

1 International Criminal Court

2 Appeals Chamber

3 Uganda Situation and Kony Case - ICC-02/04, ICC-02/04-01/05

4 Delivery of Judgement - Open Session

5 Monday, 23 February 2009

6 The hearing starts at 9.29 a.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 COURT OFFICER: Situation in Uganda, number 02/04, in the case
10 Prosecutor against Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic
11 Ongwen, number 02/04-01/05.

12 MR. GUARIGLIA: Good morning, your Honour, it's Fabricio
13 Guariglia, Senior Appeals Counsel in the Office of the Prosecutor, and
14 with me today are Mr. Ekkehard Withopf, Senior Trial Attorney in charge
15 of the Kony case; and the Case Manager of Appeals Section, Ms. Carmen
16 Garcia Ramos.

17 MS. PELLET (interpretation): Good morning, Mr. President. I'm
18 the Ad Interim Counsel for counsel of the victim's office.

19 MR. KEITA (interpretation): Good morning, Mr. President, Jean
20 Keita, Public Counsel for Defence. I apologise for -- Ms. St. Laurent
21 has just sent an urgent message saying, exceptionally, she was not able
22 to come from Quebec, and I would ask my colleagues to excuse her, and I
23 will represent her for this hearing, and I thank you for your
24 understanding on that.

25 JUDGE PIKIS: (Microphone not activated)... judgement that

1 constitutes the only authoritative text.

2 The present appeals of the Defence are directed against two
3 identical decisions of Pre-Trial Chamber II on the participation of
4 victims in relation to the situation in Uganda and the case of Kony.

5 In the impugned decisions, the Pre-Trial Chamber found inter alia
6 that applicants, and their numbers are referred to, had suffered
7 emotional harm as the result of loss of members of their families and
8 recognised them as victims in the meaning of Rule 85(a) of the Rules of
9 Procedure and Evidence. Pre-Trial Chamber, in respect of all four,
10 victims that they have also suffered other forms of harm.

11 The Appeals Chamber has decided the present appeals by majority,
12 Judge Pikis dissenting, as follows:

13 The decisions recognising applicants a/0094/06, a/103/06,
14 a/0102/06, and a/0123/06 as victims, as contained in the impugned
15 decisions are confirmed. Although the Pre-Trial Chamber erred when
16 finding that there was sufficient factual and evidential basis to
17 establish that the four applicants had suffered emotional harm as the
18 result of the loss of a family member, this error was inconsequential for
19 the recognition of the applicants as victims as they had, in any event,
20 suffered other forms of harm that rendered them victims within the
21 meaning of Rule 85(a). Therefore, the appeals are dismissed.

22 The reasons for the decision may be summarised as follows:

23 The Defence sought and was granted leave to appeal the impugned
24 decisions in respect of the following issue: In order to establish
25 mental harm suffered as a result of physical harm suffered by another

1 person, should the identity of the latter and the relationship of the
2 applicant with the person be required?

3 On appeal, the Defence submitted that if an applicant for victim
4 status alleges that he/she has suffered emotional harm as the result of
5 the loss of a family member, the applicant should be required to provide
6 documentary evidence establishing the identity of the family member and
7 his or her relationship with the applicant. The Defence recalled that
8 the Pre-Trial Chamber, in the impugned decisions, required applicants to
9 establish their own identities by the submission of certain means of
10 proof. In the view of the Defence, the same means of proof should be
11 required in respect of the identities of their family members.

12 The Defence noted furthermore that the impugned decision, as well
13 as the applications of the four applicants were redacted and that the
14 Defence therefore was unable to examine whether sufficient information
15 has been provided in the case at hand.

16 The Prosecutor did not oppose the position of the Defence that
17 some evidence must be provided if an applicant alleges to have suffered
18 emotional harm as the result of the loss of a family member. He noted,
19 however, that this requirement must be interpreted in a non-technical
20 manner and on a case-by-case basis. The Prosecutor submitted furthermore
21 that the Defence failed to make any out error of fact in the impugned
22 decisions and that therefore the findings of the Pre-Trial Chamber should
23 be left undisturbed.

