

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

No.: **ICC-02/04-01/05**

Date: **16 June 2008**

THE APPEALS CHAMBER

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

**SITUATION IN UGANDA
IN THE CASE OF**

***THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO,
DOMINIC ONGWEN***

Public Document

**Defence Appeal of Pre-Trial Chamber II's Decision of 14 March 2008 on Victim
Participation**

Source: Ms Michelyne C. St-Laurent, 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 Applicants

Unrepresented Victims

**Unrepresented Applicants for
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Detention Section

**Victims Participation and Reparations
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Other

PROCEDURAL BACKGROUND

1. On 22 November 2006, Pre-Trial Chamber II designated the honourable Judge Mauro Politi as Single Judge responsible for all applications for victim participation in the situation in Uganda ("the Situation") and in the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen ("the Case").¹
2. On 10 August 2007, in his *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*,² the Single Judge granted victim status to applicants a/0101/06 to a/0119/06, in the Situation in Uganda and victim status to applicants a/0090/06, a/0098/06, a/0112/06, a/0119/06 and a/0122/06 in the Case.
3. On 12 October 2007, the Single Judge received the "Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda" from the Victims Participation and Reparations Section (VPRS).
4. On 15 February 2008, the Victims Participation and Reparations Section (VPRS) transmitted the "Addendum to 'Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda", which provides additional information on identifying documents in Uganda.
5. On 14 March 2008, the honourable Single Judge issued the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06"³ ("the Decision") in which he grants victim status to

¹ ICC-02/04-01/05-130.

² ICC-02/04-101 and ICC-02/04-01/05-252

³ ICC-02/04-125 and ICC-02/04-01/05-282

applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06 and a/0123/06 respectively, in the Situation, and to applicants a/0094/06, a/0095/06, a/0103/06, a/0117/06, a/0120/06, a/0121/06, a/0123/06 and a/0124/06 in the Case.

6. On 25 March 2008, Ad Hoc Counsel for the Defence filed the “Defence Application for Leave to Appeal the *Decision on victims’ applications for participation* issued on 14 March 2008” (the “Defence Application”) seeking leave to appeal the Decision,⁴ in particular with regard to the following issues:

- Can victims be granted a general right to participate or should it be considered that such participation is possible only if it is established that the specific personal interests of the applicant are affected by the proceedings and that such participation is appropriate at the stage of the proceedings?
- In order to establish mental harm suffered as a result of physical harm suffered by another person, should the identity of the latter and the relationship of the applicant with the person be required?

7. On 31 March 2008, the Prosecutor filed the “Prosecution’s Response to Defence’s Request for Leave to Appeal the Single Judge’s 14 March 2008 Decision on the Applications for Participation in the Proceedings”.⁵

8. On 31 March 2008, the Office of Public Counsel for Victims (OPCV) filed the “Request for leave to file a response to the “Requête de la Défense sollicitant l’autorisation d’interjeter appel de la ‘Decision on victims’ applications for participation’ rendue le 14 mars 2008””⁶ in which the OPCV requests the honourable Single Judge to appoint it as legal representative for the victims authorised to

⁴ ICC-02/04-128tENG and ICC-02/04-01/05-285tENG

⁵ ICC-02/04-129 and ICC-02/04-01/05-287

⁶ ICC-02/04-130 and ICC-02/04-01/05-288

participate in the Case until a common legal representative is chosen by the victims, and seeks leave to file a response to the Defence Application.

9. On 2 April 2008, the Office of Public Counsel for Victims submitted the “Request for leave to file observations to the ‘Prosecution’s Response to Defence’s Request for Leave to Appeal the Single Judge’s 14 March 2008 Decision on the Applications for Participation in the Proceedings’”⁷ in which it requests the honourable Single Judge to appoint it as legal representative for the victims authorised to participate in the Situation until a common legal representative is chosen by the victims, and seeks leave to file observations on the Prosecution’s Response to the Defence Application.

10. On 4 April 2008, in his *Decision on the OPCV’s Requests for leave to file a response to the Defence’s Application dated 25 March 2008 and to file observations on the Prosecution’s Response to such Application*,⁸ the honourable Single Judge appointed the Principal Counsel of the Office of Public Counsel for Victims as legal representative of the victims authorised to participate in the Situation and in the Case, and granted her leave to respond to the Defence’s Application and to file observations on the Prosecution’s Response.

