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before the Inter  
Criminal Court

## ICC Victims' Rights Legal Update

June- August 2008

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### I. DRC SITUATION

- 1. Appeals Chamber allows victims to participate in the appeals against PTC I's decisions of 7 and 24 December 2007

[Background] On 23 January and 6 February 2008<sup>1</sup>, Pre-Trial Chamber I (PTC I) granted the Prosecutor (OTP) and the Office of Public Counsel for the Defence (OPCD) leave to appeal its 24 December and 7 December 2007 decisions,<sup>2</sup> which granted procedural status to 60 victims and denied OPCD's request for the victim-applicants to provide supplementary information to what had been provided already in their applications. Legal representatives of victims as well as the Office of Public Counsel for Victims (OPCV), representing both participating victims and

<sup>1</sup> 23 Jan. 2008 decision: [www.icc-cpi.int/library/cases/ICC-01-04-438-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-438-ENG.pdf) ; 6 Feb. 2008 decision: [www.icc-cpi.int/library/cases/ICC-01-04-444-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-444-ENG.pdf).

<sup>2</sup> 24 Dec. 2007 decision: [www.icc-cpi.int/library/cases/ICC-01-04-423-FRA.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-423-FRA.pdf); 7 Dec. 2007 decision: [www.icc-cpi.int/library/cases/ICC-01-04-417-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-417-ENG.pdf).

applicants, had requested leave to participate in these appeals, on the basis that victims' "personal interests" were affected by the issues raised, as the outcome of the appeal would impact on the procedural status of victims in the situation and on their ability to present their views and concerns.<sup>3</sup>

On 30 June 2008, the Appeals Chamber decided that those victims who have been granted the procedural status of participating victims in the situation (or case) can participate in the appeals<sup>4</sup> The applicants whose procedural status has not yet been determined did not meet the criteria.<sup>5</sup> **In addition,**

➤ **Victims' personal interests must be affected by the issues on appeal.**

In the present case, the victims are personally affected by the issues on appeal, as they face the risk of losing rights that they gained through the PTC I decisions.

➤ **Participation of victims must be appropriate.**

In the present case, victim participation is appropriate given the subject-matter of the appeals and the desirability for the views of victims to be heard.

➤ **Participation must not be prejudicial to or inconsistent with the rights of the accused and a fair trial.**

In the present case this would be respected provided that the observations of the victims be specifically relevant to the issues arising in the appeal and only to the extent that their personal interests are affected by the proceedings.

In their observations of 8 July 2008, victims submitted essentially that:

- Article 68(3) of the Statute allows for a procedural status of victims at the investigation stage of a situation and at the pre-trial stage of a case.
- Victims can be granted a general right to participate at these *stages* and therefore, there is no need to examine this right for each *act of proceedings* within these stages.
- The application process only aims at granting the procedural status of victims and is thus distinct and separate from the determination of the procedural rights attached to such status.<sup>6</sup>
- The arguments of the OPCD and OTP, if followed, would make onerous, ineffective and meaningless the rights of victims to participate in proceedings.

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<sup>3</sup> Victims' request to participate in the appeal against the 24 Dec. 2007 decision:

[www.icc-cpi.int/library/cases/ICC-01-04-474-tENG-OA6.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-474-tENG-OA6.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-475-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-475-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-476-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-476-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-476-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-476-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-478-tENG-OA6.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-478-tENG-OA6.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-486-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-486-ENG.pdf);

Victims' request to participate in the appeal against the 7 Dec. 2007 decision:

[www.icc-cpi.int/library/cases/ICC-01-04-446-FRA.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-446-FRA.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-446-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-446-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-448-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-448-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-466-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-466-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-467-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-467-tENG.pdf);  
[www.icc-cpi.int/library/cases/ICC-01-04-468-ENG-OA4.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-468-ENG-OA4.pdf);

<sup>4</sup> 30 June Appeals Chamber decision : [www.icc-cpi.int/library/cases/ICC-01-04-503-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-503-ENG.pdf).

<sup>5</sup> Judge Song dissented, considering that the fact that the PTC has not yet disposed of their applications for participation does not mean that they are not 'participants' in the meaning of regulations 64(4) and 65(5) of the Regulations of the Court.

<sup>6</sup> Legal representative of Victim a/105/06: [www.icc-cpi.int/library/cases/ICC-01-04-510-FRA.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-510-FRA.pdf); legal representatives of Victims a/0071/06, VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6: [www.icc-cpi.int/library/cases/ICC-01-04-508-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-508-tENG.pdf); OPCV as the legal representative of Victims a/0007/06, a/0008/06, a/0022/06 to a/0024/06, a/0026/06, a/0030/06, a/0033/06, a/0040/06, a/0041/06, a/0046/06, a/0072/06, a/0128/06 to a/0141/06, a/0145/06 to a/0147/06, a/0149/06, a/0151/06, a/0152/06, a/0161/06, a/162/06, and a/0209/06 [www.icc-cpi.int/library/cases/ICC-01-04-507-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-507-tENG.pdf); Legal Representative of Victims a/0016/06, a/0018/06, /0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, a/0228/06: [www.icc-cpi.int/library/cases/ICC-01-04-509-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-509-ENG.pdf).

