

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 June 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")***

Public Document

Decision on 6 Applications for Victims' Participation in the Proceedings

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Mr Essa Faal, Senior Trial Lawyer

Counsel for the Defence

Mr Ahmad Assed

Legal Representatives of Victims

Legal Representatives of Applicants

Mr Nicolas Kaufman

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

I, **Judge Sanji Mmasenono Monageng**, acting on behalf of Pre-Trial Chamber I (“Chamber”) of the International Criminal Court (“Court”) as Single Judge responsible for all issues relating to applications for authorisation to participate as victims in the proceedings in the case of *The Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”) and *Ali Muhammad Ali Abd-al-Rahman* (“Ali Kushayb”) (“Harun and Kushayb Case”);¹

NOTING the “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” (“Decision in the Al Bashir Case”) issued on 10 December 2009 in the case of *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (“Al Bashir Case”),² whereby Applicants a/0443/09 to a/0448/09 (“Applicants”), among others, were recognised as victims for the purpose of participating in the pre-trial stage of the Al Bashir Case;

NOTING the “Report on Applications to Participate in the Proceedings a/0443/09 to a/0448/09” filed by the Registry on 26 February 2010,³ together with six applications (“Applications”) in which the Applicants request to be authorised to participate in proceedings concerning the crimes as a result of which they allegedly suffered harm;

NOTING the “Decision Setting a Time Limit for the Parties’ Replies to 6 Applications for Victims’ Participation in the Proceedings” issued on 26 April 2010,⁴ in which the Single Judge appointed Mr Ahmad Assed (“Defence”) to represent Ahmad Harun and Ali Kushayb (“Suspects”) in relation to the proceedings concerning the Applications and granted the Prosecution until 20 May 2010, and the Defence three weeks after the receipt of copies of the Applications, to reply to the Applications;

¹ “Decision on the Designation of a Single Judge on Victims’ Issues”, 19 August 2009, ICC-02/05-01/07-46.

² ICC-02/05-01/09-62.

³ ICC-02/05-01/07-47-Conf-Exp.

⁴ ICC-02/05-01/07-49.

NOTING the “Prosecution’s Observations on 6 Applications for Victims’ Participation in the Proceedings” filed on 20 May 2010,⁵ in which the Prosecution submits that the Applicants *prima facie* meet the criteria for participation as victims;

NOTING the “Defence Counsel’s Observations of the 6 Applicants’ Petitions for Victim-Participant Status” filed on 25 May 2010 (“Defence’s Reply”),⁶ whereby the Defence submits that the Applicants *prima facie* meet the requirements of rule 85 (a) of the Rules of Procedure and Evidence (“Rules”) and requests that the Chamber should take into consideration a limited role of *ad hoc* counsel in the proceedings and grant the Applicants a form of provisional status of victims until such time as the Suspects obtain counsel of their choice;

NOTING articles 57 (3) (c), and 68 (3) of the Rome Statute (“Statute”); rules 85, 86, 89 (1) and 91 of the Rules; as well as regulation 86 of the Regulations of the Court (“Regulations”);

HEREBY RENDER THIS DECISION

1. On 26 February 2010, the Single Judge was seized of six applications for participation in the proceedings in the Harun and Kushayb Case.⁷ As indicated earlier, the Applicants have already been authorised to participate as victims in the pre-trial stage of the Al Bashir Case. The same Applications have been merely re-submitted in the present case and the Single Judge will thus rely, to a certain extent, on the findings previously made in the Decision in the Al Bashir Case.

⁵ ICC-02/05-01/07-55.

⁶ ICC-02/05-01/07-56.

⁷ Applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09 and a/0448/09.

I. APPLICABLE LAW

2. The Single Judge recalls that in determining whether a person may be granted the right to participate in proceedings the following matters must be examined: (i) whether that person has submitted a complete application for participation, (ii) whether he or she meets the criteria of a victim set out in rule 85 of the Rules, and (iii) whether his or her personal interests are affected by the proceedings in issue, as prescribed in article 68 (3) of the Statute.

