

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/04-01/07**
Date: **23 November 2010**

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 document

**Decision on the arrangements for contact between
represented victims and the parties**

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 Victims

Mr Jean-Louis Gilissen
 Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
 Section**

Ms Fiona McKay

Other

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64, 67 and 68 of the Rome Statute (“the Statute”), rule 16 of the Rules of Procedure and Evidence (“the Rules”) and articles 1, 15 and 28 of the Code of Professional Conduct for counsel (“the Code of Conduct”), decides as follows.

I. INTRODUCTION

1. On 17 December 2009, in response to a request from the legal representatives of the victims (“the Legal Representatives”), the Chamber invited the parties and participants to reach a mutual agreement on the arrangements for informing the Legal Representatives in advance where the parties wish to contact one of the victims they represent. The Chamber also stated that it should be seized of the matter in the event of any difficulty.¹

2. At the hearing of 29 March 2010, the common legal representative of the main group of victims, Mr Nsita Luvengika, and the Defence for Mathieu Ngudjolo informed the Chamber that attempts to reach an agreement on the arrangements for informing the Legal Representatives had been made, but had not yet produced a result.² During that hearing, the Chamber urged the parties and participants to continue their efforts to reach an agreement.³

3. On 14 May 2010, the Legal Representatives informed the Chamber of the difficulties they were encountering in preparing a draft protocol.⁴ Given the delays

¹ *Third Decision on the Disclosure of the Identities of Victims to the Parties*, 17 December 2009, ICC-01/04-01/07-1731-tENG, para. 13.

² ICC-01/04-01/07-T-125-Conf-FRA ET, 29 March 2010, pp. 18-20.

³ *Ibid.*, pp. 21 and 22.

⁴ ICC-01/04-01/07-T-141-Red-FRA WT, 14 May 2010, pp. 11 and 12.

in the parties' communicating their observations and proposals, the Chamber set 31 May 2010 as the time limit for the filing of the draft protocol between the parties and participants, or of their observations, in the absence of such agreement.⁵

4. On 28 May 2010, the Legal Representatives informed the Chamber that a new version of the draft protocol had been provided to the parties and requested an extension of time until 7 June 2010 to allow all parties to submit their observations.⁶ After granting this first request for an extension of time, on 7 June 2010 the Chamber set the time limit for the filing of the draft protocol as 17 June 2010, at the request of the Defence for Germain Katanga, which was supported by the Defence for Mathieu Ngudjolo and by the Prosecutor.⁷

5. On 17 June 2010, in the absence of an agreement on the entirety of the document, the Legal Representatives filed a draft protocol (the "Draft Protocol"), stating its legal bases and commenting on the provisions.⁸ The Draft Protocol takes account of the observations of the Victims and Witnesses Unit ("VWU") on a previous version of the Draft Protocol, which are attached to the Legal Representatives' filing.⁹ At the same time, the Legal Representatives also requested the Chamber's leave pursuant to regulation 24(5) of the Regulations of the Court to file "[TRANSLATION] a reply to the observations of the parties, in order to respond

⁵ *Ibid.*, p. 13.

⁶ ICC-01/04-01/07-T-149-Red-FRA WT, 28 May 2010, pp. 1 and 2.

⁷ ICC-01/04-01/07-T-150-Red-FRA WT, 7 June 2010, p. 17.

⁸ Legal Representatives of the Victims, "*Dépôt d'un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties*", 17 June 2010, ICC-01/04-01/07-2202 and ICC-01/04-01/07-2202-Corr ("*Filing of Draft Protocol of 17 June 2010, ICC-01/04-01/07-2202*"), with the Draft Protocol annexed: "*Modalités de contact avec les victimes représentées, organisation d'entretiens potentiels avec une victime représentée et possible convocation de victimes en tant que témoins à décharge*", 17 June 2010, ICC-01/04-01/07-2202-Anx1.

⁹ ICC-01/04-01/07-2202-Conf-Anx2.

to the parties' legal arguments with which they had not previously been acquainted [...]"¹⁰

6. That same day, the Prosecutor submitted his observations, referring to the draft previously prepared by the Legal Representatives, and enclosing a confidential annex.¹¹ The Prosecutor did not express any objections to the Draft Protocol and wished only that it should be stated, by adding the wording included in article 68 of the Statute, that should a legal representative refer to VWU the situation of a particularly vulnerable victim or one whose safety is of concern, VWU must focus primarily on the "[TRANSLATION] physical and psychological well-being of the victim".¹²

7. On 29 June 2010, the Legal Representatives restated their wish to be able to respond to the fresh observations which the Defence teams intended to make on the Draft Protocol.¹³ Since they had yet to file their observations, the Defence teams requested the Chamber to consider the request premature.¹⁴ The Chamber decided to reserve its ruling on the legal basis of the Legal Representatives' request until all submissions had been filed.¹⁵

¹⁰ Filing of Draft Protocol of 17 June 2010, ICC-01/04-01/07-2202, p. 12.

¹¹ Office of the Prosecutor, "*Dépôt des commentaires du Bureau du Procureur sur le projet de Protocole relatif aux Modalités de contact avec les victimes représentées*", 17 June 2010, ICC-01/04-01/07-2201-Conf ("Observations of the Prosecutor, ICC-01/04-01/07-2201"), with confidential annex, ICC-01/04-01/07-2201-Conf-AnxA.

¹² Observations of the Prosecutor, ICC-01/04-01/07-2201, para. 5.

¹³ ICC-01/04-01/07-T-162-Red-FRA WT, 29 June 2010, p. 57.

¹⁴ *Ibid.*, pp. 57-59.

¹⁵ *Ibid.*, pp. 59-61.

