

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/07

Date: 22 July 2009

**TRIAL CHAMBER II**

**Before: Judge Bruno Cotte , Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Hans-Peter Kaul**

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

**Public Document**

**Order on the organisation of common legal representation of victims**

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
 Ms Fatou Bensouda, Deputy Prosecutor  
 Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for Germain Katanga**

Mr David Hooper  
 Mr Andreas O'Shea

**Counsel for Mathieu Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila  
 Mr Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of the Victims**

Ms Carine Bapita Buyangandu  
 Mr Joseph Keta  
 Mr Jean-Louis Gilissen  
 Mr Hervé Diakiese  
 Mr Jean Chrysostome Mulamba  
 Nsokoloni  
 Mr Fidel Nsita Luvengika  
 Mr Vincent Lurquin  
 Ms Flora Mbuyu Anjelani

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for  
 Victims**

Ms Paolina Massida

**The Office of Public Counsel for the  
 Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
 Section**

Ms Fiona McKay

**Other**

Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, in accordance with rule 90 of the Rules of Procedure and Evidence ("Rules"), regulations 79 and 80 of the Regulations of the Court ("Regulations") issues the following decision.

1. On 6 November 2008, the Chamber convened the first status conference in this case in accordance with rule 132(1) of the Rules of Procedure and Evidence ("Rules"). In preparation of this hearing, the Chamber asked the participants and the Registry a number of questions and invited them to raise any issue which they deemed important.<sup>1</sup>

2. In its submissions, the Registry raised the issue of common legal representation of victims and asked the Chamber for early guidance on this matter, in order to allow the grouping of victims and the organisation of common legal representation.<sup>2</sup> The Registry further informed the Chamber that it proposed "to continue to engage in consultation with the legal representatives with a view to ensuring that the question of common legal representation can be resolved rapidly once the Chamber's decision on the applications [for participation] has been issued."<sup>3</sup>

3. During the status conference of 28 November 2008, the Registry suggested that the Chamber instruct the legal representatives already participating in the proceedings, to submit proposals on the issue of the organisation of common legal representation and order the Registry to assist in

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<sup>1</sup> "Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)", 13 November 2008, ICC-01/04-01/07-747-tENG, par. 5

<sup>2</sup> Registry, "Response to the questions raised by Trial Chamber II on 13 November 2008 and additional observations", 24 November 2008, ICC-01/04-01/07-765, p. 10

<sup>3</sup> *Ibid.*, p. 11

this, in accordance with rule 90 of the Rules.<sup>4</sup> The Registry was of the view that the Chamber could ask the “victims or particular groups of victims to choose one or two common legal representatives”.<sup>5</sup> In response to this proposal, the legal representatives argued that the mandate of each respective legal representative is “*intuitu personae*” and can therefore not be transferred from one legal representative to another.<sup>6</sup> However, the need for grouping was accepted and the main question therefore was to determine which criteria should be used for that purpose.<sup>7</sup> One suggestion made in this regard, was that grouping should be organised according to the specificity of the harm suffered by the victims.<sup>8</sup>

4. Following the status conference, the Chamber issued an order in which it, *inter alia*, “strongly encourage[d] the legal representatives to involve the Registry in their consultations and invite[d] both parties to submit practical proposals to it as soon as possible.”<sup>9</sup>

5. On 6 February 2009, all of the legal representatives already participating in the proceedings submitted a joint proposal on how to organise common legal representation.<sup>10</sup> The proposal was said to be based on a ‘compromise’ between the legal representatives and consisted of three different ‘teams’ of legal representatives.<sup>11</sup> The reason for having three different ‘teams’ was said to be the necessity of avoiding any conflict of interest.<sup>12</sup> In particular, the group of victims who were identified as giving rise to a potential conflict of

<sup>4</sup> ICC-01/04-01/07-T-53-ENG-ET WT, 28 November 2008, p. 41, lines 1-16

<sup>5</sup> *Ibid.*, p. 41, lines 1-4

<sup>6</sup> *Ibid.*, p.93, lines 18-21

<sup>7</sup> *Ibid.*, p. 94, lines 3-8

<sup>8</sup> *Ibid.*, p. 89, lines 15-17

<sup>9</sup> “Order Instructing the Participants and the Registry to File Additional Documents”, 10 December 2008, ICC-01/04-01/07-788-tENG