24 The victims participating in the present appeals agreed with the
25 Defence that some proof of identity of the family members and of their

1 relationship with the applicants must be provided. They emphasised,
2 however, that the practical realities in Northern Uganda may make the
3 submission of seven documentary evidence impossible.

4 Turning to the central point of the appeals, the Appeals Chamber
5 notes that the applicants, and they are specified, did not provide any
6 documentary or other evidence in addition to their applications that
7 would have substantiated the identities of their respective family
8 members or their relationship with the applicants. The applications
9 themselves provided little information regarding these elements. None of
10 the applicants indicated the date or place of birth of his or her family
11 members, and in two instances the names of the family members of the
12 applicant are not mentioned at all in the applications. In one instance,
13 it is unclear what the applicant alleges to have happened to the family
14 member.

15 The Appeals Chamber observes that it is an essential tenet of
16 the Rule that judicial decisions must be based on facts established by
17 evidence. When a Pre-Trial Chamber is considering whether an applicant
18 fulfils the criteria of Rule 85(a) of the Rules of Procedure and Evidence
19 because he or she suffered emotional harm as the result of the loss of a
20 family member, it must require proof of the identity of the family member
21 and of his or her relationship with the applicant. The Chamber must be
22 satisfied that the family member existed and that he or she had the
23 requisite relationship with the applicant. In light of these principles
24 and the factual and evidential basis in the present case, the Appeals
25 Chamber concludes that the Pre-Trial Chamber erred in arriving at its

1 findings that the applicants, the four applicants, had suffered emotional
2 harm as the result of the loss of a family member. And in the summary we
3 recount their numbers.

4 The Appeals Chamber nonetheless considers that the Pre-Trial
5 Chamber is in the best position to determine the nature and quantum of
6 evidence that it deems necessary and adequate at that stage of the
7 proceedings to establish the elements of Rule 85 of the Rules of
8 Procedure and Evidence. What evidence of may be sufficient cannot be
9 determined in the abstract, but must be assessed on a case-by-case basis
10 and taking into account all relevant circumstances, including the context
11 in which this court operates. For this reason, the Appeals Chamber is
12 not persuaded by the argument of the Defence that the Pre-Trial Chamber
13 erred because it did not stipulate the same evidentiary requirements in
14 respect of the identities of the family members and their relationship
15 with the applicants as in respect of the identities of the applicants
16 themselves.

17 The Appeals Chamber considers that although an error has been
18 identified in the impugned decisions, for the following reasons it is
19 nonetheless appropriate to confirm the decisions of the Pre-Trial Chamber
20 recognising the four applicants as victims.

21 In the impugned decisions the Pre-Trial Chamber decided that the
22 four applicants are victims pursuant to Rule 85 of the Rules of Procedure
23 and Evidence in relation to the case of Kony and others. However, this
24 decision was not based solely on the finding of emotional harm that the
25 four applicants had suffered, but also on findings that they had suffered

1 other forms of harm. In relation to applicants a/0094/06 and a/0103 the
2 Pre-Trial Chamber found that the applicants had suffered physical harm as
3 well as economic loss as a result of the same set of events that led to
4 the emotional harm; in relation to applicant a/0120/06, the Pre-Trial
5 Chamber found that the applicant had also suffered economic loss; and in
6 relation to the fourth applicant, 0123/06, the Pre-Trial Chamber
7 concluded that the applicant had suffered economic loss as well as
8 emotional harm result from "witnessing events of an exceedingly violent
9 and shocking nature" in addition to the emotional harm suffered as the
10 result of a loss of a family member. These findings of harm had not been
11 challenged on appeal and were unrelated to the error that has been
12 identified in the preceding section of this judgement.

13 Thus the error of the Pre-Trial Chamber was inconsequential and
14 did not materially effect the correctness of the overall finding of the
15 Pre-Trial Chamber that the four applicants are victims specified -- are
16 victims under Rule 85(a) of the Rules of Procedure and Evidence.

17 Now I shall proceed to read the summary of the dissenting
18 opinion. Again, nothing said in this summary qualifies in any way the
19 dissenting opinion that constitute the only authentic text.

