



Original : English

No.: ICC-02/05
Date: 29 February 2008

THE APPEALS CHAMBER

Before: Judge Navanethem Pillay, Presiding Judge
Judge Philippe Kirsch
Judge Georgios M. Pikis
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

SITUATION IN DARFUR, SUDAN

Public Document

**OPCD Response to Prosecution's Document in Support of Appeal against the
6 December 2007 Decision on the Victims' Applications for Participation in the
Proceedings**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Mr Fabricio Guariglia
Mr Essa Faal

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

Mr Xavier-Jean Keïta

Legal Representative of Applicants

Ms Wanda M. Akin
Mr Raymond M. Brown

Procedural History

1. On 6 February 2008, the Honourable Single Judge granted the Prosecution leave to appeal in relation to the issue of “whether a “procedural status of victim”, within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence”.¹
2. In its Appeal Brief, which was filed on 18 February 2008, the Prosecution identifies three errors of law underpinning the findings of the Honourable Single Judge.
3. Firstly, the Prosecution submits that “the Decision erred by interpreting Article 68(3) and Rule 89 as allowing formal procedural status to be granted to victims in an investigation solely on the basis of the finding made in the Decision, and in particular, without fulfilling the criteria and complying with the requirements of Rule 89(1). This allowed the victims to be granted this status in the absence of, and without any connection with, specific proceedings in which victims could exercise meaningful rights, and without specifying the nature of those rights”.²
4. Secondly, the Prosecution avers that “the Decision erred in the interpretation and application of the requirement in Article 68(3) that a victim’s personal interests be affected, by making this finding in general terms; without any case-by-case consideration; and with no connection to particular proceedings and therefore no consideration of the impact of those proceedings on the interests of the victims”.³
5. Thirdly, the Prosecution concludes that “the Decision similarly erred in holding that the requirement of appropriateness was to be assessed in relation to the entire phase of the proceedings”.⁴
6. In response, the Office of Public Counsel for the Defence (OPCD) submits that the three grounds of appeal correctly identify errors of law, which warrant immediate rectification by the Appeals Chamber.

¹ Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation, ICC-02-05-121.

² Appeal Brief at paragraph 11.

³ Appeal Brief at paragraph 11.

⁴ Appeal Brief at paragraph 11.

7. The OPCD further concurs with the Prosecution's proposition⁵ that in light of the overlap between the issues and inter-linked procedural history, it would be in the interests of judicial economy and clarity to consider the appeals jointly.

Issue 1: The Statute and Rules do not permit the Chamber to grant applicants a procedural status of victim

8. The Defence concurs with the Prosecution that a finding that the applicant meets the definition of victim under Rule 85 does not in itself suffice to trigger the right to participate in proceedings before the ICC.
9. In this connection, the OPCD observes that an applicant continues to benefit from a prior finding that he or she met the definition of victim under Rule 85 for the entirety of the phase in question, unless one of the parties or the Chamber *proprio motu* adduces new information which would justify the revocation of this finding.
10. However, the OPCD respectfully submits that the Honourable Single Judge conflates the concept of a rebuttable presumption with the creation of a procedural status. A rebuttable presumption would operate to preclude the necessity of re-litigating a previously adjudicated issue as to whether an applicant meets the definition of victim under Rule 85 each and every time that an applicant wishes to participate in the proceedings in that particular phase. The creation of a 'procedural status of victim' equates to an irrefutable and seemingly irrevocable presumption that all elements of Article 68(3) have been met.
11. Provided both parties have been afforded an effective right to be heard, the concept of utilising a rebuttable presumption within the same situation (and with respect to the same factual issue concerning the same applicant) is not inconsistent with either the Statute or the Rules, and would promote judicial economy. In contrast, the creation of a procedural status of victim clearly contravenes Article 68(3), Rule 89 and the jurisprudence of the Appeals Chamber of the ICC, unnecessarily embroils the time and resources of the parties through the creation of a two-tier process, and perpetrates an aura of uncertainty

⁵ At paragraph 7.

and ambiguity concerning the role of applicants granted the status of ‘victim’ in the proceedings.

