

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/05 OA2

Date: 27 October 2008

THE APPEALS CHAMBER

Before:

**Judge Georghios M. Pikis, Presiding Judge
Judge Philippe Kirsch
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Daniel David Ntanda Nsereko**

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR

v.

JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN

Public Document

Decision on the participation of victims in the appeal

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor

The Ad hoc Counsel for the Defence

Ms Michelyne C. St-Laurent

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda, Principal Counsel
Ms Adesola Adeboyejo

REGISTRY

Registrar

Ms Silvana Arbia

A handwritten signature in black ink, appearing to be a stylized 'B' or 'D' with a horizontal line extending to the right.

The Appeals Chamber of the International Criminal Court,

In the appeal of the Ad Hoc Counsel for the Defence against the decision of the Single Judge of Pre-Trial Chamber II entitled “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” dated 14 March 2008 (ICC-02/04-01/05-282) (hereinafter “Impugned Decision”),

Having before it the “Request of the 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” of 20 June 2008 (ICC-02/04-01/05-302),

Issues, Judge Pikis dissenting, the following

DECISION

(i) Victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 are granted the right to participate in the appeal for the purpose of presenting their views and concerns respecting their personal interests in the issues raised on appeal. Their submissions must be filed on Monday, 3 November 2008. Thereafter, the Ad Hoc Counsel for the Defence and the Prosecutor may file their responses by Monday, 10 November 2008 upon receiving the submissions of the victims.

(ii) The applications of victims a/0112/06 and a/0119/06 for participation in the appeal are rejected.

The reasons of the majority, namely Judge Kirsch, Judge Kourula and Judge Nsereko follow hereafter and are signed by Judge Nsereko. Judge Song appends a separate and Judge Pikis a dissenting opinion.



REASONS

I. RELEVANT PROCEDURAL BACKGROUND AND SUBMISSIONS OF THE PARTICIPANTS

1. On 17 March 2008, the Single Judge of Pre-Trial Chamber II (hereinafter: the “Chamber”) rendered two identical decisions, which were dated 14 March 2008, on victim participation in both the proceedings in the situation in Uganda¹ and in the case of *Prosecutor v. Kony et al*². In both decisions the status of victim and the right to participate in the relevant proceedings was conferred upon persons who, *inter alia*, suffered emotional harm as a result of the physical injury suffered by another person without requiring specific proof of the identity and the relationship of the latter to the victim.

2. On 2 June 2008, the Ad Hoc Counsel for the Defence was granted leave to appeal the Impugned Decision on a single issue, namely, whether “[i]n 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?”³.

3. On 16 June 2008, the Ad Hoc Counsel for the Defence filed the “Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation”.⁴

4. On 20 June 2008, the Office of Public Counsel for Victims filed an application for participation in the instant appeal,⁵ on behalf of victims a/0090/06, a/0098/06, a/0112/06, a/0119/06, a/0118/06 and a/0122/06. In support of the application their legal representatives submit, *inter alia*, that the issue on appeal directly affects the personal interests of the victims since the “criteria at stake was applied by the Chamber upon determination of their status.”⁶ In addition, the legal representatives aver that the participation of the victims is appropriate as they are “best positioned to give in depth

¹ ICC-02/04-125.

² ICC-02/04-01/05-282.

³ ICC-02/04-01/05-296 at page 9.

⁴ ICC-02/04-01/05-298-tENG.

⁵ ICC-02/04-01/05-302.

⁶ Ibid. at paragraph 24.

analysis as far as the subject matter of the present appeal is concerned, and therefore it is desirable for the Chamber to hear directly from the victims themselves.”⁷

5. On 12 August 2008, the Prosecutor filed his response⁸ to the application in which he opposes the participation of victims a/0090/06, a/0098/06, a/0112/06, and a/0119/06 on the basis that the resolution of the issue on appeal does not impact on the personal interests of these victims.⁹ In relation to victims a/0118/06 and a/0122/06 the Prosecutor does not oppose their participation.¹⁰

6. On 20 August 2008, Ad Hoc Counsel for the Defence filed a response¹¹ to the application in which she opposes the participation of all of the victims on the ground that the legal representatives of the victims did not submit any explicit legal and / or factual arguments specific to their application or state how their personal interest (as opposed to the general interest) of victims would be affected by the outcome of the appeal¹².

