

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 ET AL.***

Public Document

Observations filed by the Legal Representative of victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 on the interlocutory appeal lodged by the *Ad hoc* Counsel for the Defence against the Decision of the Single Judge of Pre-Trial Chamber II dated 14 March 2008

Source: Office of Public Counsel for Victims

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

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Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. 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 the Principal Counsel of the Office of Public Counsel for Victims (the “Office” or the “OPCV”), as legal Representative of victims a/0101/06 and a/0119/06, and a Counsel from the OPCV, as legal representative of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0122/06 (the “Legal Representatives”)¹.

2. On 14 March 2008, the Single Judge issued 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 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 *The Prosecutor v. Joseph Kony et al.* (the “Decision”)².

3. On 25 March 2008, the *Ad Hoc* Counsel for the Defence filed a “Defence’s Application for Leave to Appeal the Decision on victims’ applications for

¹ See 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” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-117 and No. ICC-02/04-01/05-267, 15 February 2008.

² 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, Single Judge), No. ICC-02/04-125 and No. ICC-02/04-01/05-282, 14 March 2008.

participation issued on 14 March 2008” (the “Defence’s Application”), seeking leave to appeal the Decision³.

4. On 31 March 2008, the Prosecution filed a “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” (the “Prosecution’s Response”)⁴.

5. On 11 April 2008, having been granted leave⁵, the Principal Counsel of the Office filed a response to the Defence’s Application as well as observations on the Prosecution’s Response⁶.

6. On 2 June 2008, the Single Judge granted the Defence leave to appeal the Decision in relation to the second issue raised by the Defence’s Application, 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?” (the “Issue under appeal”)⁷.

³ See the “Defence Application for Leave to Appeal the Decision on victims’ applications for participation issued on 14 March 2008”, No. ICC-02/04-128-tENG and No. ICC-02/04-01/05-285-tENG, 25 March 2008.

⁴ 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”, No. ICC-02/04-129 and No. ICC-02/04-01/05-287, 31 March 2008.

⁵ 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, Single Judge), No. ICC-02/04-132 and No. ICC-02/04-01/05-290, 4 April 2008.

⁶ See the “Response of the Legal Representative of Victims to the Defence Application for Leave to Appeal the Decision of 14 March 2008 and Observations on the Response of the Prosecutor to that Application”, No. ICC-02/04-133-tENG and No. ICC-02/04-01/05-291-tENG, 11 April 2008.

⁷ See the “Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation” (Pre Trial Chamber II, Single Judge), No. ICC-02/04-139 and No. ICC-02/04-01/05-296, 2 June 2008.

7. On 16 June 2008, the *Ad Hoc* Counsel for the Defence filed her “Acte d'appel de la Défense relativement à la Décision du 14 Mars 2008 de la Chambre préliminaire II concernant la participation des victimes” (the “Defence Brief”)⁸.

8. On 20 June 2008, the Legal Representatives filed their “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”⁹.

9. On 23 June 2008, in response to the issue of non-compliance with the time-limits raised by the Legal Representatives and the Prosecution, the *ad hoc* Counsel for the Defence filed her “Preliminary Response to the Victims’ Applications for Participation and Application for Extension of Time Following the Late Registration of the Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008”¹⁰.

10. On 30 June 2008, the Prosecution filed its “Prosecution Response to Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation” (the “Prosecution’s Appeal Response”)¹¹.

⁸ See 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”, No. ICC-02/04-142 and No. ICC-02/04-01/05-298, 16 June 2008 (the “Defence Brief”).

⁹ See 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”, No. ICC-02/04-01/05-302, and the “Request of the victims /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”, No. ICC-02/04-144, 20 June 2008.

¹⁰ See the “Preliminary Response to the Victims’ Applications for Participation and Application for Extension of Time Following the Late Registration of the Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008”, No. ICC-02/04-146-tENG and No. ICC-02/04-01/05-303-tENG, 23 June 2008.

¹¹ See the “Prosecution Response to Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation”, No. ICC-02/04-01/05-304, 30 June 2008 (the “Prosecution’s Appeal Response”).

11. On 22 July 2008, the Appeals Chamber issued the "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"¹², granting the Prosecution and *Ad Hoc* Counsel for the Defence until 12 August 2008 to file a Response to the request introduced by the victims' Legal Representatives.

12. On 11 August 2008, the *ad hoc* Counsel for the Defence, filed her "Réponse du Conseil ad hoc de la Défense à la "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"¹³.

13. On 12 August 2008, the Prosecution filed its "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"¹⁴.

14. On 29 August 2008, the Presidency issued the "Decision replacing a judge in the Appeals Chamber", providing that Judge Nsereko shall replace Judge Pillay in the Appeals Chamber with effect 1st September 2008¹⁵.

