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Date: **7 November 2008**

**THE APPEALS CHAMBER**

**Before:** Judge Fwoefhioa M. Pikia, Presiding Judge  
Judge Philippe Kirsch  
Judge Daniel David Ntanda Nsereko  
Judge Sang-Hyun Song  
Judge Erkki Kourula

**SITUATION IN UGANDA**

**Public Document**

**Defence Appeal Brief against 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”**

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

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## I – INTRODUCTION

1. Ad Hoc Counsel for the Defence submits that the decision raises the following issue:

– In order to establish mental harm resulting from physical harm or the death of another person, must the identity of that person and the applicant's relationship to him or her be required?

2. In his decision, the Honourable Single Judge granted victim status to several applicants on the basis of the mental harm they suffered as a result of the death of their close relations.<sup>1</sup> The Honourable Single Judge held that for applicants participating on behalf of another person, proof of identity and their relationship with the victim<sup>2</sup> must be provided. These requirements do not seem to apply to applications based on mental harm caused by physical harm, including the death of a third party.

3. Ad Hoc Counsel for the Defence respectfully submits that this issue has a significant impact on the reliability and the credibility of the application for participation in the proceedings. Neither the Chamber nor the parties have the means to ascertain whether those persons who suffered physical harm ever existed and their relationship with the applicant who suffered mental harm.

4. The Honourable Judge set a list of documents enabling the identity of an applicant acting on behalf of a victim to be established.<sup>3</sup> On the other hand, he appears not to require any proof of the identity of the victim of physical harm or of the relationship between the applicant and that victim. As such, the evidentiary

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<sup>1</sup> Applicants a|0094|06, a|0095|06, a|0103|06, a|0120|06, a|0121|06 and a|0123|06.

<sup>2</sup> Decision, para. 7.

<sup>3</sup> The Single Judge will accept as proof of such link any of the following documents : (i) "short" birth certificate or "long" birth certificate, (ii) birth notification card, (iii) baptism card, (iv) letter issued by a Rehabilitation Centre, (v) letter from a local Council, (vi) affidavit sworn before a Magistrate or Commissioner of Oaths; Decision, para. 7.

requirements for an applicant acting on behalf of a victim and for an applicant who suffered mental harm due to physical harm or the death of a third party or primary victim are not the same. These disparities and uncertainties are likely to affect the fair conduct of the proceedings.

5. The Honourable Single Judge considers that victim participation in the proceedings has a profound impact on the parties and the fair conduct of the proceedings.<sup>4</sup>

6. Ad Hoc Counsel for the Defence respectfully submits that the fairness of the proceedings would be jeopardised if the applicants who suffered mental harm as a result of physical harm or the death of a third party are exempt from providing the slightest document for the purpose of ascertaining the identity of the person who suffered the physical harm or the deceased person and the relationship between the applicant and that person. The integrity of the proceedings would also be brought into question.

7. Ad Hoc Counsel for the Defence acknowledges that in certain circumstances it may be difficult to establish the identity of a deceased person. However, such issues must be resolved on a case-by-case basis in light of the applicants' particular circumstances. This is a substantive issue which may nevertheless determine whether the proceedings are fair or not.

8. Ad Hoc Counsel for the Defence submits that although the standard of proof varies during the proceedings, there should be a mechanism for ascertaining that the essential components of the application for participation have been adhered to, the existence of the victim being the most fundamental of all. The Honourable Judge's decision not to require identification of any kinship or personal relationship at this stage of the proceedings postpones the resolution of this issue to a later stage; this

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<sup>4</sup> "Given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally

may result in a delay in the proceedings. Resolving this issue now would contribute to ensuring that the proceedings will be conducted expeditiously.

## II PROCEDURAL BACKGROUND

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* 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<sup>5</sup> issued on 14 March 2008”.<sup>6</sup>

10. On 11 April 2008, the Office of Public Counsel for Victims (OPCV) filed a “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”.

