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**International
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Court**

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THE APPEALS CHAMBER

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

SITUATION IN UGANDA

Public Document

**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**

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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Legal Representatives of Victims

Ms Paolina Massidda,
Legal Representative of Victim a/0101/06
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
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States Representatives

Amicus Curiae

REGISTRY

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Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural background

1. On 10 August 2007, the Single Judge of Pre-Trial Chamber II rendered the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, granting the status of victims allowed to participate in the situation in Uganda to applicants a/0101/06 and a/0119/06 and the status of victims allowed to participate in the case of *The Prosecutor v. Joseph Kony et al.* to applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06.¹

2. On 15 February 2008, the Single Judge of Pre-Trial Chamber II rendered the “Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06”, appointing Ms Paolina Massidda, Principal Counsel of the Office of Public Counsel for Victims (the “Office” or the “OPCV”), as legal Representative of victims a/0101/06 and a/0119/06, and Ms Adesola Adeboyejo, Counsel in the OPCV, as legal representative of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0122/06.²

3. 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/099/06, 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

¹ See the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II), No. ICC-02/04-101, and No. ICC-02/04-01/05-252, 10 August 2007.

² 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), No. ICC-02/04-117 and No. ICC-02/04-01/05-267, 15 February 2008.

and a/0124/06 the status of victims in the case *The Prosecutor v. Joseph Kony et al.* (the "Decision")³.

4. 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 participation issued on 14 March 2008" (the "Defence's Application"), seeking leave to appeal the Decision.⁴

5. 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").⁵

6. On 31 March 2008 and on 2 April 2008, the Principal Counsel of the Office requested the Single Judge to be appointed as legal representative for the victims authorised to participate in the situation and in the case by virtue of the Decision until a common legal representative is chosen by them, and to grant her leave to file a response to the Defence's Application⁶ and observations on the Prosecution's Response.⁷

³ See the "Decision on victim's application for participation a/0010/06, a/0064/06 to a/0/0070/06, 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", No. ICC-02/04-125 and No. ICC-02/04-01/05-282, 14 March 2008.

⁴ 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.

⁵ 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.

⁶ See the "Request for leave to file a response to the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la 'Decision on victims' applications for participation' rendue le 14 mars 2008'", No. ICC-02/04-130 and No. ICC-02/04-01/05-288, 31 March 2008.

⁷ See the "Request for leave to file observations to the 'Prosecution's Response to the 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-02/04-131 and No. ICC-02/04-01/05-289, 2 April 2008.

7. On 4 April 2008, the Single Judge of Pre-Trial Chamber II appointed the Principal Counsel of the Office as legal representative of the victims authorised by the Decision to participate in the situation in Uganda and in the case *The Prosecutor v. Joseph Kony et al.* and authorised her to respond to the Defence's Application and to file observations on the Prosecution's Response.⁸

8. On 11 April 2008, the Principal Counsel of the Office filed a response to the Defence's Application, as well as observations on the Prosecution's Response.⁹

9. 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 on appeal").¹⁰

10. On 18 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."¹¹

II. Preliminary issue

11. The Document in support of the appeal was filed by the *Ad Hoc* Counsel for the Defence on 18 June 2008, namely two days after the expiration of the time-limit prescribed under regulation 65(4) of the Regulations of the Court. Indeed, the

⁸ 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), No. ICC-02/04-132 and No. ICC-02/04-01/05-290, 4 April 2008.

⁹ 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, 11 April 2008.

¹⁰ 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), No. ICC-02/04-139, and No. ICC-02/04-01/05-296, 2 June 2008.

¹¹ 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-02/04-01/05-298, 16 June 2008.

Decision was notified on 3 June 2008 and therefore, the document in support of the appeal should have been filed by 16 June 2008 at 16.00 (The Hague time).

12. The Legal Representative therefore argues that the Document in support of the appeal is inadmissible and the appeal should be dismissed *in limine*.

13. However, should the Appeals Chamber consider the Document in support of the appeal admissible and therefore decide to discuss the merits of the appeal, the Legal Representative requests the Appeals Chamber to authorise the victims she represents to participate in the appeal lodged by the *Ad Hoc* Counsel for the Defence as their personal interests are affected by the Issue on appeal.

14. Should the Appeals Chamber decide to hear submissions on the admissibility of the Document in support of the appeal, the present request shall be read as also requesting leave to participate in discussions on the preliminary issue related to the admissibility of the appeal, since the interests of the victims would be directly affected by this determination.

III. Request for participation in 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

15. On 13 February 2008, the Appeals Chamber issued the "Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representative's request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the Prosecutor"¹², in which it indicated that victims seeking to participate in an appeal lodged under article 82(1)(d) of the Rome

¹² See the "Decision of the Appeals Chamber on the OPCV's request for clarification and the legal representative's request for extension of time and Order of the Appeals Chamber on the date of filing of applications for participation and on the time of the filing of the response thereto by the OPCD and the Prosecutor" (Appeals Chamber), No. ICC-01/04-450, 13 February 2008.

