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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

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

Public document

Decision on the treatment of applications for participation

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

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Detention Section

**Victims Participation and Reparations
 Section**

Other

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to article 64(3)(a), 64(6)(e) and 64(6)(f) and article 68 of the *Rome Statute* (“the Statute”), rules 81(3), 81(4), 85, 86, 87, 88 and 89 of the *Rules of Procedure and Evidence* (“the Rules”), and regulations 80, 81, 86 and 88 of the *Regulations of the Court*, rules as follows.

1. In response to a request by the Chamber on 10 December 2008,¹ the Registry submitted to it on 16 December 2008 a report pertaining to various issues related to the treatment of victims’ applications to participate in the proceedings (“the Report”).² The Report has seven annexes, setting out information concerning the status of applications for participation and reparations and the format of the Registry’s reports drafted pursuant to regulation 86 of the *Regulations of the Court*, a table summarizing the individual status of the applications registered, a sample form for the “individual report”, a sample test for the “individual report”, a sample “follow-up sheet”, and the standard form for applications for participation.³ On 12 January 2009, the Defence teams for Germain Katanga⁴ and Mathieu Ngudjolo Chui,⁵ the legal representatives of certain victims⁶ and the Office of the Prosecutor⁷

¹ “Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires”, 10 December 2008, ICC-01/04-01/07-788.

² Registry, “Rapport complémentaire du Greffe sur diverses questions liées au traitement des demandes de participation conformément à l’ordonnance du 10 décembre 2008”, 16 December 2008, ICC-01/04-01/07-796-Conf.

³ Registry, Annexes to the “Rapport complémentaire du Greffe (ICC-01/04-01/07-796-Conf) sur diverses questions liées au traitement des demandes de participation conformément à l’ordonnance du 10 décembre 2008”, 17 December 2008, ICC-01/04-01/07-797-Conf and annexes 1 to 7.

⁴ Defence for Germain Katanga, “Defence observations on the ‘Rapport complémentaire du Greffe sur diverses questions liées au traitement des demandes de participation conformément à l’ordonnance du 10 décembre 2008’”, 12 January 2009, ICC-01/04-01/07-822-Conf (“the Observations of the Defence for Germain Katanga”).

⁵ Defence for Mathieu Ngudjolo, “Quelques éléments de réponse à certaines questions soulevées par le Greffe dans son Rapport complémentaire sur diverses questions liées aux demandes de participation conformément à l’ordonnance du 10 décembre 2008”, 12 January 2009, ICC-01/04-01/07-814-Conf (“the Observations of the Defence for Mathieu Ngudjolo”).

⁶ Legal Representatives of Victims a/0333/07 and a/0110/08, “Réponse des représentants légaux des victimes a/0333/07 et a/0110/08 au Rapport complémentaire du Greffe sur diverses questions liées au traitement des demandes de participation conformément à l’ordonnance du 10 décembre 2008”, 12 January 2009, ICC-01/04-01/07-818 (“the Observations of the Legal Representatives of the Victims”).

submitted their observations on the Report. In addition, in further pursuance of the aforementioned Order of the Chamber, on 19 December 2008 the Registry presented a report on the applications for participation filed in the instant case, as required under regulation 86(5) of the *Regulations of the Court*.⁸

2. With the exception of issues pertaining to the legal representation of victims, the present Decision responds to the requests for directions submitted by the Registry to the Chamber in its Report. It addresses the following issues: a) format and content of reports submitted pursuant to regulation 86(5) of the *Regulations of the Court*; b) status of applications for which the Pre-Trial Chamber has already issued a decision; c) procedure to be followed for pending applications; d) criteria applied for the registration of applications; e) registration of incomplete applications and definition of a complete application; f) documents accepted by the Chamber to establish the identity of applicants; g) role of the Office of Public Counsel for Victims at the current stage of the proceedings; h) role of the Victims Participation and Reparations Section (“the Participation Section”) in preparing redacted versions of the applications for participation; i) nature and scope of redactions by the Participation Section; and j) registration of applications for reparations.

II. The Chamber’s analysis

3. The Chamber intends to respond to the issues raised, after recalling the questions or proposals of the Registry and outlining, where applicable, the different solutions which have been applied to date by the various Chambers of the Court.

⁷ Office of the Prosecutor, “*Réponse de l’Accusation au rapport complémentaire du Greffe sur diverses questions liées au traitement des demandes de participation conformément à l’ordonnance du 10 décembre 2008*”, 12 January 2009, ICC-01/04-01/07-820-Conf (“the Observations of the Office of the Prosecutor”).