11. On 2 June 2008, the Honourable Single Judge issued his *Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims’ Applications for Participation*.<sup>7</sup>

12. 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 Situation<sup>8</sup> and the Case.<sup>9</sup>

13. On 20 June 2008, the Office of Public Counsel for Victims (OPCV) filed an application entitled “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

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<sup>5</sup> ICC-02/04-125 and ICC-02/04-01/05-282.

<sup>6</sup> ICC-02/04-128-tENG and ICC-02/04-01/05-285-tENG.

<sup>7</sup> ICC-02/04-139 and ICC-02/04-01/05-296.

<sup>8</sup> ICC-02/04-142-tENG.

<sup>9</sup> ICC-02/04-01/05-298-tENG OA2.

Defence against the Decision of the Single Judge of Pre-Trial Chamber II dated 14 March 2008”.<sup>10</sup>

14. On 23 June 2008, Ad Hoc Counsel for the Defence filed a “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”.

15. On 30 June 2008, the Office of Public Counsel for Victims (OPCV) filed a “Prosecution Response to Defence Appeal of Pre-Trial Chamber II’s Decision of 14 March 2008 on Victim Participation”.

16. On 22 July 2008, the Appeals Chamber issued a *Decision on the application by the ad hoc Counsel for the Defence for an extension of time*.

17. For the purposes of her application, Ad Hoc Counsel for the Defence does not consider it necessary to list all the proceedings.

### III LEGAL SUBMISSIONS

18. 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 2007<sup>11</sup> 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.<sup>12</sup>

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<sup>10</sup> ICC-02/04-01/05-302.

<sup>11</sup> *Decision on victims’ applications for participation*, para. 16.

<sup>12</sup> *Decision*, para. 6.

19. 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.

20. 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,<sup>13</sup> but must be adapted to the specific factual circumstances and the legal framework applicable in the circumstances.

21. Ad Hoc Counsel for the Defence respectfully submits that this issue affects the fair conduct of the proceedings, such as the issuance of apparently inconsistent decisions by the Court on the determination of the persons authorised to participate, which could have an impact on the principles of legality and legal certainty.

22. The lack or inadequacy of legal and factual reasoning underpinning a decision directly affects the fairness of the proceedings. The adversarial principle and the principle of equality of arms are affected *de facto*, and the general nature of the Chamber's findings does not lend itself to any in-depth examination of the criteria required for victim participation.

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<sup>13</sup> The ability of victims to participate in proceedings was not considered to be automatic, but rather as depending 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.

23. 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 2007<sup>14</sup> and its Decision of 13 June 2007<sup>15</sup> 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.”<sup>16</sup> 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 participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>17</sup>

24. There are two hierarchically different bases for the participation of victims in proceedings before the Court:

- applicants acting on their own behalf as victims as a result of the harm they have personally suffered;

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<sup>14</sup> 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).

<sup>15</sup> 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).

<sup>16</sup> 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 paragraph 43.

<sup>17</sup> 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>.

- applicants acting with the consent of a victim, or on behalf of a victim, if the victim is a child or is disabled.<sup>18</sup>

25. The latter category constitutes an exception and, as such, requires more stringent admissibility criteria.<sup>19</sup> Hence, the Judge requires the applicants to provide documentation in relation to the identity of the victims they are representing<sup>20</sup> and documentation proving their link to those victims.

26. For an applicant to be considered a victim within the meaning of rule 85(a) of the *Rules of Procedure and Evidence*, the Court must determine (i) whether the identity of the applicant as a natural person is duly established; (ii) whether the events described constitute a crime falling within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) whether such harm was caused by a crime falling within the jurisdiction of the Court.<sup>21</sup>

27. Since a decision to grant an applicant the status of victim in order to participate in the proceedings may affect the rights of the accused, the rules governing the granting of victim status must be interpreted restrictively.

