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Court

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No.: **ICC-02/04 OA**
and ICC-02/04-01/05 OA2
Date: **23 February 2009**

THE APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO, DOMINIC ONGWEN

Public document

Judgment

on the appeals of the Defence against the decisions 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" of Pre-Trial Chamber II

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

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

Legal Representatives of Victims
Ms Adesola Adeboyejo
Ms Paolina Massida

REGISTRY

Registrar
Ms Silvana Arbia

The Appeals Chamber of the International Criminal Court,

In the appeals of the Defence against the decisions of Pre-Trial Chamber II of 14 March 2008 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-02/04-124-Conf-Exp and ICC-02/04-01/05-281-Conf-Exp),

After deliberation,

By majority, Judge Pikis dissenting,

Delivers the following

JUDGMENT

The decisions recognising applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 as victims, as contained in the decisions 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" are confirmed. Although the Pre-Trial Chamber erred when finding that there was a sufficient factual and evidential basis to establish that the four applicants had suffered emotional harm as the result of the loss of a family member, this error was inconsequential for the recognition of the applicants as victims as they had, in any event, suffered other forms of harm that rendered them victims within the meaning of rule 85 (a) of the Rules of Procedure and Evidence. The appeals are dismissed.

The reasons of the majority, namely Judges Kirsch, Song, Kourula and Nsereko follow hereafter and are signed by Judge Song.

REASONS

I. KEY FINDINGS

1. It is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. When a Pre-Trial Chamber is considering whether an applicant fulfils the criteria of rule 85 (a) of the Rules of Procedure and Evidence because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and of his or her relationship with the applicant. The Chamber must be satisfied that the family member existed and that he or she had the requisite relationship with the applicant.

2. What evidence may be sufficient to establish the elements of rule 85 (a) of the Rules of Procedure and Evidence in this context cannot be determined in the abstract, but must be assessed on a case-by-case basis taking into account all relevant circumstances.

II. PROCEDURAL HISTORY

3. On 14 March 2008, 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, 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" in respect of the situation in Uganda (ICC-02/04-124-Conf-Exp). An identical decision was filed in respect of the case of *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (ICC-02/04-01/04-281-Conf-Exp). These two decisions are the object of the present appeals (hereinafter: "Impugned Decisions"). Public redacted versions of the Impugned Decisions were filed under the document numbers ICC-02/04-125 and ICC-02/04-01/05-282 respectively. Unless otherwise noted, in the present judgments reference is made to the public redacted versions of the Impugned Decisions.

4. On 25 March 2008, Ad hoc Counsel for the Defence (hereinafter: "Defence") submitted the "Defence Application for Leave to Appeal the *Decision on victims applications for participation* issued on 14 March 2008" (ICC-02/04-128-tENG and

ICC-02/04-01/05-285-tENG; hereinafter: "Applications for Leave to Appeal"), requesting leave to appeal in respect of the following two issues:

> i. Can victims be granted a general right to participate or should it be considered that such participation is only possible if it is established that specific personal interests of the applicant are affected by the proceedings and that such participation is appropriate at the stage of the proceedings?
>
> ii. 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 of the applicant with the person be required? [Applications for Leave to Appeal, paragraph 18]

5. On 2 June 2008, Pre-Trial Chamber II issued the "Decision on the Defence Application for Leave to Appeal the 14 March 2008 Decision on Victims' Applications for Participation" (ICC-02/04-139 and ICC-02/04-01/05-296; hereinafter: "Decisions Granting Leave to Appeal"), granting leave to appeal only in respect of the second issue put forward in the Applications for Leave to Appeal (Decisions Granting Leave to Appeal, page 9).

6. The Defence filed the "Defence Appeal of Pre-Trial Chamber II's Decision of 14 March 2008 on Victim Participation" (ICC-02/04-142 and ICC-02/04-01/05-298-tENG; hereinafter: "Documents in Support of the Appeals") dated 16 June 2008; the Appeals Chamber extended the time limit for their filing retroactively by decision of 22 July 2008 (ICC-02/04-148 and ICC-02/04-01/05-306).

7. On 30 June 2008, the Prosecutor filed the "Prosecution Response to Defence Appeal of Pre-Trial Chamber II's Decision of 14 March 2008 on Victim Participation" (ICC-02/04-147 and ICC-02/04-01/05-304; hereinafter: "Responses to the Documents in Support of the Appeals").