Completeness of the applications for participation

3. Pursuant to rule 89 (1) of the Rules and regulation 86 (5) of the Regulations, applicants seeking participation in the proceedings must submit a written application to the Registrar, who shall then transmit the application, together with a report thereon, to the relevant Chamber. The Single Judge reiterates that she will be in a position to properly assess only fully completed applications containing the information required under regulation 86 (2) of the Regulations.⁸

Criteria of Rule 85 (a)

4. Rule 85 (a) of the Rules provides:

‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

5. The Single Judge must thus ascertain that the following four criteria are met: (i) the applicant must be a natural person; (ii) the applicant must have suffered harm; (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (iv)

⁸ *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the 52 Applications for Participation at the Pre-Trial Stage of the Case”, 8 October 2009, ICC-02/05-02/09-147-Red (“*Abu Garda Decision I*”), para. 4.

there must be a causal link between the crime and the harm.⁹ With regard to the third requirement, the Single Judge recalls that the alleged incident from which the harm resulted must be the subject of a warrant of arrest or summons to appear, or, at a later stage of the proceedings, a charging document.¹⁰

6. In the present case, the relevant alleged crimes are listed in the “Warrant of Arrest for Ahmad Harun”¹¹ and the “Warrant of Arrest for Ali Kushayb”¹² (“Warrants of Arrest”). In the Warrants of Arrest it is alleged that Ahmad Harun and Ali Kushayb, in different time periods between August 2003 and March 2004, committed war crimes and crimes against humanity against primarily the Fur population in Kodoom, Bindisi, Mukjar, Arawala, and in their surrounding areas.

7. The Single Judge reiterates that the applicants are only required to demonstrate that the four requirements set out in rule 85 (a) of the Rules are met *prima facie*.¹³

Personal interests

8. The Single Judge reiterates her previous rulings in another case that the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as it aims to determine whether there is sufficient evidence to establish substantial grounds

⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber II, “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, 10 June 2008, ICC-01/04-01/07-579 (“*Katanga Decision*”), para. 65.

¹⁰ Decision in the Al Bashir Case, para. 26; *Situation in Darfur, Sudan*, Pre-Trial Chamber I, “Decision on the Requests for Leave to Appeal the Decision on the Application for Participation of Victims in the Proceedings in the Situation”, 6 February 2008, ICC-02/05-121, p. 8; *Katanga Decision*, para. 65; *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, 11 July 2008, ICC-01/04-01/06-1432, para. 58.

¹¹ Pre-Trial Chamber I, 27 April 2007, ICC-02/05-01/07-2.

¹² Pre-Trial Chamber I, 27 April 2007, ICC-02/05-01/07-3-Corr.

¹³ *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, 25 September 2009, ICC-02/05-02/09-121 (“*Abu Garda Decision II*”), para. 14.

to believe that the person committed each of the crimes charged by the Prosecution and alleged to have caused harm to the victims.¹⁴

II. ASSESSMENT OF THE APPLICATIONS

9. The Single Judge notes that in the Decision in the Al Bashir Case the Applications were considered to be complete. The Applicants were found to be “natural persons”, within the meaning of rule 85 (a) of the Rules.¹⁵ The Single Judge reaffirms these findings.

Application a/0443/09

10. Applicant a/0443/09 submits that he is a member of the Fur tribe. He states that in June 2003 his village was attacked by the forces of the Government of the Sudan (“GoS”) and their allied Janjaweed Militia. The Applicant submits that as a result of this attack his brothers were killed in his presence and his house was burnt. He submits that in September 2003 he was captured, imprisoned, and while in captivity, was beaten and tortured. He further alleges that while in prison he saw many of the villagers being taken and killed in groups, including his uncle. He stated that he found a way to escape from the prison and then ran away to Egypt. The Applicant alleges that he has injuries in his hands and feet. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered physical and emotional harm, as well as economic

¹⁴ Decision in the Al Bashir Case, para. 5; *Abu Garda* Decision I, paras 3 and 4; *Abu Garda* Decision II, para. 2. See also *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case”, 13 May 2008, ICC-01/04-01/07-474, paras 31-44; *Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber I, “Decision on the Arrangements for Participation of Victims a/001/06, a/002/06 and a/003/06 at the Confirmation Hearing”, 22 September 2006, ICC-01/04-01/06-462-tEN, p. 5; *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, “Decision on victims’ modalities of participation at the Pre-Trial Stage of the Case”, 6 October 2009, ICC-02/05-02/09-136, para. 5.

