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**International
Criminal
Court**

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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

Public Document

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

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

The appeal by *ad hoc* counsel for the Defence (“Defence”) 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.

A number of victims who have been granted procedural status by the Single Judge in the situation in Uganda (a/0101/06 and a/0119/06 – the “Victims”) have applied to the Appeals Chamber to participate in this appeal.

The Prosecution submits that the issue under appeal does not affect the personal interests of these Victims. As a result they may not participate in this appeal pursuant to Article 68(3).

Procedural Background

1. On 10 August 2007, the Single Judge of Pre-Trial Chamber II (“Single Judge”) rendered the “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”, granting, among other things, victims a/0101/06 and a/0119/06 the status of victims allowed to participate in the situation in Uganda (“Decision Granting Victim Status”).¹
2. On 14 March 2008, the 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”).²

¹ ICC-02/04-101. For victim a/0101/06 see in particular paras. 138-144 and p. 61. For victim a/0119/06 see in particular paras. 150-156 and p. 61.

² ICC-02/04-125. The same decision was also filed in *Prosecutor v. Kony et al.*, (ICC-02/04-01/05-282, 14 March 2008).

3. 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’ applications for participation» rendue le 14 mars 2008*” (“Defence Application”).³
4. 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.
5. 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 On 30 June 2008, the Prosecution filed its response to the Defence Appeal.⁶
6. On 20 June 2008, the legal representative of victims a/0101/06 and a/0119/06 filed the “Request of victims a/0101/06 and a/0119/06 for participation in the interlocutory appeal lodged by the Defence against the Decision of the Single Judge of Pre-Trial Chamber II dated 14 March 2008” (“Victims’ Request”).⁷
7. Pursuant to the order of the Appeal Chamber,⁸ the Prosecution hereby files its response to the Victims’ Request pursuant to Regulation 65(5).⁹

³ ICC-02/04-128. The same application was also filed in *Prosecutor v. Kony et al.*, (ICC-02/04-01/05-285, 25 March 2008).

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

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

⁶ ICC-02/04-147. The same Prosecution response was also filed in *Prosecutor v. Kony et al.*, (ICC-02/04-01/05-304, 30 June 2008).

⁷ ICC-02/04-144. A similar request was also filed in the *Prosecutor v. Kony et al.*, ICC-02/04-01/05-302, 20 June 2008.

⁸ ICC-02/04-149, 22 July 2008.

⁹ Since the Appeal Chamber has already ruled on the admissibility of this appeal (ICC-02/04-148, 22 July 2008), for the purposes of this response, the Prosecution will not address the legal representative’s arguments pertaining to the admissibility of the appeal (see Victims’ Request, paras. 11-14).

Response to Victims' Request

Requirements for the victims' participation in this appeal

8. The Appeals Chamber has ruled that victims seeking to participate in an appeal lodged under Article 82(1)(d) may do so through an application for participation and a "statement in relation to whether and how the personal interests of the victims concerned are affected by this appeal, indicating why it is appropriate for the Appeals Chamber to permit their views and concerns to be presented at this stage of the proceedings and why the presentation of such views and concerns would not be prejudicial to or inconsistent with the rights of the Defence".¹⁰
9. The Appeals Chamber further stated that when seized with an application to participate in appeals proceedings from victims who have been granted such status in the situation, it will examine such application in light of its interpretation of Article 68(3) for granting participation, namely "(i) whether the individuals seeking participation are victims in the situation phase of the proceedings, (ii) whether they have personal interests that are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly, (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".¹¹
10. The above statements, as well as the manner in which the Appeals Chamber has previously ruled in the victims' applications in appeals proceedings,¹² makes it clear that the aforementioned criteria are cumulative, in the sense that the Appeals Chamber has to make a positive finding in relation to each individual criterion in order to grant the Victims' Request to participate in the proceedings of this appeal.

¹⁰ ICC-01/04-01/06-1239 OA 9 OA 10, 20 March 2008, p. 3. See also ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 88.

¹¹ ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 90.

¹² *Ibid.*, paras. 92-102.