II. DETERMINATION BY THE APPEALS CHAMBER

7. The Appeals Chamber recalls the requirements for victim participation in appellate proceedings arising in the context of a case from its previous decisions and judgments on the subject.¹³

8. In accordance with the Appeals Chamber’s previous interpretation of article 68 (3) of the Statute, victims wishing to participate in an appeal arising under article 82 (1) of the Statute must first establish their status as a victim.¹⁴ However, even if the above condition is satisfied, the right to participate is not automatic. In addition the victim must

⁷ Ibid. at paragraphs 26 and 27.

⁸ “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”, ICC-02/04-01/05-308.

⁹ Ibid. at paragraph 17.

¹⁰ Ibid. at paragraph 15.

¹¹ “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’”, dated 11 August 2008, ICC-02/04-309-tENG.

¹² Ibid. at paragraph 31.

¹³ Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-824 OA 7 and Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-925 OA 8 (Separate Opinions by Judge Pikis and Judge Song).

¹⁴ ICC-01/04-01/06-1335 OA 9 OA 10.

demonstrate how his/her personal interests are affected by the issue certified for appeal and why his/her participation would be appropriate in the circumstances. The manner of participation, if permitted, will be determined by the Appeals Chamber whose duty it is to ensure that the presentation of such views and concerns is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

9. Without prejudice to its merits, for the purpose of determining whether the victims should participate in the instant appeal, the Appeals Chamber deems the issue certified on appeal to be phrased in terms that are sufficiently broad to include victims who have suffered, *inter alia*, mental harm as a result of physical harm suffered by any person, even people with whom the victim has no relationship. In addition, for present purposes the Appeals Chamber will treat “psychological trauma” and “emotional harm” as falling within the concept of “mental harm” that is referred to in the issue on appeal, which is set out at paragraph 2 above.

10. In the present proceedings, all six victims were granted the status of victim with the right to participate in the case of *Prosecutor v. Kony et al* by an earlier decision of the Chamber dated 10 August 2007.¹⁵

11. Victims a/0090/06 and a/0098/06 were granted the status of victim based in part on the psychological trauma, constituting emotional harm, suffered on account of “witnessing events of an exceedingly violent and shocking nature”.¹⁶ As characterised by the Chamber these ‘events of an exceedingly violent and shocking nature’ generally included events wherein the victims witnessed people being killed or injured and were consequently found to have suffered emotional harm.

12. Victims, a/0118/06 and a/0122/06 were also recognized as victims on account of *inter alia*, emotional harm suffered as a result of physical injury suffered by a specific

¹⁵ ICC-01/04-01/05-252.

¹⁶ Ibid. Paragraphs 27 and 31 in respect of victim a/0090/06 and paragraphs 36 and 40 in respect of victim a/0098/06.

person or persons¹⁷, notwithstanding the absence of proof of the identity and / or relationship of the latter to the applicants.

13. In seeking to demonstrate that their personal interests are affected, victims should generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal. The Appeals Chamber notes that in the present case the submissions made on personal interests were of a broad and general nature. Notwithstanding that factor, the Appeals Chamber accepts the essence of the submissions of the victims that both the status and the right to participate of the four victims, a/0090/06, a/0098/06, a/0118/06 and a/0122/06, may be prejudiced should the resolution of the issue on appeal result in a reversal of the Chamber's decision on the issue.

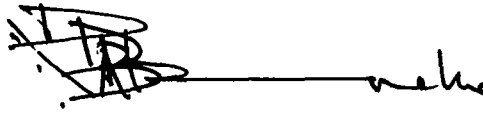
14. The Appeals Chamber considers the participation of the four victims to be appropriate in light of the consequences that the outcome of the appeal may have on their personal interests. The four victims permitted to participate in appeal proceedings may submit their views and concerns with regard to their personal interests on the issues arising for determination. This manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Thereafter, the Ad Hoc Counsel for the Defence and the Prosecutor will be at liberty to make responses to the submissions of the victims.

15. On the other hand victims, a/0112/06 and a/0119/06 were recognized by the Chamber as victims with a right to participate owing to physical harm or economic loss directly arising from criminal acts within the jurisdiction of the Court.¹⁸ Accordingly, their status as victims as well as their right to participate will not be prejudiced by the resolution of the issue on appeal and consequently their applications for participation are rejected.

¹⁷ ICC-02/04-01-05-252, paragraphs 56 and 60 in respect of victim a/0118/06 and paragraphs 72 and 76 in respect of victim a/0122/06.

¹⁸ ICC-02/04-01-05-252.



A handwritten signature in black ink, consisting of a stylized, somewhat abstract set of loops and lines, followed by a horizontal line and a small, cursive-like flourish.