¹⁵ Decision in the Al Bashir Case, paras 42, 44, 45, 47, 48, 50, 51, 53, 54, 56, 57, 59.

loss.¹⁶ The Single Judge is also satisfied that at least some of the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.¹⁷

Application a/0444/09

11. Applicant a/0444/09 submits that he is a Muslim member of the Fur tribe. He states that around February 2004 soldiers surrounded his village in the Mukjar area, took all the livestock and crops and burned all the houses. The Applicant alleges that he lost his house, two shops and his livestock. He further submits that he was beaten and as a result of that he has eyesight problems and difficulties in sleeping. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered physical and emotional harm, as well as economic loss.¹⁸ The Single Judge is also satisfied that at least some of the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.¹⁹

Application a/0445/09

12. Applicant a/0445/09 submits that he is a Muslim member of the Fur tribe. He states that between August 2003 and January 2004, Mukjar and surrounding villages were attacked by the GoS forces and the Janjaweed. The Applicant alleges to have lost his uncles and cousins, his house and his livestock. He states that he suffers from psychological trauma and sleeping difficulties, and that he cries a lot. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered emotional harm and economic loss.²⁰ The Single Judge is also satisfied that at least some of

¹⁶ Decision in the Al Bashir Case, para. 44.

¹⁷ *See*, for example, Count 35 of the Warrants of Arrest (“Torture in Mukjar town and surrounding areas constituting a crime against humanity”).

¹⁸ Decision in the Al Bashir Case, para. 47.

¹⁹ *See*, for example, Count 36 of the Warrants of Arrest (“Pillaging in Mukjar town and surrounding areas constituting a war crime”).

²⁰ Decision in the Al Bashir Case, para. 50.

the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.²¹

Application a/0446/09

13. Applicant a/0446/09 submits that he is a member of the Fur tribe. He states that in a period of one and a half months from 15 August 2003, his village was attacked several times by the GoS forces and the Janjaweed, and that during these attacks all food was stolen. The Applicant alleges that some children and elderly people died of starvation, including his grandmother and two other relatives. He further submits that he lost his house and all his property, and that he suffers from nightmares. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered emotional harm and economic loss.²² The Single Judge is also satisfied that at least some of the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.²³

Application a/0447/09

14. Applicant a/0447/09 submits that he is a member of the Fur tribe. He states that on 19 October 2003 he had to flee from Mukjar, which was being attacked by the Janjaweed. The Applicant submits that when he returned to the village, apparently shortly after the attack, in order to assist the elderly and children that stayed behind, he was captured, tortured and detained for several days. The Applicant states that he suffers from psychological trauma and nightmares. He submits that he lost his house, all his livestock and property. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered physical and emotional harm, as well as economic

²¹ See, for example, Count 38 of the Warrants of Arrest (“Destruction of property in Mukjar town and surrounding areas constituting a war crime”).

²² Decision in the Al Bashir Case, para. 53.

