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THE APPEALS CHAMBER

Before: Judge Navi Pillay, Presiding Judge
Judge Georghios M. Pikis
Judge Philippe Kirsch
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

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

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Introduction

1. The Prosecution hereby responds to the “Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation”, filed on 18 June 2008.
2. The issue in this appeal concerns applications by victims who claim to have suffered mental harm, and whether specific requirements (namely the identity of the primary victim and their relationship to the applicant) must be proved. The Defence submits that the Single Judge erred in fact and in law by granting victim status to applicants without requiring proof of the identity of the primary victims and of their relationship with the applicants.
3. In the event that the Appeals Chamber decides to accept the delayed filing of the Defence Appeal, the Prosecution submits that it does not oppose the appeal in relation to the alleged error of law, but it opposes the appeal in relation to the alleged error of fact, as the Defence does not advance any argument to identify or support an error of fact in the Decision warranting the intervention by the Appeals Chamber.

Procedural Background

4. On 14 March 2008, the Single Judge of Pre-Trial Chamber II (“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” (“Impugned Decision”).¹ The Impugned Decision was notified to the parties on 17 March 2008.
5. On 25 March, *ad hoc* counsel for the Defence (“Defence”) filed the “*Requête de la Défense sollicitant l’autorisation d’interjeter appel de la «Decision on Victims’*

¹ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-282, 14 March 2008. The same decision was filed in the *Situation in Uganda*, ICC-02/04-125, 14 March 2008.

applications for participation» rendue le 14 mars 2008 ("Defence Application"),² in which the Defence seeks leave to appeal the Decision on two issues. The Prosecution responded to the Defence Application on 31 March 2008.³

6. On 2 June 2008, the Single Judge issued the "Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims' Applications for Participation" ("Decision Granting Leave"),⁴ in which it granted leave to appeal the Impugned Decision on one issue.
7. On 16 June 2008, the Defence filed the "*Acte d'appel de la Défense relativement à la Décision du 14 mars 2008 de la Chambre préliminaire II concernant la participation des victimes*" ("Defence Appeal").⁵
8. The Prosecution hereby files its response to the Defence Appeal pursuant to Regulation 65(5).

Delayed filing of the Defence Appeal

9. The Decision Granting Leave was received by the Registry on Monday 2 June 2008 at 4:45 p.m. and notified to the participants on Tuesday 3 June 2008 at 9:23 a.m. Pursuant to Regulations 65(4) and 33, the document in support of the appeal was due on Monday 16 June 2008 at 4:00 p.m. However the Defence Appeal was filed with the Registry not until Wednesday 18 June 2008 at 1:32 p.m., and it was notified to the participants on the same day. The Prosecution notes that the Defence did not request the Appeals Chamber for an extension of the time limit to file the Defence Appeal.

² *Prosecutor v. Kony et al.*, ICC-02/04-01/05-285, 25 March 2008. The same application was filed also in the *Situation in Uganda*, ICC-02/04-128, 25 March 2008.

³ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-287, 31 March 2008. The same response was filed also in the *Situation in Uganda*, ICC-02/04-129 31 March 2008.

⁴ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-296, 2 June 2008. The same decision was filed also in the *Situation in Uganda*, ICC-02/04-139, 2 June 2008.

⁵ *Prosecutor v. Kony et al.*, ICC-02/04-01/05-298, 2 June 2008. The same Defence Appeal was filed also in the *Situation in Uganda*, ICC-02/04-142, 2 June 2008. See also the English translation of the Defence Appeal filed on 24 June 2008 (*Prosecutor v. Kony et al.*, ICC-02/04-01/05-298-tENG).

10. As a consequence of the above, the Prosecution notes that the Defence Appeal was filed with a delay of almost two full days.⁶ The Appeals Chamber has recently emphasised “the importance of complying with the deadlines prescribed in the relevant legal texts” and reminded the participants that “failure to comply with prescribed time-limits may [...] entail rejection of a documents filed late”.⁷
11. The Prosecution takes no position on whether or not the Defence Appeal should be rejected due to its delayed filing and presents the below submissions on the merits of the issue under appeal for the event that the Appeals Chamber decides to accept the filing of the Defence Appeal on an exceptional basis.⁸

The Issue in this Appeal

12. The issue certified for this appeal by the Single Judge is whether “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?”⁹
13. The Prosecution notes that this issue is identical to one in relation to which the OPCD sought, and was granted leave to appeal in the DRC situation.¹⁰ The appeal in that situation is currently pending before the Appeals Chamber.¹¹

⁶ The Prosecution submits that the fact that the Defence Appeal bears the date of 16 June 2008 is irrelevant in light of the clear provisions included in Regulations 65(4) and 33(2), requiring that the relevant document be “filed” by a specific date.

⁷ *Prosecutor v. Katanga*, 01/04-01/07-522 OA3, Judgement on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “Decision on the Defence Request Concerning Languages”, 27 May 2008, (“*Katanga Language Appeal*”) para. 13. The Appeals Chamber has also recently stated that “failure to make timeous application for an extension of the time limit will normally result in rejection of the filing by the Appeals Chamber” (*Situation in Darfur*, ICC-02/05-138 OA OA2 OA3, 18 June 2008, para. 31).