The Victims have been granted victim status in the situation in Uganda

11. The Prosecution does not contest that, following the practice of Pre-Trial Chambers I and II,¹³ the individuals seeking participation in this appeal are victims in the situation phase of the proceedings. They have been granted victims status in the situation in Uganda by the Single Judge.¹⁴ Pursuant to the consistent practice of the Appeals Chamber, “in circumstances in which victims have already been granted leave to participate in the proceedings before the Pre-Trial Chamber, it would not enquire into their victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal.”¹⁵

The issue under appeal does not affect the personal interests of the Victims

12. The issue in this appeal 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?”¹⁶ In its document in support of the Appeal, 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.¹⁷

13. While the Prosecution agrees with the legal representative that in general, “the resolution of the issue on appeal might have a great impact on the burden placed upon victims”, who apply for participation in the proceedings,¹⁸ the resolution of

¹³ See Decision Granting Victim Status. See also *Situation in the DRC*, ICC-01/04-101-tEN, 17 January 2006. The Prosecution notes that in the situation in the DRC, the following issue is currently under appeal: “whether a ‘procedural status of victim’, ... 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” (see *Situation in the DRC*, ICC-01/04-454 OA6, 18 February 2008).

¹⁴ Decision Granting Victim Status, paras. 138-144 and p. 61 (victim a/0101/06) and paras. 150-156 and p. 61 (victim a/0119/06).

¹⁵ ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 92; see also ICC-01/04-01/06-824 OA7, para. 44.

¹⁶ Decision Granting Leave, p. 9.

¹⁷ Defence Appeal, para. 43, see also paras. 30 and 41-42.

¹⁸ Victims’ Request, para. 23.

this issue does not impact on the personal interests of the two Victims who are seeking to participate in this appeal.

14. The Prosecution submits that the outcome of this appeal does not affect the personal interests of the two Victims who have already been granted victim status in the situation of Uganda, based on harm of a different nature than mental harm suffered as a result of physical harm suffered by another person. In particular, the Single Judge granted victim status to:

- victim a/0101/06, based on “both the physical injuries and the psychological trauma [which] might reasonably be the result of being beaten and/or random shooting, as well as of witnessing events of an exceedingly violent and shocking nature”;¹⁹ and
- victim a/0119/06, based on “[t]he physical injuries alleged [which] might reasonably be the result of a violent beating.”²⁰

15. The legal representative further argues that the personal interests of victims are affected in general at the investigation phase and that therefore, the personal interests of victims are affected in general in all proceedings in connection with the investigation into a situation, including by any interlocutory appeal.²¹

16. The Prosecution strongly contests this argument: First, the question of whether the personal interests of victims are affected in general at the investigation stage is currently the subject of separate appeal proceedings.²² Hence, in deciding on the Victims’ Request, the Appeals Chamber should not pre-judge the issue subject to that appeal and should therefore not rely on the submission made by the legal

¹⁹ Decision Granting Victim Status, para. 143. The Prosecution notes that the Defence Appeal expressly concedes that for victims who suffered mental harm by witnessing “first-hand exceedingly violent and shocking acts, which caused psychological problems”, 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 (Defence Appeal, paras. 26-27). According to the Defence, where the application is based on mental harm caused as a result of physical harm suffered by the loss of a close family member, some proof is required to establish the identity of the persons suffering physical harm, as well as the relationship between the applicant and the person suffering physical harm (Defence Appeal paras. 26 and 28).

²⁰ Decision Granting Victim Status, para. 155.

²¹ Victims’ Request, para. 25.

²² *Situation in the DRC*, ICC-01/04-454 OA6, 18 February 2008, see in particular the second error alleged by the Prosecution (paras. 20-35).

representative. Second, for the purpose of victims' participation, appeal proceedings are considered to be separate proceedings which require a fresh determination of the personal interests of the victims and the appropriateness of their participation, which is to be made in relation to the issue subject to the appeal proceedings.²³ The scope of these appeal proceedings is not to "clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered".²⁴ Hence, the analogy suggested by the legal representative between the general interest of victims in the investigation phase and the alleged general interest of victims in any interlocutory appeal arising from the investigation phase is flawed.

17. The Prosecution therefore submits that the issue in this appeal does not affect the personal interests of these Victims, and that as a result they may not participate in this appeal under Article 68(3).
18. The Prosecution also submits that the participation of the Victims in this appeal is not appropriate. In this context, the Prosecution notes the argument advanced by the legal representative that due to the power of the Defence to respond to any documents filed by any participant in the case, "the appropriateness of the participation of the victims in the present appeal is guaranteed through the restrictions imposed upon it".²⁵ Regulation 24 does not relate to victims' participation in the proceedings pursuant to Article 68(3) and can therefore not be invoked to determine the appropriateness of the Victims' participation in the proceedings.

