

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 23 April 2012

TRIAL CHAMBER II

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

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

Public

**Decision on the Urgent Requests by the Legal Representative of
Victims for Review of Registrar's Decision of 3 April 2012
regarding Legal Aid**

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

Ms Fatou Bensouda

Mr Eric MacDonald

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

Mr Fidel Nsita Luvengika

Mr Jean-Louis Gilissen

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

States Representatives

The Office of Public Counsel for the Defence

REGISTRY

Registrar

Ms Silvana Arbia

Mr Marc Dubuisson

Victims and Witnesses Unit

Counsel Support Section

Mr Esteban Peralta Losilla

Others

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to regulations 23bis, 24 and 83(4) of the Regulations of the Court (“the Regulations”), decides as follows:

I. PROCEDURAL HISTORY

1. The Chamber is seized of a request by the Legal Representative of the principal group of victims (“the Legal Representative”) to review an administrative decision by the Registrar concerning the attribution of legal aid for a field mission.¹ According to the Legal Representative, this mission had a double objective. On the one hand, the Legal Representative wanted to inform his clients of important evolutions that have taken place since the last mission in July 2011 and to collect their instructions, especially regarding the final arguments of the parties and in view of the preparation of the final oral arguments. On the other hand, the Legal Representative wished to meet individually with certain victims in order to get some precisions on their personal files. The Legal Representative intended to travel to the DRC in person, together with his Legal Assistant based at the seat of the Court in The Hague.

2. On 3 April 2012, the Registrar rejected the request for legal aid in the following terms:

Therefore, taking into consideration the pertinent points advanced for this mission, the Registry is of the view that a highly qualified and full time Legal Assistant based in the field can reasonably perform and fulfil all activities as envisaged. For these reasons, we are amenable to approve the mission of the Legal Assistant based in the field to accomplish all necessary tasks prior to the final oral pleadings in the case. Consequently, the request of the Legal

¹ “Demande d’examen d’une décision du Greffier relative à une demande de mission du représentant légal”, 6 April 2012, ICC-01/04-01/07-3268 (“Request”)

*Assistant based in The Hague and Counsel to also simultaneously partake this mission is not approved.*²

3. The Legal Representative argues that the Registrar's decision is wrong, in essence because the Registrar did not sufficiently consider the importance of personal contact between the Legal Representative and his clients and the bond of trust that must exist between the two. The Legal Representative states that he has been asked several times by his clients to meet in person. He is of the view that the Legal Assistant in the field cannot substitute him in this regard. Furthermore, the Legal Representative submits that it is only at this point in time that he can inform the victims of the positions taken by the Prosecutor and the Defence and that it is important for him to be able to inform them about the upcoming procedural steps and to collect the instructions from his clients. On this basis, the Legal Representative asks the Chamber to decide that the mission falls within the scope of the legal aid provisions and to order the Registrar to assume its costs.

4. In fact, the Legal Representative asks the Chamber to rule on three alternative requests:

- a. In the first instance, to decide that the planned mission falls within the parameters of legal aid and to order the Registrar to cover the following costs: air travel for one person travelling from Europe; airport taxes; Daily Subsistence Allowance for 16 days; remuneration of a resource person; costs of transporting, lodging and catering victims who have to travel; rental costs for rooms; printing costs of official documents.³
- b. Subsidiarily, to decide that the general costs of the mission by the Legal Assistant in the field should be covered by legal aid, namely:

² ICC-01/04-01/07-3270-Conf-Exp-Anx1

³ ICC-01/04-01/07-3268, para. 53

an unspecified amount of Daily Subsistence Allowance for the Legal Assistant in the field; remuneration of a resource person; costs of transporting, lodging and catering for victims who have to travel; rental costs for rooms; printing costs of official documents.⁴

- c. Alternatively, in case the Legal Representative were to have to pay his own travel costs to the DRC, to order the Registrar to provide logistical and security support to conduct the mission, including MONUSCO flights to and from Bunia.⁵

5. On 16 April 2012, the Registrar submitted observations in respect of the Request and the Additional Request on the basis of regulation 24*bis* of the Regulations.⁶ The Registrar argues that the Legal Representative has failed to establish that her decision was arbitrary or in violation of the applicable texts or the established practice in relation to legal aid. The Registrar further refers to the standard of review established by the Presidency for dealing with requests for review of administrative decisions of the Registrar.⁷ Furthermore, the Registrar argues that the Legal Representative has not established that there is a need for him to travel to the DRC.

6. On 17 April, the Legal Representative asked for permission to submit a reply to the Registrar's Observations.⁸

⁴ ICC-01/04-01/07-3268, para. 58

⁵ "Demande Complémentaire à la demande d'examen d'une décision du Greffier relative à une demande de mission du représentant légal", 13 April 2012, ICC-01/04-01/07-3269 ("Additional Request")

⁶ "Observations du Greffier relatives à la 'Demande d'examen d'une décision du Greffier relative à une demande de mission du représentant légal' datée du 6 avril 2012 et la Demande complémentaire ICC-01/04-01/07-3269, du 13 avril 2012", 16 April 2012, ICC-01/04-01/07-3270-Conf-Exp ("Observations")

⁷ ICC-01/04-01/07-3270-Conf-Exp, para. 14,

⁸ "Demande de réplique aux Observations du Greffier", 17 April 2012, ICC-01/04-01/07-3271-Conf-Exp

II. ANALYSIS

7. The Chamber notes that the admissibility of the Request is not contested. It confirms that the Request falls within scope of regulation 83(4) of the Regulations, as it pertains to the scope of legal assistance to be paid by the Court.