⁸ Registry, “Registry’s First Report on Applications for Participation pursuant to Regulation 86(5) of the Regulations of the Court”, 19 December 2008, ICC-01/04-01/07-803-Conf-Exp-tENG.

A. Format and content of reports submitted pursuant to regulation 86(5) of the *Regulations of the Court*

4. After presenting the content of the various sections of the reports which it has to prepare pursuant to regulation 86(5) of the *Regulations of the Court*, recalling that the format for reports has been developed in consultation with the various Chambers, and stating that the current format has been used by Pre-Trial Chambers I, II and III and Trial Chamber I,⁹ the Registry asks the Chamber whether it wishes to provide it with any specific directions concerning format and content.

5. The Registry further recalls that the format currently in use is “individual” and that two pages are devoted to each application for participation. The Chamber considers that the “individual report” form clearly shows the information required to enable it to verify whether the applications fall within the scope of rule 85 of the Rules.

6. The Chamber nonetheless considers that, in order better to assess the need to redact certain information before applications for participation are transmitted to the parties for their comments, in future it would be useful to have more detailed information in the “protective measures” section.¹⁰ The Chamber is aware of the existence of heightened security risks on the territory of the Democratic Republic of the Congo (DRC), and proposes that the Registry set out in its report, at the place it deems most appropriate, specific information concerning the applicant’s safety and the risks he or she may face. Any such information should be gathered by liaising with the Victims and Witnesses Unit, pursuant to regulations 99 and 100 of the *Regulations of the Registry*. The Chamber likewise considers it essential that the Participation Section reminds those assisting applicants in filling in the application form for participation that they must particularly bring to their attention the

⁹ Registry, Annex II to the Supplementary Report, 17 December 2008, ICC-01/04-01/07-797-Conf-Anx2, paras. 1 and 2.

¹⁰ Registry, Annex IV to the Supplementary Report, 17 December 2008, ICC-01/04-01/07-797-Conf-Anx4, p. 2.

importance of the step they are taking and the possible consequences of their identity being disclosed to the participants in the proceedings.

B. Status of applications on which the Pre-Trial Chamber has already issued a decision

7. Pre-Trial Chamber I decided to grant victim status to 57 applicants during the pre-trial stage.¹¹ Furthermore, it rejected several applications because they were incomplete. The Registry wishes to know whether victims authorised to participate in the proceedings at the pre-trial stage are automatically authorised to participate in the trial and, if not, whether it should re-register the applications in accordance with regulation 86(5) of the *Regulations of the Court*. In respect of applications which were rejected because they were incomplete, the Registry asks the Chamber whether it intends to rule again on those applications by applying its own criteria and whether the Registry must register them a second time, and append a report.

8. The Chamber notes that the legal representatives of the victims consider that victims already authorised to participate in the proceedings should retain that status, without the Chamber having to rule again on their participation.¹² However, it notes that the Defence for Germain Katanga submits that only non-anonymous victims having obtained victim status should automatically be authorised to participate in the subsequent stage of the proceedings.¹³

9. The Chamber refers to rule 91(1) of the Rules, which allows a Chamber to modify previous rulings under rule 89, irrespective of whether they concern the status of victims or the modalities of their participation. However, it considers that regulation 86(8) of the *Regulations of the Court* should be construed to mean that, in a

¹¹ Pre-Trial Chamber I, *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, ICC-01/04-01/07-357, pp. 9 to 11; *Decision on the Application for Participation of Witness 166*, 23 June 2008, ICC-01/04-01/07-632, para. 9; *Public Redacted Version of the "Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case"*, 10 June 2008, ICC-01/04-01/07-579 ("the Decision of 10 June 2008"), paras. 69 to 129.

¹² Observations of the Legal Representatives of the Victims, para. 1.

¹³ Observations of the Defence for Germain Katanga, para. 2.

specific case and at all stages of the proceedings, a previous decision by a Chamber under rule 89 of the Rules must be applied by the Chambers seized subsequently, but without their being deprived of the right to exercise the power available to them under rule 91(1) above.

10. In *Lubanga*, Trial Chamber I considered that it was bound to reassess the four applications for participation accepted by the Pre-Trial Chamber.¹⁴ In the opinion of the Chamber, a distinction should be made between a decision granting or denying victim status to an applicant and a decision defining the modalities of his or her participation. It considers that, in the interest of the proper administration of justice, victims authorised to participate in the proceedings at the pre-trial stage must, in principle, and subject to the considerations set forth below, automatically be authorised to participate in the proceedings at the trial stage, without the need for their applications to be registered and assessed a second time. In the Chamber's view, the analysis by the Pre-Trial Chamber, in particular in respect of the criteria set forth in rule 85 of the Rules with reference to the confirmation of charges, remains completely valid in principle, and does not have to be revisited at the subsequent stages of the proceedings. The same does not apply to the modalities of participation set forth in article 68 of the Statute and rule 89 of the Rules, which the Chambers generally consider must be reassessed, taking into account the stage of the proceedings, the prejudice which may be caused to the rights of the Defence and the requirements of a fair trial.