<sup>10</sup> “Soumission relative à la représentation légale commune”, 6 February 2009, ICC-01/04-01/07-876-Corr

<sup>11</sup> ICC-01/04-01/07-876-Corr, par. 4

<sup>12</sup> *Ibid.*, par. 8

interest were the victims of the enlistment of child soldiers, who took an active part in the attack and may therefore also be seen as perpetrators.<sup>13</sup>

6. In its observations on the legal representatives' proposal, the Registry subscribed to the view that there exists a potential conflict of interest between those victims who participated in the attack (the victims of the crime of conscription and enlistment of children under fifteen years of age and the fact that they were used to participate actively in hostilities) and the other victims.<sup>14</sup> However, the Registry stated that it had no reason to believe that there might be a conflict of interest between the other victims of the case<sup>15</sup> and concluded that it would arguably add to the efficiency of the proceedings if the legal representatives were to regroup in two teams rather than three.<sup>16</sup>

7. The Chamber further notes that in the proposal of the victims' legal representatives, it is suggested that a rotation system be put in place within each team in order to ensure that the team is permanently represented by only one legal representative for the duration of the entire trial proceedings.<sup>17</sup> Each 'team' would thus consist of more than one principal counsel, who would represent each other's clients on a rotating basis. The Registry seems to have endorsed this approach, with the understanding that, except in exceptional circumstances, all legal representatives of one team would have to address the Chamber jointly.<sup>18</sup> In addition, the Registry proposed that it should clearly be indicated that it would be the responsibility of each team to ensure that all of the victims

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<sup>13</sup> *Idem*

<sup>14</sup> "Observations du Greffe sur la représentation légale commune des victimes", 17 February 2009, ICC-01/04-01/07-905-Conf-Exp, par. 12. Although this report was filed *ex parte*, the Chamber notes that the Registry has not expressed any opposition to the Chamber making reference to it. The Chamber does, moreover, not reveal any sensitive or confidential information contained in the report.

<sup>15</sup> *Ibid.*, par. 12

<sup>16</sup> *Ibid.*, par. 25

<sup>17</sup> ICC-01/04-01/07-876-Corr, par. 11

<sup>18</sup> ICC-01/04-01/07-905-Conf-Exp, par. 17

represented by it are kept informed and are consulted in an appropriate manner.<sup>19</sup> Finally, the Registry advised that any decision on the proposal should be reviewed if and when additional victims were given leave to participate.<sup>20</sup>

8. Since then, a large number of additional applications for participation have been received by the Court. Some applicants have chosen a legal representative from the legal counsel already representing victims in the proceedings, whereas others have chosen other legal counsel for their representation. Those who have not yet decided on a legal representative are being represented by the Office of Public Counsel for the Victims. In its several reports on the applications for participation, in accordance with regulation 86(5)<sup>21</sup>, the Registry stated that it would be in a position to make recommendations to the Chamber about the grouping of the legal representatives once the Chamber has decided on all of the individual applications for participation.<sup>22</sup> The Registry also drew the Chamber's attention to the necessity of determining the maximum number of legal representatives per 'team'.<sup>23</sup>

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<sup>19</sup> Ibid., par. 16

<sup>20</sup> Ibid., par. 25

<sup>21</sup> "Premier rapport du Greffe sur des demandes de participation en vertu de la norme 86-5 du Règlement de la Cour", 19 December 2008, ICC-01/04-01/07-803-Conf-Exp; "Filing of proposed redactions on victims' applications in accordance with decision ICC-01/04-01/07-933", 3 April 2009, ICC-01/04-01/07-1023-Conf-Exp, including seven requests for participation additional to the 90 applications submitted in ICC-01/04-01/07-803-Conf-Exp; "Deuxième rapport du Greffe sur des demandes de participation en application de la norme 86-5 du Règlement de la Cour", 21 April 2009, ICC-01/04-01/07-1066-Conf-Exp; "Rapport du Greffe sur les demandes de participation rejetées par la Chambre préliminaire", 4 May 2008, ICC-01/04-01/07-1104-Conf-Exp; "Troisième rapport du Greffe sur des demandes de participation en application de la norme 86-5 du Règlement de la Cour", 4 May 2009, ICC-01/04-01/07-1092-Conf-Exp; "Quatrième rapport du Greffe sur des demandes de participation en application de la norme 86-5 du Règlement de la Cour", 8 May 2009, ICC-01/04-01/07-1121-Conf-Exp; "Cinquième rapport du Greffe sur des demandes de participation en application de la norme 86-5 du Règlement de la Cour", 20 May 2009, ICC-01/04-01/07-1159-Conf-Exp; "Rapport du Greffe sur la demande de participation a/0114/08 en application de la norme 86-5 du Règlement de la Cour", 18 June 2009, ICC-01/04-01/07-1216-Conf-Exp