8. After having received applications by victims for participation in the proceedings, the Appeals Chamber rendered on 27 October 2008 the "Decision on the participation of victims in the appeal" (ICC-02/04-164 and ICC-02/04-01/05-324), granting victim a/0101/06 the right to participate in respect of the appeal 02/04 OA and victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 the right to participate in respect of the appeal 02/04-01/05 OA 2.

9. The legal representative of victim a/0101/06 submitted the "Observations filed by the Legal Representative of victim a/0101/06 on the interlocutory appeal lodged by the Ad hoc Counsel for the Defence against the Decision of the Single Judge of the Pre-Trial Chamber II dated 14 March 2008" on 3 November 2008 (ICC-02/04-166). The legal representative of victims a/0090/06, a/0098/06, a/0118/06 and a/0122/06 filed the "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 the Pre-Trial Chamber II dated 14 March 2008" on the same date (ICC-02/04-01/05-331). The substance of the two filings is identical (hereinafter: "Observations of Victims").

10. The Defence filed the "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'" dated 7 November 2008 (ICC-02/04-167-tENG and ICC-02/04-01/05-338). The substance of the two filings is identical (hereinafter: "Defence Responses to Victims' Observations").

11. The Prosecutor filed the "Prosecution Response to Victim's Observations on the Defence Appeal against Pre-Trial Chamber II's 14 March 2008 Decision on Victim Participation" (ICC-02/04-168) and the "Prosecution Response to Victims' Observations on the Defence Appeal against Pre-Trial Chamber II's 14 March 2008 Decision on Victim Participation" (ICC-02/04-01/05-340) on 10 November 2008. The substance of the two filings is identical (hereinafter: "Prosecutor's Responses to Victims' Observations").

III. JOINDER OF THE PROCEEDINGS

12. The present appeals are directed against two decisions of the Pre-Trial Chamber of 14 March 2008: the decision on participation of victims in relation to the situation in Uganda and the decision on participation of victims in relation to the case of *Joseph Kony et al.* The Appeals Chamber has decided to render a single judgment on the two appeals because the Impugned Decisions are identical. Although the Pre-Trial Chamber recognised applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 as

victims on the basis of emotional harm suffered as the result of the loss of family members only in respect of the case, the Appeals Chamber notes that a situation comprises all cases that have arisen within it. Thus, the issue on appeal is relevant both for participation in proceedings related to the case of *Joseph Kony et al.* and in proceedings related to the situation. In such circumstances, it is appropriate to render a joint judgment.

IV. MERITS

A. Context and relevant part of the Impugned Decisions

13. In the Impugned Decisions, the Pre-Trial Chamber disposed of several applications for participation in proceedings in relation to the situation in Uganda and the case of *Joseph Kony et al.* The Pre-Trial Chamber granted applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 the status of victim in relation to the case *inter alia* on the basis of emotional harm suffered as the result of the loss of family members in the course of events appearing to constitute crimes under the jurisdiction of the Court; in addition to the emotional harm suffered as the result of the loss of a family member, the Pre-Trial Chamber found in relation to all four applicants that they had suffered harm for other reasons (see Impugned Decisions, paragraphs 19 and 20, 34 and 35, 51 and 52, and 65 and 66, respectively).

14. The approach of the Pre-Trial Chamber in respect of the factual assessment of the applications for participation may be summarised as follows: in its "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" dated 10 August 2007 and filed on 13 August 2007 (ICC-02/04-100-Conf-Exp; ICC-02/04-01/05-251-Conf-Exp; herein-after: "Decisions dated 10 August 2007"; public redacted versions of these decisions were filed under ICC-02/04-101 and ICC-02/04-01/05-252) the Pre-Trial Chamber had explained that rule 85 (a) of the Rules of Procedure and Evidence – the provision containing the definition of victims – comprised four elements, and that the Chamber therefore would assess applications:

> [B]y analysing (i) whether the identity of the applicant as a natural person appears duly established; (ii) whether the events described by each applicant constitute a crime within the jurisdiction of the Court; (iii) whether the applicant claims to have suffered harm; and (iv) most crucially, whether such harm

> appears to have arisen 'as a result' of the event constituting a crime within the jurisdiction of the Court. [Decisions dated 10 August 2007, paragraph 12.]