28. Rule 85(a) of the Rules neither explicitly excludes nor includes the possibility of an applicant's participating on the basis of mental harm.<sup>22</sup> It follows from article 21 of

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<sup>18</sup> Rule 89(3) of the *Rules of Procedure and Evidence*: "An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled."

<sup>19</sup> The words "when necessary" in rule 89(3) imply that the provision must apply only in cases where the victim cannot participate on his or her own behalf.

<sup>20</sup> Regulation 86(2)(a) of the *Regulations of the Court*.

<sup>21</sup> See the decisions of 10 August 2007, ICC-02/04-101 and ICC-02/04-01/05-252, para. 12, and the decision of 14 March 2008, para. 8.

<sup>22</sup> ICC-01/04-455, 18 February 2008, "OPCD Appeal Brief on the "Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République Démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06", para. 49.

the Statute concerning the sources of applicable law that participations based on mental harm must be the exception and be considered restrictively.

29. Interpreting the concept of mental harm broadly in respect of victims' applications for participation would create a risk for the rights of the accused and the fair and expeditious conduct of the proceedings.

30. Moreover, the practice of international criminal courts shows that, in general, the concept of a victim who has suffered mental harm is strictly construed and that the psychological suffering of third parties is taken into account only in limited, exceptional cases.<sup>23</sup>

31. Such a concept of mental harm must be even more restrictive in cases of indirect harm. Indeed, the Chamber has ruled that "permitting victims who suffered indirect harm to participate may significantly affect the number of victims who are involved in the case and the issues that will fall to be canvassed during the proceedings".<sup>24</sup>

32. An analysis of national laws on mental harm based on the death of another person shows that this principle is not universally recognised and that the concept

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<sup>23</sup> Rule 2 of the respective *Rules of Procedure and Evidence* of the ICTY and ICTR defines a victim as "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed"; see the decision of the Special Court for Sierra Leone, *Prosecutor v. Fofana*, Judgment of 2 August 2007, para. 153, citing the *Runzindana* decision of the ICTR: "The Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where [...] the Accused had the intention to inflict serious mental suffering on the third party, or where the Accused had reasonable knowledge that his act would likely cause [such] serious mental suffering on the third party." Lastly, the Extraordinary Chambers in the Courts of Cambodia require the harm suffered by the applicant victim to be "the direct consequence of the offence, personal and have actually come into being", rule 23(2) of the Internal Rules (Rev. 1) 1 February 2008; more specifically, see the OPCD Appeal Brief of 18 February 2008, ICC-01/04-455, para. 51.

<sup>24</sup> ICC-01/04-01/06-1191, para. 27, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008*, 26 February 2008, *The Prosecutor v. Thomas Lubanga Dyilo*; see also ICC-01/04-455, 18 February 2008, "OPCD Appeal Brief", para. 55, more specifically footnote 54, showing that one victim in a family of an average of 5 children might generate 39 potential applicants if indirect family members of the victim, *inter alia* uncles and cousins, were granted the right to participate.

has not yet gained currency in domestic law.<sup>25</sup> In principle, kinship is required between the applicant and the primary victim. Accordingly, stringent criteria for identifying the primary victim and the links between the applicants and the primary victim should be required.

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<sup>25</sup> More specifically, see the OPCD Appeal Brief of 18 February 2008, ICC-01/04-455, footnote 52. For example, under article 121(12) of the Code of Criminal Procedure of Gabon “[TRANSLATION] any person suffering must be considered a victim, provided that such suffering may be personal, real (that is, manifest itself in emotional or psychological trauma and/or established material harm), found to be socially unacceptable and would merit counselling for the persons concerned (...)”.

In France, “indirect victims” can receive compensation only if they establish family or emotional ties – see the judgment of a Joint Bench of the Court of Cassation of 27 February 1970 (D. 1970, Jur. p. 201) – but the existence of family ties does not necessarily result in compensation. (See Cass. 2ème Civ., 29 January 1997, RTD Civ. 1997, p. 955); see also the law known as the Badinter Law, No. 85-677 of 5 July 1985 for victims of road traffic accidents.