Statute, may do so through an application for participation and a statement specifying how their personal interests would be affected by the said appeal, as well as explaining why the presentation of their views and concerns would be appropriate at that stage. According to the said decision, victims also need to show that such participation would not be inconsistent with or prejudicial to the rights of the Defence.¹³

16. The Legal Representative further notes that the Appeals Chamber, in its “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’”¹⁴ held that, pursuant to article 68(3) of the Rome Statute, “[p]articipation 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.”¹⁵ The Appeals Chamber further set out that it will examine victims’ application for participation in interlocutory appeals against four criteria, namely, “(i) whether the individuals seeking participation are victims in the case [or in the situation¹⁶] (ii) whether they have personal interests which are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁷

¹³ *Ibid.*, p. 3.

¹⁴ See the “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’” (Appeals Chamber), No. ICC-01/04-01/06-1335, 16 May 2008.

¹⁵ *Ibid.*, par. 35.

¹⁶ See the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against the Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against the Pre-Trial Chamber I’s Decision of 6 December 2007” (Appeals Chamber), No. ICC-02/05-138, 18 June 2008, par. 53.

¹⁷ See the “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’”, *supra* note 14, par. 36.

17. The Legal Representative submits that the issue on which leave to appeal has been granted affects the personal interests of victims a/0101/06 and a/0119/06.

18. Pursuant to the previous decisions of the Appeals Chamber on the participation of victims in interlocutory appeals, and in particular to the Appeals Chamber's decisions of 16 May 2008¹⁸ and 18 June 2008¹⁹, the Legal Representative analyses consecutively the criteria established for allowing victims to participate in an interlocutory appeal: (i) whether the individuals seeking participation are victims in the situation; (ii) whether their personal interests are affected by the Issue on appeal; (iii) whether their participation is appropriate; and (iv) whether the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

(i) The individuals seeking participation are victims in the situation

19. The Legal Representative submits that the criterion set out by the Appeals Chamber in this respect has been fully met by the victims as they have already been granted the status of victim by the Single Judge of the Pre-Trial Chamber II in the situation in Uganda.²⁰

20. Pursuant to the Appeals Chamber's Decisions of 16 May 2008 and 18 June 2008, with regards to the individuals who have already been granted the status of victims by a relevant Chamber, the Appeals Chamber decided it "*would not enquire*

¹⁸ See the "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'", *supra* note 14.

¹⁹ See the "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against the Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against the Pre-Trial Chamber I's Decision of 6 December 2007", *supra* note 16.

²⁰ See the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", *supra* note 1.

into their victim status but will proceed to the next stage of its enquiry, namely, the question of whether their personal interests are affected by the interlocutory appeal.”²¹

21. The Legal Representative therefore turns directly to the demonstration regarding the other criteria established for allowing victims to participate in an interlocutory appeal.

(ii) The personal interests of the victims are affected by the Issue on appeal

22. The Legal Representative submits that the issue canvassed by the Defence impacts on the application process for participation of victims. Indeed, depending on the decision of the Appeals Chamber, this process might be affected. In this regard, the Legal Representative notes that the Appeals Chamber already established that “[a]ny change to the application process will affect [the victims] personally.”²² Moreover, the Appeals Chamber has even recognised that victims whose interests may not be directly affected by an issue on appeal could suffer adversely from the determination of the Appeals Chamber.²³ Therefore, the Legal Representative submits that since the Issue on appeal directly concern the victims, they should be authorised to express their views and concerns on the matter.

²¹ See the “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’”, *supra* note 14, par. 37; and the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against the Pre-Trial Chamber I’s Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against the Pre-Trial Chamber I’s Decision of 6 December 2007”, *supra* note 16, par. 53.

²² See the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 3 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 6 December 2007” (Appeals Chamber), No. ICC-02/05-138, 18 June 2008, par. 57-58.

²³ See the “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’”, *supra* note 14, par. 43.

23. Furthermore, the Legal Representative argues that the resolution of the Issue on appeal might have a great impact on the burden placed upon victims and it is therefore important for them to present their views and concerns on the matter.

24. The Legal Representative also submits that, as recognised by the Appeals Chamber in its Decision dated 16 May 2008, the Issue on appeal necessary affects directly the personal interests of the victims since the criteria at stake was applied by the Single Judge of Pre-Trial Chamber II upon determination of their status.²⁴

25. Finally, the Legal Representative considers that, in accordance with the Court's previous decisions, "*the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered*".²⁵ Moreover, this is settled case law before Pre-Trial Chamber I, which has, in turn, been adopted by Pre-Trial Chamber II, which established identical principles in the situation in Uganda.²⁶ It follows that the personal interests of victims are affected in general in all proceedings in connection with the investigation into a situation. Thus, the personal interests of the victims are also affected by any potential interlocutory appeal, since it would result from an issue raised in a proceeding in which the victims were authorised to participate in the first instance.²⁷

²⁴ See the "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'", *supra* note 14, par. 44.

²⁵ See the "Decision on the Applications for participation in the proceedings of VPRS 1, VPPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (Pre-Trial Chamber I), No. ICC-01/04-101-tEN, 17 January 2006, para. 63.