11. On 11 April 2008, the Legal Representative for Victims filed the “Response of the Legal Representative of Victims to the Defence Application for Leave to Appeal the Decision of 14 March 2008 and Observations on the Response of the Prosecutor to that Application”.⁹

⁷ ICC-02/04-131 and ICC-02/04-01/05-289

⁸ ICC-02/04-132 and ICC-02/04-01/05-290

⁹ ICC-02/04-133tENG and ICC-02/04-01/05-291tENG

12. On 2 June 2008, the honourable Single Judge issued his *Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims' Applications for Participation*.¹⁰

13. By this decision, the honourable Single Judge granted leave to appeal the following issue:

In order to establish mental harm suffered as a result of physical harm suffered by another person, should the identity of the latter and the relationship the applicant has with the person be required?¹¹

14. Ad Hoc Counsel for the Defence hereby respectfully submits to the Appeals Chamber her observations on the issue with regard to which the Single Judge granted leave to appeal.

IN LAW

15. In his decision of 2 June 2008,¹² the Honourable Judge Politi acknowledges that pursuant to article 82(1)(d) of the Statute this issue constitutes “an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which [...] an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

16. The Honourable Judge Politi generally considers that the participation of victims in the proceedings has a profound impact on the parties and on the fairness of the proceedings.¹³

¹⁰ ICC-02/04-139 and ICC-02/04-01/05-296

¹¹ ICC-02/04-139 and ICC-02/04-01/05-296, p. 9.

¹² *Ibid.*, pp. 8 and 9.

¹³ Decision of 14 March 2008, para. 6: “the profound impact which the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings means that the applicants must submit a proper proof of their identity”. See also the decision of 10 August 2007, ICC-02/04-101 and ICC-02/04-01/05-252, para. 16.

17. Judge Politi observed that “the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted”.¹⁴

18. There are two hierarchically different bases for the participation of victims in proceedings before the Court:

- applicants acting on their own behalf as victims as a result of the harm they have personally suffered;
- applicants acting with the consent of a victim, or on behalf of a victim, if the victim is a child or is disabled.¹⁵

19. The latter category constitutes an exception and, as such, requires more stringent admissibility criteria.¹⁶ Hence, the Judge requires the applicants to provide documentation in relation to the identity of the victims they are representing¹⁷ and documentation proving their link to those victims.

20. For an applicant to be considered a victim within the meaning of rule 85(a) of the *Rules of Procedure and Evidence*, the Court must determine (i) whether the identity of the applicant as a natural person is duly established; (ii) whether the events described constitute a crime falling within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) whether such harm was caused by a crime falling within the jurisdiction of the Court.¹⁸

¹⁴ ICC-02/04-112, para. 50, referring to ICC-02/04-01/05-US-Exp, para. 22.

¹⁵ Rule 89(3) of the *Rules of Procedure and Evidence*: “An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.”

¹⁶ The wording “when necessary” in rule 89(3) implies that the provision must apply only in cases where the victim cannot participate on his or her own behalf.

¹⁷ Regulation 86(2)(a) of the *Regulations of the Court*.

¹⁸ See the decision of 10 August 2007, ICC-02/04-101 and ICC-02/04-01/05-252, para. 12, and the decision of 14 March 2008, para. 8.

21. Since a decision to grant an applicant the status of victim in order to participate in the proceedings may affect the rights of the accused, the rules governing the granting of victim status must be interpreted restrictively.

22. Rule 85(a) of the Rules neither explicitly excludes nor includes the possibility of an applicant's participating on the basis of mental harm.¹⁹ On the basis of article 21 of the Statute concerning the sources of applicable law, it can be seen that participations based on mental harm must remain exceptional and be considered restrictively.

23. Interpreting the concept of mental harm broadly in respect of victims' applications for participation would create a risk to the rights of the accused and the fair and expeditious conduct of the proceedings.

24. Moreover, the practice in international criminal courts shows that, in general, they apply a strict interpretation of the concept of a victim who has suffered mental harm and that the psychological suffering of third parties is taken into account only in limited, exceptional cases.²⁰

25. Such a concept of mental harm must be even more restrictive in cases of indirect harm. Indeed, the Chamber has ruled that "permitting victims who suffered indirect

¹⁹ ICC-01/04-455, 18 February 2008, "OPCD Appeal Brief on the «*Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République Démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06*», para. 49.