On 18 and 25 July 2008, the OTP and the OPCD presented their consolidated responses to these 4 observations of victims, in which they reiterated their earlier submissions<sup>7</sup>.

At the time of writing, the Appeals Chamber had not rendered its judgment. The eventual judgment will be extremely important for the determination and clarification of the content of the victims' right to participate at the investigation and pre-trial phases.

## **2. PTC I grants victim status to 32 applicants**

In its 3 July 2008 decision,<sup>8</sup> concerning victim applications filed in July 2006 and April 2007, PTC I, affirmed that:

- i. Applicants must have submitted a complete application to have their cases considered
- ii. Applicants must have demonstrated, *prima facie*, that they fit within the definition of "victims" in Rule 85 of the Rules of Procedure and Evidence, e.g., the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered.

On this basis, PTC I:

- Denied 18 applicants.
- Granted victim status to 32 individuals.
- Granted access to *public* documents to these 32 victims and their legal representatives.
- Noted that this decision is based on the current jurisprudence of PTC I and may be modified by Appeals Chamber decisions.

On 9 July, OPCD requested leave to appeal this decision in relation to the following issues<sup>9</sup>:

- i) Whether viewing the application form in the light most favourable to the applicants, and drawing inferences in favour of the applicants, reverses the burden of proof and violates the principle of *in dubio pro reo*.
- ii) Whether the reference to specific individuals and militia [factions], in the context of *prima facie* factual findings issued in a public decision during the investigations phase, compromises the integrity and impartiality of the Prosecutor's investigations, and contravenes the presumption of innocence.

The OTP opposed the 2<sup>nd</sup> issue in the OPCD's application, while the legal representatives of victims and the OPCV requested PTC I to reject the entirety of the OPCD's request, arguing that it does not fulfil the criteria of Article 82(1)(d) of the Statute (on criteria for appeals) because it does not demonstrate that the issues raised could significantly affect the fair and expeditious conduct of the proceedings, and that an immediate resolution of these issues by the Appeals Chamber would advance the proceedings.<sup>10</sup>

At the time of writing, the decision from PTC I on the OPCD's request for leave to appeal was still pending.

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<sup>7</sup> OTP's response: [www.icc-cpi.int/library/cases/ICC-01-04-524-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-524-ENG.pdf); OPCD's response: [www.icc-cpi.int/library/cases/ICC-01-04-529-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-529-ENG.pdf).

<sup>8</sup> 3 July 2008 decision on victim participation: [www.icc-cpi.int/library/cases/ICC-01-04-505-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-505-ENG.pdf).

<sup>9</sup> OPCD's request for leave to appeal the 3 July decision: <http://www.icc-cpi.int/library/cases/ICC-01-04-511-ENG.pdf>.

<sup>10</sup> Legal representative: [www.icc-cpi.int/library/cases/ICC-01-04-513-FRA.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-513-FRA.pdf); OPCV: [www.icc-cpi.int/library/cases/ICC-01-04-514-FRA.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-514-FRA.pdf).

### **3. PTC I invites parties to submit observations on 8 victim applications to participate at the investigation stage**

The 8 victims initially applied in the Katanga and Ngudjolo Chui case but PTC I rejected their applications.<sup>11</sup> Their applications are now being considered for the procedural status of victim at the stage of the investigation *in the situation* of the DRC<sup>12</sup>.

On 18 July, the OTP submitted that 2 of the applications were incomplete and 6 appeared to be complete and met the requirements of the definition of victim in Rule 85(a), in connection with the situation in the DRC.<sup>13</sup> The OPCD requested PTC I to suspend the application process pending an outcome of an investigation that OPCD says should be ordered by the PTC to clarify allegations of false applications and of bribes to potential applicants.<sup>14</sup> Those allegations are supposedly based according to the OPCD on a Human Rights Watch report dated 11 July 2008.<sup>15</sup> The OPCD submitted alternatively that the 8 applicants do not meet the criteria of Article 68(3) for participation in the proceedings.

A decision from PTC I on these applications is pending.

