

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04
Date: 18 July 2008

PRE-TRIAL CHAMBER I

Before: Judge Anita Ušacka, Single Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

**Prosecution's Observations on Applications a/0332/07, a/0334/07 to a/0337/07,
a/0001/08, a/0030/08 and a/0031/08 for Victim Participation at the Investigation
Phase of the Situation in the DRC**

Source: Office of the Prosecutor

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

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I. Background

1. On 26 May 2008, the Registry filed 99 applications for participation as victims in the proceedings in the file of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, including applications a/0030/08 and a/0031/08.¹
2. On 30 January 2008, applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08 for participation as victims in the proceedings were filed in the record of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* by the Registry on a confidential, *ex parte* basis.²
3. On 6 March 2008, the Prosecution submitted its observations on applications for victim participation a/0332/07, a/0334/07 to a/0337/07, and a/0001/08 limited to the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.³
4. On 2 April 2008, the then Single Judge Steiner rendered the “Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08”⁴, denying the procedural status of victim at the pre-trial stage of the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* to applicants a/0332/07, a/0334/07 to a/0337/07, a/0001/08. The Single Judge furthermore decided that these applications should be examined in due course for the investigation stage of the situation in the DRC.⁵
5. On 4 June 2008, the Prosecution submitted observations on applications for victim participation in the case of *The Prosecutor v. Germain Katanga and*

¹ ICC-01/04-01/07-579, at page 5.

² ICC-01/04-504, at page 3 citing ICC-01/04-01/07-171-Conf-Exp-Anx6 and ICC-01/04-01/07-171-Conf-Exp-Anx8 to 12.

³ ICC-01/04-01/07-250-Conf-Exp.

⁴ ICC-01/04-01/07-357.

⁵ ICC-01/04-01/07-357, at page 13.

Mathieu Ngudjolo Chui including amongst others on applications a/0030/08 and a/0031/08.⁶

6. On 10 June 2008, the then Single Judge Kuenyehia rendered the "Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case'" in which she dismissed applications a/0030/08 and a/0031/08 for participation in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* and decided that their applications to participate at the investigation stage in the situation in the DRC will be examined by the Chamber in due course.⁷
7. On 3 July 2008, Single Judge Ušacka issued the "Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of the Congo by Applicants a/0047/06 to a/0052/06, a/0163/06 to a/0187/06, a/0221/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06"⁸, in which the Single Judge outlined the procedural history of the pending appeals⁹ on issues related to victim participation in the situation in the DRC¹⁰ and noted "that the appeals on

⁶ ICC-01/04-01/07-549-Conf-Exp.

⁷ ICC-01/04-01/07-579, at para 83 and page 51; See also the "Decision rectifying errors in the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case'", ICC-01/04-01/07-589, of 13 June 2008, at page 4.

⁸ ICC-01/04-505

⁹ ICC-01/04-505, at paras 2 to 3; Regarding the procedural history of the appeals the Prosecution makes reference to its filing of 12 June 2008 (ICC-01/04-501, "Prosecution's Observations on 28 Applications for Victim Participation at the Investigation Stage of the Situation in the DRC").

¹⁰ The following four issues are currently pending appeal:

On 23 January 2008, the Single Judge granted the OPCD's Request for leave to appeal in her "Decision on Request for leave to appeal 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'" (ICC-01/04-438, page 8), in relation to the following issue:

Issue 1: "whether article 68(3) of the Statute can be interpreted as providing for a 'procedural status of victim' at the investigation stage of a situation and the pre-trial stage of a case; and (i) if so, whether rule 89 of the Rules and regulation 86 of the Regulations provide for an application process which only aims to grant the procedural status of victim and is thus distinct and separate from the determination of the procedural rights attached to such status; and what are the specific procedural features of the application process? Or (ii) if not, how applications for participation at the investigation stage of a situation and the pre-trial stage of a case must be dealt with".

On 6 February 2008, Single Judge Steiner rendered the "Decision on the Prosecution, OPCD and OPCV Requests for Leave to Appeal the Decision on the Applications for Participation of Victims in the Proceedings in the Situation" (ICC-01/04-444), granting leave to appeal the following issues (the first having been raised by the Prosecution and the latter two by OPCD):

these decisions are still pending before the Appeals Chamber. However, the Appeals Chamber has not ordered suspensive effect as to these decisions pursuant to article 82(3) of the Statute"¹¹. Thus the Single Judge decided to proceed with examining and deciding upon victim applications in the situation based on the current jurisprudence of the Pre-Trial Chamber, acknowledging that "the Single Judge's decision may later require modification in accordance with the Appeals Chamber's judgment"¹².

8. On 3 July 2008, Single Judge Ušacka also rendered the "Decision Authorizing the Submission of Observations Pursuant to rule 89(1) of the Rules on Applications a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08"¹³ inviting the Prosecution and the Office of Public Counsel for the Defence (OPCD) to submit their observations on these eight applications for participation as victims in the investigation stage of the Situation in the DRC by 18 July 2008.

II. Criteria for determining "Victim" status in the context of the Situation

9. To determine whether an applicant may participate in the proceedings pursuant to Rule 89 (2) of the Rules of Procedure and Evidence ("Rules"), the Pre-Trial Chamber must first consider whether the applicant qualifies as a "victim" as defined in Rule 85.