12. In terms of the applicable statutory and regulatory regime, Article 68(3) commences with the phrase: “[w]here the personal interests of the victims are affected, the Court shall [...]”.⁶ The power of the Court set out in Article 68(3) is thus inextricably tied to a prior finding that the personal interests of the applicants are affected. This is clearly indicated by the French version, “Lorsque [...], la Cour permet”; the power of the Court to allow the presentation of views and concerns under this provision is time-limited, in the sense that it is only triggered at that point in time lorsque/when the personal interests of the applicants are affected.
13. The emphasis in this phrase is also on the finding that the applicant’s personal interests are affected, rather than on a finding that the applicant is a victim. Indeed, the reference to victim in Article 68(3) serves only to focus the inquiry of the Chamber on the category of persons whose personal interests could potentially be affected in a manner which would justify the exercise of the Chamber’s power to grant a right to present views and concerns. It would thus subvert the clear objective of the Article if the Chamber were to make the finding that the applicant is a victim the primary and indeed sole focus of the Chamber’s assessment under Article 68(3).
14. The OPCD further concurs with the Prosecution that the text of Rule 89 clearly stipulates that the application process is directed towards ensuring that those applicants, who meet all the criteria set out in Article 68(3), are able to present their views and concerns.⁷ As noted in the OPCD Appeal Brief of 4 February 2008, the drafters of the Rome Statute decided that those applicants, who met the criteria set out in Article 68(3), should have an automatic rather than discretionary entitlement to have their views presented and considered. The discretionary elements are comprised within the Chamber’s assessment as to firstly, whether it would be appropriate to participate at that particular stage of the proceedings, and secondly, the appropriate mode of presenting these views and concerns.

⁶ The French version provides “Lorsque les interest personnel des victimes sont concernés, la Cour permet [...]”.

⁷ Prosecution’s Appeal Brief at paragraph 15.

15. If the Honourable Single Judge had indeed found that the personal interests of the applicants were affected and that the stage of the proceedings was appropriate for participation, the Honourable Single Judge would have been obliged to immediately determine the modalities of presenting the applicants' views and concerns, in order to give effect to this right to participate.
16. The OPCD therefore respectfully submits that in deferring this consideration, the Honourable Single Judge has misapplied the discretionary element permitted by Article 68(3) and Rule 89. The OPCD further agrees with the Prosecution that this error stems from interlinked errors, namely, the failure to define the personal interests of the applicants in a particularised manner, and the failure to consider the personal interests of the applicants against the backdrop of specific as opposed to abstract or hypothetical proceedings.

Issue 2: The Chamber is obliged to assess whether the applicant's personal interests are affected on a case-by-case basis in connection with particular proceedings

17. The OPCD observes that the Prosecution has correctly set out the prior jurisprudence of the Appeals Chamber, which mandates a case by case consideration of the personal interests of the respective applicants.⁸
18. The OPCD also finds the Prosecution's reference to Rule 89(2) to be pertinent. Rule 89(2) states that the Chamber may dismiss an application either because the person is not a victim or the criteria otherwise set forth in Article 68(3) are not met. By leaving open the possibility that a person so rejected may subsequently file a new application later in the proceeding, Rule 89(2) envisages that the Chamber's assessment as to whether the applicant meets either the definition of victim, or the criteria otherwise set out under Article 68(3) might fluctuate during the proceedings.
19. The adoption of a particularised approach is also consonant with the fact that "[t]here may [...] be areas where the interests and concerns of victims are at odds with those of others".⁹

⁸ Prosecution Appeals Brief at paragraph 22.

20. The OPCD further observes that the purpose of participation under Article 68(3) is not to enable applicants to supplement or supplant the role of the prosecutor¹⁰ (or indeed the defence); the reference to personal interests underscores that the applicant is “a purely private person [who] is not called upon to protect the interests of justice or the interests of the investigation”.¹¹
21. Nor is its purpose to broaden the right to access the court to all interested parties; it is to ensure effective access for alleged victims to the judicial proceedings which directly concern them, and to “avoid secondary victimization which occurs because those responsible for ordering criminal justice processes and procedures do so without taking into account the perspective of the victim”.¹²
22. As concerns the right to access the judicial process, the right to actively participate in the proceedings is but one subcomponent of this overarching right, and an exceptional component at that, which must be strictly regulated in accordance with an active assessment of the personal interests of the applicant, and the appropriateness of the stage of their participation.¹³ The OPCD notes in

⁹Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, publication of the United Nations Office for Drug Control and Crime Prevention (New York, 1999) at page 3. <http://www.uncjin.org/Standards/9857854.pdf>

¹⁰The United Nations Handbook on Justice for Victims remarks that the “right to participate with full prosecutorial rights in criminal proceedings is recognized by only a few legal systems and even here, in practice, victims usually leave most prosecutorial duties to the public prosecutor” (at p. 39).