²⁰ Rule 2 of the respective *Rules of Procedure and Evidence* of the ICTY and ICTR defines a victim as "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed"; see the decision of the Special Court for Sierra Leone, *Prosecutor v. Fofana, Judgment* of 2 August 2007, para. 153, citing the Runzindana decision of the ICTR: "The Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where [...] the Accused had the intention to inflict serious mental suffering on the third party, or where the Accused had reasonable knowledge that his act would likely cause [such] serious mental suffering on the third party." Lastly, the Extraordinary Chambers in the Courts of Cambodia require the harm suffered by the applicant victim to be "the direct consequence of the offence, personal and have actually come into being", rule 23(2) of the *Internal Rules* (Rev. 1) 1 February 2008; more specifically, see the OPCD Appeal Brief of 18 February 2008, ICC-01/04-455, para. 51.

harm to participate may significantly affect the number of victims who are involved in the case and the issues that will fall to be canvassed during the proceedings”.²¹

26. The applicants put forward two types of categories of mental harm.²² The first category encompasses victims who witnessed first-hand exceedingly violent and shocking acts which caused psychological problems.²³ The second category encompasses persons suffering mental harm as a result of the loss of a close family member.²⁴

27. Since, for the first category, the mental harm did not result from the loss of a loved one but from the violence of the events, it is not necessary to provide proof of the identity of persons who may have died in the course of such events or to establish the link between the applicants and those persons.

28. However, in the second category, the applicants are affected mentally because the harm they suffer results precisely from the link between them and the “primary” victim. The mental harm they sustain is personal to them because of the closeness of that link.

29. Ad Hoc Counsel for the Defence respectfully submits that, in order to establish the existence of such harm, documentation establishing the identity of the primary victims and the nature of the link between them and the applicants must be

²¹ ICC-01/04-01/06-1191, para. 27, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008*, 26 February 2008, *The Prosecutor v. Thomas Lubanga Dyilo*; see also ICC-01/04-455, 18 February 2008, “OPCD Appeal Brief”, para. 55, more specifically footnote 54, which demonstrates that one victim in a family of an average of 5 children might generate 39 potential applicants if indirect family members of the victim, *inter alia* uncles and cousins, were granted the right to participate.

²² ICC-02/04-133 and ICC-02/04-01/05-291, para. 35.

²³ The Judge speaks of “psychological trauma as a result of witnessing events of an exceedingly violent and shocking nature”; see, for example, Applicants a/0093/06, a/0095/06, a/0117/06 and a/0124/06 in the Decision of 14 March 2008.

²⁴ The Single Judge in the Situation in Darfur acknowledged this possibility, provided that the family members satisfy all of the criteria for being granted victim status: “However, family members affected by the disappearance could be considered victims under the Statute, the Rules and the Regulations, provided that they meet all the necessary criteria”, *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05 17/24 14 December 2007, para. 35.

provided.²⁵ If this is not done, applicants who do not satisfy the criteria to be granted victim status could, in order to be able to participate, simply allege that they suffered mental harm as a result of the death of any person whatsoever.

30. The Chambers require an applicant acting on behalf of a victim to provide proof of his or her identity and of the identity of the victim he or she is representing.²⁶ Moreover, where an applicant is representing a child or a disabled person, they require proof of the link between the applicant and those persons.²⁷ Lastly, the Chambers require an applicant acting on his or her own behalf to establish his or her identity and to provide evidence of the harm he or she suffered. They do not, however, appear to require any proof of the identity of the “primary” deceased victim who is the origin of the applicant’s mental harm or of the link between the applicant and that victim.

31. It would be paradoxical and unjust if the proof required of an applicant who has suffered mental harm as a result of the death of a family member is less than that of an applicant acting on behalf of a victim.

32. An analysis of national laws on mental harm based on the death of another person shows that this principle is not universally recognised and that the concept

²⁵ Furthermore, the Single Judge considered in the context of the Situation in Darfur, Sudan, that an applicant who based his or her application for participation solely on emotional suffering due to the death of family members must provide proof of his or her relationship with the deceased family members in order to be granted victim status: see *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05 17/24, 14 December 2007, paras. 30 and 31.

²⁶ In the Decision of 14 March 2008, the Single Judge is of the opinion that “both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by one of the above listed documents”, para. 7.

²⁷ “The link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed by a document attached to the application as supporting documentation within the meaning of regulation 86(2)(e) of the Regulations”, Decision of 14 March 2008, para. 7; see also *Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation*, ICC-01/04-374, Situation in the DRC, para. 13.

has not yet gained currency in domestic law.²⁸ In principle, the family relationship between the applicant and the primary victim must be proved. Accordingly, stringent criteria for identifying the primary victim and the links between the applicants and the primary victim should be required.

