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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

Public Document

Response of Ad Hoc Counsel for the Defence to the “Request of the 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”

The Office of the Prosecutor

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

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Legal Representatives of the Victims

Ms Paolina Massidda, Legal
Representative of Victim a/0119/06

Legal Representatives of the Applicants

Ms Adesola Adeboyejo, Legal
Representative of Victims a/0090/06,
a/0098/06, a/0112/06, a/0118/06 and
a/0122/06

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Mme Paolina Massidda
Mme Adesola Adeboyejo

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States Representatives

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I – INTRODUCTION

1. Ad Hoc Counsel for the Defence recognises that, where the personal interests of the victims are affected, the Court permits their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. Counsel for the Defence recalls and submits that the Appeals Chamber must determine the application criteria for persons suffering mental harm as a result of the loss of a third party in order to grant them victim status.
3. Ad Hoc Counsel for the Defence submits to this honourable Chamber that the Request of Victims a/0101/06 and a/0119/06 is general and non-specific.
4. Without specific facts about those victims to justify the right being granted, their request cannot be entertained.

II – PROCEDURAL BACKGROUND

5. On 1 February 2007, the Single Judge rendered the *Decision on legal representation, appointment of counsel for the Defence, protective measures and time-limit for submission of observations on 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*, by which he ordered the Office of Public Counsel for Victims (“the OPCV” or “the Office”) to provide any support and assistance which may be necessary or appropriate at the stage of the proceedings prior to the decision on their status in the context of the situation in Uganda and the case of *The Prosecutor v. Joseph Kony et al.*¹

¹ See the *Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on 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* (Pre-Trial Chamber II), ICC-02/04-01/05-134, 1 February 2007, para. 13.

6. On 10 August 2007, the Single Judge of Pre-Trial Chamber II rendered the *Decision on victims' application 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 the status of victim in the context of the investigation into the situation in Uganda to Applicants a/0101/06 and a/0119/06 and the status of victim in the case of *The Prosecutor v. Joseph Kony et al* to Applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06.² This decision also ordered the Office, *inter alia*, to continue to provide support and assistance to victims and applicants.³

7. On 15 February 2008, the Single Judge of Pre-Trial Chamber II rendered the *Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06*, appointing Ms Paolina Massidda, Principal Counsel of the OPCV, as legal representative of those victims, and Ms Adesola Adeboyejo, Counsel in the OPCV, as legal representative of Victims a/0090/06, a/0098/06, a/0112/06, a/0118/06 and a/0122/06.⁴

8. On 14 March 2008, the Single Judge rendered the *Decision on victims' application 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*, granting Applicants a/0065/06, a/0068/06, a/0093/06, a/0096/06, a/0117/06, a/0120/06 and a/0123/06 the status of victims in the context of the investigation into the situation in Uganda, and 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 the status of victims in the case of *The Prosecutor v.*

² See the *Decision on victims' application 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/0101/06, 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* (Pre-Trial Chamber II), ICC-02/04-124-Conf-Exp and ICC-02/04-01/05-281-Conf-Exp, 14 March 2008 ("the Decision").

³ *Ibid.*, p. 73.

⁴ ICC-02/04-117 and ICC-02/04-01/05-267.

*Joseph Kony et al*⁵ (“the Decision”). The same decision also ordered the Office, *inter alia*, to continue to provide support and assistance to victims and applicants.⁶

9. On 25 March 2008, Ad Hoc Counsel for the Defence filed a “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.⁷

10. On 31 March 2008, the Principal Counsel of the Office requested the Single Judge to appoint her as legal representative of the victims authorised to participate in the situation stage until the victims appoint a common legal representative and to grant her leave to respond to the Defence Application.⁸

11. On 31 March 2008, the Prosecution filed its response to the Defence Application (“the Prosecution’s Response”).⁹

12. On 2 April 2008, the Principal Counsel of the OPCV filed a request for leave to submit observations on the Prosecution’s Response.¹⁰

13. On 4 April 2008, the Single Judge appointed the Principal Counsel of the Office as legal representative of the victims authorised to participate in the situation and

⁵ See the *Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on 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* (Pre-Trial Chamber II), ICC-02/04-01/05-134, 1 February 2007, para. 13.

⁶ *Ibid.*, para. 164.

⁷ See the “Defence Application for Leave to Appeal the *Decision on victims’ applications for participation* issued on 14 March 2008”, ICC-02/04-128-tENG and ICC-02/04-01/05-285-tENG, 25 March 2008 (“the Defence Application”).

