

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04 OA**
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

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

REGISTRY

Registrar

Ms Silvana Arbia



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-02/04-125) (hereinafter “Impugned Decision”),

Having before it 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” (ICC-02/04-144),

Issues, Judge Georghios M. Pikis dissenting, the following

DECISION

(i) Victim a/0101/06 is granted the right to participate in the appeal for the purpose of presenting his views and concerns respecting his personal interests in the issues raised on appeal. The submissions of the victim must be filed by 4pm on Monday, 3 November 2008. Thereafter, the Ad Hoc Counsel for the Defence and the Prosecutor may file their responses by 4pm on Monday, 10 November 2008 upon receiving the submissions of the victim.

(ii) The application of victim a/0119/06 for participation in the appeal is 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 proceeding 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 on behalf of victim a/0101/06 and a/0119/06 for participation in the instant appeal⁵. In support of the application their legal representative submits, *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 representative avers that the participation of the victims is appropriate as they are “best positioned to give in depth analysis as far as the subject matter of the present appeal is

¹ ICC-02/04-125.

² ICC-02/04-01/05-282.

³ ICC-02/04-139 at page 9.

⁴ ICC-02/04-142-tENG.

⁵ ICC-02/04-144.

⁶ *Ibid.* at paragraph 24.

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 the victims, contending that the outcome of this appeal does not affect the personal interests of victim a/0101/06 and a/0119/06 because they were granted victim status based on harm “of a different nature than mental harm suffered as a result of physical harm suffered by another person.”⁹ Therefore, the Prosecutor argues that the participation of these two victims in the appeal proceedings is not appropriate and should not be permitted¹⁰.

6. On 20 August 2008, Ad Hoc Counsel for the Defence filed a response¹¹ to the application in which she opposes the participation of both 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. THE DETERMINATION OF THE APPEALS CHAMBER

7. The Appeals Chamber has firmly established, in its previous jurisprudence on the subject¹³, the requirements applicable, under article 68 (3) of the Statute, for victim participation in appellate proceedings arising from either a case or the situation phase. Essentially, an applicant will have to show that: (i) he/she is a victim in the situation, (ii) he/she has personal interests which are affected by the issue on appeal, (iii) his/her participation in the appeal is appropriate and (iv) the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

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-02/04-150.

⁹ Ibid. at paragraph 14.

¹⁰ Ibid. at paragraph 16 to 18.

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-02/04-151-tENG.

¹² Ibid. at paragraph 31.

¹³ ICC-01/04-01/06-1335, paragraphs 35 and 36; ICC-01/04-503, paragraph 90; ICC-01/04-01/06-824.

8. 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.

9. In the instant appeal, both victims were granted the status of victim with the right to participate in the situation in Uganda in an earlier decision of the Chamber dated 10 August 2007¹⁴.

10. Victim a/0101/06 was acknowledged by the Chamber to have suffered physical injuries and psychological trauma, as a result of being beaten and randomly shot at “as well as being a witness to events of an exceedingly violent and shocking nature.”¹⁵ As characterised by the Chamber these ‘events of an exceedingly violent and shocking nature’ generally included events during which the victim witnessed people being killed or injured and was consequently found to have suffered emotional harm.

11. 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 victim a/0101/06 that both his status and his right to participate may be prejudiced should the resolution of the issue on appeal result in a reversal of the Chamber’s decision on the issue.

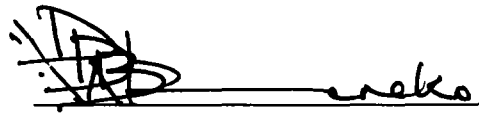
¹⁴ ICC-02/04-101.

¹⁵ ICC-02/04-101, paragraph 143.

12. Accordingly the Appeals Chamber considers the participation of victim a/0101/06 is appropriate in light of the consequences that the outcome of the appeal may have on his personal interests. Therefore victim a/0101/06 is permitted to participate in the instant appeal proceedings by submitting his views and concerns with regard to his 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 victim.

13. In relation to victim a/0119/06, the Chamber acknowledged the status of victim and the right to participate in the situation of Uganda based solely on the physical harm suffered as the result of a “violent beating”¹⁶. His status as a victim as well as his right to participate will not be prejudiced by the resolution of the issue on appeal and consequently his application for participation is rejected.

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



Judge Daniel David Ntanda Nsereko

Dated this 27th day of October 2008

At The Hague, The Netherlands

¹⁶ ICC-02/04-101, paragraph 155 to 156.

Separate opinion of Judge Sang-Hyun Song

1. I agree with the majority of the Appeals Chamber that victim a/0101/06 should be allowed to participate in this appeal.