20 The issue raised for determination is clouded with ambiguity. Is
21 the question raised designed to elicit whether someone may qualify as a
22 victim owing to hurt or injury caused to an unidentified or anonymous
23 person? From whom or by reference to what is specification of the
24 identity of the third person required? Does the issue relate to the
25 foundation, that is, the necessary particulars, of an application or

1 motion for recognition of a person as a victim? Or is the Appeals
2 Chamber asked to determine the proof required to substantiate such a
3 claim?

4 The formulation of an application for the acknowledgement of a
5 right is one thing, proof of it another. It is elementary that facts
6 founding an application or grounding a motion must be pleaded. And in
7 the case of harm suffered because of injury occasioned, the source of the
8 hurt or injury must be specified. It is a cardinal rule of pleading that
9 the facts relied upon in support of a claim must be explicitly
10 identified; proof is confined to a verification of these facts through
11 the adduction of evidence. The more authentic the evidence, the more
12 readily the court will acknowledge the existence of the facts relied
13 upon. If this is not possible because such evidence is either
14 unavailable or impossible to secure, other evidence may be adduced
15 depending on the persuasiveness of which the court may accept the facts
16 as proven or not.

17 In the decision granting leave, the Pre-Trial Chamber
18 acknowledges that the decision by reference to which leave to appeal was
19 sought "did not explicitly address the issue" set down for appeal.
20 Seemingly, the Single Judge did not duly appreciate that the appealable
21 issue must arise from a decision of a first-instance court and not
22 independently of any decision taken.

23 The subject matter of an appeal under Article 82(1), including
24 paragraph of the same -- subparagraph 4(d) of the same paragraph is a
25 decision of a first-instance court. The object of an appeal under

1 Article 82(1)(d) of the Statute is to forestall the implications of a
2 decision on the course of the proceedings in case the first-instance
3 court has gone wrong in relation to an issue determined therein.

4 What may form the subject matter of an appeal under Article
5 82(1)(d) was explored in the judgement of the Appeals Chamber of 13th
6 July 2006. The following passages from that decision are to the point:

7 Article 82(1)(d) of the Statute does not confer a right to appeal
8 interlocutory or intermediate decisions of either the Pre-Trial or Trial
9 Chamber. The right to appeal arises only if the Pre-Trial Chamber is of
10 the opinion that any such decision must receive the immediate attention
11 of the Appeals Chamber. This opinion constitutes the definitive element
12 for the genesis of a right to appeal. In essence, the pre-trial or Trial
13 Chamber is vested with power to state, or more accurately still, to
14 certify the existence after appealable issue.

15 Only an issue may form the subject matter of an appealable
16 decision. An issue is an identifiable subject or topic requiring a
17 decision for its resolution, not merely a question over which there is
18 disagreement or conflicting opinion.

19 Sequentially, what may found an appeal under Article 82(1)(d) of
20 the Statute is an issue, the determination of which is an integral part
21 of a decision of the first-instance court. Here we have it from the
22 Judge who certified the issue that it does not arise from a decision of
23 the court. Consequently, the certification of the issue can find no
24 legal justification, founded as it is, outside the framework of the
25 provisions of Article 82(1)(d) of the Statute.

1 As may be inferred from the decision of the Single Judge, leave
2 was granted to appeal this specific issue in order to guide the
3 first-instance court in addressing the subjects in proceedings before it.
4 The advice of the Appeals Chamber is sought on the community; a course
5 outside its authority, as the Appeals Chamber declared on a previous
6 occasion. The Appeals Chamber, it was said in a previous decision,
7 "cannot assume the role of an advisory body, which it considers to be
8 beyond and outside the scope of its authority."

9 Previous decisions of the court are a source of law in accordance
10 with Article 21(2) with regard to the principles and rules emerging from
11 the interpretation of applicable law.

12 The case law of the Appeals Chamber as to the subject matter of
13 an appeal under Article 82(1)(d) of the Statute establishing that a) only
14 issues arising from a decision of a first-instance court can be made the
15 subject of an appeal under Article 82(1)(d) of the Statute and b) the
16 Appeals Chamber is not an advice-rendering body, seals the outcome of a
17 this appeal. The appeal is held to be inadmissible and as such it should
18 be dismissed.

19 COURT USHER: All rise.

20 The hearing ends at 9.49 a.m.

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