¹² See the "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" (Appeals Chamber), No. ICC-02/04-01/05-307, and the "Order on the filing of responses by the Prosecutor and the ad hoc Counsel for the Defence to the request of victims a/0101/06 and a/0119/06 for participation in the appeal" (Appeals Chamber), No. ICC-02/04-149, 22 July 2008.

¹³ See the "Réponse du Conseil ad hoc de la Défense à la "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", No. ICC-02-04-01-05-309 and the "Réponse du Conseil ad hoc de la Défense à la "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", No. ICC-02-04-151, 11 August 2008.

¹⁴ See "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", No. ICC-02-04-01-05-308 and No. ICC-02-04-150, 12 August 2008.

15. On 27 October 2008, the Appeals Chamber issued the “Decision on the participation of victims in the appeal”, authorising victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 to participate in the interlocutory appeal lodged by the *ad hoc* Counsel for the Defence against the Single Judge’s decision dated 14 March 2008¹⁵.

16. The Legal Representative of victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 respectfully submits the following observations on the Issue under appeal.

II. The Issue under Appeal

17. Preliminary, the Legal Representative notes that the Defence in its Appeal advances arguments that are not relevant for the Issue under Appeal. The reference is to the arguments pertaining to the scope of the definition of victims pursuant to Rule 85 of the Rules of Procedure and Evidence; whether or not the person having suffered physical harm must be deceased; whether there must be a causal link between the harm allegedly suffered and the crimes charged; whether proof of the applicant’s proximity to the events should be required, as well as the nature or degree of proof required and the degree of proximity between the applicant and the person suffering physical harm¹⁷. Therefore, the Legal Representative concurs with the Prosecution’s position according to which such arguments shall not be considered by the Appeals Chamber¹⁸.

18. The Issue under Appeal as granted by the Single Judge of Pre-Trial Chamber II 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

¹⁵ See the “Decision replacing a judge in the Appeals Chamber” (Presidency), No. ICC-02/04-152 and No. ICC-02/04-01/05-310, 29 August 2008.

¹⁶ See the “Decision on the participation of victims in the appeal” (Appeals Chamber), 27 October 2008, No. ICC-02/04-164 and No. ICC-02/04-01/05-324.

¹⁷ See the Defence Brief, *supra*. note 8, paras. 25, 33, 36-40, 47 and 48.

¹⁸ See the Prosecution’s Appeal Response, *supra*. note 11, par. 14.

applicant has with the person be required.” The Legal Representative therefore addresses only arguments relevant to the issue for which appeal has been granted.

19. The *ad hoc* Counsel for the Defence submits that the Single Judge erred in fact and in law by granting the status of victims to applicants having suffered mental harm as a result of a physical harm suffered by another person, without requesting proof of identity of the primary victim and the relationship between the primary victim and the applicant.

20. In relation to the alleged error of fact, the Legal Representative considers that the *ad hoc* Counsel for the Defence has not satisfied the requirements under regulation 64(2) of the Regulations of the Court requesting that a document in support of the appeal shall set out the grounds of appeal and contain the legal and/or factual reasons in support of each ground. Accordingly, the Legal Representative concurs with the Prosecutions’ position and opposes the Defence Appeal on the alleged error of fact¹⁹.

21. Therefore, the Legal Representative argues only on the alleged error of law.

22. The Legal Representative considers that some proof of identity and some proof concerning the relationship between the applicant and the person may be required from applicants claiming to have suffered mental harm based on the harm suffered by another person. However, such requirements cannot be interpreted in a way which will be prejudicial to the applicant and which *de facto* will prevent victims from being able to participate in the proceedings before the Court.

23. Indeed, a study of the jurisprudence of the main bodies dealing with either participation of victims or reparations tends to prove that an applicant placed in a

¹⁹ *Idem.*, paras. 19-21.

similar situation as the one concerned by the appeal at stake would have to prove his or her identity and the relationship between her or him and the deceased person.

24. For example, within the framework of the United Nations Compensation Commission, with regards to claims submitted for death, “[t]he Panel determines that claims for death are compensable where three elements are present in the claim: a) evidence of the fact of the death, b) proof of the family relationship between the claimant (or claimants) and the deceased, and c) proof of causation (evidence of the link of the death to the invasion and occupation of Kuwait by Iraq)”²⁰. Moreover, the jurisprudence of the Inter-American Court of Human Rights also requires indirect victims (next-of-kin or dependants) to prove, when claiming reparations, the relationship existing between him or her and the direct victim²¹.

25. However, it has to be noted that the above-mentioned jurisprudences deal with reparations proceedings and not with participation ones. Therefore, one could legitimately argue that although such element could be required when dealing with applications for reparations, it will be too cumbersome to request the same element in the context of the proceedings for participation and consequently, that some flexibility should be applied in this context.