⁸ The Prosecution notes that the Appeals Chamber has previously accepted a defence document in support of an appeal, which was filed out of time, “on an exceptional basis”, due to the “negligible extent of the delay and because there was no objection to the late filing by the Prosecutor” (*Katanga Language Appeal*, para. 12).

⁹ Decision Granting Leave, p. 9.

¹⁰ See *Situation in the DRC*, ICC-01/04-429, Request for leave to appeal 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/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 à a/0241/06 à a/0250/06’, 7 January 2008; *Situation in the DRC*, ICC-01/04-444, 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, 6 February 2008. The Prosecution did not oppose the OPCD’s request for leave to appeal on that issue (*Situation in the DRC*, ICC-01/04-428,

14. The Prosecution further submits that the issue in this appeal is narrowly defined and that many of the arguments advanced by the Defence in the Defence Appeal do not relate to the issue certified for appeal and must accordingly be rejected.¹²

The errors alleged by the Defence

15. The Defence submits that the Single Judge erred in fact and in law by granting victim status to applicants without requiring proof of the identity of the primary victims and of their relationship with the applicants.¹³

(i) First ground of appeal: an alleged error of law

16. For victims who suffered mental harm by witnessing “first-hand exceedingly violent and shocking acts, which caused psychological problems”, the Defence argues that there is no requirement to provide proof of the identity of the person who suffered physical harm or the relationship between the latter and the victim applicant.¹⁴ However, if the application is based on mental harm caused as a result of physical harm suffered by the loss of a close family member, the Defence contends that some proof is required to establish the identity of the persons

Prosecution's Application for Leave to Appeal the Single Judge's 24 December 2007 'Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo', 7 January 2008).

¹¹ *Situation in the DRC*, ICC-01/04-455 OA5, 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/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 à a/0241/06 à a/0250/06”, 18 February 2008. See also *Situation in the DRC*, ICC-01/04-482 OA5, Prosecution's Response to OPCD Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the Proceedings, 29 February 2008.

¹² The issue certified for appeal does not concern the question of whether persons who suffered indirect harm fall within the scope of the definition of victims pursuant to Rule 85 (Defence Appeal, para. 25). It does also not concern whether or not the person suffering physical harm must be deceased (Defence Appeal, paras. 35, 38 and 40) or whether there has to be a causal link between the harm allegedly suffered by the victim and the crimes charged (Defence Appeal, paras. 36-38). Further, the issue also does not concern the questions pertaining to whether proof of the applicant's proximity to the events themselves is required (Defence Appeal, para. 39), the nature or degree of proof required (Defence Appeal, para. 47) and the degree of proximity between the applicant and the person suffering physical harm (i.e. spouse, father, mother and children) (Defence Appeal, paras. 33 and 48(c)).

¹³ Defence Appeal, para. 43, see also paras. 30 and 41-42. For the purposes of the present filing, the alleged error of law is referred to as “the first ground of appeal” and the alleged error of fact is referred to as “the second ground of appeal”.

¹⁴ Defence Appeal, paras. 26-27.

suffering physical harm, as well as the relationship between the applicant and the person suffering physical harm.¹⁵

17. The Defence submits that the Single Judge erred by granting applications a/0094/06, a/0103/06, a/0120/06 and a/0123/06 on the basis of this category of mental harm, without requiring proof of the identity of the person who suffered physical harm or the relationship of that person with the victim applicant.¹⁶ Although the Defence does not explicitly characterize this submission as an error of law, the Prosecution interprets the Defence's argument to pertain to the failure by the Single Judge to identify some of the requirements necessary to grant a victims application based on mental harm, and therefore as an error of law.
18. The Prosecution does not oppose the position that in order to meet the criteria under Rule 85, applicants who claim to have suffered mental harm based on the harm suffered by another person must adduce some evidence to establish the identity of the victim on whose physical harm the application is based,¹⁷ or, where a claim for mental harm is based on the applicant's relationship with another person, some level of proof concerning that relationship.¹⁸ The Prosecution however submits that such requirements must be interpreted in a non-technical manner, so as not to constitute an obstacle for victims' legitimate interests in participating in the Court's process. It also considers that any

¹⁵ Defence Appeal, paras. 26 and 28. The Prosecution recalls that the issue in this appeal does not concern the degree of relationship (close family members), but is limited to whether proof is required to establish the identity of the person suffering physical harm and the relation that person has with the applicant who suffered mental harm.