15. The Pre-Trial Chamber noted that the Statute neither provides for a particular method of examination of applications nor for an applicable standard of proof, and concluded that "in the absence of any such rules, the Chamber has a broad discretion in assessing the soundness of a given statement or other piece of evidence" (Decisions dated 10 August 2007, paragraph 13). The Pre-Trial Chamber explained furthermore that:

> Such an assessment has to comply with the general principle of law that the burden of proof of elements supporting a claim lies on the party making the claim. Furthermore, as pointed out by Pre-Trial Chamber I, the purpose of a decision under rule 89 of the Rules is not *"to make a definitive determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case"*. [Decisions dated 10 August 2007, paragraph 13, footnote omitted.]

16. At paragraph 15 of the Decisions dated 10 August 2007 the Pre-Trial Chamber stated that:

> Accordingly, all the factors identified as relevant for the definition of victim provided by rule 85 of the Rules are to be proved to a level which might be considered satisfactory for the limited purposes of that rule. Furthermore, it is to be reasonably expected that victims will not necessarily or always be in a position to fully substantiate their claim. It is also accepted as a general principle of law that "indirect proof" (i.e., inferences of fact and circumstantial evidence) is admissible if it can be shown that the party bearing the burden of proof is hampered by objective obstacles from gathering direct proof of a relevant element supporting his or her claim; the more so when such indirect evidence appears to be based "on a series of facts linked together and leading logically to a single conclusion". Similarly to the method followed by Pre-Trial Chamber I, the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber. [Footnote omitted.]

17. In respect of the first element of rule 85 (a) of the Rules of Procedure and Evidence, the identity of the applicant, the Pre-Trial Chamber explained at paragraph 16 of the Decisions dated 10 August 2007:

> The first area in which the need for selecting an appropriate standard of proof arises is the determination as to whether the existence and the identity of an applicant have been satisfactorily established. On the one hand, the Single Judge would point out that in a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an ongoing conflict and

> communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties. On the other hand, 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 inappropriate not to require that some kind of proof meeting a few basic requirements be submitted. Accordingly, the Single Judge takes the view that, in principle, the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the holder.

18. The Pre-Trial Chamber applied the same approach in the Impugned Decisions (see Impugned Decisions, paragraph 8), although it further broadened the range of documents it would accept to establish the identity of an applicant (Impugned Decisions, paragraph 6).

B. Submissions of the Defence

19. In the submission of the Defence, the Pre-Trial Chamber erred in fact and in law by recognising applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 as victims on the basis of emotional harm suffered as the result of the loss of a family member without requiring proof of the identities of their respective family members and of their relationship with the applicants (see Documents in Support of the Appeals, paragraphs 42 and 43).

20. The Defence submits that if an applicant alleges that he or she has suffered emotional harm as the result of the loss of a family member, the applicant should be required to provide documentary evidence establishing the identity of the family member as well as his or her relationship with the applicant (Documents in Support of the Appeals, paragraphs 26 to 29). In the view of the Defence, it was "unjust and paradoxical" that the Pre-Trial Chamber did not require the same proof regarding the identities of the family members and their relationship with the applicants as it did in respect of the identities of the applicants (Documents in Support of the Appeals, paragraph 31). While the Defence acknowledges that it may be difficult for applicants to provide the necessary documentary evidence, it recalls that the Pre-Trial Chamber had decided to accept alternative means for proving the identity of applicants which are less formal than official documents, and that similar means of proof should also be

required in respect of the family members (Documents in Support of the Appeals, paragraph 47).

21. Only the loss of members of the immediate family (spouse, parents and children of the applicant) should be recognised as resulting in emotional harm (Documents in Support of the Appeals, paragraphs 33). Furthermore, the Defence is of the view that emotional harm as the result of the loss of a family member should only be considered if the family member is deceased or has given his or her consent to being represented by the applicant. If it were otherwise, applicants could claim victim status even though they have not been authorised to act on behalf of the "direct victim" by re-qualifying the suffering of the "direct victim" as their own suffering (Documents in Support of the Appeals, paragraphs 34 and 35).

22. It is furthermore submitted that while rule 85 (a) of the Rules of Procedure and Evidence does not explicitly exclude that "indirect" victims be granted victim status based on "mental harm", this notion should be interpreted restrictively, in line with the jurisprudence of other courts, and in order not to prejudice the rights of the defence (Documents in Support of the Appeals, paragraphs 22 to 25).

23. The Defence underlines that rule 85 (a) of the Rules of Procedure and Evidence requires a causal link between the crimes charged and the events in the course of which the "direct victims" suffered harm (Documents in Support of the Appeals, paragraph 38). In addition, an applicant should be required to provide evidence establishing a close link between these events and him or her (Documents in Support of the Appeals, paragraph 39).