11. The fact remains that the Chamber may see fit to rule on applications for participation which the Pre-Trial Chamber has already allowed, in particular where one or more victims have been authorised to participate in the proceedings at the pre-trial stage solely on the basis of the commission of a crime corresponding to a charge which was not confirmed by the Pre-Trial Chamber. Generally speaking, it

¹⁴ Trial Chamber I, *Decision on victims' participation*, 18 January 2008, ICC-01/04-01/06-1119 ("the Decision of 18 January 2008"), para. 112; Trial Chamber I, *Decision on the applications by victims to participate in the proceedings*, 15 December 2008, ICC-01/04-01/06-1556, paras. 54 to 59.

would be desirable in the future if, at the end of the pre-trial stage and as soon as the Trial Chamber had been constituted, it were to be provided with a concise report in which the Participation Section lists those victims authorised to participate in the proceedings in such circumstances, stating the charge or charges concerned.

12. The Chamber might also examine applications for participation already allowed if new information were to appear at the trial stage. This could be the case, for example, for a victim wrongly authorised to participate in the proceedings on the basis of supporting documentation which subsequently turned out to be invalid. In that event, it would then be for the Registry or the parties immediately to inform the Chamber, so that it could rule on the matter.

13. In the instant case, the 57 victims authorised to participate in the proceedings by Pre-Trial Chamber I have, within the meaning of rule 85(a) of the Rules, suffered harm as a result of the commission of at least one crime corresponding to a charge confirmed by the said Chamber. The present Chamber does not intend to rule again on those applications, which therefore do not need to be re-registered.

14. Applications which Pre-Trial Chamber I rejected on the ground that they were incomplete will be assessed by the Chamber if the applicants file a new application, duly completed in accordance with the criteria set out by the Chamber in paragraph 28 of this Decision. The Registry must then transmit those new applications to the Chamber, along with the report referred to in regulation 86(5) of the *Regulations of the Court*.

15. Lastly, in respect of the observations submitted by the Defence for Germain Katanga, the Chamber states that the modalities of participation for anonymous victims when the discussions on the merits begin will be assessed in a subsequent decision on the modalities of victims' participation before this Chamber.¹⁵

¹⁵ Observations of the Defence for Germain Katanga, para. 13.

C. Procedure to be followed for pending applications

16. The Registry seeks clarification on the procedure to be followed in respect of seven applications which are pending. Those applications were submitted to Pre-Trial Chamber I on 26 May 2008 but were incomplete.¹⁶ They were completed on 2 June 2008, that is, after the time limit of 26 May 2008 set by Pre-Trial Chamber I.¹⁷ Hence they were not considered in its decision of 10 June 2008 on the 97 applications for participation in the pre-trial stage of the case, and now a ruling is required on how they are to be treated. The Chamber therefore asks the Participation Section to have them registered, and to submit to it a report concerning those applications specifically.

D. Criteria for the registration of applications

17. Having recalled that Pre-Trial Chamber I ordered it in the present case to register only those applications for participation which have a direct link to the crimes ascribed to the accused, the Registry proposes, in the interest of efficiency, to apply this criterion itself prior to transmitting the applications to the Chamber.

18. In its Observations, the Defence for Mathieu Ngudjolo submits that it is the sole preserve of the judges to rule on the existence of a direct link between the applications for participation and the charges confirmed, since the Chamber must remain a “[TRANSLATION] neutral and impartial” arbiter.¹⁸ It adds that “[TRANSLATION] leaving [this assessment] entirely to [the Participation Section], even at the stage of the registration of applications, might result in arbitrary decisions, which would be difficult to rectify without any judicial oversight”.¹⁹

19. The Chamber recalls that, under regulation 86 of the *Regulations of the Court*, it alone may grant applications for participation which fall within the scope of rule 85

¹⁶ Participation Section, “*Transmission de 97 demandes de participation*”, 26 May 2008, ICC-01/04-01/07-510-Conf-Exp-Corr.

¹⁷ Decision of 10 June 2008, para. 47.

¹⁸ Observations of the Defence for Mathieu Ngudjolo, para. 4.