## **II. LUBANGA CASE - DRC**

### **1. Appeals Chamber renders a landmark decision on victim participation**

[Background] On 18 January 2008, Trial Chamber I rendered an important decision regarding victim participation in the trial phase. On 26 February, both OTP and the Defence were granted leave to appeal certain aspects of this decision.<sup>16</sup> (NB: It should be noted that the aspects of the 18 January decision that were not subject to appeal are in force<sup>17</sup>). On 16 May, 3 victims were granted the right to participate in the appeal<sup>18</sup> (as they satisfied the 4 “classical” criteria<sup>19</sup> examined by the Appeals Chamber) and they filed their observations on 21 May 2008.<sup>20</sup>

On 11 July, the Appeals Chamber rendered a landmark judgment, defining more precisely the content of participation rights at the trial phase.<sup>21</sup> The Appeals Chamber confirmed two issues on appeal and reversed one:

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<sup>11</sup> Decisions on victim applications for participation at the pre-trial stage of the case: 2 April 2008: [www.icc-cpi.int/library/cases/ICC-01-04-01-07-357-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-357-ENG.pdf); 10 June 2008: [www.icc-cpi.int/library/cases/ICC-01-04-01-07-579-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-579-ENG.pdf)

<sup>12</sup> Decision inviting observations on application for participation: [www.icc-cpi.int/library/cases/ICC-01-04-504-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-504-ENG.pdf).

<sup>13</sup> OTP's observations: [www.icc-cpi.int/library/cases/ICC-01-04-525-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-525-ENG.pdf).

<sup>14</sup> OPCD's observations : [www.icc-cpi.int/library/cases/ICC-01-04-522-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-522-ENG.pdf).

<sup>15</sup> The Human Rights Watch Report is entitled 'Courting History: the Landmark International Criminal Court's First Years', 11 July 2008, available at: <http://hrw.org/reports/2008/icc0708/icc0708web.pdf>.

<sup>16</sup> 26 Feb. 2008 decision granting leave to appeal: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1191-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1191-ENG.pdf).

<sup>17</sup> For a more detailed summary of the 18 January decision, see the February 2008 Legal Update at pp.3-4.

<sup>18</sup> 16 May 2008 decision : [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1335-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1335-ENG.pdf); see also June 08 Legal Update p. 5.

<sup>19</sup> The test for participation in the appeal is: 1) The persons must have the status of victims in the case; 2) Their personal interests are affected by the issues on appeal, 3) Their participation is appropriate; 4) Their participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

<sup>20</sup> 21 May 2008 victims' observations: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1345-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1345-tENG.pdf).

<sup>21</sup> 11 July 2008 Appeals Chamber's decision: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); **Partly dissenting opinion of Judge Kirsch**: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-Anx.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-Anx.pdf). He stated that only the parties (the OTP or the defence) can lead evidence on guilt or innocence. **Partly dissenting opinion of Judge G.M Pikis**: [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf) (p.37) Judge Pikis disagreed with the position that "the harm suffered by victims does not necessarily have to be direct", stating that "there must be a direct nexus between the crime and the harm, in the sense of cause and effect. Psychological harm may, no doubt, be suffered without prior physical harm, but the crime itself must be the cause generating the harm, as may be the case with the destruction, violation or humiliation of persons near and dear to the victims". He also dissented from the majority judgment on the third issue on appeal, considering that "victims can neither adduce evidence on the guilt or innocence of the accused nor challenge the admissibility or relevance of evidence".

### **1.1. The notion of “victim” does not necessarily imply the existence of direct harm, but requires the existence of personal harm**

On this first issue, the Appeals Chamber confirmed the decision of the Trial Chamber, as it found that, for the purpose of Rule 85 (a) of the Rules of Procedure and Evidence, the harm suffered by victims does not necessarily have to be direct. Incidentally, the judges confirmed that *“material, physical, and psychological harm are all forms of harm”*.<sup>22</sup> However, it added that harm suffered by a victim applicant for the purposes of Rule 85 (a) of the Rules of Procedure and Evidence, must be “personal,” Holding that *“the harm suffered by a natural person is harm to that person, it means personal harm.”* The Appeals Chamber found that *“harm suffered by one victim as a result of the commission of a crime (...) can give rise to harm suffered by other victims (...) For instance, the recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child.”*<sup>23</sup> The Chamber concluded that *“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”*<sup>24</sup>.

### **1.2 The harm alleged by a victim and the concept of 'personal interests' under Article 68 of the Statute must be linked with the charges against the accused**

A significant finding of the 18 January decision was that victims did not need to bring evidence of harm suffered as a result of the **charges confirmed against the accused**. The Appeals Chamber reversed this finding, after having interpreted Article 68(3) of the Statute contextually, together with Rules 85 and 89 (1) of the ICC Rules of Procedure and Evidence. It found that *“the participation of victims in the trial proceedings (...) is limited to those victims who are linked to the charges”*. Also, it considered that, *“given that the purpose of trial proceedings is the determination of the guilt or innocence of the accused of the crimes and that the application under rule 89 (1) of the Rules in this context is for participation in the trial, only victims of these crimes will be able to demonstrate that the trial affects their personal interests”*.<sup>25</sup> Therefore, only victims who are victims of the crimes charged against the accused may participate in trial proceedings.