24. As to the present case, the Defence recalls that the applications for participation as well as the Impugned Decisions were redacted in respect of the identities of the family members and their relationship with the applicants, making it impossible for the Defence to establish whether the family members of the applicants have been identified and whether their relationship with the applicants has been properly established (Documents in Support of the Appeals, paragraph 46).

C. Submissions of the Prosecutor

25. The Prosecutor submits that the issue on appeal is narrowly defined and that not all of the arguments of the Defence are covered by the issue (Responses to the Documents in Support of the Appeals, paragraph 14). In his view, *inter alia* the questions of whether rule 85 of the Rules of Procedure and Evidence provides for "indirect victims", whether the "direct victim" must be deceased, whether there must be a causal link, whether the applicant must be close to the event in the course of which the "direct victim" suffered harm, and whether only the spouse, parents or children may be recognised as family members are not covered by the issue and therefore should be rejected (Responses to the Documents in Support of the Appeals, footnote 12 and paragraph 14).

26. To the extent that it is argued by the Defence that the Pre-Trial Chamber erred by acknowledging that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 are victims in the meaning of rule 85 (a) of the Rules of Procedure and Evidence on the basis of emotional harm suffered as the result of the loss of a family member without requiring proof of the identities of the family members and of their relationship with the applicants, the Prosecutor does not oppose the position that some evidence must be adduced (Responses to the Documents in Support of the Appeals, paragraphs 17 and 18). The Prosecutor submits, however, that this requirement must be interpreted in a "non-technical manner" and on a case-by-case basis (Responses to the Documents in Support of the Appeals, paragraph 18).

27. To the extent that the Defence alleges that the Pre-Trial Chamber made an error of fact, the Prosecutor submits that the Defence has failed to advance any argument supporting such an allegation. For that reason, the Prosecutor submits that the factual findings of the Pre-Trial Chamber should be left undisturbed and opposes the appeals in this respect (Responses to the Documents in Support of the Appeals, paragraphs 19 to 21).

D. Submissions of the participating victims and responses thereto

28. The victims participating in the present proceedings agree with the submission of the Prosecutor that not all questions raised by the Defence are covered by the issue in respect of which the Pre-Trial Chamber granted leave to appeal (Observations of Victims, paragraph 17). The victims also agree with the Prosecutor that the Defence failed to identify any error of fact (Observations of Victims, paragraph 20).

29. The victims agree with the submissions of the Defence to the extent that some level of proof of identity of the family member and of his or her relationship with the applicant may be required if an applicant seeks to be recognised as a victim on the basis of emotional harm suffered as the result of the loss of that family member (Observations of Victims, paragraph 22). They refer the Appeals Chamber to the practice of other international bodies in this respect (Observations of Victims, paragraphs 23 to 25). The victims underline, however, that such an evidentiary requirement should not be interpreted in a way that would be prejudicial to the applicants and would *de facto* prevent their participation in the proceedings (Observations of Victims, paragraph 22). In particular, the victims refer to the practical realities in Northern Uganda, which may make the provision of certain documentary proof impossible (Observations of Victims, paragraph 27), a fact that has already been recognised in a report of the Victims Participation and Reparations Section of the Registry of this Court (Observations of Victims, paragraph 28). The victims argue furthermore that the legal instruments of the Court do not require "indirect victims to prove the psychological effect of the harm occasioned by the death of a primary victim" and therefore refute the "threshold proposed by the Defence" in this respect (Observations of Victims, paragraph 26).

30. In the Prosecutor's Responses to Victims' Observations, the Prosecutor underlines that neither he nor the victims challenge the position of the Defence that some proof may have to be submitted to establish the identities of family members and their relationship with the applicants (Prosecutor's Responses to Victims' Observations, paragraph 4). He states furthermore that he agrees with the submission of the victims that this requirement must be applied with flexibility and on a case-by-case basis, taking into account the factual situation in Northern Uganda (Prosecutor's

Responses to Victims' Observations, paragraph 5). In the submission of the Prosecutor, the present appeals only concern the question of whether some proof is required, not what kind of proof or the degree of proof (Prosecutor's Responses to Victims' Observations, paragraph 6).

31. In the Defence Responses to Victims' Observations the Defence does not respond directly to the submissions of the victims, but merely repeats arguments previously made in the Documents in Support of the Appeals.