<sup>22</sup> "Quatrième rapport du Greffe sur des demandes de participation en application de la norme 86-5 du Règlement de la Cour", 8 May 2009, ICC-01/04-01/07-1121-Conf-Exp, par. 15

<sup>23</sup> Ibid., par. 17

9. Considering that the Chamber is now in possession of all the applications for participation in this case, the time is opportune to organise the common legal representation of the victims who have been granted leave to participate in the proceedings, in accordance with regulation 79 (1) of the Regulations.

10. In formulating the following guidelines, the Chamber was guided by three overriding concerns:

- a. First, the Chamber attaches the greatest importance to the requirement that the participation of victims, through their legal representatives, must be as meaningful as possible as opposed to being purely symbolic. To that end, the Chamber considers it of utmost importance that there is a steady and reliable flow of information about the proceedings to the victims and that there is real involvement by the victims in terms of instructing the legal representatives on how their interests should be represented.
- b. Second, the Chamber is duty-bound to ensure that the proceedings are conducted efficiently and with the appropriate celerity.<sup>24</sup> The Chamber must therefore guard against any unnecessary repetition or multiplication of similar arguments and submissions. This requirement also implies that victims' legal representatives must always be available to participate fully, even on short notice, in all stages of the proceedings when their clients' interests are engaged. This further requires that legal representatives who appear before it are completely familiar with all legal and factual aspects of the case.

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<sup>24</sup> Article 64(2)

- c. Third, the Chamber is of the view that its obligation under article 68(3) of the Statute to ensure that victims' participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, extends to the organisation of the legal representation of victims. It is important, in this respect, that the participation of victims does not impose too heavy a burden upon the Defence.

11. Furthermore, the Chamber emphasises that, although victims are free to choose a legal representative<sup>25</sup>, this right is subject to the important practical, financial, infrastructural and logistical constraints faced by the Court. Common legal representation is the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings, whilst at the same time ensuring meaningful participation by potentially thousands of victims, all within the bounds of what is practically possible. The Chamber considers, therefore, that the freedom to choose a personal legal representative, set out in rule 90(1) is qualified by rule 90(2) and subject to the inherent and express<sup>26</sup> powers of the Chamber to take all measures necessary if the interests of justice so require.

12. The Chamber analysed all applications for participation in light of the above and noted that:

- a. The number of applications is so large that, taking into consideration that (1) the Chamber has already authorised 57 victims who participated in the confirmation proceedings to continue participating in the trial proceedings and (2) that the Chamber will soon issue its decision on the new applications, which will multiply the number of

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<sup>25</sup> Rule 90(1)

<sup>26</sup> Regulation 80(1)



participating victims, it would be entirely unfeasible for each of them to be represented individually.

- b. Apart from a limited number of applicants, all victims allege to have suffered harm as a consequence of the attack on Bogoro on 24 February 2003. There do not seem to be tensions between them in terms of ethnicity, age, gender or the type of crimes they were allegedly the victim of.
- c. Falling outside of this large group, there is a small number of applicants who are former child soldiers, who allege to have participated in the attack of 24 February 2003. They may thus have perpetrated some of the crimes that victimised the other applicants. Moreover, these applicants have a different ethnic background to that of the other applicants.
- d. Apart from the applicants mentioned in (c.), immediately above, a large proportion of victims allege to have been the victims of more than one of the crimes charged and to have suffered different types of harm. It is thus not possible to group the victims in entirely separate categories, as there are a number of victims who fall in more than one category.
- e. Most applicants are still living in the area in which the attack took place.