Issue 2: Whether a "procedural status of victim", within the terms of the Decision, can be granted independent of any finding by the Chamber that the requirements of article 68(3) and rule 89 are satisfied, and without addressing and providing for a definition of the personal interests, or following the steps required by the Appeals Chamber's jurisprudence;

Issue 3: Whether it is possible to grant victims a general right to participate, or whether victim participation is conditioned upon a determination concerning the impact of specific proceedings on the personal interests of the applicants, and an assessment as to the propriety of their participation;

Issue 4: Whether, in order to establish moral harm on the basis of harm suffered by a second person, it is necessary to adduce some level of proof concerning the identity of the second person and the applicant's relationship with this person.

¹¹ ICC-01/04-505, at para 4.

¹² ICC-01/04-505, at para 4.

¹³ ICC-01/04-504

10. Pursuant to Rule 85 (a) of the Rules, “‘victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.
11. The Pre-Trial Chamber has previously held that it will make this assessment on a *prima facie* basis.¹⁴ The Pre-Trial Chamber has held that, for an individual to be granted victim status four criteria must be satisfied: (a) the victim must be a natural person; (b) he or she must have suffered harm; (c) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (d) a causal link between the crime and the harm must exist.¹⁵
12. The Appeals Chamber clarified in the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” that the harm suffered “can attach to both direct and indirect victims” so long as it is “personal to the individual”.¹⁶
13. Furthermore Article 68(3) of the Statute provides that the Chamber shall permit participation of an individual (as defined by Rule 85) where the personal interests of the individual are affected. The Prosecution submits that Article 68(3) of the Statute and Rule 85, viewed together, establish two cumulative requirements for an individual to participate in the proceedings as a victim: first, the applicant must fulfil the criteria set out in Rule 85; and

¹⁴ ICC-01/04-444, pages 10 and 11.

¹⁵ See ICC-01/04-101, para. 94.

¹⁶ See ICC-01/04-01/06-1432 OA9 OA10, at para 32, “The Appeals Chamber considers that the harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. It is in this sense that the Appeals Chamber understands the Trial Chamber’s statement that “people can be the direct or indirect victims of a crime within the jurisdiction of the Court”. The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.”

second, the Chamber must also be satisfied that the personal interests of the victim are directly affected by the proceedings.¹⁷

14. Furthermore, the Pre-Trial Chamber, in its 17 August 2007 Decision, established criteria that need to be fulfilled in order to guarantee completeness of the applications.¹⁸

III. Factual analysis of the applications

Incomplete Applications

15. The Prosecution submits that applications a/0332/07 and a/0001/08 are incomplete.

16. Application a/0332/07 lacks any indication of consent by a legal guardian. Given that applicant a/0332/07 is a minor born in 1992, formal approval by a legal guardian is necessary for his application to be considered complete.

17. Application a/0001/08 mentions economic loss endured after having fled an attack that took place in the territory of the DRC. The Application lacks information on the specific crimes which lead to the loss.

¹⁷ ICC-01/04-101, para 62.

¹⁸ ICC-01/04-374, para 12:

- (i) the identity of the applicant;
- (ii) the date of the crime(s);
- (iii) the location of the crime(s);
- (iv) a description of the harm suffered as a result of the commission of any crime within the jurisdiction of the Court;
- (v) proof of identity;
- (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;
- (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship.
- (viii) a signature or thumb-print of the applicant on the document, at the very least, on the last page of the application.

18. The Prosecution submits that both applicants a/0332/07 and a/0001/08 should be requested to provide further information before the Chamber can grant them participation.

Complete Applications

19. The Prosecution submits that all remaining six applications (a/0334/07, a/0335/07, a/0336/07, a/0337/07, a/0030/08 and a/0031/08) are complete.
20. Furthermore, the applicants qualify as natural persons within the meaning of Rule 85 (a). Although some applicants base their applications on the death of family members, all act in their own name and invoke harm they personally suffered due to the death of a family member, or additionally also for loss of personal property.
21. The Prosecution submits that these applications *prima facie* meet the necessary requirements for the definition of victim under Rule 85(a) in connection with the situation, since the applicants have suffered personal harm from crimes committed in the territory of the DRC after July 2002.
22. Applicants a/0334/07, a/0335/07 and a/0337/07 all claim to have suffered emotional and physical harm due to the killing of family members during an attack in the territory of the DRC in May 2003 and also invoke material damage suffered due to the pillaging of their belongings.
23. Applicant a/0336/07 asserts in her application that she was raped and held as a sexual slave in the territory of the DRC in May 2003 and that she suffered psychological and emotional harm as a result thereof.
24. Applicants a/0030/08 and a/0031/08 claim emotional harm due to the death of family members during an attack on a village in the territory of the DRC in February 2003. Both applicants also invoke to have suffered material harm as a result of the pillaging of their goods.

IV. Conclusion

25. The Prosecution submits that Applicants a/0332/07 and a/0001/08 should be requested to provide further information before their applications can be considered complete.¹⁹
26. The Prosecution submits that the remaining six applications (a/0334/07, a/0335/07, a/0336/07, a/0337/07, a/0030/08 and a/0031/08) appear to be complete and *prima facie* meet the necessary requirements for the definition of victim in Rule 85(a) in connection with the Situation in the DRC.



Ekkehard Withopf, Senior Trial Lawyer
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 18th day of July 2008
At The Hague, The Netherlands

¹⁹ In relation to the allegations of pillaging and forced labour brought forward by applicant a/0336/07 further information regarding time and location of the alleged crimes should be requested