A. Applicable standard of review

8. The Chamber notes that there appears to be some ambiguity about the applicable standard of review under regulation 83(4) of the Regulations. On the one hand, the Legal Representative seems to believe that it is the Chamber's role to reconsider the entire question *de novo*. This follows from the arguments developed by the Legal Representative and by the way in which the prayers for relief of both the Request and the Additional Request are formulated. The Registrar, on the other hand, refers to the standard of review applied by the Presidency in relation to administrative decisions by the Registrar, but also engages the Legal Representative's substantive arguments.

9. As regulation 83(4) of the Regulations does not specify a standard of review, the Chamber must clarify this before considering the actual decision under review. A first point, in this regard, is that the Registrar's reference to the Presidency's standard of review is not entirely correct, as the Presidency does not review decisions on the scope of legal assistance paid by the Court.⁹ The Chamber is therefore not bound to apply the same standard of review. Instead, the Chamber is of the view that a more flexible standard is appropriate, given that the impact and importance of the Registrar's decisions in relation to the scope of legal aid varies so broadly. For example, when Chambers are asked to review crucial decisions affecting the composition of

⁹ Presidency, *Prosecutor v. Lubanga*, "Decision on the 'Demande de réexamen de la décision du Greffier sur la demande d'aide judiciaire aux frais de la Cour déposée par Maîtres Walley, Mulenda Diakiese et Mulamba dans l'affaire Le Procureur c/Thomas Lubanga Dyilo'", 1 April 2012, ICC-RoC85-01/09-7

defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation.¹⁰ However, when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or legal representatives and their teams, the Chamber's intervention is more limited. This is so because the Chamber is not supposed to micromanage the Registrar in this regard and because it is the Registrar's responsibility to administer the available legal aid budget. It is not disputed that the Registrar has a relatively wide margin of discretion in this area and Chambers should therefore only interfere with this discretion when there are compelling reasons for doing so. In practical terms, this means that in reviewing such decisions, the Chamber must not consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber will only intervene if counsel can show that the Registrar's decision falls foul of one or more of these criteria.

B. Review of the Registrar's decision of 3 April 2012

10. The Chamber is of the view that the Registrar's decision does not raise fundamental questions of procedural fairness and must thus be reviewed in accordance with the standard adopted in paragraph 9.

1. Did the Registrar abuse her discretion?

11. As it is not suggested that the Registrar abused her discretion, the Chamber will not consider this point any further.

¹⁰ E.g.; Trial Chamber I, *Prosecutor v. Lubanga*, "Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry", 30 August 2011, ICC-01/04-01/06-2800

2. Is the Registrar's decision affected by a material error of law or fact?

12. In terms of errors of law, the Legal Representative argues that the Registrar erred in noting the stage of the proceedings.¹¹ He argues that the stage of the proceedings has no influence on his need to have personal contact with his clients.

13. The Chamber agrees with the Legal Representative that the stage of the proceedings as such cannot be a ground for rejecting all field missions. At the same time, when assessing the necessity of a field mission, the Registrar must take the procedural stage into consideration.

14. In any case, as the Legal Representative points out himself, it is unclear which consequences the Registrar attached to the stage of the proceedings. However, it is clear that it was not the decisive ground for rejecting the mission. Therefore, the Chamber is not persuaded that its invocation was improper.

15. The Legal Representative further complains about the fact that the Registrar did not sufficiently take into consideration the fact that he had previously planned two missions, which he was not able to conduct because of the security situation in the region. Moreover, the Legal Representative argues that the Registrar did not sufficiently take into consideration the Chamber's position in respect of his need to enter into contact with his clients.¹²

16. The Chamber observes that the fact that previous missions had to be aborted because of security concerns has only limited relevance for the question as to whether the present mission is warranted and necessary. The Chamber therefore fails to see a material error of fact here.

¹¹ ICC-01/04-01/07-3268, paras. 28-31

¹² ICC-01/04-01/07-3268, paras. 33-35

17. As regards to the Legal Representative's reference to the Chamber's supposed acceptance of the need to meet with the victims in person, the Chamber simply points out that it never stated this. In fact, the words of the Presiding Judge were as follows:

S'il s'avérait que des contacts avec telles ou telles victimes, peut-être pas avec toutes, s'avèraient absolument indispensables, alors peut-être serez-vous contraint à nous écrire pour nous demander, éventuellement, de manière très spécifique, très motivée et très justifiée, les raisons pour lesquelles vous auriez éventuellement besoin d'un petit complément de mémoire.¹³

18. Although the Chamber recognised the potential importance of *contacting* certain victims for the purpose of preparing the final submissions, this did not imply that participating victims have an unqualified right to meet their legal representative in person at the expense of the Court. There is thus no error of law on the part of the Registrar in this respect.