‘Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, publication of the United Nations Office for Drug Control and Crime Prevention (New York, 1999).

The OPCD further refers to the following observation, which was formulated on the basis of an analysis of ICC jurisprudence concerning the role of alleged victims in ICC proceedings: “it must be kept in mind that the Rome Statute is a new procedural strategy with no tradition yet. The incorporation of civil party participation in an excessive way is an unusual step and does not mirror national experiences and traditions”. ‘Amicus brief by Christopher Safferling on the issue of civil party participation’, filed before the Extraordinary Chambers in the Courts of Cambodia, 20 February 2008, at page 6, http://www.eccc.gov.kh/english/cabinet/courtDoc/38/Amicus_Christoph_Safferling_C11_39_EN.pdf

¹¹ ‘Amicus brief by Christopher Safferling on the issue of civil party participation’, filed before the Extraordinary Chambers in the Courts of Cambodia, 20 February 2008, at page 3.

¹²Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, publication of the United Nations Office for Drug Control and Crime Prevention (New York, 1999) at page 9.

¹³ In this connection, the OPCD submits that it is the personal quality of the views and concerns which justifies the right of the alleged victims to directly present these views and concerns, as opposed to their passive presentation through the prosecutor or the party calling this person as a witness. The OPCD refers to the following extract from the United Nations Handbook on Justice for Victims: “The possibility that the victim may be involved in decision-making regarding the case has aroused considerable discussion in many jurisdictions [...] When the Declaration was adopted, the reservations some jurisdictions had against direct victim involvement were noted. It was pointed out that the formulation of the paragraph in question envisages different options in “allowing the views and concerns of victims to be presented and considered”. First, there is no explicit reference to any active role on the part of the victims; the “views and concerns of victims” could, for example, be presented by the prosecutor. Second, there are many ways in which the views and concerns of victims can be “presented and considered” without their physical presence or even, indeed, representation. Third,

this regard that Rule 103 of the Rules of Procedure and Evidence provides the vehicle through which persons or entities with a general interest in the proceedings may seek authorisation to present their observations to the Chamber. Even the fact that an organisation or State purports to represent the general interests of victims does not in itself suffice to establish a right to be heard,¹⁴ particularly if the request does not relate to an issue which the Chamber is directly seized of.¹⁵

23. Indeed, the distinguishing feature of Article 68(3) as compared to Rule 103, is that the fact that the personal interests of the applicants are directly affected by the proceeding in question elevates their position from a person who may seek the authorisation of the Chamber to present observations, which may or may not be taken into consideration, to a person who has a right to have their personal views and concerns taken into consideration by the Chamber.¹⁶

24. The OPCD further observes that both Rule 103 and Article 68(3) oblige the Chamber to firstly consider the appropriateness of receiving observations on the issue/s in question. In light of the fact that the Pre-Trial Chamber has held that its determination as to the appropriateness of receiving *amicus* submissions on particular issues “shall necessarily be made by the Chamber on a case by case basis”,¹⁷ it would logically follow that the Chamber’s assessment as to the

the subparagraph refers only to “appropriate” stages, leaving it to the individual jurisdiction to decide what such stages are [...]” (at page 36-37).

¹⁴ See for example, Decision on the Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence, 17 August 2007, ICC-01/04-373, Prosecutor v Bagambiki et al, ‘Decision on the Application to file an *Amicus Curiae* brief according to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations’, 24 May 2001; Prosecutor v. Bagambiki et al, Decision on the Coalition for Women’s Human Rights in Conflict Situation’s Motion for Reconsideration of the Decision on Application to File an *Amicus Curiae* Brief, 24 September 2001; Prosecutor v. Bagasora, Decision On *Amicus Curiae* Request By The Rwandan Government, 13 October 2004.