²⁶ *Ibid.* See also the "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" (Pre-Trial Chamber II), No. ICC-02/04-101, 10 August 2007, paras. 7-10 and 84. Finally, see the "Decision on 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" (Pre-Trial Chamber I), No. ICC-02/05-111-Corr., 14 December 2007, para. 1.

²⁷ The Legal representative recalls the Dissenting Opinion of Judge Sang-Hyun Song Regarding the Participation of Victims appended to the 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" (Appeals Chamber), No. ICC-01/04-01/06-824, 13 February 2007, in particular, paras. 3, 4, 6, and 7. By way of example, see para. 3, *ibid.*: "*In my view, no application by the victims is necessary to file a response to the document in support of the appeal in appeals proceedings*

(iii) The participation of the victims in the appeal is appropriate

26. The participation of the victims is appropriate as they are the persons primarily affected by the outcome of the proceedings in appeal. Moreover, this participation precisely fits the requirements of a fair trial, insofar as it would enable the interests of the victims to be taken into account objectively and in depth.

27. In this respect, the Legal Representative recalls that the Appeals Chamber has recognised that this criterion is met if the “*subject-matter*” of an issue on appeal leads to “*the desirability for the views of victims in appeals [...] to be heard*”.²⁸ The Legal Representative argues that the victims are best positioned to give in depth 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.

28. Furthermore, the Legal Representative recalls the possibility for the *Ad Hoc* Counsel to file a response to “*any document filed by any participant in the case*” pursuant to regulation 24(1) of the Regulations of the Court. Hence the appropriateness of the participation of the victims in the present appeal is guaranteed through the restrictions imposed upon it.

(iv) The manner of participation of the victims is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial

29. Although the Legal Representative concurs that the protection of the rights of the Defence is a fundamental principle without which the integrity of the proceedings cannot be safeguarded, they also note that the participation of victims in proceedings before the Court is not, in itself, liable to undermine the rights of the Defence.

pursuant to article 82(1)(b) of the Statute, provided that the victims in question have participated in the proceedings that gave rise to the appeal.”

²⁸ *Ibid.*, par. 47.

30. Indeed, as put forward by the Single Judge of Pre-Trial Chamber I, *“the fact that one or several natural or legal persons may be entitled to the procedural status of victim is not, per se, prejudicial to the Defence”*.²⁹ Moreover, Judge Blattmann emphasised that: *“both the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims’ participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding.”*³⁰

31. In this respect the Legal Representative notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly on 29 November 1985 spells out the principle of victims’ access to justice and their right to fair treatment.³¹

32. Moreover, the Legal Representative submits that the participation of victims is an integral part of the concept of a fair and impartial trial, since it is expressly embodied in the founding texts of the Court and has been so interpreted by the Appeals Chamber. This right granted to victims is consistent with international human rights law and is recognised in many national systems. As a consequence, the *equilibrium* within criminal proceedings would not be affected by the participation of the victims but will rather constitute one of the contributory factors in balancing it.

33. As the Appeals Chamber has held, the views and concerns of the victims should be limited *“solely to the issues raised on appeal”* and observations of the victims must also be *“specifically relevant to the issues arising in the appeal and to the extent that*

²⁹ See the “Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)e of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (Pre-Trial Chamber I), No ICC-02/05-110, 3 December 2007, par. 4.

³⁰ See the “Separate and Dissenting Opinion of Judge René Blattmann” appended to the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 26, p. 58.

³¹ See the United Nations General Assembly resolution 40/34 of 29 November 1985, available at: <http://www2.ohchr.org/english/law/victims.htm>, principles 4 to 7.

their personal interests are affected by the proceedings."³² Since the views and concerns of the victims are directly relevant to the Issue on appeal, their participation will not prejudice the interests of the Defence.

34. In addition, the participation of the victims would neither be inconsistent with nor prejudicial to the rights of the Defence since, under regulation 24(1) of the Regulations of the Court, the Defence may file a response to any document that would be filed by the victims as a result.³³

FOR THE FOREGOING REASONS,


The Legal Representative submits that the persons seeking participation in the interlocutory appeal are victims already authorised to participate in the situation; their personal interests are affected by the Issue on appeal; the presentation of their views and concerns appears appropriate at this stage of the proceedings; and their participation is neither inconsistent with nor prejudicial to the rights of the Defence.

Accordingly, the Legal Representative respectfully requests the Appeals Chamber, should the Document in support of the appeal be recognised as admissible, to allow victims a/0101/06 and a/0119/06 to participate in the interlocutory appeal lodged by

³² See the "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'", *supra* note 14, par. 50.

³³ See *supra*, par. 28.

the *Ad Hoc* Counsel for the Defence against the Decision issued by the Single Judge of the Pre-Trial Chamber II on 14 March 2008, by way of submitting written arguments on the Issue on appeal.



Paolina Massidda
Legal Representative of victims
a/0101/06 and a/0119/06

Dated this 20th day of June 2008

At The Hague

The Netherlands