Judge Daniel David Ntanda Nsereko

Dated this 27th day of October 2008

At The Hague, The Netherlands

Separate opinion of Judge Sang-Hyun Song

1. I agree with the majority of the Appeals Chamber that the victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 should be allowed to participate in this appeal.

2. I note that these four victims were recognised as such already in the decision of Pre-Trial Chamber II entitled “Decision on victims’ applications for participation of 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” dated 10 August 2007 and registered on 13 August 2007 (ICC-02/04-01/05-251-Conf-Exp¹; hereinafter: “Decision of 10 August 2007”). The victims made no submissions in respect of the proceedings before the Pre-Trial Chamber that gave rise to 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” of 14 March 2008 (ICC-02/04-01/05-281-Conf-Exp²) that is object of the present appeal. Accordingly, the victims were not participants in these proceedings in the meaning of regulations 65 (5) and 64 (4) of the Regulations of the Court with a right to file a response to the document in support of the appeal pursuant to these regulations (on participation of victims pursuant to regulations 65 (5) and 64 (4) of the Regulations of the Court see the “Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims”, 13 February 2007, ICC-01/04-01/06-824, pp. 55 to 57).

3. It is, however, appropriate to seek the views of the victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 pursuant to rule 93, second sentence, of the Rules of Procedure and Evidence. Victims a/0090/06 and a/0098/06 were recognised as victims by Pre-Trial Chamber II inter alia because of psychological trauma suffered as a result of “witnessing events of exceedingly violent and shocking nature” (Decision of 10 August 2007, paragraphs 31 and 40, respectively). Victims a/0118/06/06 and a/0122/06 were recognised as victims by Pre-Trial Chamber II inter alia because of the mental harm suffered as a result of harm suffered by third persons (see Decision of 10 August 2007,

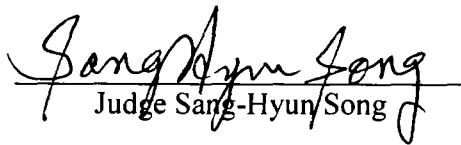
¹ A public redacted version of the decision was registered on 13 August 2007 (ICC-02/04-01/05-252)

² A public redacted version of the decision was registered on 17 March 2008 (ICC-02/04-01/05-282).

paragraphs 60 and 76, respectively). The four victims were therefore recognised on grounds closely related to the issue in respect of which the Pre-Trial Chamber granted leave to appeal, namely whether “[i]n 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?” (ICC-02/04-01/05-295, page 9). Submissions by the four victims on the issue on appeal may therefore be useful for its proper disposal.

4. I also agree that the victims a/0112/06 and a/0119/06 should not be allowed to participate. These victims have no right to participate pursuant to regulations 65 (5) and 64 (4) of the Regulations of the Court because they were recognised as victims already in the Decision of 10 August 2007 and did not participate in the proceedings giving rise to the present appeal. Furthermore, given that the reasons for which they were recognised as victims (see Decision of 10 August 2007, paragraphs 45 to 51 and 62 to 68, respectively) are unrelated to the issue in respect of which leave to appeal was granted, it would be inappropriate to seek their views on the appeal pursuant to rule 93, second sentence, of the Rules of Procedure and Evidence.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song

Dated this 27th day of October 2008

At The Hague, The Netherlands

Dissenting opinion of Judge Georghios M. Pikis

I. PROCEDURAL HISTORY

1. On 2 June 2008, Pre-Trial Chamber II (hereinafter “the Pre-Trial Chamber”) – its jurisdiction being exercised by a Single Judge – granted leave to Ad Hoc Counsel for the Defence to appeal its decision of 14 March 2008¹ in relation to the following issue, namely

[i]n 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?²

2. By the Impugned Decision, the Pre-Trial Chamber granted victim status with the right to participate in the case against *Kony a.o.* to persons, among others, who suffered mental harm on account of physical injury occasioned to persons related to them. Also they acknowledged like status to persons suffering mental or emotional harm on account of witnessing injury inflicted upon unspecified persons in the course of the commission of the crimes allegedly committed by the individuals under investigation. This being the case, the issue raised can only be described as imprecisely defined inasmuch as the naming of an individual is not the only means of identifying that person. By way of example, if the person suffering mental harm specifies that the cause of it is the death or injury of his wife or child without naming them, there is no shortfall in the identification of the individual whose injuries are the cause of his distress. Juxtaposing the issue raised with the decision wherefrom it derives, the question posed for resolution is whether in order to establish, i.e. to prove, mental harm suffered because of injury caused to another, the applicant is required to substantiate who that person is by naming him/her and the relationship, if any, to the person claiming victim status.