### **1.3 It is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence**

The Appeals Chamber confirmed the decision of the Trial Chamber on this point. The appellate judges first recalled that the right to lead evidence pertaining to the guilt or innocence of the accused, and to challenge the admissibility or relevance of evidence in trial lies primarily with the parties - OTP and Defence.<sup>26</sup> However, it found that the applicable provisions (Article 69(3), 64(6)(d) and 66(2) of the Statute, Rule 76 to 84 of the Rules) do not *“preclude the possibility for victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence during the trial proceedings.”*<sup>27</sup> The Appeals Chamber noted that *“to give effect to the spirit and intention of Article 68 (3) of the Statute in the context of the Trial Proceedings, it must be interpreted so as to make **participation by victims meaningful**”*.<sup>28</sup> It added that *“if victims (...) were precluded from tendering [such] evidence (...) and from challenging the admissibility or relevance of evidence, their right to participate in the trial would potentially become ineffectual.”*<sup>29</sup> Victims who wish to lead such evidence are required to

<sup>22</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); Paragraph 32.

<sup>23</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); Paragraph 32.

<sup>24</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); Paragraph 32.

<sup>25</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); Paragraph 62; In the Lubanga case, it would mean that only child soldiers (or parents or close relatives who also suffered harm by repercussion) can be victims in the case.

<sup>26</sup> Article 69 (3) of the Statute.

<sup>27</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1432-ENG.pdf); Para 94; It should be noted that this right has not been recognised at the pre-trial stage (see decision of 13 May 2008, [www.icc-cpi.int/library/cases/ICC-01-04-01-07-475-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-475-ENG.pdf)).

<sup>28</sup> At paragraph 97.

<sup>29</sup> At paragraph 97.

demonstrate why their interests are affected by the evidence or issue, upon which the Chamber will decide, on a case-by-case basis whether or not to allow it.<sup>30</sup>

If a Trial Chamber decides that evidence should be presented, the Trial Chamber “*could rule on the modalities for the proper disclosure of such evidence*” and “*could order one of the parties to present the evidence, call the evidence itself, or order the victims to present evidence*”<sup>31</sup>. Finally, the Appeals Chamber held that the Trial Chamber “*correctly identified the procedure and confined limits within which it will exercise its power to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to the parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (iv) consistency with the rights of the accused and a fair trial*”<sup>32</sup>.

## **2. Stay of proceedings and release of the accused**

We will be issuing a separate Legal Update on this issue.

### **III. KATANGA AND NGUDJOLO CHUI CASE - DRC**

#### **1. Important decisions on victim anonymity**

##### **1.1 The 10 June Decision on the 97 Applications for Participation at Pre-Trial Phase**

This decision<sup>33</sup> granted 51 applicants the right to participate at the pre-trial stage of this case. Among these victims, 14 agreed to disclose their identities to the Defence of both Katanga and Ngudjolo, and are therefore **non-anonymous** victims, while 37 requested to remain **anonymous**.

##### **i) Non-Anonymous victims**

PTC1 found that non anonymous victims are “*taking an inherent risk by appearing before the Court (...) without requesting that their identities be not disclosed to Defence.*” PTC1 considered that “*regardless of the reasons for [these victims to do so] it is the duty of [the PTC], pursuant to articles 57(3)(c) and 68(1) of the Statute, to minimize this risk*”. PTC I ordered OTP and Defence not to disclose the identities of these victims “*to the public and the media. This entails keeping their names confidential and ordering the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui and any other participant in the proceedings to refer to them by the numbers currently assigned to them by the Registry and not by their names*”.

##### **ii) Anonymous victims**

PTC 1 considered as requesting anonymity *vis-à-vis* the Defence not only victims who clearly requested such anonymity, but also victims who only requested anonymity *vis-à-vis* the suspects but not *vis-à-vis* their counsel. Also, victims who said that they were requesting that “*their identities remain confidential*” were treated as anonymous victims.

##### **iii) Observations of OTP and Defence teams**

The Single Judge requested the OTP and Defence teams to submit their observations on these 37 requests for anonymity. Considering that the security situation is still volatile in the region

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<sup>30</sup> At paragraph 99; the Appeals Chamber said “For example, should a victim demonstrate that his or her personal interests would be negatively affected if a particular witness (who could attest to the harm suffered by the victim) was not called to testify or if a piece of evidence (which would have ramifications on the safety and security of the victim) were to be declared admissible, then the victim would be able to move the Chamber to exercise its powers under article 69(3) to present the evidence or challenge the admissibility of the evidence respectively”.

<sup>31</sup> At paragraph 100.

<sup>32</sup> At paragraph 4.

