

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07
Date: 24 November 2008

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
Annexes ex-parte under seal VWU only
URGENT
Response to the questions raised by Trial Chamber II on 13 November 2008 and
additional observations**

Source: The Registrar

Document 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 Mr. Germain Katanga

Mr. David Hooper
Ms. Caroline Buisman

**Counsel for Mr. Mathieu Ngudjolo
Chui**

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

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Hervé Diakiese
Mr Jean-Christophe Mulamba Nsokoloni
Mr Joseph Keta
Mr J.L. Gilissen

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Simo Vaatainen

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

The Registrar of the International Criminal Court (“the Court”);

NOTING the “*Ordonnance fixant la date d’une conférence de mise en état (règle 132 du Règlement de procédure et de preuve*” rendered by Trial Chamber II (“the Chamber”) on 6 November 2008;¹

NOTING the “*Ordonnance enjoignant aux participants et au Greffe de répondre aux questions de la Chambre de première instance II en vue de la conférence de mise en état (article 64-3-a du Statut)*” (“the Order for Submissions”) rendered by Trial Chamber II on 13 November 2008;²

NOTING Article 64 (2) (3) (a) of the Rome Statute, Rule 132 of the Rules of Procedure and Evidence, Regulations 23*bis*, 28 (2), 86 (5) of the Regulations of the Court;

CONSIDERING that in the Order for Submissions, the Chamber requests the Registry to respond to two separate questions related to victim applications to participate in the proceedings and witness protection measures;³

CONSIDERING that, furthermore, the Chamber invites the participants and the Registry to further submit in writing relevant questions and observations for consideration by the Chamber;⁴

FURTHER CONSIDERING that the Chamber has requested the participants to provide written submissions on subjects, some of whose determination will have a direct impact on the operations of the Registry;⁵

¹ ICC-01/04-01/07-739.

² ICC-01/04-01/07-747.

³ Ibid. at p. 12, questions 1) and 2).

⁴ Ibid. at p. 3, para. 5.

RESPECTFULLY SUBMITS as follows:

Part I: RESPONSES TO QUESTIONS 1) AND 2)

Response to question 1)⁶

- On applications to participate

1. The VPRS confirms that it has received additional applications to participate in the proceedings emanating from the DRC since the last time it filed applications in the record of the Case with Pre-Trial Chamber I on 26 May 2008.⁷
2. The exact number of applications to be filed will depend on instructions from the Chamber on two issues.
3. First, in accordance with the jurisprudence of Pre-Trial Chamber I and the practice established with that Chamber, during the pre-trial phase the VPRS filed in the record of the Case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* only applications that it appeared might be linked with the charges in this Case (i.e. applications related to crimes allegedly committed during the alleged joint FRPI/FNI attack on the village of Bogoro on or about 24 February 2003).⁸

⁵ Ibid at p. 6, question 7); p. 7, questions 10), 12), and 13); p. 8, questions 15) and 1); p. 9, question 1); p. 10, questions 4), 2) and 3); p. 11, questions 4), 2) and 3)."

⁶ « *Le Greffe a-t-il reçu de nouvelles demandes de participation de victimes ? Dans l'affirmative, quand transmettra-t-il à la Chambre le rapport prévu à la norme 86-5 du Règlement de la Cour ?* »

⁷ Pre-Trial Chamber I indicated in its decision of 13 May 2008 (ICC-01/04-01/07-474) that it would not consider for the purpose of the confirmation of charges hearing any application transmitted by the Registry after 26 May 2008.

⁸ ICC-01/04-01/07-357, page 8.

4. If the Chamber wishes to follow the same practice, the VPRS would file approximately 110 additional applications that have been received after 26 May 2008 but not yet filed in the record of the Case. If the Chamber wishes to take a different approach, the VPRS requests guidance as to the basis on which it should determine which applications to file.⁹ The Registry would also draw to the Chamber's attention the fact that there are also an additional 7 applications filed before the Pre-Trial Chamber that are still pending.
5. Second, the VPRS wishes to receive guidance from the Chamber as to whether it should file only complete applications, or also incomplete ones. The practice of the Pre-Trial Chamber I was to request VPRS to file only complete applications, as defined by the Chamber.¹⁰ Where applications received were incomplete, the VPRS sought the missing information in accordance with Regulation 86(4) of the Regulations of the Court and filed the application only if and when such missing information could be obtained.
6. If the Chamber wishes to follow the same practice, the VPRS would only file those of the above 110 applications that are already complete. Otherwise, VPRS would file all 110 applications, and supplement this with the missing information as and when it is received.
7. The VPRS is in the process of preparing a detailed account of the status of all applications, which will be presented to the Chamber by 28 November 2008.