Manner of participation

19. In its order of 22 July 2008, the Appeals Chamber expressly invited the parties to make submissions not only in relation to the right of victims to participate in this

²³ The Appeals Chamber has stated that "[i]t cannot automatically be bound by the previous determination of the Pre-Trial Chamber that it was appropriate for the victims to participate before the court of first instance. Participation of victims in interlocutory appeals can, in principle, be permitted if it can be shown that their personal interests are affected by the issues on appeal and if the Appeals Chamber deems such participation to be appropriate." (ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 88).

²⁴ Victims' Request, para. 25.

²⁵ Victims' Response, para. 28. See also para. 34.

appeal, but also in relation to the modalities of such participation.²⁶ As, for the above reasons, the Prosecution opposes the Victims' participation in this appeal under Article 68(3), its submissions pertaining to the manner of the Victims' participation are of a subsidiary nature and are to be considered only in the event that the Appeals Chamber rejects the above arguments regarding the lack of personal interests of the Victims and the inappropriateness of their participation in this appeal. The present submissions are also intended to assist the Appeals Chamber in the event that it finds that the Victims do not have a right to participate in this appeal, but it nevertheless decides to seek the views of the Victims or their legal representatives on the issue under appeal pursuant to Rule 93.²⁷

20. The Prosecution submits that the following procedure to present the Victims' views and concerns in this appeal is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial proceeding.
21. The Victims' views and concerns in this appeal should be submitted by the legal representative in writing.²⁸ The views and concerns should be limited to the specific issue arising in this appeal, and to the extent that these issues impact on their personal interests.²⁹ In this regard, the purpose is to present the views and concerns of the victims relating to this issue: the filing is not a legal response to the brief filed by the Appellant; their role is to provide the Appeals Chamber with the *personal* views and concerns of the victims on the issue under appeal, not to refute particular legal arguments.³⁰

²⁶ ICC-02/04-149, 22 July 2008, p. 3.

²⁷ See Dissenting Opinion of Judge Song in *Prosecutor v. Lubanga*, ICC-01/04-01/06-1335 OA 9 and OA 10, 16 May 2008, paras 8-9, Diss. Op.

²⁸ The Prosecution submits that written observations will be sufficient to convey the views and concerns of the victims in relation to this appeal. The practice of the Appeals Chamber to date has not been to hold hearings for interlocutory appeals, consistent with Rule 156(3). See also Victims' Request, p. 14.

²⁹ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 55; *Situation in the DRC*, ICC-01/04-503, 30 June 2008, para. 101; and *Situation in Darfur*, ICC-02/05-138, 18 June 2008, para. 62. See also Victim's Request, para. 33.

³⁰ See e.g. *Prosecutor v. Lubanga*, ICC-01/04-01/06-925 OA8, 13 June 2007, Separate Opinion of Judge Pikis, paras. 15-16.

22. The Prosecution finally submits that the Appeals Chamber should allow it and the Defence to respond to the various views and concerns of the victims. The Prosecution contends that the period prescribed by the Appeals Chamber for the filing of such a response should reflect the number of filings to which it will be responding.³¹

Conclusion

23. For the reasons referred to above, the Prosecution requests that the Appeals Chamber deny the Victims' Request to participate in this appeal.

24. In the event that the Appeal Chamber grants the Victims' Request to participate in the appeal, or that it decides to seek the views of the Victims or their legal representative pursuant to Rule 93, the Prosecution requests that the Appeal Chamber order the Victims to file their views and concerns in writing within a defined period; and permit the Prosecution and the Defence to respond to the submissions of views and concerns within a deadline prescribed by the Appeals Chamber.

A handwritten signature in black ink, appearing to read 'Luis', is written over a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 12th day of August, 2008

At The Hague, The Netherlands

³¹ The Prosecution notes that a request similar to the Victims' Request has been filed by two legal representatives in the case *Prosecutor v. Kony et al.* (ICC-02/04-01/05-302 OA2, 20 June 2008).