E. Determination by the Appeals Chamber

32. The Appeals Chamber notes that the present appeals concern only a narrow issue, namely whether the Pre-Trial Chamber erred in not requiring the submission of evidence establishing the identities of family members and their relationship with the applicants when finding that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 suffered emotional harm as the result of the loss of members of their families. The Appeals Chamber sees no need to respond to arguments of the Defence that go beyond this issue. Notably, the issue on appeal does not encompass the question of whether rule 85 (a) of the Rules of Procedure and Evidence potentially includes "indirect victims"[1], nor does it encompass the questions of whether emotional harm may only be based on the loss of a member of the immediate family, whether the family member must be deceased, whether the notion of emotional harm should be interpreted restrictively, or whether other elements of rule 85 (a) of the Rules of Procedure and Evidence have to be established by the submission of certain evidence.

33. The Appeals Chamber notes furthermore that the Pre-Trial Chamber did not grant leave to appeal in respect of the question of whether victims may be granted general participatory rights in relation to the Prosecutor's investigations (see above, paragraphs 4 and 5). The Appeals Chamber recalls its judgments of 19 December 2008[2] and of 2 February 2009.[3] The present judgment, which addresses the narrow

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[1] On this question see "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", 11 July 2008, ICC-01/04-01/06-1432, paragraph 32; hereinafter: "Judgment of 11 July 2008".

[2] "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the

issue recapitulated at paragraph 32 above, is not meant to alter those judgments in any respect.

34. As to the issue on appeal, the Appeals Chamber considers it useful, first of all, to clarify the usage of terms. In the Impugned Decisions, the Pre-Trial Chamber explained that applicants a/0094/06, a/0103/06 and a/0120/06 were recognised as victims *inter alia* because of the "emotional harm due to the loss" of a family member (Impugned Decisions, paragraphs 19, 34 and 51). In relation to applicant a/0123/06 the Pre-Trial Chamber explained that the "[p]sychological trauma alleged by Applicant a/0123/06 might reasonably be the result ... of the loss of his [family member] during the events. Accordingly, they appear to constitute emotional harm within the meaning of rule 85 of the Rules" (Impugned Decisions, paragraph 65). In the French original of the Applications for Leave to Appeal, the Defence uses the term "préjudice moral" for the term "emotional harm", which in the English translation of the Applications for Leave to Appeal is translated as "mental harm" (see Applications for Leave to Appeal, paragraph 18). In the Decisions Granting Leave to Appeal, the Pre-Trial Chamber quotes the relevant passage of the Applications for Leave to Appeal, using the term "mental harm", and the Prosecutor and the participating Victims also refer to "mental harm" in their submissions (see, for example, Responses to the Documents in Support of the Appeal, paragraph 18; Observations of the Victims, paragraph 19). In its Judgment of 11 July 2008 the Appeals Chamber explained at paragraph 32 that "[m]aterial, physical, and psychological harm are all forms of harm that fall within [rule 85 (a) of the Rules of Procedure and Evidence] if they are suffered personally by the victim." For the purposes of the present appeals, the Appeals Chamber understands "emotional harm" to refer to a form of psychological harm; it understands the terms "préjudice moral" and "mental harm" to have the same meaning. For that reason, and having noted the definition of victims provided in Principle 8 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* of 16

OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007" (ICC-01/04-556)

[3] "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007" (02/05-177)

December 2005[4], the Appeals Chamber will use the term "emotional harm" in the present judgment.

35. Turning to the central point of the appeals, the Appeals Chamber notes that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 did not provide any documentary or other evidence in addition to their applications that would have substantiated the identities of their respective family members or their relationship with the applicants. The applications themselves provided little information regarding these elements.[5] None of the applicants indicated the date or place of birth of his or her family members, and in two instances, the names of the family members of the applicants are not mentioned at all in the applications. In one instance, it is unclear what the applicant alleges to have happened to the family member.

36. The Appeals Chamber observes that it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law. When a Pre-Trial Chamber is considering whether an applicant fulfils the criteria of rule 85 (a) of the Rules of Procedure and Evidence because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and of his or her relationship with the applicant. The Chamber must be satisfied that the family member existed and that he or she had the requisite relationship with the applicant. In light of these principles and the factual and evidential basis in the present case, as summarised at paragraph 35 above, the Pre-Trial Chamber erred in arriving at its finding that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 had suffered emotional harm as the result of the loss of a family member.