¹⁹ Observations of the Defence for Mathieu Ngudjolo, para. 4.

of the Rules, although regulation 86 does indeed require the Registry to conduct a prior investigation on the basis of objective criteria defined by the Chambers and to include it in the report provided for in paragraph 5 of the said regulation. That report, by summarising the information contained in the standard application forms for participation, enables an overview of that information to be obtained. However, this preparatory work by the Registry cannot take the place of the decision of the Chamber, which is alone in a position to assess, on a case-by-case basis, the merits of the applications transmitted to it. It should be recalled that it is for the Chamber to assess whether a causal link exists between the harm suffered and the commission of the alleged crimes.

20. In the present case, Pre-Trial Chamber I considered it possible to request the Registry to transmit to it, and hence first to register, only those applications having a direct link to the alleged crimes, that is, those relating to harm as a result of crimes 1) falling within the jurisdiction of the Court and 2) committed during the joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003.²⁰ Accordingly, the Pre-Trial Chamber did not receive any applications for participation which did not satisfy those criteria.

21. At the trial stage, the Chamber intends to adopt a similar approach, subject to specific adjustments. First, the criteria to be applied must henceforth be assessed in light of the *Decision on the confirmation of charges*. After assessing the applications for participation, the Participation Section must therefore transmit those which make reference to the acts specified by Pre-Trial Chamber I in the said Decision (regardless of the legal characterisation given to them), that is, essentially, the attack on the village of Bogoro on 24 February 2003. Furthermore, the applications must refer to acts committed by FRPI and FNI troops. The Chamber intends, however, to retain a certain margin of discretion in respect of the location where the acts were committed and to accept any reference to the immediate surroundings of the village of Bogoro.

²⁰ ICC-01/04-01/07-357, p. 8.

In order to assist the Participation Section in this assessment, the Chamber invites it to refer to the following paragraphs of the *Decision on the confirmation of charges*: 5, 6, 7, 8, 9, 10, 239, 240, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 275, 277, 278, 279, 280, 281, 282, 298, 299, 300, 301, 302, 303, 304, 306, 319, 320, 321, 322, 323, 324, 325, 334, 335, 336, 337, 347, 348, 349, 350, 351, 352, 353, 361, 362, 363, 373, 375, 403, 404, 405, 406, 407, 424, 425, 426, 434, 435, 442, 443, 456, 457, 458 and 462.

22. In the event that an application does not refer explicitly to the date of 24 February 2003, but where the alleged facts indisputably correspond to the acts specified by the Pre-Trial Chamber, the Participation Section should transmit it to the Chamber. Furthermore, the Registry must pay particular attention to the situation of persons claiming to be victims of crimes which cannot be confined only to the date of 24 February 2003, such as pillaging, using children to participate actively in hostilities, or sexual enslavement.

23. Moreover, the Chamber notes that, in the table appended to the report submitted by the Participation Section, no mention is made of the perpetrators of the alleged crime or crimes. It considers that that information would be helpful to it in analysing the applications for participation, and it therefore wishes the table to be supplemented accordingly. Here again, it would be useful to refer in a separate column of the table to the acts specified by the Pre-Trial Chamber, as recalled at paragraph 21 *in fine* above.

24. Lastly, the Chamber requests the Registry to submit to it a report summarising, for each application received during the pre-trial stage, or after the confirmation of the charges, all of its reasons for not having registered it.

25. More generally, the Chamber considers it necessary to recall that its oversight is exercised within the limits of the information provided by the applicants, as collected and verified by the Participation Section, while regulation 86 of the *Regulations of the Court* requests both the Participation Section and the Chamber to ensure that

applications for participation, including those considered to be complete, comprise sufficient information and that they do not rely on simple assertions. If necessary, the Chamber may arrange *ex parte* hearings in the presence of the Participation Section alone in order to assess the applications and, where required, to request its assistance in gathering additional information, as provided for under regulation 86(7) of the *Regulations of the Court*. Nevertheless, in order to enhance the effectiveness of the oversight exercised by the Chamber, it is essential that the Registry give full effect to the provisions of regulation 86(4) of the *Regulations of the Court* in order to ensure, in particular, before transmission to the Chamber, that the information gathered is complete and consistent, and that it is clearly consistent with the wishes of the victim. This additional verification required of the Registry is especially important, since any requests for additional information by the Chamber under regulation 86(7) of the *Regulations of the Court* would involve implementation of a more complex, and therefore lengthier, procedure.