33. For this reason, Ad Hoc Counsel for the Defence respectfully submits that it is necessary to provide proof of a proximate relationship between the applicant and the primary victim, such relationships being limited to the immediate family, that is, family *strictu sensu*: spouse, father, mother and children.

²⁸ More specifically, see the OPCD Appeal Brief of 18 February 2008, ICC-01/04-455, footnote 52. For example, in Gabon, under article 121(12) of the Code of Criminal Procedure of the Republic of Gabon “[TRANSLATION] any person suffering must be considered to be a victim, provided that such suffering may be personal, real (that is, manifest itself in emotional or psychological trauma and/or established material harm), found to be socially unacceptable and would merit counselling for the persons concerned (...)”.

In France, “secondary victims” can receive compensation only if they establish family or emotional ties – see the judgment of the Court of Cassation rendered in a mixed chamber on 27 February 1970 (D. 1970, Jur. p. 201) – but the existence of family ties does not necessarily result in compensation. (See *Cass. 2ème Civ.*, 29 January 1997, *RTD Civ.* 1997, p. 955); see also the law known as the Badinter Law, No. 85-677 of 5 July 1985 for victims of road traffic accidents.

In Québec, secondary victims – that is, those who suffer mental harm resulting from the physical harm suffered by the person who is the victim of the accident – are not considered to be victims (Section 6 of the Automobile Insurance Act: “Every person who suffers bodily injury in an accident is a victim”). Compensation for such persons is nevertheless possible, but restricted to the victim’s close relatives; see, for example, TAQ SAS-Q-093911-0212, Case of 25 March 2003 (AZ-03551450).

In the United Kingdom, compensation may be awarded only to those persons who suffered directly the injury, loss or damage (Archbold, *Criminal Pleading and Practice*, (Sweet & Maxwell Ltd, 2003) 5-415 (pp. 705-706). In order to award compensation, the courts require the plaintiff to have personally witnessed the events and to be a close relative of the victim, *Alcock v. Chief Constable of the South Yorkshire Police* [1992] 3 (the Hillsborough case).

Austria, Portugal and Spain do not offer financial compensation for moral harm as a result of the death of a relative: (European Commission Green Paper on Compensation to Crime Victims, Brussels, 28 September 2001, COM(2001) 536, at para 3.3.4.

In the Democratic Republic of the Congo, persons alleging mental harm due to the death of a family member are obliged to prove their relationship with the deceased person (under article 72 of Act 87-010 of 1 August 1987, the civil status of persons can be established only on production of an official document).

Lastly, concerning case law in relation to human rights, the European Court of Human Rights in Strasbourg emphasised in *Kurt v. Turkey* (24276/94, 25 May 1998) that a high evidential threshold is required to establish ill-treatment based on emotional suffering. Moreover, in that case, the applicant was the mother of the victim and had been present during the acts. The Inter-American Court of Human Rights also requires proof of mental harm. This proof is facilitated if the applicants establish that they are the direct successor of the victim, or if they are close relatives of the victim: in *Aloeboetoe et al.*, Judgment of 10 September 1993, paras. 75-76. Article 43(3)(a) and (b) of the Rules of Procedure of the Inter-American Court of Human Rights requires applicants to provide information about their link to the victim.

34. Furthermore, persons who fail to obtain the consent of victims to represent them could secure victim status for themselves for alleged personal moral harm by re-qualifying the events and the harm suffered. Hence, it is crucial that the “primary” victim be deceased; otherwise proof of the victim’s express consent is mandatory.²⁹ Indeed, as the Single Judge noted for the Situation in Darfur, it is impossible to request participation in proceedings on behalf of a deceased victim.³⁰

35. Ad Hoc Counsel for the Defence respectfully submits that the primary victim must be deceased before an application for participation can be accepted from a person alleging mental harm as a result of physical harm caused to another person.

36. Judge Blattman adds that “[i]t is important to note that [the Chambers] have required, in order to determine the status of victims, that a causal link be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with. The Appeals Chamber has never overruled this important causal link requirement and no party has questioned the validity of maintaining this”.³¹

37. Furthermore, the Chamber considered that “the participation of victims of crimes other than those included in the charges, could (...) significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial”.³²

38. Pursuant to Rule 85(a), which states that a causal link must exist between the crime within the jurisdiction of the Court and the harm alleged by applicants,³³ it is

²⁹ See OPCD Appeal Brief, ICC-01/04-455, para. 52.

