in the abstract, the perspectives of the defence, but not necessarily the interests of any one person.
18. While it is clear that Rule 89(1) allows the defence to reply to victim applications, its drafting history suggests that this right is framed within an adversarial process informed by an accused individual. Support for this comes from the draft version of rule 89, debated during the Paris Conference (Rule A). While the language of the draft tracks the current Rule, a footnote to the draft defines “Defence” as referring to persons subject to a warrant for arrest or who have been summoned to appear, or who have been accused, and to counsel for these persons.”¹⁴ Thus, this right is set-off by the existence of counsel who represents a person, rather than a perspective.
19. With that said, *ad hoc* counsel recognizes the challenges of the Single Judge’s role in balancing the rights of the accused with the rights of victims, and suggests the Single Judge adopt a flexible approach to granting procedural status to the 6 Applications. Specifically, the Single Judge should grant the 6 Applications a form of provisional status until such time as Harun and Kushayb obtain counsel who represent their specific interests and whose decision can bind them throughout the proceedings.

¹⁴ Footnote 6, Report on the International Seminar on Victims’ Access to the International Criminal Court, PCNICC/1999/WGRPE/INF/2, 6 July 1999

20. Granting such provisional status is the most pragmatic way to fully preserve the rights and interests of the accused, as well as the victims. The victims retain the status they seek with the caveat that it can be addressed later in the Pre-Trial stage, while the specific and personal rights of Harun and Kushayb remain inviolate dependant on their desire to exercise them.



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on behalf of
Ahmad Harun and Ali Kushayb

Dated this 24th of May, 2010

At Albuquerque, NM United States of America