E. Registration of incomplete applications and definition of a complete application

26. The Registry asks the Chamber whether it wishes it to register only applications considered to be complete or whether it should also register incomplete applications. It recalls the practice adopted by the various Chambers of the Court in this respect,²¹ in particular that of Pre-Trial Chamber I, which requested that the Participation Section initially only register complete applications and submit the others subsequently, after completing them in accordance with regulation 86(4) of the *Regulations of the Court*.

²¹ Decision of 18 January 2008, paras. 86 to 89; Pre-Trial Chamber II, *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*, ICC-02/04-101, 10 August 2007, para. 16 and *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*, ICC-02/04-125, 14 March 2008, paras. 6 and 7; Pre-Trial Chamber III, *Decision on victim participation*, ICC-01/05-01/08-103-tENG-Corr, 12 September 2008, para. 8.

27. The Chamber intends to adopt a similar approach, by insisting that the Registry do everything possible to obtain the additional information as rapidly as possible, with a view to ensuring the efficient and expeditious preparation of the trial. In this regard, it informs the Registry and the participants that any new applications for participation must be submitted to the Participation Section by 20 April 2009; the Participation Section must, barring exceptional circumstances, which it must justify, transmit them to the Chamber by 4 May 2009, along with the reports compiled pursuant to regulation 86(5) of the *Regulations of the Court*. The same shall apply to any applications which are yet to be completed. These time limits do not, however, apply to the submission of applications for reparations.

28. The Registry wishes to know what constitutes a complete application. It refers to the definition given by Pre-Trial Chamber I in its Decision of 17 August 2007,²² which has also been adopted by Pre-Trial Chamber III. In the present case, this Chamber is also of the view that an application can be considered to be complete if it contains the following information:

- 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 unequivocal 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

²² Pre-Trial Chamber I, *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation*, 17 August 2007, ICC-01/04-374 ("the Decision of 17 August 2007"), para. 12; see also the Decision of 10 June 2008, para. 44.

guardianship, subject to the observations set forth at paragraph 36 below;

viii) a signature or thumb-print of the applicant on the document, at the very least on the last page of the application.²³

F. Documents accepted by the Chamber in order to establish the identity of applicants

29. The Registry asks the Chamber which documents it intends to accept in order to establish the identity of applicants. It recalls the very similar positions adopted by Pre-Trial Chamber I²⁴ and Trial Chamber I,²⁵ although the latter required that, if the applicant's identity is corroborated by two witnesses, they must be considered credible.²⁶ The Registry considers that the list of documents accepted by those two Chambers is appropriate for victims residing in the DRC, given the particular situation of that country.²⁷

30. The Chamber shares this viewpoint and hence authorises the submission of the following documents:

- i) national identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;
- ii) voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;
- iii) certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association or political party membership card, documents issued

²³ Decision of 17 August 2007, para. 12.

²⁴ Decision of 17 August 2007, para. 15.

²⁵ Decision of 18 January 2008, para. 87.

²⁶ Registry's Report, para. 49.

²⁷ Registry's Report, paras. 47 and 51.

in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or

- iv) a statement signed by two credible witnesses, within the meaning understood by Trial Chamber I,²⁸ attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.²⁹

31. As regards the credibility of witnesses called upon to sign statements, the Chamber indicates that it will take into consideration, non-cumulatively, factors such as the nature and length of the relationship of those witnesses with the applicant, or their standing in the community.

32. In its Observations, the Defence for Mathieu Ngudjolo submits that it is possible to obtain some of the abovementioned documents illegally³⁰ and that, notwithstanding the particular situation prevailing in the DRC, the authenticity of the documents must be verified. The Chamber concurs, but considers that it cannot completely disregard the difficulties encountered by applicants in having the supporting documents for their applications authenticated. It recalls, however, that the parties, to whom the applications for participation in the proceedings will be disclosed for their comments, have the opportunity to challenge before the Chamber the authenticity of the documents submitted. It further requests the Participation Section to remind applicants to ensure that, as far as practicable, they submit the most relevant supporting documentation under 86(2)(e) of the *Regulations of the Court*.

²⁸ Decision of 18 January 2008, para. 88.

²⁹ Decision of 17 August 2007, para. 15; see also Pre-Trial Chamber III, *Fourth Decision on Victims' Participation*, 12 December 2008, ICC-01/05-01/08-320 ("Fourth Decision on Victims' Participation"), paras. 36 and 37.

³⁰ Observations of the Defence for Mathieu Ngudjolo, paras. 14 to 18.

33. The Registry also asks the Chamber about the position it intends to adopt if there is a notable difference between the identity documents provided and the information stated on the application form for participation. It recalls that various Chambers of the Court have shown some degree of flexibility in this regard.