<sup>33</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-07-579-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-579-ENG.pdf).

where the victims currently reside, the OTP did not oppose their requests for anonymity.<sup>34</sup> The Defence did not file observations.<sup>35</sup> There was thus no opposition to these requests.

### **1.2. The 23 June Decision granting anonymity to 35 Victims at pre-trial stage**

On 23 June, PTC I<sup>36</sup> granted *anonymity* to the victims who had requested it, i.e. the right not to have their identities disclosed to the Defence, to any other participants in the proceedings, to the public or to the media during the pre-trial stage of the case. The Chamber based its decision on the fact that the security situation in the region where the victims currently reside remains volatile and “has repercussions on the range of protective measures currently available and which can be implemented to protect those victims (...) who are particularly vulnerable and live in a risk area in the DRC”. Under these circumstances, according to PTC I, those “victims can participate in the proceedings effectively only if their anonymity is preserved”. PTC I further decided that these victims had the right to attend public parts of the confirmation hearing that took place on 27 June 2008.<sup>37</sup>

Non-anonymous victims have different procedural rights from anonymous victims. These rights have already been defined in the 13 May “Decision on the set of Procedural Rights Attached to Procedural Status of Victim at Pre-Trial Stage of the Case”<sup>38</sup> and in the 30 May “Decision on Limitations of set of procedural Rights for Non-Anonymous Victims”<sup>39</sup>:

#### **i) Set of procedural rights for non-anonymous victims**

The procedural rights of non-anonymous victims are divided in 6 groups:

- I. The right to have access, prior to and during the confirmation hearing, to the record of the case kept by the Registry, including to the evidence filed by the Prosecution and the Defence; **Limitations:** it does not include the right to access “*ex parte*” filings and decisions. Furthermore, *only* the legal representatives of the victim have the right to access *confidential* parts of the record. They cannot transmit *copies or transcripts* to their clients; however, they can *discuss* the confidential evidence and information, except when it would allow the victim to identify a witness<sup>40</sup>.
- II. The rights (i) to make submissions on all issues relating to the admissibility and probative value of the evidence on which the Prosecution and the Defence intend to rely at the confirmation hearing; and (ii) to examine such evidence at the confirmation hearing.
- III. The right to examine witnesses, including the right to examine, at the confirmation hearing, any witness proposed by the prosecution and the Defence.
- IV. The right to attend all public hearings. **Limitations:** it does not include the right to attend *closed session* hearings, or “*ex parte*” hearings (i.e. that only the Chamber and the party bringing the motion can attend). However, the legal representative can *discuss* with the victim the information gathered in *closed session*, unless it would allow the victim to identify a witness.
- V. The right to participate by way of oral motions, responses and submissions in hearings.
- VI. The right to file written motions, responses and replies.

#### **ii) Set of procedural rights for anonymous victims**

These include:

- Notification of *public* documents in the case record.
- Attendance at status conferences, or the parts of status conferences, which are *public*.

<sup>34</sup> OTP’ observations on requests for anonymity : [www.icc-cpi.int/library/cases/ICC-01-04-01-07-595-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-595-ENG.pdf)

<sup>35</sup> In an e-mail sent by the case manager of the Defence team.

<sup>36</sup> [www.icc-cpi.int/library/cases/ICC-01/04-01/07-628-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01/04-01/07-628-ENG.pdf).

<sup>37</sup> Regarding confirmation hearing, see below.

<sup>38</sup> [www.icc-cpi.int/library/cases/ICC-01/04-01/07-474-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01/04-01/07-474-ENG.pdf).

<sup>39</sup> [www.icc-cpi.int/library/cases/ICC-01/04-01/07-537-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01/04-01/07-537-ENG.pdf).

<sup>40</sup> [www.icc-cpi.int/library/cases/ICC-01/04-01/07-537-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01/04-01/07-537-ENG.pdf).

- Making opening and closing statements at the confirmation hearing, in which they can, inter alia, address points of law, including the legal characterisation of the modes of liability included in the charges.
- Requesting during the said status conferences and during the public sessions of the confirmation hearing, leave to intervene, in which case the Chamber would rule on a case by case basis.
- **Limitations:** Victims granted anonymity can *not* add any point of fact or any evidence *nor* can they question the witnesses according to the procedure set out in rule 91(3) of the Rules<sup>41</sup>.

The procedural rights for anonymous victims could be extended “*in light of exceptional circumstances*”<sup>42</sup>.