⁸ See the *Decision on victim’s application 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/0101/06, 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* (Pre-Trial Chamber II), ICC-02/04-124-Conf-Exp and ICC-02/04-01/05-281-Conf-Exp, 14 March 2008 (“the Decision”).

⁹ See 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 », ICC-02/04-129 and ICC-02/04-01/05-287, 31 March 2008 (“the Prosecution’s Response”).

¹⁰ See 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”, ICC-02/04-131 and ICC-02/04-01/05-289, 2 April 2008.

the case of *Kony et al* (“the Legal Representative”) and granted her leave to respond to the Defence Application and to submit observations on the Prosecution’s Response.¹¹

14. On 2 June 2008, the Honourable Judge rendered his *Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation*.¹²

15. On 18 June 2008, Ad Hoc Counsel for the Defence filed a “Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation” in respect of the Situation¹³ and the Case.¹⁴

16. On 22 July 2008, the Appeals Chamber issued an *Order on the filing of responses by the Prosecutor and the ad hoc Counsel for the Defence to 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 appeal*.¹⁵

III – LEGAL SUBMISSIONS

17. Article 68(3) of the Statute requires that victim participation should be appropriate and should be neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial. This position is reiterated in the impugned decision. In fact, the Single Judge reiterates the considerations set forth in his 10 August 2007¹⁶ decision to the effect that the participation of victims in the proceedings has a profound impact on the parties and the fair conduct of the proceedings.

¹¹ See the *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* (Pre-Trial Chamber II), ICC-02/04-132 and ICC-02/04-01/05-290, 4 April 2008.

¹² ICC-02/04-139 and ICC-02/04-01/05-296.

¹³ ICC-02/04-142-tENG.

¹⁴ ICC-02/04-01/05-298-tENG.

¹⁵ ICC-02/04-149 and ICC-02/04-01/05-307.

¹⁶ See 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* (Pre-Trial Chamber II), ICC-02/04-101 and ICC-02/04-01/05-252, 10 August 2007.

18. Ad Hoc Counsel for the Defence respectfully submits that the clear provisions of article 68(3) of the Statute require the Chamber to determine, first, whether there is a particular proceeding at the pre-trial phase that could affect the personal interests of the applicants, and then, whether it would be appropriate for the victims to participate in such proceedings.

19. The Defence further submits that the jurisprudence of the Appeals Chamber suggests that the determination of the victim's right to participate in the proceedings cannot be made in the abstract,¹⁷ but must be adapted to the specific factual circumstances and the legal framework applicable in those circumstances.

20. The Appeals Chamber recalled that:

[The Chamber] has previously considered the import of article 68 (3) of the Statute in its Judgement of 13 February 2007¹⁸ and its Decision of 13 June 2007¹⁹ in which it held, inter alia, that "the Appeals Chamber, pursuant to article 68 (3) is required to determine whether the participation of victims in relation to that particular appeal is appropriate. It 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."²⁰ 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. It is for the Appeals Chamber to ensure that their

¹⁷ The ability of victims to participate in proceedings was not considered to be automatic, but rather as conditional on a decision by which the Appeals Chamber would deem it appropriate. Victims must attach to their applications for participation "a statement from the victims in relation to whether and how their personal interests are affected [...] as well as why it is 'appropriate' for the Appeals Chamber to permit their views and concerns to be presented." *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"* ICC-01/04-01/06-824, 13 February 2007, para. 40. See also ICC-01/04-01/06-925, *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 of 2 February 2007, 13 June 2007, para. 23.*

¹⁸ *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, (ICC-01/04-01/06-824 OA7).

¹⁹ *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' of 2 February 2007* (ICC-01/04-01/06-925).

²⁰ *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo"*, (ICC-01/04-01/06-824 OA7) at para. 43.

participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²¹

IV – FACTUAL SUBMISSIONS

21. The victims' Request did not establish any link between their personal application and the Defence's ground of appeal – that is, the participation of the victims based on mental harm as a result of the death of a third party.