34. The Chamber considers that it must adopt a similar stance. It will rule on a case-by-case basis on any differences it may detect. It considers that, except where there is a blatant contradiction,³¹ applications should be accepted if the differences at issue do not call into question the credibility of the information provided by the applicants on their identity and age, and there are documents providing information which, taken together, enable the identity and age of the applicants to be determined on initial scrutiny.

35. As regards proof of legal guardianship where an applicant must be represented, the Registry draws the Chamber's attention to the fact that recourse is seldom had to documents proving kinship or a relationship of authority, and that official documents of this nature are provided only when the persons concerned encounter "[TRANSLATION] legal difficulties".³² Furthermore, it stresses that, in the majority of cases, children who have lost their direct relatives are looked after by the community, their extended family or care centres, without any official recognition of their situation.³³

36. The Chamber considers that, in the absence of any documents proving legal guardianship, the existence of kinship and/or a relationship of authority shall be

³¹ See also, for example, Pre-Trial Chamber I, "Corrigendum to the 'Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, 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'", 31 January 2008, ICC-01/04-423-Corr-tENG, para. 18; Decision of 10 June 2008, para. 49; ICC-01/04-01/06-1556, para. 89.

³² Registry's Report, para. 75.

³³ *Ibid.*

established by a statement of two credible witnesses, as indicated at paragraphs 30 and 31 above.

37. Lastly, the Registry draws the Chamber's attention to the difficulties it encounters when applications are submitted by a minor or a person who is disabled, or on behalf of a deceased person.

38. In respect of minors, the question raised by the Registry is whether, as Pre-Trial Chambers I and II have ruled,³⁴ the minor must be represented by a person who has reached the age of majority or whether, as Trial Chamber I has held,³⁵ the minor should be permitted to act on his or her own behalf.

39. The Chamber observes that the provisions of rule 89(3) of the Rules do not preclude a minor from applying on his or her own behalf to participate in the proceedings as a victim. It will assess the admissibility of such applications on a case-by-case basis, by considering the information gathered specifically by the Registry in relation to the applicant's maturity and powers of discernment. If the Chamber has any doubts in this respect, it will require that the application be submitted through a person who has reached the age of majority acting on behalf of the minor.

40. Concerning persons who are disabled, the Chamber considers that they too are capable of submitting their own applications for participation if their disability does not affect their powers of discernment. It asks the Registry to ensure that the form contains any relevant information on this point and, if necessary, to obtain more detailed information. Where there is any doubt about an applicant's ability to assess the precise scope of the step he or she is taking, the Chamber will require that the application be submitted through a person acting on his or her behalf.

³⁴ Pre-Trial Chamber I, *Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of Congo by Applicants a/0189/06 to a/0198/06, a/0200/06 to a/0202/06, a/0204/06 to a/0208/06, a/0210/06 to a/0213/06, a/0215/06 to a/0218/06, a/0219/06, a/0223/06, a/0332/07, a/0334/07 to a/0337/07, a/0001/08, a/0030/08 and a/0031/08*, 4 November 2008, ICC-01/04-545, para. 33; Pre-Trial Chamber II, *Decision on victims' applications for participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07*, ICC-02/04-172, 21 November 2008, paras. 19 and 20.

³⁵ ICC-01/04-01/06-1556, paras. 94 and 95.

41. Lastly, in respect of deceased persons, rule 89(3) of the Rules provides for the possibility of a person acting with the consent of a victim or on behalf of him or her in the case of a victim who is a child or who is disabled, but it does not provide for the case of action carried out on behalf of a deceased person. This in particular was what led Pre-Trial Chamber I to refuse to grant victim status to a deceased person.³⁶ Pre-Trial Chamber III, taking into account the jurisprudence of the Inter-American Court of Human Rights, considered that, despite the fact that a deceased person cannot express his or her views and concerns, there is nothing to stop his or her rights being exercised during the proceedings by his or her successors if they have been granted the status of victims participating in the proceedings.³⁷

42. The Chamber will rule on this issue very shortly.

G. Role of the Office of Public Counsel for Victims at the current stage of the proceedings

43. The Registry considers that it would be helpful to appoint the Office of Public Counsel for Victims to represent or assist applicants who have no legal representation until such time as their status is determined or they have chosen a legal representative.