## **2. Dual procedural status of victim and witness: landmark decision on the application for participation of witness 166**

[Background] In the 10 June 2008 “Decision on 97 applications for participation at the pre-trial stage of the case”, the Pre-Trial Chamber I (PTC I) stated that one of the applicants to be a participating victim was also a witness on whom the Prosecution intended to rely at the confirmation hearing and because of his unique status, his application for participation would be examined in a separate decision.<sup>43</sup> It is in its 23 June 2008 “Decision on the application for participation of Witness 166”, that the PTC 1 examined whether a dual status as victim and witness was possible, and what would be the set of procedural rights attached to such a status.<sup>44</sup>

PTC I found that participating victims could also be witnesses. It held that:

- 1) Neither the Statute nor the Rules expressly prohibit participating victims from being witnesses and nothing prevents the admissibility of evidence tendered by witnesses who are also participating victims in the same case;
- 2) The Court’s only case law on this matter - the 18 January 2008<sup>45</sup> decision in the Lubanga Case - has accepted this dual procedural status of victim and witness
- 3) National systems that recognise victims’ procedural rights do not prohibit this dual procedural status.

Thus, after having granted witness 166 the ability to participate in the pre-trial phase of the Katanga and Ngudjolo Chui case and during the investigation into the DRC situation, PTC I examined the *procedural rights* which should be attached to this dual *status*.

PTC I agreed with the Defence for Ngudjolo “*that the Court must act cautiously in deciding on the dual status of victims and witnesses*”, in order to preserve “*the admissibility and probative value of the evidence of Witness 166 at trial*”. The Chamber therefore considered that the safeguards proposed by the Defence for Katanga were “*adequate precautionary measures*” and ordered that the witness have the usual procedural rights of an anonymous victim, while being prevented from:

- 1) Having access to the confidential part of the case record, including the statements of the other witnesses;
- 2) Attending any hearing of a witness in the present case, even if such a hearing is public.

This decision is applicable at the Pre-Trial stage of the proceedings. It should be noted that there is, to date, no decision of a Trial Chamber or an Appeals Chamber which has been rendered on the procedural rights attached to dual status victims.

<sup>41</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-462-tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462-tEnglish.pdf).

<sup>42</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-06-462-tEnglish.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-462-tEnglish.pdf).

<sup>43</sup> [www.icc-cpi.int/library/cases/ICC-01/04-01/07-579\\_ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01/04-01/07-579_ENG.pdf).

<sup>44</sup> [www.icc-cpi.int/library/cases/ICC-01-04-01-07-632-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-632-ENG.pdf).

<sup>45</sup> <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1119-ENG.pdf> paras 132-134.



### **3. Confirmation of charges hearing from 27 June - 16 July 2008**<sup>46</sup>

After having been postponed twice by PTC I, the confirmation hearing in the Katanga and Ngudjolo Chui case took place on 27 June 2008.

The two accused are alleged to have committed three counts of crimes against humanity (murder, inhumane acts and sexual slavery), and six counts of war crimes in Ituri/DRC (wilful killing, inhuman treatment, sexual slavery, using children under the age of 15 years to participate actively in hostilities, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities, and pillaging a town or place, even when taken by assault), from January to March 2003. The arrest warrants for the two suspects focus specifically on the attack on the village of Bogoro on 24 February 2003. At the confirmation of charges hearing, the Prosecutor has to support those charges with sufficient evidence to establish substantial grounds to believe that both suspects committed the crimes they are accused of. The charges have to be confirmed for the trial to start.

#### **3.1 The participation of victims at the confirmation hearing**

Five legal representatives of participating victims participated in the confirmation hearing.

#### **3.2 The modalities of victim participation**<sup>47</sup>

The procedural status of victim at the pre-trial stage allows victims to participate in the public sessions of the confirmation hearing.

The legal representatives of victims were invited to make opening and closing statements, and oral and written motions, responses, replies and submissions. The legal representatives of *non-anonymous* victims also had the right to examine any prosecution and Defence witnesses. During the hearings, the Judge emphasised on several occasions the fact that victims' declarations *cannot be elements of evidence*.

#### **3.3 The outcome of the confirmation hearing**

The parties and participants were invited to present their final observations on issues raised at the hearing. The victims, in their observations,<sup>48</sup> submitted that the evidence of the Prosecution was sufficient to establish substantial grounds to believe that the accused committed the crimes charged and requested the confirmation of charges against the two accused.

The PTC I has three options:<sup>49</sup>

- Confirm all or some of the charges and assign the accused to a trial chamber for trial on those charges.
- Decline to confirm those charges if there is not enough evidence.
- Adjourn the hearing and request the prosecutor to consider providing further evidence or conducting further investigation with respect to a charge, or amend a charge to conform to the supporting evidence.

At the time of writing, the decision on the confirmation of charges against Katanga and Ngudjolo Chui was still pending. PTC I indicated that it would issue it around 26 September 2008.

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<sup>46</sup> For more details, see the document of the Coalition for the International Criminal Court, Confirmation of Charges Hearing: the Prosecutor vs. Germain Katanga and Matthieu Ngudjolo Chui 27 June 2008. [www.iccnw.org/documents/katanga\\_and\\_ngudjolo\\_26\\_June\\_20081.pdf](http://www.iccnw.org/documents/katanga_and_ngudjolo_26_June_20081.pdf).