22. The Appeals Chamber recalled that four criteria must be assessed:

- (i) whether the individuals seeking participation are victims in the case
- (ii) whether they have personal interests which 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.²²

23. Ad Hoc Counsel for the Defence submits that, in respect of the first criterion, Victims a/0101/06 and a/0119/06 have effectively been granted victim status in the Situation in Uganda.²³

24. Ad Hoc Counsel for the Defence submits that, in respect of the second criterion – whether they have personal interests which are affected by the issues on appeal – the Appeals Chamber indicated that

[S]uch applications shall include 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.²⁴

²¹ Decision of 16 May 2008, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1335-ENG.pdf>, para. 35. See also the decision in the Situation in Sudan, 18 June 2008, para. 49 <http://www.icc-cpi.int/library/cases/ICC-02-05-138-ENG.pdf>.

²² Decision of 16 May 2008, <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1335-ENG.pdf> para. 36. See also the decision in the Situation in Sudan, 18 June 2008, para. 51, <http://www.icc-cpi.int/library/cases/ICC-02-05-138-ENG.pdf>

²³ Decision ICC-02/04-101.

²⁴ See the Order of 13 February 2008, p. 3: <http://www.icc-cpi.int/library/cases/ICC-01-04-450-ENG.pdf>.

Victims must demonstrate an “explicit link between their submissions and the specific issues raised on appeal”.²⁵

25. The victims indicate that the issue under appeal by the Defence affects the process for applications for participation; that it affects the burden of proof placed on the victims; that the resultant criterion is used as a marker to determine victim status; personal interests are generally affected in the process of investigating a situation, including the appeals phase. However, nowhere do the victims indicate how their personal interest is directly affected.

26. Furthermore, Applicant a/0119/06 is not affected by the appeal. The applicant claims only physical, not mental harm: the Decision of 10 August 2007 granting victim status to Applicant a/0119/06 found that “The physical injuries alleged by Applicant a/0119/06 might reasonably be the result of a violent beating. Accordingly, they appear to constitute physical harm within the meaning of rule 85 of the Rules, as construed by Pre-Trial Chamber I.”²⁶

27. Applicant a/0119/06 does not mention any mental harm. It cannot therefore be argued that the applicant has a personal interest in participating in the appeal, whose scope is strictly limited to the issue of establishing mental harm and the link between the applicant and the deceased person.

28. As regards Victim a/0101/06, the Decision of 10 August 2007 states:

Both the physical injuries and the psychological trauma alleged by Applicant a/0101/06 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. Accordingly, they appear to constitute

²⁵ Decision of 13 February 2007, para. 44, *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, (ICC-01/04-01/06-824 OA7)

²⁶ Decision ICC-02/04-101.

physical and emotional harm within the meaning of rule 85 of the Rules, as construed by Pre-Trial Chamber I.²⁷

The Decision of 10 August 2007 clearly sets out the context of the mental harm mentioned: “He states that he suffered ‘serious psychological torture’, as he saw people being killed every day, and that he still experiences [REDACTED] pains.” It would appear that it has nothing whatsoever to do with the death of a family member of the applicant.

29. Ad Hoc Counsel for the Defence submits that the Legal Representative of the Victims maintains that the personal interests of the victims are affected in general at the investigation stage of a situation, including the appeals stage. She uses allegations which neither help the parties to promote by interpretation the right of victims to participate, nor comply with the decisions of the Appeals Chamber on the matter.

30. As regards the appropriateness of the victims’ participation, article 68(3) stipulates a “specific determination by the Appeals Chamber that the participation of victims is appropriate in the particular interlocutory appeal under consideration”.²⁸ In this regard, the Honourable Judge Pikis stated that “[t]he stage at which the views and concerns of victims may be presented must be at an interval of the proceedings that would be appropriate, regard being had to the norms of a fair and impartial trial and the rights of the accused”.

V – CONCLUSION

31. Ad Hoc Counsel for the Defence respectfully submits to this Honourable Chamber that Victims a/0101/06 and a/0119/06 did not submit any explicit legal and factual arguments specific to their application or state how their personal interest (as

²⁷ *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*, ICC-02/04-101, para. 143 (http://www.icc-cpi.int/library/cases/ICC-02-04-101_English.pdf).

²⁸ *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber Judgment of 13 February 2007, ICC-01/04-01/06-824, para. 40.

opposed to the general interest of victims) has been affected by the outcome of the appeal;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE CHAMBER TO:

DENY the “Request of the 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”.

Respectfully submitted,

[signed]
Ms Michelyne C. St-Laurent
Ad Hoc Counsel for the Defence

Dated this 11 August 2008

At Quebec, Canada