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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 ET AL.***

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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**Unrepresented Applicants for
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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 case *Prosecutor v. Kony et al.* (a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06) have applied to the Appeals Chamber to participate in this appeal.

The Prosecution submits that the issue under appeal affects the personal interests of victims a/0118/06 and a/0122/06 whose participatory rights are based, among other things, on emotional harm suffered due to the loss of a related person. As a result, these victims may participate in this appeal pursuant to Article 68(3). However, the Prosecution submits that the issue under appeal does not affect the personal interests of victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06 and therefore opposes their participation 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/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 the status of victims allowed to participate in the case *Prosecutor v. Kony et al.* (“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,

¹ ICC-02/04-01/05-252. For victim a/0090/06 see in particular paras. 26-32 and p. 61; for victim a/0098/06 see in particular paras. 35-41 and p. 61; for victim a/0112/06 see in particular paras. 45-51 and p. 61; for victim a/0118/06 see in particular paras. 55-61 and p. 61; for victim a/0119/06 see in particular paras. 62-68 and p. 61; and for victim a/0122/06 see in particular paras. 71-77 and p. 61.

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

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 representatives of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 filed the “Request of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 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

² ICC-02/04-01/05-282. The same decision was also filed in the *Situation in Uganda* (ICC-02/04-125, 14 March 2008).

³ ICC-02/04-01/05-285. The same application was also filed in the *Situation in Uganda* (ICC-02/04-128, 25 March 2008).

⁴ ICC-02/04-01/05-296. The same decision was also filed in the *Situation in Uganda* (ICC-02/04-139, 2 June 2008).

⁵ ICC-02/04-01/05-298. The same Defence Appeal was also filed 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 (ICC-02/04-01/05-298-tENG).

⁶ ICC-02/04-01/05-304. The same Prosecution response was also filed in the *Situation in Uganda* (ICC-02/04-147, 30 June 2008).

⁷ ICC-02/04-01/05-302. A similar request was also made in the *Situation in Uganda* (ICC-02/04-144, 20 June 2008).

⁸ ICC-02/04-01/05-307, 22 July 2008.

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 a case, 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 case, (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.

⁹ Since the Appeal Chamber has already ruled on the admissibility of this appeal (ICC-02/04-01/05-306, 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).

¹⁰ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1239 OA9 OA10, 20 March 2008, p. 3. See also *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 88.

¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1335 OA9 OA, 16 May 2008, para. 36

¹² *Ibid*, paras. 37-49.

The victims have been granted victim status in the case Prosecutor v. Kony et al.

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 case *Prosecutor v. Kony et al.* They have been granted victims status in the case *Prosecutor v. Kony et al.*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 affects the personal interests of victims a/0118/06 and a/0122/06, but does not affect the personal interests of victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06

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 representatives that in general, “the resolution of the issue on appeal might have a great impact on the burden placed

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. 26-32 and p. 61 (victim a/0090/06); paras. 35-41 and p. 61 (victim a/0098/06); paras. 45-51 and p. 61 (victim a/0112/06); paras. 55-61 and p. 61 (victim a/0118/06); paras. 62-68 and p. 61 (victim a/0119/06); and paras. 71-77 and p. 61 (victim a/0122/06).

¹⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-824 OA7, para. 44. see also *Situation in the DRC*, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 92.

¹⁶ Decision Granting Leave, p. 9.

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

upon victims”, who apply for participation in the proceedings,¹⁸ the resolution of this issue does not impact on the personal interests of all six victims who are seeking to participate in this appeal.

14. The Prosecution submits that the outcome of this appeal only affects the personal interests of victims a/0118/06 and a/0122/06 who have already been granted victim status in the case *Prosecutor v. Kony et al.* based in part on mental harm suffered as a result of physical harm suffered by another person. The Single Judge granted victim status to:

- victim a/0118/06, based on “[t]he physical injuries alleged [which] might reasonably be the result of being shot at and forced to cover oneself with heavy blocks in order to avoid being burnt. [...] a/0118/06 also appears to have suffered economic loss, as all his belongings were burnt, as well as emotional harm due to the loss of his [REDACTED] and children”;¹⁹ and
- victim a/0122/06, [t]he physical injuries [which] might reasonably be the result of being shot at. [...] a/0122/06 also appears to have suffered economic loss, as all his belongings were burnt, as well as emotional harm due to the loss of his [REDACTED] and [REDACTED]”.²⁰

15. The Prosecution therefore submits that the issue in this appeal affects the personal interests of these two victims, and that as a result they may participate in this appeal under Article 68(3).

16. The Prosecution, however, contests that the issue under appeal affects the personal interests of victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06. These four victims have not been granted victim status based on emotional harm suffered due to the loss of a related person. Instead, they have been granted victim status based on other forms of harm, including physical harm and economic loss. In particular, the Single Judge granted victim status to:

¹⁸ Victims’ Request, para. 23.

¹⁹ Decision Granting Procedural Status, para. 60.

²⁰ Decision Granting Procedural Status, para. 76.

- victim a/0090/06, based on “[b]oth the physical injuries and the psychological trauma alleged [which] might reasonably be the result of exposure to fire and/or random shooting, as well as of witnessing events of an exceedingly violent and shocking nature. [...] a/0090/06 also appears to have suffered economic loss”;²¹
- victim a/0098/06, based on “[b]oth the physical injuries and the psychological trauma alleged [which] might reasonably be the result of exposure to shooting and burning. [...] a/0098/06 also appears to have suffered economic loss”;²²
- victim a/0112/06, based on “[t]he physical injuries [which] might reasonably be the result of suffering severe burns. [...] a/0112/06 also appears to have suffered economic loss”;²³ and
- victim a/0119/06 based on “[t]he destruction of all of [...] a/0119/06's belongings [...] might reasonably be the result of the attack on the [...] IDP Camp”.²⁴

17. As a result, the Prosecution submits that victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06 do not meet the requirements under Article 68(3) for participation in this appeal.

18. The Prosecution also submits that the participation of victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06 in this appeal is not appropriate. In this context, the Prosecution notes that it does not support the argument advanced by the legal representatives 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

²¹ Decision Granting Procedural Status, para. 31. 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).

²² Decision Granting Procedural Status, para. 40.

²³ Decision Granting Procedural Status, para. 50.

²⁴ Decision Granting Procedural Status, para. 67.

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 appeal, but also in relation to the modalities of such participation.²⁶ The present submissions are also intended to assist the Appeals Chamber in the event that it finds that victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06 do not have a right to participate in this appeal, but it nevertheless decides to seek the views of these 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 fair and impartial proceedings.
21. The victims' views and concerns in this appeal should be submitted by the legal representatives 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

²⁵ Victims' Response, para. 27. See also para. 33.

²⁶ ICC-02/04-01/05-307, 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. 13.

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. 32.

the *personal* views and concerns of the victims on the issue under appeal, not to refute particular legal arguments.³⁰

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 allows the participation of victims a/0118/06 and a/0122/06 and deny the other request of victims a/0090/06, a/0099/06, a/0112/06, and a/0119/06 to participate in this appeal.
24. In the event that the Appeal Chamber grants, in whole or in part, the Victims' Request to participate in the appeal, or that it decides to seek the views of the victims or their legal representatives 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.



Luis Moreno-Ocampo, Prosecutor

Dated this 12th day of August, 2008

At The Hague, The Netherlands

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.

³¹ The Prosecution notes that a request similar to the Victims' Request has been filed by one of the legal representatives in the *Situation in Uganda* (ICC-02/04-144 OA, 20 June 2008).