<sup>47</sup> See the 13 May 2008 landmark decision on victims' procedural rights at pre-trial stage [www.icc-cpi.int/library/cases/ICC-01-04-01-07-474-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-474-ENG.pdf); as well as the 30 May 2008 decision on limitations of non-anonymous victims' procedural rights [www.icc-cpi.int/library/cases/ICC-01-04-01-07-537-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-537-ENG.pdf).

<sup>48</sup> Victims' observations: [www.icc-cpi.int/library/cases/ICC-01-04-01-07-691-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-691-tENG.pdf), [www.icc-cpi.int/library/cases/ICC-01-04-01-07-689-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-689-tENG.pdf), [www.icc-cpi.int/library/cases/ICC-01-04-01-07-693-tENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-693-tENG.pdf).

<sup>49</sup> [www.iccnw.org/documents/katanga\\_and\\_ngudjolo\\_26\\_June\\_20081.pdf](http://www.iccnw.org/documents/katanga_and_ngudjolo_26_June_20081.pdf).

## IV. DARFUR SITUATION

### 1. 11 victims allowed to participate in pending appeals

[Background] On 10 March 2008, legal representatives for victims applied<sup>50</sup> to participate in the OTP and the OPCD appeals<sup>51</sup> against the 6 December 2007 PTC I decision granting victim status to 11 applicants<sup>52</sup>, and in the OPCD appeal against the 3 December 2007 PTC I decision rejecting OPCD's request for additional information on victims' applications.<sup>53</sup> PTC I granted leave to appeal with respect to 2 issues<sup>54</sup> - similar to the ones on appeal in the DRC situation (see above). In its appeal brief, the OPCD submitted, among other arguments, that "*there can't be a procedural status of 'victim' during the investigative and pre confirmation stage*" and "*that there can be no recognized victim participation at the situation stage*" but rather such participation "*would be more appropriately deferred to case proceedings*"<sup>55</sup>. The OTP also contended in its appeal brief that the impugned decisions of PTC I involve a "*series of interlocking errors of law*" which "*allow[s] formal procedural status to be granted to victims in an investigation (...) without fulfilling the criteria and complying with the requirements of Rule 89(1)*"<sup>56</sup>.

On 18 June 2008, the Appeals Chamber (with Judge Song partly dissenting), granted to the 11 applicants who have victim status, the right to participate in the appeals to present their views and concerns insofar as their personal interests are affected by the issues on appeal.<sup>57</sup>

On 24 June 2008, the legal representatives of victims presented their consolidated observations on the issues on appeal.<sup>58</sup> The victims submitted, in particular, that a) the PTC I's decisions properly considered and applied the criteria of Article 68(3) and Rule 89 and didn't improperly collapse them into a single determination of "victim", b) The jurisprudence approach to victim participation suggested by the OTP and the OPCD is unworkable in practice and threatens to cause a needless multiplicity of applications, proceedings and appeals. The victims requested the Appeals Chamber to deny the appeals<sup>59</sup>.

On 3 July 2008, the OPCD and the OTP submitted their responses to the legal representatives' submissions, in which they reiterated their earlier submissions.<sup>60</sup>

The decision of the Appeals Chamber on these issues is pending.

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<sup>50</sup> Legal representative's request : [www.icc-cpi.int/library/cases/ICC-02-05-134-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-134-ENG.pdf) .

<sup>51</sup> 4 Feb. OPCD appeal brief on 3 Dec. 2007 decision: [www.icc-cpi.int/library/cases/ICC-02-05-119-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-119-ENG.pdf); 18 Feb. OTP appeal brief on the 6 Dec. 2007 decision: [www.icc-cpi.int/library/cases/ICC-02-05-125-ENG-OA.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-125-ENG-OA.pdf); 18 Feb. OPCD appeal brief on the 6 Dec. 2007 decision: [www.icc-cpi.int/library/cases/ICC-02-05-126-ENG-OA3.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-126-ENG-OA3.pdf) .

<sup>52</sup> 6 Dec. 2007 PTC I decision on victims' applications (corrigendum): [www.icc-cpi.int/library/cases/ICC-02-05-111-Corr-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-111-Corr-ENG.pdf).

<sup>53</sup> 3 Dec. 2007 PTC I decision : [www.icc-cpi.int/library/cases/ICC-02-05-110-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-110-ENG.pdf) .

<sup>54</sup> The 2 issues on appeal: 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. 2) 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 a specific proceedings on the personal interest of the applicants and an assessment as to the propriety of their participation.

<sup>55</sup> [www.icc-cpi.int/library/cases/ICC-02-05-126-ENG-OA3.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-126-ENG-OA3.pdf) ; para 47.