In Quebec, “indirect” victims – that is, those who suffer mental harm resulting from the physical harm suffered by the person who is the victim of the accident – are not considered victims (Section 6 of the *Automobile Insurance Act*: “Every person who suffers bodily injury in an accident is a victim”). Compensation for such persons is now possible, but restricted to the victim’s close relatives; see, for example, TAQ SAS-Q-093911-0212, Case of 25 March 2003 (AZ-03551450).

In the United Kingdom, compensation may be awarded only to those persons who suffered directly the injury, loss or damage (Archbold, *Criminal Pleading and Practice*, (Sweet & Maxwell Ltd, 2003) 5-415 (pp. 705-706). In order to award compensation, the courts require the plaintiff to have personally witnessed the events and to be a close relative of the victim, *Alcock v. Chief Constable of the South Yorkshire Police* [1992] 3 (the Hillsborough Case).

Austria, Portugal and Spain do not offer financial compensation for mental harm as a result of the death of a relative: (European Commission Green Paper on Compensation to Crime Victims, Brussels, 28 September 2001, COM(2001) 536, at para. 3.3.4.

In the Democratic Republic of the Congo, persons alleging mental harm due to the death of a family member are required to prove their relationship with the deceased person (under article 72 of Law 87-010 of 1 August 1987, the civil status of persons can be established only on production of an official document).

Lastly, concerning human rights case law, the European Court of Human Rights in Strasbourg emphasised in *Kurt v. Turkey* (24276/94, 25 May 1998) that a high evidential threshold is required to establish ill-treatment based on emotional suffering. Moreover, in that case, the applicant was the mother of the victim and had been present during the acts. The Inter-American Court of Human Rights also requires proof of mental harm. This proof is facilitated if the applicants establish that they are the direct successors of the victim, or if they are close relatives of the victim: *Aloeboetoe et al.*, Judgment of 10 September 1993, paras. 75-76. Article 43(3)(a) and (b) of the *Rules of Procedure* of the Inter-American Court of Human Rights requires applicants to provide information about their link to the victim.

#### IV FACTUAL SUBMISSIONS

33. The applicants rely on two types of categories of mental harm.<sup>26</sup> The first category encompasses victims who witnessed first-hand exceedingly violent and shocking acts which caused psychological problems.<sup>27</sup> The second category encompasses persons suffering mental harm as a result of the loss of a close family member.<sup>28</sup>

34. Since, for the first category, the mental harm does not result from the loss of a loved one, but from the violence of the events, it is not necessary to provide proof of the identity of the persons who may have died in the course of such events or to establish the link between the applicants and those persons.

35. However, in the second category, the applicants are affected mentally because the harm they suffer results precisely from the link between them and the “primary” victim. The mental harm that they sustain is personal to them because of the closeness of that link.

36. Ad Hoc Counsel for the Defence respectfully submits that, in order to establish the existence of such harm, documentation establishing the identity of the primary victims and the nature of the link between them and the applicants must be provided.<sup>29</sup> Otherwise, applicants who do not satisfy the criteria to be granted victim

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<sup>26</sup> ICC-02/04-133 and ICC-02/04-01/05-291, para. 35

<sup>27</sup> The Judge speaks of “psychological trauma as a result of witnessing events of an exceedingly violent and shocking nature”; see, for example, Applicants a/0093/06, a/0095/06, a/0117/06 and a/0124/06 in the Decision of 14 March 2008.

<sup>28</sup> The Single Judge in the Situation in Darfur acknowledged this possibility, provided that the family members satisfy all the criteria for being granted victim status: “However, family members affected by the disappearance could be considered victims under the Statute, the Rules and the Regulations, provided that they meet all the necessary criteria”, *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05 17/24, 14 December 2007, para. 35.