37. The Appeals Chamber is not persuaded by the argument of the Prosecutor that the Defence failed to identify specific errors regarding the factual basis of the Impugned Decisions. The Appeals Chamber notes that the unredacted versions of the

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[4] See United Nations General Assembly Resolution 60/147, UN Doc. A/RES/60/147.
[5] See ICC-02/04-32-Conf-Exp-Anx14, ICC-02/04-32-Conf-Exp-Anx23, ICC-02/04-33-Conf-Exp-Anx10, ICC-02/04-33-Conf-Exp-Anx13.

applications of applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 and of the Impugned Decisions were unavailable to the Defence. For that reason, it is understandable that the Documents in Support of the Appeals contain only the general submission that the Pre-Trial Chamber acknowledged the status of victim on an insufficient evidentiary basis.

38. Having stated as above, the Appeals Chamber nonetheless considers that the Pre-Trial Chamber is in the best position to determine the nature and quantum of evidence that it deems necessary and adequate at that stage of the proceedings to establish the elements of rule 85 (a) of the Rules of Procedure and Evidence. What evidence (be it documentary or otherwise) may be sufficient cannot be determined in the abstract, but must be assessed on a case-by-case basis and taking into account all relevant circumstances, including the context in which this Court operates. For this reason, the Appeals Chamber is not persuaded by the argument of the Defence that the Pre-Trial Chamber erred because it did not stipulate the same evidentiary requirements in respect of the identities of the family members and their relationship with the applicants as in respect of the identities of the applicants themselves. It is noteworthy that the identity of an applicant on the one hand and the identities of his or her family members and their relationship with the applicant on the other hand relate to different elements of rule 85 (a) of the Rules of Procedure and Evidence. The former relates to the first element of rule 85 (a) of the Rules of Procedure and Evidence identified by the Pre-Trial Chamber, namely whether the identity of the applicant as a natural person appears duly established (see paragraph 14 above); the latter relate to the other three elements of rule 85 (a) of the Rules of Procedure and Evidence, namely whether a crime under the jurisdiction of the Court was committed, whether the applicant suffered harm, and whether the harm was the result of the events constituting a crime under the jurisdiction of the Court. It is not *per se* erroneous for a Pre-Trial Chamber to require specific evidence in respect of one of the elements of rule 85 (a) of the Rules of Procedure and Evidence, but not to require the same specific evidence in respect of the other elements of that rule, in certain circumstances. Furthermore, the Appeals Chamber is aware that, in the context in which this Court operates, it may be more difficult for an applicant to obtain documentary evidence in relation to the identity of another person than in relation to his or her own identity.

V. APPROPRIATE RELIEF

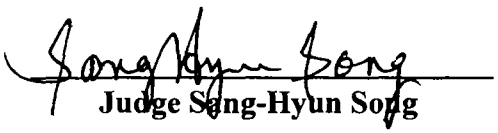
39. On an appeal pursuant to article 82 (1) (d) of the Statute the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence).

40. The Defence requests the Appeals Chamber *inter alia* to reverse the Impugned Decisions in respect of applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 (Documents in Support of the Appeals, paragraph 48). In the Impugned Decisions the Pre-Trial Chamber decided that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 are victims pursuant to rule 85 (a) of the Rules of Procedure and Evidence in relation to the case of *Kony et al.* (see Impugned Decisions, p. 71, penultimate paragraph). However, this decision was not based solely on the finding of emotional harm that the four applicants had suffered, but also on findings that they had suffered other forms of harm: in relation to applicants a/0094/06 and a/0103/06 the Pre-Trial Chamber found that the applicants had suffered physical harm as well as economic loss as a result of the same set of events that led to the emotional harm (Impugned Decisions, paragraphs 19 and 34); in relation to applicant a/0120/06, the Pre-Trial Chamber found that the applicant had also suffered economic loss (Impugned Decisions, paragraph 51); and in relation to applicant a/0123/06, the Pre-Trial Chamber concluded that the applicant had suffered economic loss as well as emotional harm resulting from "witnessing events of an exceedingly violent and shocking nature" in addition to the emotional harm suffered as the result of the loss of a family member (Impugned Decisions, paragraph 65). These findings of harm have not been challenged on appeal and were unrelated to the error that has been identified in the preceding section of this judgment. Thus, the error of the Pre-Trial Chamber was inconsequential and did not materially affect the correctness of the overall finding of the Pre-Trial Chamber that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 are victims under rule 85 (a) of the Rules of Procedure and Evidence.