¹ *Prosecutor v Kony a.o.* “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/104/06, a/111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” 14 March 2008 ICC-02/04-01/05-282; *Situation in Uganda* “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/104/06, a/111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” 14 March 2008 (ICC-02/04-01/05-282).

² *Prosecutor v Kony a.o.* “Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation” 2 June 2008 (ICC-02/04-01/05-296). page 9.



3. In coming to the decision to identify the specific issue as the subject of the appeal, the Pre-Trial Chamber was guided by the decision of the Appeals Chamber of 13 July 2006.³ Reference is made in the decision of the Pre-Trial Chamber to the following passage from the aforesaid judgment, which mirrors the object of an interlocutory appeal under article 82 (1) (d) of the Statute, designed “to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”⁴ The Pre-Trial Chamber granted leave to the Ad Hoc Counsel to appeal the decision of 14 March 2008 in relation to the aforementioned issue.⁵

4. The six applicants (a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06) seek participation in the present proceedings on the ground that the issue raised on appeal affects their personal interests.⁶

5. The Prosecutor opposes the application of four of the six applicants on the ground that their personal interests are in no way affected or likely to be affected by the proceedings. The opposite is the case with the other two applicants (a/0118/06 and a/0122/06), whose right to participate was acknowledged notwithstanding the absence of reference to the victims’ relationship to the person whose physical injury was the cause of their mental harm.⁷

6. Ad Hoc Counsel for the Defence, on the other hand, opposes the applications of all six victims for failure to disclose or substantiate how their personal interests, if any, are or can be affected by the appeal proceedings.⁸

³ See *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168).

⁴ *Ibid* para 19.

⁵ See *Prosecutor v Kony a o* “Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation” 2 June 2008 (ICC-02/04-01/05-298)..

⁶ *Prosecutor v Kony a o* “Request of the 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” 20 June 2008 (ICC-02/04-01/05-302), para 22

⁷ See *Prosecutor v Kony a o* “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” 12 August 2008 (ICC-02/04-01/05-308).

⁸ See *Prosecutor v, Kony a o* “Response of Ad Hoc Counsel for the Defence to the ‘Request of the 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

II. DETERMINATION

7. In its judgment of 11 July 2008⁹, the Appeals Chamber acknowledged that not only physical but also material and psychological injury are forms of harm that fall within the ambit of rule 85 (a) of the Rules of Procedure and Evidence defining victims of a crime within the jurisdiction of the Court. Later on, in the same judgment, it is pointed out that “[t]he issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances”¹⁰. In my partly dissenting opinion, emphasis is laid on the presence of a “direct nexus between the crime and the harm in the sense of cause and effect”¹¹.

8. The requisites for victim participation in appeal proceedings and the framework within which it may take place were identified and explained in a series of decisions of the Appeals Chamber to the extent that they may be regarded as firmly established. Chronologically, the first case in the line of precedent of the Appeals Chamber is the judgment in the *Case of the Prosecutor v. Thomas Lubanga Dyilo*.¹² There, the Appeals Chamber held that approval of victim participation in appeal proceedings is a *sine qua non* for any participation. A distinct application to that end must be made, setting out the grounds and reasons legitimising applicants’ participation. Such participation is necessarily confined to voicing views and concerns respecting the personal interests of the victim affected by the proceedings. It is the affection of personal interests by the proceedings before a Chamber that can ground victim participation. In that appeal, the application for participation was accepted as the applicants had a demonstrable interest in the issue raised for determination, notably the interim release of the accused.

appeal lodged by the Defence against the Decision of the Single Judge of Pre-Trial Chamber II dated 14 March 2008” 11 August 2008 (ICC-02/04-01/05-309-tENG).

⁹ *Prosecutor v. Lubanga* “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” 11 July 2008 (ICC-01/04-01/06-1432).

¹⁰ *Ibid.*, para 32.

¹¹ *Ibid.*, para 3 of the partly dissenting opinion of Judge Pikis.

¹² *Prosecutor v. Lubanga Dyilo* “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’” 13 February 2007 (ICC-01/04-01-06-824) OA 7.



9. The next decision of the Appeals Chamber relevant to the *sub judice* issue is that of 13 June 2007.¹³ The court treaded along the path earmarked by its previous decision as to the configuration of the parameters of victim participation in appeal proceedings, underlining the need for detailed specification of the personal interests at stake. The application was rejected as the victims had no identifiable personal interest in the matter under consideration, notably the admissibility of the appeal. No decision of the Appeals Chamber on the *sub judice* issue could have any bearing on their interests.