<sup>29</sup> In fact, the Single Judge considered in the context of the Situation in Darfur, Sudan, that an applicant who based his or her application for participation solely on emotional suffering due to the death of family members had to provide proof of his or her relationship with the deceased family

status could, in order to be able to participate, simply allege that they suffered mental harm as a result of the death of any person whatsoever.

37. The Chambers require an applicant acting on behalf of a victim to provide proof of his or her identity and that of the victim he or she is representing.<sup>30</sup> Moreover, where an applicant is representing a child or a disabled person, they require proof of the link between the applicant and those persons.<sup>31</sup> Lastly, the Chambers require an applicant acting on his or her own behalf to establish his or her identity and to provide evidence of the harm he or she suffered. They do not, however, appear to require any proof of the identity of the “primary” deceased victim who is the source of the applicant’s mental harm and of the link between the applicant and that victim.

38. It would be paradoxical and unjust if the proof required of an applicant who has suffered mental harm as a result of the death of a close family member is less than that of an applicant acting on behalf of a victim.

39. Accordingly, Ad Hoc Counsel for the Defence respectfully submits that it is necessary to provide proof of close proximity between the applicant and the primary victim, such relationships being limited to the immediate family, that is, family *strictu sensu*: spouse, father, mother and children.

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members in order to be granted victim status: see *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05 17/24, 14 December 2007, paras. 30 and 31.

<sup>30</sup> In the Decision of 14 March 2008, the Single Judge is of the opinion that “both the identity of the applicant and the identity of the person acting with his or her consent or on his or her behalf must be confirmed by one of the above listed documents”, para. 7.

<sup>31</sup> “The link existing between a child applying for participation and the person acting on his or her behalf (kinship, guardianship, or legal guardianship) as well as the link existing between a disabled applicant and the person acting on his or her behalf (legal guardianship) should be confirmed by a document attached to the application as supporting documentation within the meaning of regulation 86(2)(e) of the Regulations”, Decision of 14 March 2008, para. 7; see also *Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation*, ICC-01/04-374, Situation in the DRC, para. 13.

40. Furthermore, persons who fail to obtain the consent of victims to represent them could secure victim status for themselves for alleged personal mental harm by re-characterising the events and the harm suffered. Hence, it is crucial that the “primary” victim be deceased; otherwise proof of the victim’s express consent is mandatory.<sup>32</sup> Indeed, as the Single Judge noted in respect of the Situation in Darfur, it is impossible to request participation in proceedings on behalf of a deceased victim.<sup>33</sup>

41. Ad Hoc Counsel for the Defence respectfully submits that the primary victim must be deceased before an application for participation can be accepted from a person alleging mental harm as a result of physical harm caused to another person.

42. Judge Blattman adds that “[i]t is important to note that [the Chambers] have required, in order to determine the status of victims, that a causal link be found between the harm a victim applicant has suffered and the crimes that the accused has been charged with. The Appeals Chamber has never overruled this important causal link requirement and no party has questioned the validity of maintaining this”.<sup>34</sup>

43. Furthermore, the Chamber considered that “the participation of victims of crimes other than those included in the charges, could (...) significantly affect the fair and expeditious conduct of the proceedings as well as the outcome of the trial”.<sup>35</sup>

44. Pursuant to Rule 85(a), which states that a causal link must exist between the crime within the jurisdiction of the Court and the harm alleged by applicants,<sup>36</sup> it is

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<sup>32</sup> See OPCD Appeal Brief, ICC-01/04-455, para. 52

<sup>33</sup> ICC-02/05 17/24, Situation in Darfur, Sudan, 14 December 2007, *Corrigendum to Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, paras. 35 and 36.

<sup>34</sup> ICC-01/04-01/06-1119, 18 January 2008, *The Prosecutor v. Thomas Lubanga Dyilo, Decision on victims’ participation*, para. 17, Separate and Dissenting Opinion of Judge René Blattman.