2. I note that victim a/0101/06 was recognised as a victim 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-02/04-100-Conf-Exp¹; hereinafter: “Decision of 10 August 2007”). Victim a/0101/06 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-02/04-124-Conf-Exp²) that is object of the present appeal. Accordingly, victim a/0101/06 was not a participant 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 (see on participation of victims pursuant to regulations 65 (5) and 64 (4) of the Regulations of the Court 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 victim a/0101/06 pursuant to rule 93, second sentence, of the Rules of Procedure and Evidence. Victim a/0101/06 was recognised as a victim by Pre-Trial Chamber II inter alia because of a psychological trauma suffered as a result of “witnessing events of exceedingly violent and shocking nature” (Decision of 10 August 2007, paragraph 143). He was 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

¹ A public redacted version of the decision was registered on 13 August 2007 (ICC-02/04-101).

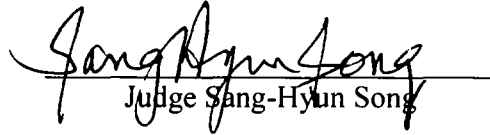
² A public redacted version of the decision was registered on 17 March 2008 (ICC-02/04-125).



relationship the applicant has with the person be required?" (ICC-02/04-139, page 9). Submissions by the victim on the issue on appeal may therefore be useful for the proper disposal of this appeal.

4. I also agree that victim a/0119/06 should not be allowed to participate in this appeal. This victim has no right to participate pursuant to regulations 65 (5) and 64 (4) of the Regulations of the Court because he was recognised as a victim 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 he was recognised as a victim (see Decision of 10 August 2007, paragraphs 62 to 68) are unrelated to the issue in respect of which leave to appeal was granted, it would be inappropriate to seek his 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. The issue raised for determination is identical to the one posed for resolution in the parallel appeal *Prosecutor v. Kony a.o.*¹, the following:

[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. On 14 March 2008, two decisions³ were issued by Pre-Trial Chamber II (hereinafter “the Pre-Trial Chamber”) – jurisdiction in the matter being exercised by the Single Judge – on victim participation in parallel proceedings, notably in the proceedings in the case of *Prosecutor v. Kony a.o.* and in the present proceedings concerning the Ugandan Situation. The impugned decisions of the Pre-Trial Chamber in the two proceedings are identical, save for particulars specifying the litigants in either case.

3. The applicants a/0101/06 and a/0119/06 maintain that they have a right to participate in the appeal *proceedings*, firstly because they have been acknowledged as victims by the Pre-Trial Chamber, and secondly because their personal interests are affected by the resolution of the *sub judice* issue.⁴

¹ *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)..

² *Situation in Uganda* “Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation” 2 June 2008 (ICC-02/04-139), page 9.

³ *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-02/04-125).

⁴ See *Situation in Uganda* “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” 20 June 2008 (ICC-02/04-144).

4. Ad Hoc Counsel for the Defence as well as the Prosecutor oppose the application for participation on the grounds that no *personal* interests of the victims are at stake or likely to be affected by the determination of the issue before the Appeals Chamber.⁵

5. In its decision of 30 June 2008,⁶ the Appeals Chamber held that the requisites for *participation* in interlocutory appeals in either a case or a situation are the same. This is reflected in the following passage from that decision:

The Appeals Chamber is aware that the abovementioned determinations were made in relation to interlocutory appeals arising in the case of Mr. Thomas Lubanga Dyilo. In determining victim participation in interlocutory appeals arising in the situation phase of the proceedings before the Pre-Trial Chamber, article 68 (3) as interpreted by the Appeals Chamber in the case of Mr. Lubanga should also be made applicable to interlocutory appeals in the situation phase of proceedings.⁷

II. DETERMINATION

6. The applicants are in the same position as the applicants in the parallel appeal proceedings arising in the case of *Prosecutor v. Kony a.o.* (hereinafter “parallel appeal OA2”). Like them, they *are* unrelated to the *sub judice* decision, which in no way can affect their interests. They were acknowledged victim status like the applicants in the parallel appeal OA2 by an earlier decision of Pre-Trial Chamber I, notably that of 10 August 2006.⁸ They were in no way involved in the first instance proceedings, nor does the decision given therein affect them in any way. For the same reasons as those given in the decision in the parallel appeal OA2, no personal interest of them could conceivably be affected by the resolution of the issue on appeal.

⁵ *Situation in Uganda* “Response of Ad Hoc 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’” 11 August 2008 (ICC-02/04-151-tENG); “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-02/04-150).

⁶ *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)

⁷ *Ibid* paragraph 89.

⁸ See *Situation in Uganda* “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-02/04-101).

7. Hence, their *application* to participate is doomed to failure, and I would sequentially dismiss it.

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