³⁶ Decision of 10 June 2008, para. 62, which quotes the Corrigendum to the *Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo*, ICC-01/04-423-Corr-tENG, 31 January 2008, paras. 23 to 25 (“[...] rule 89(3) of the Rules states that an application for participation may be made by a person acting on behalf of the victim concerned with the victim’s consent, or on the victim’s behalf in the case of a child or a disabled person. However, no provision permits the submission of an application for participation on behalf of a deceased person. Rule 89(3) authorises the submission of an application for participation on a person’s behalf provided the person consents. The Single Judge notes that such consent cannot be given by a deceased person. She is therefore of the opinion that deceased persons cannot be considered to be natural persons within the meaning of rule 85(a). However, close relations of deceased and disappeared persons may be considered to be victims under the Statute, the Rules, and the *Regulations of the Court* provided they fulfil the necessary criteria.”) See also, Pre-Trial Chamber I, Corrigendum to *Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07*, ICC-02/05-111, 14 December 2007, paras. 35 and 36; Pre-Trial Chamber I, *Decision on the applications for participation filed in connection with the investigation in the Democratic Republic of 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*, ICC-01/04-505, 3 July 2008, para. 23.

³⁷ Fourth Decision on Victims’ Participation, paras. 44 and 47.

44. Although a literal reading of regulation 81(4) of the *Regulations of the Court* would suggest that it concerns only persons who have been granted victim status within the meaning of rule 85 of the Rules, three Chambers of the Court³⁸ have thus far deemed it necessary to request the Registry to appoint the Office of Public Counsel for Victims as the legal representative of the victims, pending a decision of the Chamber on their victim status, or until a legal representative is appointed.

45. The Chamber also adopts this position, while stressing that the appointment of the Office of Public Counsel for Victims is in this instance provisional, and that it does not prejudice any subsequent granting of victim status by the Chamber.

H. Role of the Participation Section in preparing redacted versions of applications for participation

46. The Registrar recalls that, under rule 89(1) of the Rules, she must provide a copy of the applications for participation to the Office of the Prosecutor and the Defence, and the parties are entitled to reply within a time limit to be set by the Chamber. However, she draws the Chamber's attention to article 68(1) of the Statute, under which the Court must take any appropriate measures to protect victims.

47. The Registry would like to know under what conditions applications for participation are to be transmitted to the parties, whether the Chamber wishes to have applications redacted prior to their transmission and what, in the Chamber's view, the scope of the envisaged redactions should be.

³⁸ Decision of 17 August 2007, paras. 43 and 44; Trial Chamber I, *Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08*, ICC-01/04-01/06-1308, 6 May 2008 ("the Decision of 6 May 2008"), para. 18; Pre-Trial Chamber III, *Decision on Victim Participation*, ICC-01/05-01/08-103-tENG-Corr, 12 September 2008, para. 10; Trial Chamber I, *Decision on the role of the Office of Public Counsel for Victims and its request for access to documents*, ICC-01/04-01/06-1211, 6 March 2008, paras. 30, 31 and 34.

48. Most applicants do in fact indicate that they do not want their identity or any other identifying information to be disclosed. Accordingly, the Chamber concurs with Trial Chamber I³⁹ in recommending that the Participation Section, working together with the Victims and Witnesses Unit, should propose to the Chamber the redactions it considers may be necessary for each of the applications for participation.

49. In particular, these proposals should take into account the following identifying information:

- i) applicant's name(s);
- ii) name(s) of relatives;
- iii) place of birth;
- iv) date of birth;
- v) name of tribe or ethnic group, if the applicant belongs to a tribe or ethnic group which is in a minority in the region or town where he or she resides;
- vi) occupation, if a specific occupation which would enable the applicant to be identified;
- vii) current address;
- viii) telephone number or e-mail address; and
- ix) names and details of any person who helped the victim to fill out the application for participation.

50. The Participation Section must take particular care with applicants who have stated that they see no impediment to their identity being disclosed, and adapt its proposals accordingly. However, they should first ensure, by whatever means they consider appropriate and in accordance with regulation 86(4) of the *Regulations of the Court*, that that was what the applicant wanted and that no ambiguity remains on this point.

³⁹ Decision of 6 May 2008, paras. 27 and 28. See also, ICC-01/04-01/06-1333, para. 16.

51. Next, in relation to information requiring more individualised assessment, the Registry shall determine, on a case-by-case basis and by coordinating the work of the relevant departments, whether it should propose to the Chamber that the following information also be redacted:

- i) name(s) of victims of and/or witnesses to the acts described;
- ii) characteristics enabling the applicant to be identified from the injury or harm suffered; and
- iii) any other information enabling the applicant to be clearly identified.

For this second series of identifying information, the Participation Section shall submit to the Chamber, concisely and in writing, an explanation of the reasons having led it to propose those redactions. If required, a hearing will be convened to discuss the matter.