<sup>35</sup> ICC-01/04-01/06-1191, para. 32, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims Participation of 18 January 2008*, 26 February 2008; *The Prosecutor v. Thomas Lubanga Dyilo*.

<sup>36</sup> See ICC-01/04-01/06-1220, Defence Appeal against Trial Chamber I’s 18 January 2008 Decision on Victims’ Participation, paras. 30 to 32, 10 March 2008. Furthermore, in accordance with the rules of

necessary that there be a link between the crimes included in the charges and the events in which the primary victim died.<sup>37</sup> The crimes which caused the death of the primary victims must fall within the jurisdiction of the Court, must be included in the warrants of arrest or must have been committed within the temporal and territorial limits of the relevant Situation.<sup>38</sup>

45. Proof of the applicant's proximity to the events themselves must therefore also be provided in order for the Chamber to determine how the applicant's personal interests are affected under article 68(3) of the Statute and whether his or her participation is appropriate at this stage of the proceedings.

46. Ad Hoc Counsel for the Defence respectfully submits, in conclusion, that applicants who allege mental harm as a result of the death of another person must suffer from psychological trauma directly related to the death of the direct victim, that they must have a close relationship with the victim, and that the death must have resulted from the commission of crimes which fall within the jurisdiction of the Court.

47. In the impugned decision of 14 March 2008, the Honourable Single Judge granted victim status to several applicants on the basis of the mental harm they suffered as a result of the death of other persons, but did not indicate precisely what type of information is required to establish the identity of primary victims and their relationship with the applicants.<sup>39</sup> In this situation, neither the Chamber nor the parties can verify whether the primary victims, who are the source of the applicant's

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interpretation in article 31 of the 1969 *Vienna Convention on the Law of Treaties*, the Statute must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.

<sup>37</sup> Decision of 10 August 2007, ICC-02/04-101 and ICC-02/04-01/05-252, para.12: "Since no harm, however serious, would be of relevance in the Court's proceedings unless it resulted from the commission of a crime within the jurisdiction of the Court".

<sup>38</sup> See ICC-01/04-101-tEN-Corr, Situation in the DRC, *Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, para. 100.

<sup>39</sup> Applicants a|0094|06, a|0095|06, a|0103|06, a|0120|06, a|0121|06 and a|0123|06.

mental harm, ever existed and whether they had a close relationship with the applicant.<sup>40</sup>

48. Applicants a/0094/06,<sup>41</sup> a/0103/06,<sup>42</sup> a/0120/06<sup>43</sup> and a/0123/06<sup>44</sup> allege that they suffered mental harm as a result of the death of persons who appear to have been their family members. None of these applicants provided proof of identity of those persons or of their relationship with them. The identity and kinship of these primary victims are not stated in the decision or in the victim participation forms. Moreover, certain applicants mention the death of one of their relatives, but that death does not appear to be the source of the mental harm suffered or they do not refer to that death in their description of the events.<sup>45</sup>

## CONCLUSIONS

49. Ad Hoc Counsel for the Defence respectfully submits that the Single Judge committed errors of fact and law by granting victim status to these applicants without requiring proof of the identity of the primary victims and of their relationship with the applicants.<sup>46</sup>

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<sup>40</sup> Granting victim status without a possibility to verify the existence of an alleged crime on the basis of which the applicant has suffered mental harm might significantly affect the fairness of the proceedings; see ICC-01/04-434 para. 20, "Prosecution's Response to OPCD's Request for leave to appeal the Single Judge's 24 December 2007 *Decision on the Applications for Participation in the Proceedings*", 11 January 2008.

<sup>41</sup> ICC-02/04-49-Conf and ICC-02/04-01/05-181-Conf.