¹⁶ Defence Appeal, para. 42. See also Defence Application, para. 17. The Prosecution refers to the following paragraphs of the Decision: application a/0094/06 - paras. 14-20, in particular para. 19; application a/0103/06 - paras. 29-35, in particular para. 34; application a/0120/06 - paras. 46-52, in particular para. 51; and application a/0123/06 - paras. 60-66, in particular para. 65. To the extent that the Prosecution can reconstruct the findings of the Single Judge from the redacted version of the Decision, which is available to the Prosecution, it concurs with the Defence that the Single Judge granted these four applications, among other factors, on the basis of mental harm suffered as a consequence of a crime committed against another person, without requiring any proof as to the identity of that other person or the relationship between that person and the applicant. Hence the issue is addressed in the Decision (see Decision Granting Leave, p. 7, finding that the Decision "did not explicitly address the [issue]").

¹⁷ In accordance with prior submissions by the Prosecution, proof of identity of the primary victim and the relation between the applicant and that person constitute a safeguard to prevent that the process of participation being abused, even with the aim to obstruct or impede the investigation and prosecution of crimes within the jurisdiction of the Court (*Situation in the DRC*, ICC-01/04-103, 23 January 2006, para. 18; see also *Situation in Uganda*, ICC-02/04-103, 20 August 2007, para. 14).

¹⁸ The Prosecution agrees with the Defence that a claim for mental harm may be based on other factors than a relationship between the applicant and another person (see Defence Appeal, para. 26).

assessment of mental harm and the level of evidence or documentation required should be made on a case by case basis.¹⁹

(ii) Second ground of appeal: alleged error of fact

19. The Prosecution submits that the Defence does not advance any argument to identify or support an error of fact in the Decision warranting the intervention by the Appeals Chamber. It is the Defence's burden as an appealing party to demonstrate that the Single Judge had erred in his determination of the relevant application. Absent such a showing, the general principles of appellate review lead to the conclusion that the Single Judge's findings should remain undisturbed.²⁰

20. Regulation 64(2) requires that a document in support of appeal set out the grounds of appeal²¹ and contain the legal and/or factual reasons in support of each ground.²² As stated by Judge Pikis, these reasons must be defined by reference to the decision under review.²³ The Appeals Chamber has further held that "[t]he nature of an interlocutory appeal is corrective and limited to the specific ground of appeal raised".²⁴

¹⁹ The Prosecution submits that this approach would also be consistent with the Appeals Chamber's jurisprudence requiring careful consideration of the requirements relevant to victims participation on a case by case basis (see for instance *Prosecutor v. Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' or 2 February 2007, ICC-01/04-01/06-925 OA8, 13 June 2007, para. 28).

²⁰ The Prosecution contends that regardless of whether the error in question is a procedural error, an error of law, or an error of fact, the burden lies on the appellant to identify the alleged error and to advance some arguments in support of its contention. See Mark A Drumbi and Kenneth S Gallant, *Appeals in the ad hoc international criminal tribunals: structure, procedure, and recent cases*, Journal of Appellate Practice and Process, Vol. 3, no 2(Fall 2001), pp. 622 and 627.

²¹ In contrast to final appeals under Article 81, the Statute does not prescribe the grounds on which an interlocutory appeal under Article 82 can be made. The Appeals Chamber has held that "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 (see *Prosecutor v. Lubanga*, Judgement on Disclosure Restrictions pursuant to Rule 81(2) (and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, para. 19).

²² Pursuant to Regulation 65(4), this also applies in relation to appeals that require leave of the Court under Rule 155.

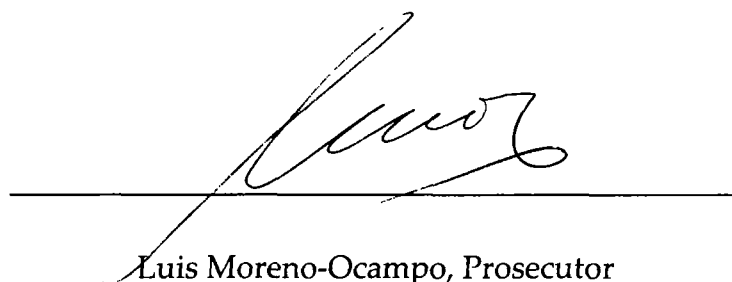
²³ *Prosecutor v. Lubanga*, Judgement on Disclosure Restrictions pursuant to Rule 81(2) (and (4), ICC-01/04-01/06-568 OA3, 13 October 2006, Dissenting opinion of Judge Pikis, para. 14.

²⁴ *Prosecutor v. Lubanga*, Judgement on Interim Release Appeal, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 71.

21. Concerning the alleged error of fact, the Defence Appeal does not comply with the requirements set out by the Appeals Chamber and the Regulations. The Prosecution therefore opposes the Defence Appeal on the alleged error of fact.²⁵

Relief Sought

22. For the reasons referred to above, the Prosecution respectfully submits that it does not oppose the first ground of appeal and requests that the Appeals Chamber deny the second ground of appeal;



Luis Moreno-Ocampo, Prosecutor

Dated this 30th day of June, 2008

At The Hague, The Netherlands

²⁵ The Prosecution submits that the Appeals Chamber cannot be required to second guess the errors alleged by the appellant. Failure by an appellant to identify with precision the error and the manner in which it affects an impugned decision should result in a summary dismissal of the appeal. See for example, *Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, paras. 17-31.