26. Moreover, interestingly, nothing in the framework of the Rome Statute and of the Rules of Procedure and Evidence imposes indirect victims to prove the psychological effect of the harm occasioned by the death of a primary victim. Therefore, the threshold proposed by the *ad hoc* Counsel for the Defense²² not only goes beyond the requirements envisaged in the founding texts of the Court but is

²⁰ See United Nations Compensation Commission Governing Council, “Recommendations made by the Panel of Commissioners concerning individuals claims for serious personal injury of death (Category “B” Claims)”, UN Doc. S/AC.26/1994/1, 26 May 1994, p. 39 (we underline).

²¹ See, *inter alia*, IACHR, Case *Caracaso v. Venezuela*, Reparation Decision, 29 August 2002, paras. 63 and 72-73. See also IACHR, Case *Massacre of Plan Sanchez v. Guatemala*, Reparation Decision, 19 November 2004, paras. 72-75.

²² See the Defence Brief, *supra* note 8, paras. 39-41.

also unrealistic in the context of conflicts or post-conflicts situations as the one prevailing in Northern Uganda.

27. Conflict or post-conflict situations call for flexibility regarding documents accepted as proof of the identity of the indirect victim as well as proof of the relationship with the person who directly suffered the harm. Indeed, the situation in Northern Uganda where massive displacement of the population occurred, renders the submission of certain elements of proof impossible for the applicants. This conclusion is supported not only by the international jurisprudence but also by the Court itself.

28. In its “Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda”, the Victims Participation and Reparations Section itself indicated that it will be onerous for applicants to determine the identity of the primary victim in view of the “*enormous difficulties*” and “*often insurmountable logistical, economic and other obstacles*” they themselves face when they try to obtain identification documentation to support their application due to the armed conflict in Northern Uganda²³.

29. Furthermore, lowering the standard of proof in order to cater to the realities associated with serious violations of human rights would not be an innovation of the International Criminal Court. Indeed, the Inter-American Court of Human Rights does recognise the impossibility to prove the identity of the victims, in cases where gross violations of human rights have occurred, and in these cases, awards reparations to the community under the heading “other forms of reparations”²⁴.

²³ See the Decision, *supra* note 2, par. 6. See also the “Report on the identity documents available in the Ugandan legal and administrative system and other supporting documentation for applications for participation in proceedings in Uganda”, No. ICC-02/04-125-Anx and No. ICC-02/04-01/05-282-Anx, 17 March 2008, paras. 18, 33, 54 and 56.

²⁴ See IACHR, Case *Massacre of Plan Sanchez v. Guatemala*, Reparation Decision, 19 November 2004, par. 62.

Moreover, like the principle applied within the International Tribunal for Rwanda, where the contents of the applications are uncorroborated, the Court can create a rebuttable presumption on the veracity of the contents of the applications until the Defence is able to provide evidence to the contrary²⁵.

30. Accordingly, applying a lower threshold taking into account the difficulties inherent to the situation in Northern Uganda for victims trying to establish a relationship link in the present instance will not only ensure the fairness of the process but would also ensure that indirect victims' participation is made possible. Indeed, participation of indirect victims has been recognised by the Appeals Chamber when stating that the "*harm suffered is personal to the individual [and] can attach to both direct and indirect victims*"²⁶.

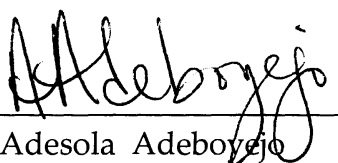
31. Therefore, the Legal Representative submits that although some proof of identity and some proof concerning the relationship may be required from applicants claiming to have suffered mental harm as a result of the harm suffered by another person, the determination of the appropriateness of the standard of proof has to be made on a-case-by-case basis and in cognisance of the socio-cultural dynamics of the region of the armed conflict.

²⁵ See ICTR, *The Prosecutor v. Alfred Musema*, Appeals Chamber Judgment, No. ICTR-96-13-A, 16 November 2001, paras. 172 to 194, where the Appeals Chamber heard additional evidence in relation to the rape count in order to review the finding and conviction granted by the Trial Chamber.

²⁶ See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), 11 July 2008, No. ICC-01/04-01/06-1432, paras. 1 and 32 (we underline).

FOR THE FOREGOING REASONS,

The Legal Representative of victims a/0090/06, a/0098/06, a/0118/06, and a/0122/06 does not oppose the ground of appeal in relation to the error of law and respectfully requests the Appeals Chamber to take into consideration these observations in its judgement. The Legal Representatives further requests the Appeals Chamber to deny the ground of appeal relating to the error of fact.



Adesola Adeboyejo

Legal Representative of victims

a/0090/06, a/0098/06, a/0118/06 and a/0122/06

Dated this 3 November 2008

At The Hague

The Netherlands