

1 International Criminal Court.

2 Appeals Chamber

3 Situation in Darfur, The Sudan - ICC-02/05

4 Hearing - Open Session

5 Monday, 2 February 2009

6 The hearing starts at 10.00 a.m.

7 COURT USHER: All rise.

8 The International Criminal Court is now

9 in session. Please be seated.

10 JUDGE PIKIS: Can we have the case called.

11 COURT OFFICER: Situation in the Darfur, Sudan.

12 JUDGE PIKIS: Can we have the appearances.

13 MR. GUARIGLIA: Good morning, your Honour. It's Fabricio

14 Guariglia, Senior Appeals Counsel in the Office of the Prosecutor;

15 appearing together with Appeals Counsels Ben Batros and Reinhold

16 Gallmetzer, and also Associate Legal Officer Victor Baiesu.

17 JUDGE PIKIS: The Defence counsel for the OPCD.

18 MR. KEITA (interpretation): Good morning, your Honour. I am

19 Xavier-Jean Keita, Principal Counsel for the Office of Public Counsel for

20 the Defence. And I am accompanied by Ms. Melinda Taylor; Ms. Vedrana

21 Residovic, Case Manager; and Ms. Geraldine Danhoui, Legal Assistant.

22 Thank you.

23 MS. YAZJI: My name is Maria Victoria Yazji, and I am Counsel

24 for the Office of Public Counsel for Victims. However, today we're

25 standing in on behalf of Ms. Akin and Mr. Brown who are the Legal

1 Representatives in this situation.

2 JUDGE PIKIS: I shall read out the summary of the judgement that
3 is delivered today noting that nothing said in this summary qualifies the
4 judgement that constitutes the only authentic text.

5 The three appeals under consideration have in essence the same
6 subject matter, and on that account they were dealt with together.

7 The issues raised derive from two decisions of Pre-Trial Chamber
8 I, appealed by Office of Public Counsel for Defence and the Prosecutor.

9 The decisions have a common theme: Is it possible to acknowledge
10 victims general participatory rights in the investigation of crimes
11 committed in the situation referring to the Court?

12 Identical issues to the ones posing for resolution in these
13 appeals were addressed and determined in three other appeals, OA4, OA5,
14 and OA6 in relation to the situation in the Democratic Republic of the
15 Congo. The judgement of the Appeals Chamber was issued on 19th December
16 2008.

17 Similar, if not identical, arguments were advanced by the
18 appellants in support of the appeals to those advanced by the appellants
19 in the aforesaid appeals relating to the DRC situation. In their
20 submissions, victims have no right to participate generally in the
21 investigation of crimes.

22 The victims who participated in the present appeal proceedings
23 argued, as did the victims who participated in the appeals OA4, 5, and 6
24 had done, that victims do have a right to generally participate in the
25 investigation of crimes. In their submission, the status acknowledged to

1 them, "victims procedural status" is both feasible under the law and
2 warranted by their circumstances.

3 In its judgement of 19th December 2008, disposing of appeals OA4,
4 5, and 6, the Appeals Chamber reversed the sub judice decisions bearing
5 on the granting of procedural status to victims that would have entitled
6 them to participate generally in the Prosecutor's investigations into a
7 crime or crimes within the jurisdiction of the court. The reasons for so
8 holding are set out in the determinative part of that judgement,
9 extending from paragraphs 36 to 59. The Appeals Chamber adopts those
10 reasons without need arising either to reframe or rephrase them.

11 This being the case, the Appeals Chamber can do no better than to
12 reproduce them as part of the reasoning of this case, leading inexorably
13 to the reversal of the two decisions under appeal.

14 Hereafter, I decide some passage indicative of its approach to
15 the subject.

16 The term "procedural status of victim" is not phrase with a
17 distinct meaning or a word coined as term of art. The word "procedural"
18 indicates something pertaining to procedure. Procedure is the code
19 regulating the exercise of judicial power known as adjectival law. It is
20 contrasted to substantive law, definitive of the rights, duties, and
21 obligations of a person. The word "status" signifies a person's legal
22 position, whether personal or proprietary. Procedure is not of itself
23 determinative of the status of any person.

24 The article of the Statute that confers power upon a victim to
25 participate in any proceedings is Article 68(3). What emerges from the

1 case law of the Appeals Chamber is that participation can take place only
2 within the context of judicial proceedings. Article 68(3) of the Statute
3 correlates victim participation to "proceedings," a term denoting a
4 judicial cause pending before a Trial Chamber. In contrast, an
5 investigation is not a judicial proceeding but an inquiry conducted by
6 the Prosecutor into the commission of a crime with a view to bringing to
7 justice those deemed responsible.

8 The domain and powers of the Prosecutor are outlined in
9 Article 42 of the Statute, paragraph (1) of which reads:

10 "The Office of the Prosecutor shall act independently as a
11 separate organ of the court. It shall be responsible for receiving
12 referrals and any substantiated information on crimes within the
13 jurisdiction of the court, for examining them and for conducting
14 investigations and prosecutions before the court. A member of the office
15 shall not see or act on instructions from any external source."

16 Manifestly, authority for the conduct of investigations vests in
17 the Prosecutor. Acknowledgement by the Pre-Trial Chamber of a right to
18 victims to participate in the investigation would necessarily contravene
19 the Statute by reading into it a power outside its ambit and remit.

20 Participation pursuant to Article 68(3) of the Statute is
21 confined to proceedings before the court and aims to afford victims an
22 opportunity to voice their views and concerns on matters affecting their
23 personal interests.

24 On the other hand, it must be clarified that victims are not
25 precluded from seeking participation in any judicial proceedings,

1 including proceedings affecting investigations, provided their personal
2 interests are affected by issues arising for resolution.

3 In the result, as we noted in the decision of the Appeals Chamber
4 of 19th December 2008, the decisions of the Pre-Trial Chamber
5 acknowledging procedural status to victims, entitling them to participate
6 generally in the investigation of a situation are ill-founded and must be
7 set aside. The reversal of the impugned decision is the unavoidable
8 outcome of these proceedings.

9 For similar reasons, the Appeals Chamber determines that the sub
10 judicial decisions are liable to be reversed, and so it is ordered.

11 Court will rise.

12 COURT USHER: All rise.

13 The hearing ends at 10.09 a.m.

14

15

16

17

18

19

20

21

22

23

24

25