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N° : ICC-01/04-01/07

Date : 7 March 2008

PRE-TRIAL CHAMBER I

Before : Judge Sylvia Steiner, Single Judge

Registrar : Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA**

Public

Defence observations of the 12 applications for participation as victims

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer
Mrs. Florence Darques-Lane, Legal Adviser

Defence

Mr David Hooper
Ms Caroline Buisman
Mr Göran Sluiter
Ms Sophie Menegon

1. This is the defence response to the invitation by the Single Judge on 7 February 2008, to present observations regarding applications for participation of a/0327/07 to a/0001/08 and on the possible granting to those applicants the status of victims authorised to participate in the proceedings before the Chamber in the case *The Prosecutor v. Germain Katanga*. The Defence hereby submits the following observations on these applications.
2. The Defence, respectfully submit, as a preliminary matter and concern, that the applicants' forms provided to the defence appear unnecessarily redacted. By way of example, in the application form of a/0333/07, the following redaction, at page 18, is to be found: "guerre tribal avec les Hema qui en voulaient aux XXX afin de les exterminer". There seems to be no discernible interest served in such a redaction. Further, in a number of the applications relating to an attack in May 2003 (a/0337/07, a/0336/07, a/0335/07) the date of the alleged attack is redacted. In the application of a/0332/07 the name of the person who recruited the applicant is redacted, though provision of the name, in our submission, is unlikely to reveal identity; in the application by a/0031/07 the value of the loss is redacted. The defence raise these points as a general concern in respect of the extent of redaction of documents.
3. It is submitted that the relevant criteria to be applied in assessing whether an applicant should be a victim participant are:
 - (i) whether the applicant is a victim of a crime as defined in Rule 85 of the Rules, and
 - (ii) whether the personal interests of the victim are affected in the proceedings pursuant to Article 68(3) of the Statute.
4. Under Rule 85(a) it is submitted that the following four criteria must be satisfied for victim status to be granted, regardless of the stage of the proceedings in which the applicants wish to participate:
 - the victim must be a natural person;
 - the victim must have suffered harm;
 - the crime from which the harm resulted must fall within the jurisdiction of the Court;
 - and there must be a causal link between the crime and the harm.

The first three of the criteria are not contentious, while the final criterion requiring a link between the harm and the crime charged has been subject of considerable debate

and differing opinion. The defence submit that there must exist a causal link or sufficient nexus between the harm done and the charges sought to be confirmed in the case against Germain Katanga in order for the particular applicant to be designated as a victim in this case. The defence refer to extensive support for this proposition in the available jurisprudence of the court.¹

5. Comments by the defence in respect of specific applicants

(i) All the charges against GK concern facts that are alleged to have occurred at Bogoro on or about 24 February 2003.

However the following applicants refer only to an event in May 2003:

- a/0337/07,
- a/0336/07,
- a/0335/07,
- a/0334/07,
- a/0333/07.

¹ ICC-01/04-01/06-172-tEN, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, p. 6-8 : “CONSIDERING that at the case stage, the Applicants must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo bears criminal responsibility and for which the Chamber has issued an arrest warrant; CONSIDERING that the Chamber considers that the causal link required by rule 85 of the Rules at the case stage, is substantiated when the victim, and where applicable, close family or dependants,²⁴ provides sufficient evidence to allow it to be established that the victim has suffered harm directly linked to the crimes contained in the arrest warrant or that the victim has suffered harm whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes”

ICC-01/04-01/06-228-tEN, The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo, 28 July 2006, p. 8-9: “CONSIDERING that in the “Decision on the Application for Participation in the Proceedings of VPRS1 to VPRS6 in the case of The Prosecutor v. Thomas Lubanga Dyilo”, which was rendered by the Chamber on 22 June 2006, the Chamber held that at this stage in the case, the Applicants must demonstrate that there is a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant; that the causal link required by rule 85 of the Rules with regard to the stage of the case is demonstrated once the victim, and, if applicable, the immediate family or dependents of that victim, provide sufficient evidence to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed;”

ICC-01/04-01/06-601-tEN, The Prosecutor v. Thomas Lubanga Dyilo, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, 20 October 2006, p. 9: “CONSIDERING that at this stage of the proceedings, the causation requirement under rule 85 of the Rules is satisfied where the victim and, as the case may be, the immediate family or the dependents of the direct victim, provide sufficient evidence to show that there are reasonable grounds to believe that he or she has suffered harm directly lined to the crimes set forth in the warrant of arrest, or that he or she suffered harm in intervening to assist direct victims in the case, or to prevent their victimisation as a result of the commission of these crimes;”

- a/0332/07.

In our submission as there is therefore no sufficient link with the charges contained in the arrest warrant, or those sought to be confirmed, these applications should not be further entertained by the chamber².

(ii) In respect of Applicant a/0336/07, the defence, by reference to the redacted account, has no indication of whether the applicant was resident in Bogoro village or elsewhere, and further, the event described is said to have occurred in May. The application should not be allowed as there is no sufficient nexus between the alleged facts on the application and those charges contained in the arrest warrant, and sought to be confirmed by the Prosecution.

(iii) Applicant a/0001/08 refers to events in January 2003. The Prosecution are not seeking confirmation of charges relating to events in January 2003. The alleged harm is not directly linked to the crimes set out in the arrest warrant, or sought to be confirmed, and therefore this application should be dismissed.

6. Article 68 requires, as a prerequisite to victim participation, that the “personal interests of a victim are affected”.
7. The Defence submit that the Pre-Trial Chamber should not grant participatory rights at this stage to those it qualifies to be victims in respect of the entire length of the proceedings. To do so would, we submit, exceed the power under Article 68(3) to allow the expression by victims of their views and concerns only where ‘the personal interests of a victim are affected’. A generic assessment is not, we submit, authorized by Article 68(3), as it would necessarily apply to all procedural stages, irrespective of whether the criteria was satisfied at some future stage.
8. The defence submit that, if designated as victims in the case, it has not been further demonstrated that the applicants’ personal interests are sufficiently affected, in respect of any issue, to participate at this stage of the proceedings under Article 68(3). The defence submit that victims do not have a general right to participate, under Article

² If the Chamber is moved to consider that the date of May arises as a result of an error common to the applicants, who are represented by the same lawyer, then the defence would wish to question the manner in which the statements were taken or provided and the doubts thereby raised as to the credibility of the assertions made.

68(3), at the pre-trial stage but must first demonstrate, or have demonstrated on their behalf, that their 'personal interests... are affected'. The defence submit that this necessarily requires the victim to demonstrate, or to have demonstrated on his or her behalf, that a particular issue or issues at the pre-trial stage affects the victim's personal interest. A general interest in the proceedings, we submit, is no more than a feature of 'victimhood' and is not a sufficient basis for participation.³



Mr David Hooper, Lead Counsel

The 7th March 2008

At Den Haag, The Netherlands

³ According to the Appeals Chamber, 'personal interests of the victims' should for the purpose of their participation under Article 68(3) be interpreted strictly – namely, as limited to claims for reparations and protection and to the exclusion of the public interest that the accused is found guilty, which in the ICC legal regime is the prerogative of the Prosecutor. See ICC-01/04-01/06-925, *The Prosecutor v. Thomas Lubanga Dyilo*, 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. 28: "[...] an assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor. [...]"