³⁰ ICC-02/05 17/24, Situation in Darfur, Sudan, 14 December 2007, *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, paras. 35 and 36.

³¹ ICC-01/04-01/06-1119, 18 January 2008, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on victims’ participation*, para. 17, Separate and Dissenting Opinion of Judge René Blattman.

³² ICC-01/04-01/06-1191, para.32, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims Participation of 18 January 2008*, 26 February 2008; *The Prosecutor v. Thomas Lubanga Dyilo*.

³³ See ICC-01/04-01/06-1220, Defence Appeal against Trial Chamber I’s 18 January 2008 *Decision on Victims’ Participation*, para. 30 to 32, 10 March 2008. Furthermore, in accordance with the rules of

necessary that there be a link between the crimes included in the charges and the events in which the primary victim died.³⁴ The crimes which caused the death of the primary victims must fall within the jurisdiction of the Court, be indicated in the warrants of arrest or have been committed within the temporal and territorial limits of the relevant situation.³⁵

39. Proof of the applicant's proximity to the events themselves must therefore also be provided in order for the Chamber to determine how the applicant's personal interests are affected under article 68(3) of the Statute and whether his/her participation is appropriate at this stage of the proceedings.

40. Ad Hoc Counsel for the Defence respectfully submits, in conclusion, that applicants who allege mental harm as a result of the death of another person must suffer from psychological trauma directly related to the death of the direct victim, that they must have a proximate relationship with the victim, and that the death must result from the commission of crimes which fall within the jurisdiction of the Court.

41. In the impugned decision of 14 March 2008, the Honorable Single Judge granted victim status to several applicants on the basis of the mental harm they suffered as a result of the death of other persons but did not indicate precisely what type of information is required to establish the identity of primary victims and their relationship with the applicants.³⁶ In this case, neither the Chamber nor the parties can verify whether the primary victims, who are the source of the applicant's mental

interpretation in article 31 of the 1969 Vienna Convention on the Law of Treaties, the Statute shall be treated in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.

³⁴ Decision of 10 August 2007, ICC-02/04-101 and ICC-02/04-01/05-252, para.12: "Since no harm, however serious, would be of relevance in the Court's proceedings unless it resulted from the commission of a crime within the jurisdiction of the Court".

³⁵ See ICC-01/04-101-IB-Corr, Situation in the DRC, *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, para. 100.

³⁶ Defence Application, ICC-02/04-128 and ICC-02/04-01/05-285, para.17

harm, actually existed and whether they had a proximate relationship with the applicant.³⁷

42. Applicants a/0094/06³⁸, a/0103/06³⁹, a/0120/06⁴⁰ and a/0123/06⁴¹ allege to have suffered mental harm as a result of the death of persons who appear to have been their family members. None of these applicants provided proof of identity of those persons or of their relationship with them. The identity and relationship of these primary victims are not stated in the decision or in the victim participation forms. Moreover, certain applicants mention the death of one of their relatives but that death does not appear to be the source of the mental harm suffered or they do not speak of that death in their description of the events.⁴²

43. Ad Hoc Counsel for the Defense respectfully submits that the Single Judge committed errors of fact and law by granting victim status to these applicants without requiring proof of the identity of the primary victims and of their relationship with the applicants.⁴³

³⁷ Admitting victim applications without a possibility to verify the existence of an alleged crime or the basis on which the applicant has suffered moral harm might significantly affect the fairness of the proceedings, See ICC-01/04-434 para. 20, 'Prosecution's Response to OPCD's Request for leave to appeal the Single Judge's 24 December 2007 Decision on the Applications for Participation in the Proceedings', 11 January 2008.

³⁸ ICC-02/04-49-Conf and ICC-02/04-01/05-181-Conf.

³⁹ ICC-02/04-58-Conf and ICC-02/04-01/05-190-Conf; moreover, this applicant also does not disclose the identity of the armed group which carried out the attacks; it is not proved that the crimes are included in the charges brought against the accused.

⁴⁰ ICC-02/04-01/05-166-Conf and ICC-02/04-84-Conf.

⁴¹ ICC-02/04-71-Conf and ICC-02/04-01/05-203-Conf.

⁴² a/0102/06 and a/0123/06.