13. Given these factors, the Chamber considers it both necessary and appropriate to group all victims who have been admitted to participate in this case, with the exception of the victims mentioned in paragraph 12.c, into one group represented by one common legal representative. The common legal representative shall be responsible for both representing the common interests

of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake. The common legal representative shall be accountable to the victims as a group, who may petition the Registry in case of significant problems with the representative function of the common legal representative. If the problem cannot be resolved by the Registry, the latter shall inform the Chamber.

14. As the Chamber noted earlier, it is vital that the common legal representative must be fully available throughout the entire duration of the proceedings. The Chamber is of the view that the quality of the legal representation of victims may not suffer as a result of other competing engagements of the (common) legal representatives. Before accepting his or her mandate, a (common) legal representative must give reasonable assurance that he or she will be available at the seat of the Court for the entirety of the expected duration of the hearings on the merits and the subsequent reparations phase. It would therefore be preferable for the common legal representative not to be involved in more than one case before this Court at once.

15. At the same time, the Chamber considers that it would be desirable if the common legal representative (or at least one member of his or her team) has a strong connection with the local situation of the victims and the region in general. This will assist the common legal representative in presenting the genuine perspective of the victims, as is his or her primary role.

16. In case the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber. In case the conflicting instructions are irreconcilable with representation by one common legal representative, and thus amount to a conflict of interest, the common legal representative shall inform the Chamber immediately, who will take

appropriate measures and may, for example, appoint the Office of Public Counsel for the Victims to represent one group of victims with regard to the specific issue which gives rise to the conflict of interest. The Chamber notes that nothing in the paragraph predetermines the modalities of participation which the Chamber will determine in a separate decision.

17. In order to allow the common legal representative to perform his or her duties efficiently, the Registry, in consultation with the common legal representative, shall propose a suitable support structure, in order to provide the common legal representative with the necessary legal and administrative support, both at the seat of the Court and in the field. This support structure must, to the extent possible and within the limits of the available legal aid structure, allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.
- c. Maintain up to date files of all participating victims and their whereabouts.
- d. Obtain qualified legal support on a need basis.

- e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner.
- f. Communicate with victims in a language they understand.

18. To the extent that this is reconcilable with the Registry's mandate and neutrality, and insofar as this does not affect the independence of the common legal representative, the support structure may rely on resources available to the Registry at the seat of the Court or in the field (e.g. facilities or support staff available in a field office). If the Registry seconds one or more members of its personnel to the support structure of the common legal representative, these persons, although belonging to the Registry for administrative purposes, shall operate under the instruction of the common legal representative.

**FOR THESE REASONS,**

**THE CHAMBER**

**ORDERS** the Registry to assist the victims in choosing a common legal representative, in consultation with the legal representatives who are currently participating in this case. If the victims are unable to choose a common legal representative, the Chamber authorises the Registrar to choose an appropriate common legal representative on the basis of the criteria laid down in the Statute, Rules and Regulations of the Court, as well as the present Decision.

**INVITES** the common legal representative to appoint an assistant common legal representative who is able to support him or her in the representation of the victims and may replace the common legal representative in case of unforeseen unavailability of the latter. This assistant must be qualified for inclusion on the List of assistants to counsel, in accordance with regulation 124 of the Regulations of the Registry.

**ORDERS** the Registry to consult with the common legal representative, as soon as he or she has been chosen, in order to put in place an appropriate support structure in accordance with paragraph 17 of this Decision. In case there are difficulties with the composition of the appropriate support structure, the Registry shall alert the Chamber immediately.

**ORDERS** the Registry to submit a report to the Chamber on the abovementioned matters no later than Friday 14 August 2009.

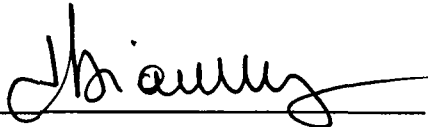
**AUTHORISES** the participation of a separate legal representative for the representation of the victims described in paragraph 12.c.

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



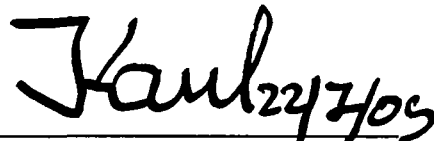
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Judge Bruno Cotte  
Presiding Judge



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Judge Fatoumata Dembele Diarra



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Judge Hans-Peter Kaul

Dated this 22 July 2009

At The Hague, the Netherlands