41. It is therefore appropriate to confirm the Impugned Decisions even though the Pre-Trial Chamber erred in arriving at its finding that applicants a/0094/06, a/0103/06, a/0120/06 and a/0123/06 had suffered emotional harm as the result of the loss of a family member (see paragraph 35 above). Should, however, the question of whether these applicants suffered emotional harm as the result of the loss of a family

member become relevant in any future proceedings, the Chamber then seized of the matter would have to reassess whether or not there is sufficient evidence to support such a conclusion.

Judge Pikis appends a dissenting opinion to this judgment.



Judge Sang-Hyun Song

Dated this 23rd day of February 2009

At The Hague, The Netherlands

Dissenting opinion of Judge Georghios M. Pikis

1. A number of persons claiming to be victims of crimes within the jurisdiction of the Court applied to Pre-Trial Chamber II (hereinafter "Pre-Trial Chamber") seeking participation in the Prosecutor's investigations in the Ugandan situation and a specific case, *Prosecutor v. Kony a.o.*, investigated within the same context.

2. The Pre-Trial Chamber (its jurisdiction in the matter being exercised by a Single Judge) addressed a number of issues raised by the applications resulting in two identical decisions given on 14 March 2008.[6] Similar decisions affecting a number of other persons claiming to be victims were earlier given on 10 August 2007.[7]

3. Ad Hoc Counsel for the Defence raised, pursuant to article 82 (1) (d) of the Statute, two issues,[8] one of which was certified as a proper subject of appeal. The issue arose from failure or omission of the Pre-Trial Chamber to answer questions raised in the proceedings that remained unanswered by the decisions given. The question certified as a subject for appeal is 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?[9]

4. The issue is clouded with ambiguity. Is the question raised designed to elicit whether someone may qualify as a victim owing to hurt or injury caused to an unidentified or anonymous person? From whom or by reference to what is specification of the identity of the third person required? Does the issue relate to the foundation (the necessary particulars) of an application or motion for recognition of a

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[6] See *Uganda, 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/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" 14 March 2008 (confidential *ex parte*), 17 March 2008 (confidential) (ICC-02/04-125, ICC-02/04-01/05-282).

[7] See *Uganda, Prosecutor v Kony a o* "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06" 10 August 2007 (confidential *ex parte*), 13 August 2007 (public) (ICC-02/04-101, ICC-02/04-01/05-252).

[8] See *Uganda, Prosecutor v Kony a o* "Defence Application for Leave to Appeal the *Decision on victims' applications for participation* issued on 14 March 2008" 25 March 2008 (ICC-02/04-128-tENG, ICC-02/04-01/05-285-tENG).

[9] *Uganda, 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-02/04-139, ICC-02/04-01/05-296).

person as a victim? Or is the Appeals Chamber asked to determine the proof required to substantiate such a claim?

The formulation of an application for the acknowledgment of a right is one thing, proof of it another. It is elementary that facts founding an application or grounding a motion must be pleaded. And in the case of harm suffered because of injury occasioned, the source of the hurt or injury must be specified. It is a cardinal rule of pleading that the facts relied upon in support of a claim must be explicitly identified; proof is confined to a verification of those facts through the adduction of evidence. The more authentic the evidence, the more readily will the court acknowledge the existence of the facts relied upon. If, this is not possible because such evidence is either unavailable or impossible to secure, other evidence may be adduced, depending on the persuasiveness of which the court may accept the facts as proven or not.

5. Before addressing the issue, the Appeals Chamber must be satisfied that it was raised within the framework of article 82 (1) (d) of the Statute. In his decision granting leave to appeal the Single Judge acknowledges that the decision by reference to which leave to appeal was sought "did not explicitly address the issue"[10] set down for appeal. Notwithstanding the absence of a decision on the subject certified as an appealable one, the Single Judge posed the question as the subject of appeal, deriving support in this respect from the following passage from the Judgment of the Appeals Chamber of 13 July 2006 (Extraordinary Review) to the effect that the object of an appeal under article 82 (1) (d) of the Statute is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial"[11]. Seemingly, the Single Judge did not duly appreciate that the appealable issue must arise from a decision of a first-instance court as distinct from an issue that may arise before it.

6. Article 82 (1) of the Statute specifies that the subject-matter of an appeal under its provisions is a decision of a first-instance court. Article 82 (1) (d) of the Statute defines what may constitute the subject-matter of an appeal under its provisions; this is "a decision that involves an issue [...]". What may be the subject of an appeal is a

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[10] *Ibid*, page 7.
[11] *Democratic Republic of the Congo* "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 13 July 2006 (ICC-01/04-168), para. 19.

decision determining an issue having a material bearing on the fairness or expeditiousness of the proceedings or the outcome of the trial. The object of an appeal under article 82 (1) (d) of the Statute is to forestall the implications of a decision on the course of the proceedings in case the first-instance court has gone wrong in its determination.