⁹ For the Chamber's information, the VPRS has received approximately 580 applications from applicants in the DRC, other than the 107 already filed in the record of the Case *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. Some of these have been filed in the record of other cases, and/or of the Situation in the DRC.

¹⁰ In ICC-01/04-374, PTCI ordered the Registrar to present to the Chamber, in the first instance, only complete applications and to present within a reasonable time those applications which are still incomplete even after the Registrar has exercised her authority under Regulation 86(4) of the Regulations of the Court to request further information. In accordance with this approach, the VPRS initially filed only complete applications in the Case. However, on 26 May 2008, incomplete applications were filed as well, given the fact that PTCI had established a deadline for the purpose of the confirmation of charges hearing. The practice before Trial Chamber I so far has been to receive both complete and incomplete applications.

- *When will VPRS transmit a report under Regulation 86.5?*

8. The VPRS would be able to file the new applications that appear to be linked with the charges, together with a report under Regulation 86.5, by no later than 19 December 2008.

Response to question 2)¹¹

9. Due to the confidentiality of the information contained therein, the response to question 2) is submitted in Annex A of the present submission. Furthermore, an overview of the general framework implemented by VWU in respect of protective measures is presented in Annexes B, C and D.

Part II: ADDITIONAL MATTERS FOR CONSIDERATION BY THE CHAMBER

10. The Registrar respectfully brings the attention of the Chamber to the subjects below, for its consideration and determination, in order to assist the Registry in properly discharging its functions in the preparation for the trial of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui:¹²

- *Issues for consideration part I (submitted by the Division of Court Services)*

A. Familiarization.

- i. For the Registry, it would be important to know what approach to witness proofing will be established by the Chamber. This includes

¹¹ «Des demandes de mesures de protection sont-elles en cours d'examen ? Dans l'affirmative, quel est leur nombre et dans quel délai le Greffe entend-il y répondre ? L'insécurité régnant actuellement en Ituri peut-elle influencer sur la mise en œuvre de ces mesures ? »

¹² In so doing, the Registrar provides additional points for determination to those which the Chamber has already requested written submissions from the Prosecution, the Defence and the Victims Legal Representatives in the 13 November 2008 Order for Submissions, and which will have a direct impact on the work of the Registry.

clarification on matters such as the role of the VWU, whether or not witness proofing is prohibited or not, how will statements be provided to the witnesses (i.e. in which language), what determination the Chamber will make regarding the separation of witnesses during travel and accommodation, and ensuring that VWU services are requested at least 35 days before the witness is scheduled for testimony.

B. In-Court assistance.

i. Recognizing that the experience of testifying before the Court can be particularly difficult for vulnerable and traumatized witnesses, the Registry would request the Chamber to clarify the role of the VWU with respect to courtroom familiarization and psycho-social in-court assistance to the witness during hearings.

C. Contacting witnesses of other party.

i. The Registry requires the guidance of the Chamber as to the practicalities of the process itself. What will be the duties and responsibilities of the parties and participants? What will be the role of the VWU?

D. Dual status of victims and witnesses.

i. The Registry requests the Chamber's guidance in respect to the procedure that will be applied in relation to individuals with dual status and the role of the VWU.

E. Witness testimony

i. In order to support the judicial process and facilitate the movement and testimony of witnesses, the Registry requires information on whether witnesses are expected to testify at The Hague or whether it is probable that testimony might also take place from a remote location.

F. Live broadcast of audio visual recordings.

i. In order to ensure the confidentiality of the proceedings where appropriate, the Registry requires a determination of the Chamber on whether there will be a strict control on access rights to live proceedings comprising of audio visual recordings.

G. Use of visual aids.

i. It would assist the Registry in the preparation of its work to be provided information as to what can be expected in terms of visual aids. Will the Chamber permit the use of such visual aids for the purposes of presentation of evidence? If so, in which format (i.e. are they to include subtitles? If so, in which language?).

H. Lingala interpretation for Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui

i. The Registry requests clarification from the Chamber on whether the Registry is to continue to provide such interpretation services to the accused during the proceedings. The Registry remains available to the Chamber to explain the practicalities involved in making such services available as well as the possible constraints.

I. Hearing schedule

i. The Registry would welcome information on the number of days and hours per week that the Chamber intends to hold trial hearings, in order for the Registry to be able to anticipate provision of services taking into account the Court's overall hearing schedule.