⁴³ This appeal is filed pursuant to article 82(1)(d) of the Rome Statute entitled "appeal against other decisions". Only appeals brought under article 81 need to specify the grounds of appeal which must be based on an error of law, an error of fact or a procedural error in accordance with regulation 64(2) of the *Regulations of the Court*. It is only an option for appeals brought under article 82 which are governed by rule 155 of the *Rules of Procedure and Evidence* and regulation 65 of the *Regulations of the Court*. Indeed, if the drafters provided for two different types of appeal and require establishment of grounds of appeal only for article 81, it therefore means that by virtue of the rules of interpretation of article 31 of the Vienna Convention, this requirement does not apply to appeals brought under article 82. See *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on Disclosure Restrictions pursuant to Rule 81(2) and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 19: "grounds of appeal for appeals brought under article 82(1)(d) can include those grounds that are listed at article 81(1)(a)", i.e. error of law, error of fact and procedural error", also see Prosecution's Response to OPCD Appeal against the

44. Certain applicants were not granted victim status because the Single Judge did not have enough information as to the date the events occurred⁴⁴ or, within the framework of the Situation, the places where the crimes not included in the charges were allegedly committed.⁴⁵ These applicants also allege to have suffered mental harm caused by the death of another person. No final decision was rendered as concerns these applicants, and the forms do not provide information on the identity of the primary victims or his/her relationship with the applicant. The Single Judge suspended the examination of their victim status until additional information is obtained on the date and places the alleged crimes were committed.

45. Ad Hoc Counsel for the Defence considers that when he examines the status of these victims, the Single Judge will have to require proof of the identity of primary victims and their relationship with the applicants.

46. The fact that the Decisions of 10 August 2007 and 14 March 2008, as well as the applicant participation forms, were fully redacted of the identities of the primary victims and their relationship with the applicants prevents Ad Hoc Counsel for the Defence from ensuring that the criteria for identity and family ties have been met, because she does not have the necessary information.⁴⁶

24 December 2007 *Decision on the Victims' Applications for Participation in the Proceedings*, ICC-01/04-482, 29 February 2008, para. 34 and specifically footnote 44.

⁴⁴ See applicant a/0088/06.

⁴⁵ Applicants a/0102/06 and a/0125/06.

⁴⁶ See ICC-01/04-01/06-379, 4 September 2006, *The Prosecutor v. Thomas Lubanga Dyilo*, 'Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06', in which the Defence demonstrates that the redacted nature of the case documents submitted by the applicants infringes the rights of the Defence, especially the right to equality of arms and to a fair and impartial trial, paras. 12 to 21.

47. Ad Hoc Counsel for the Defence is aware of the problems related to the difficulty of providing official identification papers in certain situations in Uganda.⁴⁷ In his decision of 14 March 2008, the Honourable Single Judge agreed to use alternative means for proving the identity of applicants, which are not as formal as the official documents initially required and established a list of the new documents accepted.⁴⁸ Ad Hoc Counsel for the Defence considers it appropriate to require the same type of document for identification of primary victims who are the source of the mental harm suffered by applicants.

CONCLUSION

48. Consequently, Ad Hoc Counsel for the Defence respectfully requests the Appeals Chamber to:

- (a) GRANT this appeal;
- (b) REVERSE the Decision of 14 March 2008 in respect of the following applicants: a/0094/6, a/0103/06, a/0120/06 and a/0123/06;
- (c) DECLARE that when an applicant alleges mental harm as a result of the death of another person, it is necessary to provide proof of the identity of that person and of the proximity of his/her relationship with the applicant; that is, the family *strictu sensu*: spouse, father, mother and children.

⁴⁷ See Addendum to 'Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda' of 15 February 2008.

⁴⁸ Decision of 14 March 2008, para.6, such as "(i) passport, (ii) voter card, (iii) certificate of registration issued by the Electoral Commission, (iv) driving permits, (v) graduated tax ticket, (vi) "short" birth certificate or "long" birth certificate, (vii) birth notification card, (viii) certificate of amnesty, (ix) resident permit or card issued by a Local Council, (x) identification letter issued by a Local Council, (xi) letter issued by a leader of an IDP Camp, (xii) "Reunion letter" issued by the Resident District Commissioner, (xiii) identity card issued by a workplace or an educational establishment, (xiv) camp registration card and card issued by humanitarian relief agencies, such as the United Nations High Commissioner for Refugees and the World Food Programme, (xv) baptism card, (xvi) letter issued by a Rehabilitation Centre".

Respectfully submitted,

[signed]

Michelyne C. St-Laurent
Ad Hoc Counsel for the Defence

Dated this 16 June 2008

At Arusha, Tanzania