10. The principles emerging from the aforementioned decisions were summarised in the subsequent decision of the Appeals Chamber of 16 May 2008.¹⁴ The status of victim is presumed if acknowledged by the first instance court; therefore, no need arises to document and establish it before the Appeals Chamber. The personal interests of the applicant and the way they are affected by the appeal must be distinctly identified. Even if the above conditions are satisfied, participation is not a foregone conclusion; it must be made to appear that participation is appropriate in the context and circumstances of the appeal. The manner of participation and the presentation of victims' views and concerns must on every occasion be prescribed by the Court.¹⁵ In all circumstances, the presentation of such views and concerns must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

11. The last decision of the Appeals Chamber on the subject under consideration is that of 6 August 2008¹⁶, which likewise gives expression to the principles outlined above.¹⁷

¹³ *Prosecutor v Lubanga Dyilo*, "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 2006 (ICC-01/04-01/06-925) (Separate opinions by Judge Pikis and Judge Song).

¹⁴ *Prosecutor v Lubanga Dyilo* "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'" 16 May 2008 (ICC-01/04-01/06-1335) (separate opinion of Judge Pikis, partly dissenting opinion of Judge Song)

¹⁵ *Ibid*

¹⁶ *Prosecutor v, Lubanga Dyilo* "Decision on the participation of victims in the appeal" 6 August 2008 (ICC-01/04-01/06-1452) (Judge Pikis dissenting).

¹⁷ See also *Situation in the Democratic Republic of the Congo* "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007" 30 June 2008 (ICC-01/04-503).



12. The six applicants were acknowledged as victims not by the impugned decision, but by an earlier unappealed decision¹⁸ of the Pre-Trial Chamber. They contend that their personal interests are affected by the decision giving rise to the issue raised for resolution in this appeal.¹⁹ The *sub judice* decision is confined to the acknowledgement of victim status to persons other than the applicants. The decision wherefrom the appealable issue arose has no impact upon their status as victims nor could its reversal affect them in any way. Their status as victims was acknowledged by the decision of the Pre-Trial Chamber of 10 August 2007, which was neither appealed nor its soundness is at issue in the present proceedings. Nor can they have a say in the Pre-Trial Chamber according or refraining from so doing victim status to a person in any other proceedings.

13. The subject of an appeal under article 82 (1) (d) of the Statute is a decision of the first instance court. Identified therein as the subject for resolution is an issue arising therefrom. The interest to validate participation must be related to the issue raised on appeal. What is an issue under article 82 (1) (d) of the Statute? The answer is given by the Judgment²⁰ of the Appeals Chamber of 13 July 2006, wherein the following is said on the subject:

9. Only an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.²¹

¹⁸ See *Prosecutor v Kony a.o* “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” 10 August 2007 (ICC-02/04-01/05-252).

¹⁹ See *Prosecutor v Kony a.o* “Request of the 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” 20 June 2008 (ICC-02/04-01/05-302).

²⁰ *Situation in the Democratic Republic of the Congo* “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” 13 July 2006 (ICC-01/04-168)

²¹ *Ibid.*, para. 9.



14. The applicants are strangers to the proceedings; in no way apt to be affected by them or the outcome of the appeal. Their status as victims is not in question.

15. Affection of the victims' substantive or procedural rights or both by the determination of the subject matter of the appeal is the key to participation, as affirmed by the decision of the Appeals Chamber of 16 May 2008. In that case, the right to participation was acknowledged, as stressed, to persons who were granted by the impugned decision substantive and procedural rights that were affected by the issues certified on appeal.²²

16. Personal interests that may legitimise victim participation in the proceedings must be related to the *sub judice* decision. The proceedings as such must affect their personal interests. Interests are defined by reference to the rights and obligations of a victim. An outsider to the proceeding cannot seek participation because of an interest in the legal principle under discussion and what may emerge therefrom.

17. No interests of the applicants are at stake or likely to be affected by the appealed decision. Their status as victims was acknowledged by the decision of the Pre-Trial Chamber of 10 August 2007. That decision was not appealed, nor is its validity in question in the present proceedings. The decision stands as final.

18. For my part, I would dismiss all six applications as wholly unfounded.

Done in both English and French, the English version being authoritative.



Judge Georghios M. Pikis, Presiding Judge

Dated this 27th day of October 2008

At The Hague, The Netherlands

²² See *Prosecutor v. Lubanga Dyilo* "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled 'Decision on Victims' Participation'" 16 May 2008 (ICC-01/04-01/06-1335), para. 43.