<sup>56</sup> [www.icc-cpi.int/library/cases/ICC-02-05-125-ENG-OA.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-125-ENG-OA.pdf); para 11.

<sup>57</sup> 18 June AC's decision : [www.icc-cpi.int/library/cases/ICC-02-05-138-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-138-ENG.pdf).

<sup>58</sup> Consolidated statements of victims : [www.icc-cpi.int/library/cases/ICC-02-05-144-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-144-ENG.pdf).

<sup>59</sup> Victims' observations : [www.icc-cpi.int/library/cases/ICC-02-05-144-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-144-ENG.pdf).

<sup>60</sup> OPCD : [www.icc-cpi.int/library/cases/ICC-02-05-147-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-147-ENG.pdf) ; OTP : [www.icc-cpi.int/library/cases/ICC-02-05-145-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-145-ENG.pdf).

## **V. UGANDA SITUATION AND CASE (THE PROSECUTOR V. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO AND DOMINIC ONGWEN)**

### **1. Victims requested to participate in the Defence's appeal against PTC II's decision granting victim status**

[Background] On 2 June 2008, PTC II decided on the Defence leave to appeal<sup>61</sup> against the 14 March 2008 decision on victims participation in proceedings -in which 4 applicants were granted status in the situation, 5 in the case against the top LRA commanders and 3 in both the situation and the case.<sup>62</sup> Leave to appeal was granted on the issue of whether, in order to establish mental harm suffered as a result of physical harm suffered by another person, the identity of the latter person and the relationship the applicant has with this person is required.

On 16 June 2008, the Defence filed its appeal brief by which it requested the Appeals Chamber to grant the appeal and to reverse the decision of 14 March 2008 in respect of 4 applicants. It also declared that *"when an applicant alleges mental harm as a result of the death of another person, it is necessary to provide proof of the identity of that person and of the proximity of his/her relationship with the applicant; that is, the family strictu sensu: spouse, father, mother and children"*.<sup>63</sup>

On 20 June 2008, the OPCV filed a request to participate in the appeal on behalf of 2 victims. It submitted that the conditions for participation (Article 68 (3) of the ICC Statute) were met as: the persons seeking participation in the appeal are victims already authorised to participate in the situation; their personal interests are affected by the issue on appeal; the presentation of their views and concerns appears appropriate at this stage of the proceedings; and their participation is neither inconsistent with nor prejudicial to the rights of the Defence.<sup>64</sup>

On 30 June 2008, the OTP responded to the Defence's appeal, submitting that *"the issue in this appeal is narrowly defined and that many of the arguments advanced by the Defence in the Defence Appeal do not relate to the issue certified for appeal and must accordingly be rejected"*.<sup>65</sup>

On 11 and 12 August 2008, the Defence<sup>66</sup> and the OTP<sup>67</sup> both requested the Appeals Chamber to deny the victims' request to participate in the appeal, considering in particular that the issue on appeal does not affect the personal interests of the victims.

The decision on the participation of victims in this appeal is pending.

**The Victims' Rights Working Group (VRWG)** is a network of over 200 civil society groups and individual experts created in 1997 under the auspices of the NGO Coalition for an International Criminal Court. Affiliated organisations include NGOs from Uganda, DRC and Sudan as well as international NGOs. The VRWG works to ensure that victims' rights are effectively protected and respected, and that their needs and concerns are met throughout the judicial process of the ICC. Particular attention is paid to the need to ensure that the Court will render not only retributive, but also restorative justice, that will aim, *inter alia*, to prevent re-victimization, to break cycles of violence and war, and to provide reparations and rehabilitation for victims. The VRWG advocates for fair and effective structures and procedures at the Court to facilitate victims' full and active participation. For a list of affiliated organisations see our website See [www.vrwg.org](http://www.vrwg.org)

<sup>61</sup> Decision granting leave to appeal: [www.icc-cpi.int/library/cases/ICC-02-04-139-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-139-ENG.pdf).

<sup>62</sup> 14 March 2008 decision on victims' application for participation: [www.icc-cpi.int/library/cases/ICC-02-04-125-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-125-ENG.pdf).

<sup>63</sup> Defence's appeal brief: <http://www.icc-cpi.int/library/cases/ICC-02-04-142-tENG.pdf>.

<sup>64</sup> OPCV's request for victims' participation in appeal : <http://www.icc-cpi.int/library/cases/ICC-02-04-144-ENG.pdf>

<sup>65</sup> OTP's response to Defence appeal : <http://www.icc-cpi.int/library/cases/ICC-02-04-147-ENG.pdf>, p.6

<sup>66</sup> Defence's response : <http://www.icc-cpi.int/library/cases/ICC-02-04-151-FRA.pdf>.

<sup>67</sup> OTP's response: <http://www.icc-cpi.int/library/cases/ICC-02-04-150-ENG.pdf>.