<sup>42</sup> ICC-02/04-58-Conf and ICC-02/04-01/05-190-Conf; moreover, this applicant also does not disclose the identity of the armed group which carried out the attacks; it is not proved that the crimes are included in the charges brought against the accused.

<sup>43</sup> ICC-02/04-01/05-166-Conf and ICC-02/04-84-Conf.

<sup>44</sup> ICC-02/04-71-Conf and ICC-02/04-01/05-203-Conf.

<sup>45</sup> a/0102/06, a/0123/06

<sup>46</sup> This appeal is filed pursuant to article 82(1)(d) of the *Rome Statute* entitled "appeal against other decisions". Only appeals brought under article 81 need to specify the grounds of appeal which must be based on an error of law, an error of fact or a procedural error in accordance with regulation 64(2) of the *Regulations of the Court*. It is only an option for appeals brought under article 82 which are governed by rule 155 of the *Rules of Procedure and Evidence* and regulation 65 of the *Regulations of the Court*. Indeed, if the legislative intent was to provide for two different types of appeal and require

50. Ad Hoc Counsel for the Defence is aware of the problems related to the difficulty of providing official identification papers in certain situations in Uganda.<sup>47</sup> In his decision of 14 March 2008, the Honourable Single Judge agreed to use alternative means for proving the identity of applicants, which are not as formal as the official documents initially required, and established a list of the new documents accepted.<sup>48</sup> Ad Hoc Counsel for the Defence considers it appropriate to require the same type of document to identify the primary victims who are the source of the mental harm suffered by applicants.

**MAY IT PLEASE THIS HONOURABLE CHAMBER TO:**

- (a) GRANT this appeal;
- (b) QUASH the Decision of 14 March 2008 in respect of the following Applicants: a/0094/6, a/0103/06, a/0120/06 and a/0123/06 in the Case and Applicants a/0120/06 and a/0123/06 in the Situation;

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establishment of grounds of appeal only for article 81, it therefore means that by virtue of the rules of interpretation of article 31 of the Vienna Convention, this requirement does not apply to appeals brought under article 82. See *The Prosecutor v. Thomas Lubanga Dyilo, Judgment on Disclosure Restrictions pursuant to Rule 81(2) and (4)*, ICC-01/04-01/06-568 OA3, 13 October 2006, para. 19: "grounds of appeal for appeals brought under article 82(1)(d) can include those grounds that are listed at article 81(l)(a)", i.e. error of law, error of fact and procedural error", also see Prosecution's Response to OPCD Appeal against the 24 December 2007 *Decision on the Victims' Applications for Participation in the Proceedings*, ICC-01/04-482, 29 February 2008, para. 34 and, specifically, footnote 44.

<sup>47</sup> See Addendum to "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" of 15 February 2008.

<sup>48</sup> Decision of 14 March 2008, para. 6, such as "(i) passport, (ii) voter card, (iii) certificate of registration issued by the Electoral Commission, (iv) driving permits, (v) graduated tax ticket, (vi) "short" birth certificate or "long" birth certificate, (vii) birth notification card, (viii) certificate of amnesty, (ix) resident permit or card issued by a Local Council, (x) identification letter issued by a Local Council, (xi) letter issued by a leader of an IDP Camp, (xii) "Reunion letter" issued by the Resident District Commissioner, (xiii) identity card issued by a workplace or an educational establishment, (xiv) camp registration card and card issued by humanitarian relief agencies, such as the United Nations High Commissioner for Refugees and the World Food Programme, (xv) baptism card, (xvi) letter issued by a Rehabilitation Centre".

(c) DECLARE that when an applicant alleges mental harm as a result of the death of another person, it is necessary to provide proof of the identity of that person and of the proximity of his or her relationship with the applicant; that is, with the family *strictu sensu*: spouse, father, mother and children.

Respectfully submitted,

[signed]

Ms Michelyne C. St-Laurent,  
Ad Hoc Counsel for the Defence

Dated this 7 November 2008

At Quebec