- Issues for consideration part II (submitted by VPRS)

A. Format of reports under Regulation 86(5) of the Regulations of the Court

i. The Registry has developed a standard format of report for the purpose of Regulation 86(5). As it should reflect what will be most useful for the Chamber, the VPRS will provide an example of this format for the Chamber's consideration, together with the more detailed report that is mentioned above in paragraph 7 of the present submission.

B. Guidance requested on specific questions relating to the processing of applications to participate in proceedings

i. Taking into account the Chamber's indication that it does not intend to reopen issues that have already been settled by other Chambers relating to, *inter alia*, victims' participation,¹³ the Registry would appreciate guidance from the Chamber in the following areas:

- Whether or not VPRS should file again applications that have already been considered and accepted or rejected in the Case by the Pre-Trial Chamber.
- What constitutes a "complete" application.¹⁴
- Which documents will be accepted as proof of identity of the applicant and any person acting on behalf of an applicant, or as proof of the link between them.¹⁵

ii. The Registry proposes to develop these questions more fully in a more detailed report to be presented to the Chamber by 28 November 2008, as referred to in paragraph 7, above.

¹³ ICC-01/04-01/07-747

¹⁴ See for example ICC-01/04-374 for criteria established by the PTCl on what constitutes a complete application. While the TCI has established a list of documents which would be accepted (for example as proof of identity), it has not ruled on what constitutes a complete application.

¹⁵ See ICC-01/04-374 and ICC-01/04-01/06-1119. While the lists of documents identified by PCTI and TCI are very similar, there are slight differences, the list of TCI being a little more specific.

C. Legal representation

i. According to Rule 90 of the Rules of Procedure and Evidence: "Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives." The Registry believes that it would be helpful for the Chamber to provide early direction on this matter, in order to allow the grouping of victims and the organisation of common legal representation to take place in a timely manner.

ii. In the meantime, the Registry assists victims in organising their legal representation in accordance with Rule 16 paragraph 1(b) of the Rules of Procedure and Evidence.

iii. Currently, there are four legal teams representing persons already afforded the status of victim in the Case by the Pre-Trial Chamber during the pre-trial phase. In addition to this, there is one further legal team representing applicants whose status in relation to the Case has yet to be determined. There are also 12 persons among the new applicants who do not have a legal representative.

iv. The Registry would like to inform the Chamber that the VPRS has made all the legal teams aware of the provisions of Rule 90, including the limitations of the Court's legal aid budget. Further, the VPRS is informed that discussions and consultations have already been taking place between the existing teams of legal representatives and believes that, once the Chamber has decided which victims will be entitled to participate during the trial, the legal representatives of those victims may wish to make a common proposal on the organisation of common legal representation for

the trial. The VPRS proposes to continue to engage in consultations 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 has been issued.

v. Another matter for the Chamber's consideration is the role of the Office of Public Counsel for Victims (OPCV). In the proceedings relating to the Situation in the DRC, the OPCV was appointed by Pre-Trial Chamber I to represent applicants who did not have a legal representative, until their status was determined or another legal representative was appointed.¹⁶ Such appointment was to be made automatically by the Registry at the same time as the filing of the applications with the Chamber. However, none of the victims accepted to participate in the Case The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui fall under this category. In the two cases where victims were authorised to participate and did not have a legal representative, the Chamber ordered the Registry to assist the victim to choose one before the confirmation of charges hearing.¹⁷ At this point, The Chamber may wish to consider whether to order the appointment of the OPCV to represent applicants who do not have a legal representative, either before or after their applications have been filed with the Chamber. If so, the Chamber may wish to either order the appointment of OPCV in relation to specific applicants, or to order the Registry to appoint the OPCV automatically in relation to any applicant who does not have a legal representative, until such time as one is appointed.

¹⁶ For Pre-Trial Chamber I's approach, see ICC-01/04-374. Trial Chamber I also issued a decision on the role of the OPCV, in which it ruled that the OPCV shall continue to represent those applicants until the Chamber issues a decision on their application to participate: ICC-01/04-01/06-1211.

¹⁷ ICC-01/04-01/07-579-Conf-Exp

vi. The Registry is available to make more detailed information regarding legal representation available to the Chamber, as well as to make more detailed recommendations regarding the organisation of legal representation.