7. The following passage from the Judgment of the Appeals Chamber of 13 July 2006 (Extraordinary Review) is characteristic of what may constitute the subject of an appeal under article 82 (1) (d) of the Statute and definitive of the requisites for the certification of an issue as the subject of an appeal:

> Article 82 (1) (d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.[12]

Another passage from the same Judgment illuminates what may be the subject of an appeal:

> Only an 'issue' may form the subject-matter of an appealable decision, An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.[13]

8. Sequentially, what may found an appeal under article 82 (1) (d) of the Statute is an issue the determination of which is an integral part of a decision of the first-instance court. The statement of an appealable issue is the sole responsibility of the court that made the decision determinative of the issue. We may repeat with benefit a part of the passage earlier quoted from the Judgment of 13 July 2006 (Extraordinary Review), i.e. that the opinion of the Pre-Trial Chamber is "the definitive element for the genesis of a right to appeal". Here, we have it from the Judge who certified the issue that this does not arise from a decision of the court. Consequently, the certification of the issue can find no legal justification, founded as it is outside the framework of the provisions of article 82 (1) (d) of the Statute.

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[12] *Ibid.*, para 20
[13] *Ibid*, para. 9.

9. The reason for setting down the issue for appeal despite the absence of a decision on the subject is explained elsewhere in the decision of the Single Judge granting leave. The object was to elucidate the scene "in light of the possible uncertainty on whether determining mental harm claimed by an applicant victim in relation to physical harm suffered by another person requires that the identity of the latter and his/her relationship with the applicant be established"[14]. The inference is that the decision of the Appeals Chamber on the issue set down for appeal is sought in order to guide the first-instance court in addressing the subject in proceedings before it. The advice of the Appeals Chamber is sought on the subject; a course outside the range of its authority. As the Appeals Chamber declared it "cannot assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority"[15].

10. Previous decisions of the Court are according to article 21 (2) of the Statute a source of law. It reads:

> The Court may apply rules and principles of law as interpreted in its previous decisions.

Under its provisions, a Chamber of the Court is legitimised to apply both principles and rules as they emerge from the interpretation of applicable law by a competent judicial authority. On a previous occasion I noted: "Judicial decisions identify the law applicable, determine its meaning, and delineate the range of its application as may be gathered from the object and purposes of the law revelatory of the spirit of a legislative enactment."[16] The interpretation of the law is the exclusive province of the

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[14] *Uganda, 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-02/04-139, ICC-02/04-01/05-296), page 9.

[15] *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), para. 30; *Darfur, Sudan* "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" 18 June 2008 (ICC-02/05-138), para. 19.

[16] *Prosecutor v. Kony a o* "Decision of the Appeals Chamber on the Unsealing of Documents" 4 February 2008 (ICC-02/04-01/05-266), page 10, para. 9 of Judge Pikis' separate opinion; *Prosecutor v Lubanga* "Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the 'Decision on the release of Thomas Lubanga Dyilo' Separate Opinion of Judge Georghios M. Pikis" 20 August 2008 (ICC-01/04-01/06-1444-Anx), para. 6.

Judiciary. Principles and rules of law as they crystallise in judicial decisions clarify the law and provide certainty as to its complexion and range of application.

11. The case law of the Appeals Chamber as to the subject-matter of an appeal under article 82 (1) (d) of the Statute establishing that a) only issues arising from a decision of a first-instance court can be made the subject of an appeal under article 82 (1) (d) of the Statute and b) the Appeals Chamber is not an advice-rendering body, seals the outcome of this appeal. The appeal is inadmissible and as such it should be dismissed.

12. Before leaving this appeal it is worth reminding of the recent judgments of the Appeals Chamber of 19 December 2008[17] and 2 February 2009[18] affirming that victims cannot participate in the Prosecutor's investigations into a crime or crimes within the jurisdiction of the Court. In accordance with article 68 (3) of the Statute, victim participation is confined to judicial proceedings affecting their personal interests.

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

Judge Georghios M. Pikis

Dated this 23rd day of February 2009

At The Hague, The Netherlands

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[17] *Democratic Republic of the Congo,* "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007" 19 December 2008 (ICC-01/04-556).

[18] *Darfur (Sudan)* "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007" 2 February 2009 (ICC-02/05-177).