52. All proposed redactions will be reviewed by the Chamber before the Registry discloses the applications to the parties for their comments. The Chamber concurs with the reasoning of Trial Chamber I in the Decision of 6 May 2008 in *Lubanga*, and will see to it that the principle of proportionality is scrupulously applied, by satisfying itself that the redactions only restrict the rights of the accused to the extent necessary, and that they constitute the only possible and sufficient measure.

53. Furthermore, the Prosecution requests that the unredacted versions of the applications for participation be disclosed to it and, to this end, cites its duty of protection under article 68(1) of the Statute, the opportunity for it to detect any inconsistency between the information provided in the application for participation and any information given to it during previous contact with the victim, and the risk which may arise from the fact that certain victims may have premature access to confidential documents used in the proceedings.⁴⁰ The Chamber takes note of these observations, but concurs with the conclusion of Trial Chamber I in the

⁴⁰ Observations of the Office of the Prosecutor, paras. 19 to 22.

aforementioned decision, whereby the principle of equality of arms requires that the same versions be disclosed to the Prosecution and to the Defence. However, the Chamber will, if need be, determine under what conditions applications for participation by victims who are also witnesses may be disclosed to the parties. Once it has received from the Prosecution the final list of prosecution witnesses and has decided on the total number of victims authorised to participate in the proceedings, the Chamber will, with the Registry's assistance, draw up a list of persons who have this dual status of witness and victim. Then, in light of the information it possesses, it will determine the procedure to be followed in order, inter alia, to enable the Defence to exercise its rights in full.

54. Finally, the Chamber recalls that redacted versions of applications for participation will be transmitted to the parties for their comments, that applicants will be referred to only by their reference number, and that applicants will be contacted only through their legal representative.⁴¹

I. Registration of applications for reparations

55. The Registry draws the Chamber's attention to the applications for reparations which victims may submit, and asks it to clarify whether it should register them and, if so, at what point. The Chamber notes that the legal representatives of the persons who have thus far submitted applications for reparations to it have requested that those applications be treated as applications for participation.

56. In regard to any subsequent applications for reparations, the Chamber will first determine whether the applicants may be granted victim status and will only rule later on their application for reparations. These will be transmitted to the parties for their comments at a subsequent stage of the proceedings.

⁴¹ Decision of 6 May 2008, paras. 30 and 33; Decision of 17 August 2007, p. 25.

FOR THESE REASONS, THE CHAMBER

DECIDES that the victims authorised by Pre-Trial Chamber I to participate in the proceedings are authorised to participate in the trial, without their applications having to be re-registered;

ORDERS the Participation Section to register the seven pending applications, together with a specific report thereon, by 4 p.m. on 4 March 2009;

ORDERS the Participation Section to verify whether applications for participation which were rejected by the Pre-Trial Chamber would merit reassessment in light of the new criteria for admissibility and registration set out in the present Decision and **ORDERS** that, if so, the said applications be submitted to the Chamber by 4 May 2009, together with an explanatory report;

ORDERS the Participation Section to submit to it a report summarising, for each application received during the pre-trial stage, all of its reasons for not having registered it;

ORDERS the Participation Section to register all complete applications as defined in paragraph 28 of this Decision;

ORDERS the Participation Section to submit to it reports on new applications for participation including the additional information suggested in paragraph 6 of this Decision;

ORDERS the Participation Section to transmit to it applications for participation which refer to the acts specified by Pre-Trial Chamber I in the *Decision on the confirmation of charges* in respect of crimes committed by FRPI and FNI troops, in accordance with the terms of paragraph 21 of the present Decision, and to complete the table annexed to the reports in accordance with the terms of paragraph 23 of the present Decision;

ORDERS the Participation Section to submit to it a report summarising, for each application received after the confirmation of the charges, all of its reasons for not having registered it;

INFORMS the Registry and the participants that any new application for participation in the proceedings, as well as any duly completed application for participation, must be submitted to the Participation Section by 20 April 2009;

ORDERS the Participation Section to transmit to it, by 4 May 2009 and in accordance with the terms of regulation 86(5) of the *Regulations of the Court*, all new applications for participation, barring exceptional circumstances, which it must justify;

ORDERS the Registrar to appoint the Office of Public Counsel for Victims as the legal representative of applicants, pending a decision of the Chamber on their victim status, or until such time as a legal representative is appointed;

ORDERS the Participation Section to propose to it, in cooperation with the Victims and Witnesses Unit, any redactions that it deems necessary for each of the applications for participation, in accordance with paragraphs 49 to 51 of this Decision; and

ORDERS the Participation Section to register applications for reparations, emphasising that they will be disclosed to the parties for their comments at a subsequent stage of the proceedings.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 26 February 2009

At The Hague, The Netherlands