D. Protection measures

i. The protection of persons applying to participate in the proceedings and victims participating in the proceedings may need determinations by the Chamber at different points in the proceedings.

ii. For the Chamber, the first occasion when questions of protection might arise is when applications are transmitted to the parties for observations. According to Rule 89 paragraph 1 of the Rules of Procedure and Evidence, the Registrar shall provide a copy of applications received to the Prosecutor and the Defence, who will have the opportunity to make observations. However, this is made subject to the provisions of the Statute, in particular, Article 68, paragraph 1. The protection measures that have been used by other Chambers at this stage are the following:

- Ordering that redacted versions of applications be transmitted to one or both of the parties;¹⁸
- Ordering that applicants be referred to only by their reference numbers;¹⁹
- Ordering that applicants should be contacted only through their legal representatives, the Victims and Witnesses Unit or the VPRS.²⁰

¹⁸ In fact all Chambers have ordered that redacted versions of applications be transmitted either to the Defence alone or to both parties. See for example ICC-01/04-01/06-1308 and ICC-01/04-01/07-509.

¹⁹ See for example ICC-01/04-01/07-509.

²⁰ See for example ICC-01/04-01/06-1308 and ICC-01/04-01/07-509.

iii. If the VPRS is to be asked to prepare redacted versions of applications, it would appreciate guidance from the Chamber in relation to the scope of redactions.

iv. Once the status of applicants has been determined, another question for determination by the Chamber is whether or not the identities of victims participating in the trial should be disclosed to the parties, should some victims request non-disclosure of their identities at that stage.²¹

v. The Registry would draw to the Chamber's attention the fact that the standard application forms for participation and reparation provide an opportunity for applicants to indicate if they wish to request that their identities or other information should not to be disclosed to the Prosecutor, the Defence or other participant or to the general public. In light of experience, however, the Registry has found that the implications of this question are frequently misunderstood by applicants, particularly those who do not have a legal representative at the time they apply.

vi. Specific protection questions may arise in relation to applicants or victims who are also witnesses (this has been referred to as victims having a "dual status"),²² particularly where such persons are also in the ICC Protection Programme. The Registry would draw to the Chamber's attention the fact that the VPRS, on receiving an application to participate in the proceedings, would not necessarily be aware that that person was also a witness for one of the parties.

²¹ See ICC-01/04-01/07-537.

²² See for instance the decision of Trial Chamber I: ICC-01/04-01/06-1119, Part E

vii. In order to assist the Chambers in making determinations on appropriate measures of protection, the Registry may be able to provide advice.²³

E. Reparation

i. The Chamber may wish to consider how it is going to approach the question of reparation, bearing in mind that applications for reparation may be received at any stage of the proceedings. As a preliminary matter, the Registry would appreciate guidance as to whether it should file any applications for reparation received, or retain these for a later stage.²⁴

F. Presentation of a more detailed report by VPRS by 28 November 2008

i. The Registry is preparing to provide the Chamber with a detailed account of the status of all applications to participate in the proceedings or reparations received by the VPRS in relation to the Case, as well as regarding the receipt, processing and filing of applications, the procedure VPRS has adopted for requesting further information under Regulation 86(4) of the Regulations of the Court and the content of the reports under Regulation 86(5) of the Regulations of the Court. The Registry proposes to provide such a report to the Chamber by 28 November 2008.

RESPECTFULLY INFORMS the Chamber:

11. That the Registrar is able to provide to the Chamber additional information on the above subjects for which the support services of the Registry will be

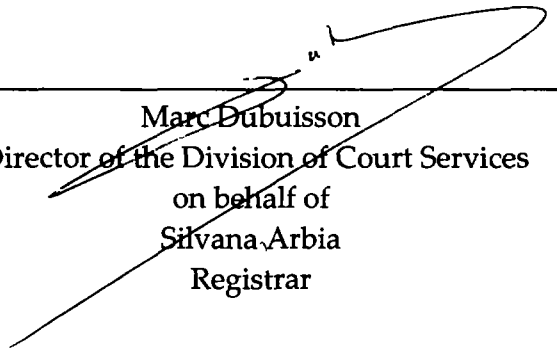
²³ See Regulation 99, Regulations of the Registry

²⁴ Trial Chamber I requested that the applications for reparation be presented to the Chamber and ruled that the Chamber would firstly determine whether they have the status of victims before considering their applications for reparation. It ordered that the applications shall be transmitted to the parties for their observations at a later stage. See ICC-01/04-01/06-1308, VI.

required, either by way of oral or written submissions, with a view to facilitating the Chamber's understanding of the practical implementation and possible constraints by the Registry vis-à-vis matters that require clarification sufficiently in advance of the commencement of trial proceedings.

12. Furthermore, the Registrar remains available to provide to the Chamber any other such information which may assist the Chamber in its trial preparations for the present case.

SUBMITS the present document as public with under seal annexes ex-parte VWU only, as the annexes contain under seal information.



Marc Dubuisson
Director of the Division of Court Services
on behalf of
Silvana Arbia
Registrar

Dated this 24 November 2008

At The Hague (The Netherlands)