



Original: **English**

No.: **ICC-01/04-01/07**
Date: **9 November 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

**Defence Observations on the Applications for Participation as Victims and
Additional Information Disclosed on 29 October 2009**

Source: Defence for Mr Germain Katanga

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

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**Victims Participation and Reparations
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Other

1. On 29th October 2009 the Registry disclosed four new applications for participation as victims (a/0285/09, a/0286/09, a/0297/09 et a/0452/09), as well as additional documents delivered by 38 applicants (a/0054/08, a/0140/08, a/0141/08, a/0207/08, a/0520/08, a/0528/08, a/0529/08, a/0530/08, a/0531/08, a/0533/08, a/0535/08, a/0536/08, a/0537/08, a/0538/08, a/0539/08, a/0120/09, a/0202/09, a/0205/09, a/0211/09, a/0216/09, a/0266/09, a/0267/09, a/0277/09, a/0285/09, a/0286/09, a/0293/09, a/0297/09, a/0304/09, a/0310/09, a/0340/09, a/0341/09, a/0342/09, a/0349/09, a/0350/09, a/0361/09, a/0389/09, a/0391/09, a/0393/09)¹.
2. The Defence for Mr. Katanga (“the Defence”) submits these observations at the invitation of the Chamber on October 28th 2009.² Pursuant to this decision, the Defence is prompted to present observations regarding the above mentioned applications, and on the possible granting to those applicants of the status of victims authorised to participate in the proceedings before the Chamber in the case.
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.³
4. Under Rule 85(a) of the Rules, the following four criteria must be satisfied for the granting to an applicant of the procedural status of victim in the proceedings:
 - (i) the applicant must be a natural person;
 - (ii) the applicant must have suffered harm;

¹ ICC-01/04-01/07-1571, *Transmission des demandes de participation expurgées a/0285/09, a/0286/09, a/0297/09 et a/0452/09 et des documents supplémentaires expurgés des demandes A/0054/08, a/0140/08, a/0141/08, A/0207/08, A/0520/08, A/0528/08, A/0529/08, A/0530/08, A/0531/08, A/0533/08, A/0535/08, A/0536/08, A/0537/08, A/0538/08, A/0539/08, A/0120/09, A/0202/09, A/0205/09, A/0211/09, A/0216/09, A/0266/09, A/0267/09, A/0277/09*, a/0285/09, a/0286/09, A/0293/09, a/0297/09, A/0304/09, A/0310/09, A/0340/09, A/0341/09, A/0342/09, A/0349/09, A/0350/09, A/0361/09, A/0389/09, A/0391/09 et A/0393/09, 29 October 2009. In its decision “*Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure*”, the Chamber suspended its decision concerning these last applicants pending the disclosure of additional information and/or documents by the applicants (ICC-01/04-01/07-1491-Conf, 23 September 2009).

² ICC-01/04-01/07-1567, *Décision invitant le Procureur et la Défense à présenter leurs observations sur certaines demandes de participation de victimes (règle 89-1 du Règlement de procédure et de preuve)*.

³ Cf., for instance, ICC-01/04-01/06-1119, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, para. 86.

- (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court and must be the subject of "a warrant of arrest or summons to appear, and, subsequently, a charging document (crimes encompassed by the relevant case);
- (iv) there must be a causal link between the crime and the harm.⁴

5. The Single Judge has held that the applicants must show that they suffered harm (i) as a result of the crimes which were allegedly committed during the alleged joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003 (direct link between the harm and the alleged crimes); or (ii) in intervening to assist direct victims in the case at hand, or to prevent their victimisation as a result of the alleged commission of the said crimes.⁵ The applicants must provide evidence establishing *prima facie* that they suffered emotional harm and/or economic loss as a result of the crimes allegedly committed in the alleged joint FRPI/FNI attack on Bogoro on or about 24 February 2003.⁶
6. The Defence notes that as to the applicants alleging that they suffered harm as a direct result of the alleged joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003, it has no objection to them obtaining the status of victim participants in the present case unless their applications raise other concerns as addressed below.
7. The Defence considers that the applications which indicate a location different from Bogoro should be denied. In its Decision *Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure* the Chamber notes that :

La Chambre estime indispensable de définir les limites territoriales dans lesquelles ont été commis les crimes retenus dans la Décision relative à la confirmation des charges. Elle considère que si le territoire concerné doit d'abord s'entendre comme couvrant l'immédiate périphérie du village de Bogoro, on ne saurait pour autant exclure systématiquement les zones géographiques situées aux environs.⁷

⁴ Cf., for instance, ICC-01/04-01/07-478-Conf, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para. 65.

⁵ ICC-01/04-01/07-478-Conf, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para. 66.

⁶ Cf. ICC-01/04-01/07-357, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008.

⁷ ICC-01/04-01/07-1491-Red, para. 74.

The Defence recalls that both in the Pre-Trial Chamber's *Decision on the confirmation of charges* and in the Prosecution's *Document Summarising the Charges Confirmed by the Pre-Trial Chamber*, the alleged crimes are geographically limited to Bogoro village⁸ and the village of Nyakeru appears just once in a description of the *groupement of Babiase*.⁹ This village has not been considered as a place where the alleged crimes were committed. An extensive conception of the alleged location of the crime would be highly prejudicial. Therefore the Defence maintains that the Chamber should not depart from the Pre-Trial Chamber's ruling denying the applications of persons alleging that the events took place in Nyakeru-Ngida, because it seemed *prima facie* that the harm claimed did not result from the crimes allegedly committed in the attack on Bogoro on or about 24 February 2003.¹⁰ Thus the Defence submits that the status of victim should be denied for the applicants a/0529/08, a/0530/08, a/0538/08, a/0531/08, a/0535/08, a/0536/08, a/0537/08, a/0539/08, a/0202/09, a/0141/08, a/0528/08, a/0205/09, a/205/09, a/0266/09, a/0293/09, a/0304/09, a/0340/09, a/0341/09, a/0342/09, a/0349/09, a/0350/09 who allege events in Nyakeru.