²³ See, for example, Count 18 of the Warrants of Arrest (“Pillaging in Bindisi town and surrounding areas constituting a war crime”).

loss.²⁴ The Single Judge is also satisfied that at least some of the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.²⁵

Application a/0448/09

15. Applicant a/0448/09 submits that he is a member of the Fur tribe. He states that on 15 August 2003 his village was attacked and totally destroyed by the GoS and the Janjaweed. The Applicant alleges that they arrested his father and deprived him of food, thereby causing his death. The Applicant further submits that he was captured by the GoS and the Janjaweed. He states that many people, including his uncle, were taken from the prison and killed. The Applicant alleges that he was tortured and kept without food and water. The Applicant submits that he has scars in his hands and that he lost his house, family shop, farm and livestock. The Single Judge is satisfied that the Applicant provided sufficient evidence to establish *prima facie* that he suffered physical and emotional harm, as well as economic loss.²⁶ The Single Judge is also satisfied that at least some of the harm suffered by the Applicant was caused by one or more of the crimes alleged in the Warrants of Arrest.²⁷

Conclusion

16. The Single Judge is satisfied that the Applicants meet the criteria of “victims”. The Single Judge is also satisfied, for the reasons set out earlier in this decision, that the personal interests of the Applicants are affected by the outcome of the pre-trial stage of the proceedings. As all the relevant criteria are met, the Single Judge is of the view that the Applicants shall be authorised to participate as victims in the pre-trial stage of the proceedings.

²⁴ Decision in the Al Bashir Case, para. 56.

²⁵ See, for example, Count 35 of the Warrants of Arrest (“Torture in Mukjar town and surrounding areas constituting a crime against humanity”).

²⁶ Decision in the Al Bashir Case, para. 59.

²⁷ See, for example, Count 19 of the Warrants of Arrest (“Destruction of property in Bindisi town and surrounding areas constituting a war crime”).

17. The Single Judge takes note of the Defence's request to grant "a form of provisional status" to the Applicants until such time as the Suspects obtain counsel of their own choice.²⁸ This request is based on the Defence's concern that the future Defence counsel will be bound by the submissions made by the present Defence with respect to the Applications.²⁹ The Single Judge agrees that the Defence counsel appointed in the future may take a different view on the matters relating to the Applications. The Single Judge, however, notes that limiting the application of the present decision to the time the Suspects are not represented by permanent counsel, as requested by the Defence, would create a state of uncertainty as to the status of victims recognised in the present case and that such uncertainty would have a bearing on the exercise of their participatory rights. The Single Judge also notes that the issue of the modalities of victims' participation will be decided upon at a later point in time. If at that point the Suspects are represented by counsel of their choice, their counsel will be able to make submissions on, *inter alia*, the issue of prejudice which such participation may cause to their rights.³⁰

18. For these reasons, the Single Judge considers that the granting of the victims' status and the participatory rights to the Applicants only for the pre-trial stage of the proceedings, without limiting their right to participation to the time the Suspects are not represented by counsel of their choice, strikes a balance between the rights of the Suspects and the rights of the recognised victims.

FOR THESE REASONS,

AUTHORISE Applicants a/0443/09, a/0444/09, a/0445/09, a/0446/09, a/0447/09 and a/0448/09 to participate as victims in the proceedings at the pre-trial stage;

ORDER the Registry to provide the Legal Representative of the Applicants with access to the public records of the case;

²⁸ Defence's Reply, para. 19.

²⁹ Defence's Reply, paras 15-16.

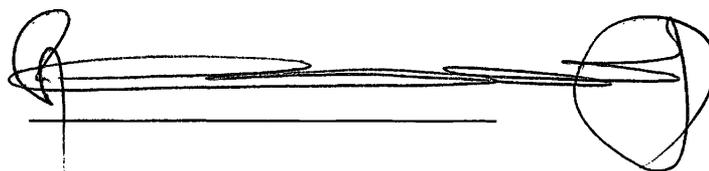
³⁰ Article 68 (3) of the Statute.

REMIND the parties and participants that the victims recognised in this decision:

- (i) shall be referred to only by the numbers assigned to them by the Registry, unless otherwise ordered by the Chamber, and
- (ii) shall only be contacted through their Legal Representative; and

ORDER the Prosecutor, Defence and Legal Representative of the Applicants to maintain the confidentiality of any information related to the victims, to ensure that no such information is disclosed to the public.

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

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a solid horizontal line.

Judge Sanji Mmasenono Monageng

Single Judge

Dated this Thursday, 17 June 2010,

At The Hague, The Netherlands