¹⁵ Prosecutor v Bagambiki et al, ‘Decision on the Application to file an *Amicus Curiae* brief according to Rule 74 of the Rules of Procedure and Evidence filed on behalf of the NGO Coalition for Women’s Human Rights in Conflict Situations’, 24 May 2001; Prosecutor v. Musema, Decision On An Application By African Concern For Leave To Appear As *Amicus Curiae*, 17 March 1999 at paragraph 13.

¹⁶ In this connection, the Pre-Trial Chamber rejected the request of the Women’s Institute for Gender Justice to present observations concerning the criteria for determining victim status, and in so doing, observed that “the position of Women’s Initiatives in the present request is not acting as a legal representative of victims admitted to participate in the proceedings at the investigation stage of the Situation in the DRC but rather acting as an *amicus curiae*. The Chamber therefore deems this issue as not appropriate at the present stage of the proceedings” (at paragraph 6). The Chamber thereby implicitly differentiated between the standing of a legal representative or alleged victim, whose personal interests would be directly affected by the question of the criteria for determining victim status, and a person or entity with a general or abstract interest in this question.

¹⁷ Decision on the Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence, 17 August 2007, ICC-01/04-373 at page 4. The OPCD further observes that in contrast to the Pre-Trial Chamber’s conclusion in its 17 January 2006 decision that the “right to present their views and concerns and to file material pertaining to the ongoing investigation stems from the fact that the victims’ personal interests are affected because it is at this stage that the persons allegedly responsible for the crimes from which they suffered must be

appropriateness of receiving the views and concerns of alleged victims (which would have a far greater impact on the proceedings) should also be determined on a case by case basis.

25. With respect to the issue of ‘secondary victimization’, concrete examples provided by the United Nations Handbook include specific judicial activities, such as the scheduling of hearings during which the alleged victim has been called to testify.¹⁸ In this connection, it has been commented that the need to take into consideration the interests of alleged victims should carefully be balanced with the need to “ne pas confrondre justice et thérapie”.¹⁹
26. The OPCD therefore submits in this regard that there can be no ‘secondary victimisation’ in relation to the proceedings in general: this would be tantamount to the Court concluding that all elements of the judicial process, rather than facilitating the right of victims to an effective remedy, potentially compound the harm suffered by the victim. This is clearly not the case for unconnected proceedings, or proceedings convened in relation to purely legalistic/technical matters which do not directly impact on the personal interests of the applicants.
27. The OPCD therefore concurs with the Prosecution that the criterion of personal interests must be assessed in connection with specific proceedings.
28. However, insofar as the Prosecution suggests at footnotes 15 and 32 of the Appeal Brief that in the context of the pre-confirmation phase and pre-trial phase, it might be more feasible to predict the range of upcoming proceedings which would impact on the personal interests of the applicants, the OPCD observes that the element of predictability entailed in assessing the personal interests of the applicants must nonetheless be considered in light of the element

identified as a first step towards their indictment” (at paragraph 72), the Chamber expressly recognises in this decision that in light of the fact that investigations in the DRC were ongoing, and the Prosecutor had not taken any decision not to investigate or prosecute, the question as to the Prosecutor’s discretion “not to prosecute a particular person or not to prosecute a person for particular crimes” did not arise for consideration.

¹⁸ For example, consulting with alleged victims or providing sufficient advance notice to enable them to make arrangements which lessen the disruption in their lives. ‘Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, publication of the United Nations Office for Drug Control and Crime Prevention (New York, 1999) at page 35.

¹⁹ R. Badinter, “Ne pas confrondre justice et thérapie” Le Monde 8 September 2007: “au nom de la souffrance des victimes, qui appelle toute la solidarité de toute la société, nous ne devons pas altérer le difficile équilibre de la justice pénale qui repose sur les principes du procès équitable inscrit dans la Convention européenne des droits de l’homme.” http://www.lemonde.fr/societe/article/2007/09/08/robert-badinter-ne-pas-confondre-justice-et-therapie_952825_3224.html#ens_id=917921

of unpredictability involved in assessing the appropriateness of their participation.