8. The Defence notes that several applicants do not annex to their application a certificate of family relationship and/or death certificates, while the Appeals Chamber has stated that:

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. [...]

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

⁸ Cf., for instance, ICC-01/04-01/07-717, *Decision on the confirmation of charges*, 1st October 2008, pages 204-206.

⁹ ICC-01/04-01/07-717, *Decision on the confirmation of charges*, 1st October 2008, para. 1, and ICC-01/04-01/07-1588-Anx1, *Document Summarising the Charges Confirmed by the Pre-Trial Chamber*, 3 november 2009, para. 7.

¹⁰ ICC-01/04-01/07-478-Conf, *Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case*, 10 June 2008, para. 83

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. a/0094/06, a/0103/06, a/0120/06 and a/0123/06 had suffered emotional harm as the 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 result of the loss of a family member¹¹.

9. While it is possible to allege a personal and moral prejudice due to the death of a member of the family's applicant,¹² the identity of the deceased person and his family relationship with the applicant has to be proved. This can be done by providing a death certificate or every other documents or elements proving the truth of the allegations in the application form. The Chamber stated that considering the difficulties for people in Ituri to receive a death certificate, the death of a member of the family can also be proved by two attestations done by two different witnesses.¹³ However, none of applicants a/0529/08, a/0530/08, a/0535/08, a/0539/08, a/0285/09 and a/0286/09 provide a death certificate or two attestations. Therefore, the Defence submits that their applications to participate as victims should be denied.

10. The Defence notes that the application a/0533/08 has been filed on behalf of a school. The Chamber asked, in its Decision *Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure*, the applicant to provide additional information to prove that he has the authority to act on behalf of the school.¹⁴ The

¹¹ ICC-02/04-179, *The Prosecutor v. Joseph Kony & all*, 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, 23 February 2009.

¹² Cf, *inter alia*, ICC-01/04-01/07-1491, *Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure*, para. 37.

¹³ Cf. ICC-01/04-423-Corr, *Situation en République Démocratique du Congo*, Corrigendum à la « Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 et a/0241/06 à a/0250/06 », 31 Janvier 2008, para. 15 ; ICC-01/04-01/06-1119, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, 18 January 2008, paras 87-88 ; ICC-01/04-01/07-478-Conf, Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, para. 45.

¹⁴ ICC-01/04-01/07-1491-Red, para. 96.

applicant did not provide any other documents which can prove this capacity. Therefore, the Defence submits that his application to participate as a victim should be denied.

11. The Defence takes note of the Chamber's position in the Decision *Motifs de la décision relative aux 345 demandes de participation de victimes à la procédure*, at paragraph 42, according to which :

“le fait qu'une déclaration soit similaire à d'autres ne suffit pas en soi à affecter son authenticité, mais conduit à la mettre en perspective avec les autres éléments d'information figurant dans la demande de participation. »

Nevertheless, the Defence raises again its concerns as to the important similarities found in the description of events or persons responsible by several applicants. The same details are given by applicants a/0293/09, a/0304/09, a/0340/09, a/0341/09, a/0342/09, a/0349/09, a/0350/09 concerning the location and the time of the events.¹⁵ Applications who mention Nyakeru village were asked to give additional information relative to the attack. The Defence notes surprisingly that while in their original applications applicant a/0140/08 alleged an attack on Nyakeru at 7km from Bogoro center¹⁶ and applicant a/0141/08 an attack on Nyakeberu, at 10km from Bogoro center,¹⁷ in the additional information they provide they now both alleged an attack on Nyakeru at 5km from Bogoro center.¹⁸ These may be small discrepancies but they are not explained and might be motivated by the desire to obtain the status of victim. This tends to demonstrate the danger of enlarging the geographical scope of the charges and the uncertainty it can bring.

12. The Defence notes in the same way that the additional information provided by applicants a/0528/08, a/0529/08, a/0530/08, a/0531/08, a/0535/08, a/0536/08, a/0537/08, a/0539/08, represented by the same Legal Representative, is drafted in

¹⁵ According to all these seven applicants the events occurred at Nyakeru (5km away from Bogoro) at 10 a.m on February 24th, 2003 and the militia men of Ngudjolo are responsible for this attack.

¹⁶ ICC-01/04-01/07-1108-Conf-Exp-Anx9.

¹⁷ ICC-01/04-01/07-1108-Conf-Exp-Anx10.

¹⁸ ICC-01/04-01/07-1571 -Conf-Exp-Anx17 and ICC-01/04-01/07-1571 -Conf-Exp-Anx18.

exactly the same words.¹⁹ Therefore the Defence appreciates and invites the Registry to follow the Chamber's invitation according to which:

43. Soucieuse toutefois de prendre en compte les observations formulées par la Défense, la Chambre invite le Greffe à rappeler aux intermédiaires que leur rôle, se borne à expliquer aux demandeurs les termes qu'ils ne comprendraient pas et à les assister dans la rédaction de leur requête. Ils ne sauraient en revanche exercer une quelconque influence sur le contenu même de leurs déclarations, notamment pour tout ce qui a trait à la nature des crimes allégués ou des dommages subis.²⁰

Respectfully submitted,



David HOOPER

Dated this 9 November 2009

At The Hague

¹⁹ They allege that the attack was launched on Nyakeru which is at 1 or 2 kms from Bogoro centre; it would be a village which belongs to the same groupement but which is different from Bogoro Centre.

²⁰ ICC-01.04-01/07-1491-Red.