3. *Is the Registrar's decision manifestly unreasonable ?*

19. The Registrar's decision seems to be based chiefly on her view that the Legal Assistant based in the field can perform and fulfil all activities envisioned in the mission plan. The Legal Representative challenges this mainly on the basis of the allegation that he must meet certain victims in person. However, it appears to the Chamber that it is not very clear from the motivation provided by the Legal Representative why such personal contact between himself and certain victims is necessary for him to be able to carry out his mandate. The Chamber notes, in this regard, that the Legal Representative has submitted his final brief on 27 February 2012¹⁴ and

¹³ ICC-01/04-01/07-T-335-FRA ET WT, p. 20

¹⁴ "Conclusions finales", 27 January 2012, ICC-01/04-01/07-3253-Conf

additional observations on 22 March 2012.¹⁵ At no point in time before or after submitting these two key documents did the Legal Representative state that he was unable to represent all of his clients or that he needed to meet with some of them in person before being able to file these crucial submissions. This is significant, given the Chamber's express invitation on this point, which is quoted in paragraph 17. The Chamber further notes that, although the Legal Representative mentioned the need to meet certain victims in person in his mission plan as well as in the Request, he did not provide any information allowing the Registrar or the Chamber to evaluate the well-foundedness of this alleged necessity.

20. Given the lack of justification on this point, the Chamber deems it was not unreasonable on the part of the Registrar to think that the Legal Assistant in the field could ensure the necessary contacts.

21. As for the remainder of the justifications for the mission, the Chamber is of the view that it was not unreasonable on the part of the Registrar to consider that the Legal Assistant in the field could reasonably perform and fulfil all the planned activities. The Chamber reaches this conclusion on the basis of the fact that, apart from the personal meetings with clients, the mission plan includes mainly tasks and responsibilities which the Legal Assistant in the field must be presumed to have carried out on a regular basis in the past. The Chamber observes, in this regard, that it has not been informed of any problems or shortcomings on the part of the Legal Assistant in the field in conveying information about procedural developments or indeed to collect the views and concerns of the victims, including obtaining their instructions.

¹⁵ "Observations additionnelles aux conclusions finales du représentant légal suite au jugement rendu dans l'affaire *Lubanga*" 22 March 2012, ICC-01/04-01/07-3263

4. Subsidiary request

22. In relation to the Legal Representative's subsidiary request (see paragraph 4 b.), the Chamber considers that the Registrar has already indicated that it was amenable to approve the mission of the Legal Assistant in the field. This appears to be a matter of formality. The subsidiary request is therefore moot.

C. Additional Request

23. Finally, the Chamber cannot rule on the Legal Representative's Additional Request, because its role under Regulation 83(4) of the Regulations is limited to reviewing decisions by the Registrar on the scope of legal aid. The Chamber cannot substitute its own decision for one still to be made by the Registrar, as this would usurp the latter's discretion. Moreover, the Chamber interpreted the Legal Representative's email message of 10 April 2012 primarily as a request for clarification of the Registrar's decision of 3 April 2012 and the Chamber obviously has no mandate to interpret the decisions of other organs of the Court on their behalf.

D. Request for Reclassification

24. As the Legal Representative has filed all documents publicly and has specifically asked the Chamber to reclassify the Registrar's Observations, excluding its annexes, the Chamber sees no reason that could justify the confidential nature of the Observations.

E. Request for Leave to Reply

25. Considering the proliferation of filings and emails that were copied to the Chamber about this matter, the Chamber considers it is sufficiently informed. Moreover, the request for leave to reply does not raise any fundamental new issues or important legal problems, which could justify the prolongation of the present proceedings.

**FOR THESE REASONS,
THE CHAMBER,**

REJECTS the Legal Representative's request to submit a reply;

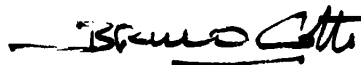
REJECTS the Request and the Additional Request;

INVITES the Legal Representative to enter into contact with the Counsel Support Section of the Registry in order to make all necessary arrangements for the mission of the Legal Assistant in the field;

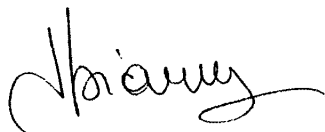
INVITES the Registrar to provide reasonably required assistance to the Legal Representative in order to facilitate communication between the latter and certain identified victims or groups of victims; and

ORDERS the Registry to reclassify the Registrar's Observations as public.

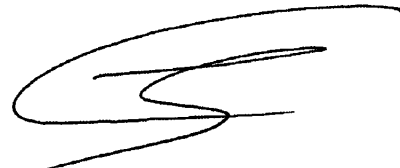
Done in both English and French, the English version being authoritative.



**Judge Bruno Cotte
Presiding Judge**



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 23 April 2012

At The Hague, The Netherlands