29. In terms of the latter element, the OPCD respectfully submits that irrespective of the stage of the proceedings, it is not possible to fetter in advance the Chamber's obligation to actively ensure the fairness and expeditiousness of the proceedings. As such, irrespective of the phase of the proceedings before the ICC, the Chamber is under a continuing obligation to assess the appropriateness of participation in specific procedural activities, in order to ensure that participation does not unduly delay important proceedings, usurp the role of the prosecutor, or interfere with the impartiality of the proceedings.²⁰ Hence, the pre-confirmation, pre-trial, and trial phases are no more amenable to the granting of a procedural status of 'victim' than the situation phase.

Issue 3: The Decision erred in holding that the requirement of appropriateness was to be assessed in relation to the entire phase of the proceedings

30. As set out in the OPCD Appeal Briefs of 4 February and 18 February 2008, the criterion of appropriateness must be interpreted in an effective manner, and as such, constitutes a separate and distinct aspect of the Chamber's assessment under Article 68(3). As noted immediately above, this assessment cannot be rendered in an abstract or permanent manner, as the question as to the propriety of participation will necessarily depend on the factual and legal matrix of the proceedings in question.
31. The OPCD further shares the Prosecution's position that the reference to 'stages of the proceedings' in Article 68(3) is intended to encompass specific procedural activities which may arise during a phase, rather than a phase (pre-confirmation phase, trial phase) in its entirety.

²⁰ The OPCD observes in this regard that the term 'appropriate' is employed in rule 89 to denote fairness, impartiality, and respect for the rights of the defence: Rule 89 states that "the Chamber shall then specify the proceedings and manner in which participation is considered appropriate". In light of the fact that the Chamber is obliged to ensure that the modalities of participation are "not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial", the reference to appropriate must be taken to incorporate these elements.

32. The Statute and Regulations clearly demarcate between phases of the proceedings, and stages of the proceedings, with the latter representing discrete components of the former.
33. In terms of the Statute, Article 72 (Protection of National Security Information) stipulates that “This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.” In accordance with the *ejusdem generis* canon of statutory construction,²¹ the phase ‘stage of the proceedings’ must be considered to fall within the same category as the other proceedings expressly delineated in this Article. It would therefore appear that Article 56, paragraphs 2 and 3, Article 61 paragraph 3, Article 64 paragraph 4 *et cetera* are all examples of stages of the proceedings.
34. Article 74(1) also provides that “[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.” The term ‘stage’ therefore denotes particular components of the trial phase.
35. In terms of the Regulations of the Court, Regulation 55(2) provides that “[i]f, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, the Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions [...]”. In this context, the ‘stage of the proceedings’ necessarily occurs within the trial phase itself, and thus represents a discrete point in time during this phase.

²¹ See Prosecutor v. Delalic, Trial Judgement, 16 November 1998, at paragraph 166.

36. In contrast, Regulation 12 (Service Within the Appeals Chamber) utilises the term ‘phase’ to refer to the entirety of the respective pre-trial, trial or appeal proceedings.²²
37. Finally, the OPCD submits that implementing a regular and effective system for notifying, and explaining to all interested persons the proceedings before the ICC would ensure that these persons would be in a position to identify specific proceedings which directly impact on their personal interests. As set out in the OPCD Appeal Brief of 4 February, notification is a passive form of the right to access justice.²³ As such, the Chamber would not be required to formally determine the person’s status in order to invoke this right.

²² “In the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, the Presidency shall, in the interests of the administration of justice, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division, subject to article 39, paragraph 1. Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case.”

²³ “There is an important distinction between active and passive involvement in decision-making. An example of active participation is the victim impact statement; and an example of passive participation is victim notification”. Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, publication of the United Nations Office for Drug Control and Crime Prevention (New York, 1999) at page 37.

Relief Sought

38. For the reasons set out above, the OPCD respectfully requests the Honourable Appeals Chamber to grant the appeal.



Mr Xavier-Jean Keïta
Principal Counsel of the Office of Public Counsel for the Defence

Dated this Friday, the 29th of February 2008

At The Hague, The Netherlands