8. On 8 and 9 July 2010, the Defence teams for Mathieu Ngudjolo and Germain Katanga filed their respective observations on the Draft Protocol.¹⁶

9. The Defence for Mathieu Ngudjolo seeks a clearer delimitation of the rights and duties of the Legal Representatives, who should in no circumstances influence the victims responding to the questions of the parties.¹⁷

10. The Defence for Germain Katanga requests the Chamber to reject the Draft Protocol. It challenges, *inter alia*, the argument that the Code of Conduct applies to the Legal Representatives, and emphasises the impact of some of the proposed provisions on the conduct of its investigations and on the rights of the Accused. For this reason, the Defence refuses to allow the Legal Representatives to be present when it is interviewing a victim they represent and to disclose the documents emanating from such interviews. Thus, in the view of the Defence, it is for the Defence, not the Legal Representatives, to provide the victim with the information prior to the interview.¹⁸

11. On 15 July 2010, the Legal Representatives filed a response to both teams' observations, requesting that the Chamber find it admissible under regulation

¹⁶ Defence for Mathieu Ngudjolo, "*Observations de la Défense de Mathieu Ngudjolo sur l'écriture ICC-01/04-01/07-2202 des Représentants légaux des victimes intitulée « Dépôt d'un projet de protocole relatif aux modalités de contact entre des victimes représentées et les parties »*", 8 July 2010, ICC-01/04-01/07-2245 ("Observations of the Ngudjolo Defence, ICC-01/04-01/07-2245"), with confidential annex, ICC-01/04-01/07-2245-Conf-Anx; Defence for Germain Katanga, "Defence Response to the '*Dépôt d'un projet de Protocole relatif aux modalités de contact entre des victimes représentées et les parties* (ICC-01/04-01/07-2202)'", 9 July 2010, ICC-01/04-01/07-2251 ("Observations of the Katanga Defence, ICC-01/04-01/07-2251"), with annex, ICC-01/04-01/07-2251-Anx.

¹⁷ Observations of the Ngudjolo Defence, ICC-01/04-01/07-2245, paras. 17-24.

¹⁸ Observations of the Katanga Defence, ICC-01/04-01/07-2251, see, *inter alia*, paras. 3 and 4, 11, 26-28, 47 and pp. 14 and 15. The Defence proposes a new draft protocol in the annex, ICC-01/04-01/07-2251-Anx.

24(2) or, alternatively, regulation 24(5) of the Regulations of the Court.¹⁹ They submit that the Code of Conduct applies to them and that its implementation should make no distinction between Defence Counsel and the Legal Representatives acting before the Court.²⁰ They also recall the obligations binding counsel entering into contact with another party, and emphasise the scope of the representation mandate, which is not limited to obtaining reparations for injuries, as the Defence for Germain Katanga alleges, but also encompasses the determination of the truth and the establishment of responsibilities, and applies at all stages of the proceedings. They rely on articles 15(1) and 28 of the Code of Conduct to argue that not only do they have a duty to counsel, but they also have a duty to assist their clients. They consider that they alone are in a position to provide their clients with the relevant advice.²¹

12. The Defence for Mathieu Ngudjolo proposes to extend article 15 of the Code of Conduct to include provisions prohibiting counsel from influencing his or her client, a proposal the Legal Representatives find “[TRANSLATION] unhelpful and unwarranted” in that the Code already addresses this issue.²² Finally, regarding the objections raised by the Defence for Germain Katanga on the violations of the rights of the Accused, they note that such criticisms were proffered without consideration of the exceptions provided for at paragraphs 6 and 16 of the Draft Protocol.²³

¹⁹ Legal Representatives of the Victims, “*Réponse des représentants légaux des victimes aux observations des parties sur le projet de protocole relatif aux modalités de contacts avec les victimes représentées (ICC-04-01/07-2202-Anx1)*”, 15 July 2010, ICC-01/04-01/07-2279, paras. 5-16.

²⁰ *Ibid.*, paras. 30-40.

²¹ *Ibid.*, paras. 41-67, referring, *inter alia*, to the *Decision on Prosecution’s request regarding an interview with two potential Defence witnesses*, 13 July 2010, ICC-01/04-01/07-2269-Conf, para. 12.

²² *Ibid.*, paras. 68 and 69.

²³ *Ibid.*, paras. 70-75.

13. Regarding the admissibility of the document, the Chamber recalls that the Draft Protocol was prepared and discussed amongst the parties and participants in the proceedings at its behest. It notes that the drafting of the document has been slow and laborious and has given rise to a number of discussions which have not resulted in a mutually agreed text. It also observes that in their last document, whose filing the Chamber authorised, the Legal Representatives submitted fresh observations in response to the additional arguments raised by the parties for which they claim they had been unable to advance an opinion. Accordingly, the Chamber considers at this stage that it has a compelling interest in collecting all of the arguments of the participants so that it may gain a better understanding of the remaining obstacles and determine their precise relevance. The Chamber is therefore of the view that the Legal Representatives' filing of 15 July 2010 promotes a more comprehensive consideration of the Draft Protocol it wished to prepare, and therefore finds it admissible.

14. On 29 October 2010, the Chamber received, at its request, further observations from VWU, which confirmed the position it expressed in its e-mail accompanying the Draft Protocol²⁴ and made additional recommendations. It stated, *inter alia*, that parties wishing to contact victims must observe best practices so as to limit the risks for the victims.²⁵

15. Finally, the Chamber notes that, on 24 September 2010, Mr Nsita Luvengika filed an application to obtain the statement of a participating victim which had been taken by the Defence for Germain Katanga.²⁶ Although related to the subject

²⁴ ICC-01/04-01/07-2202-Conf-Anx2.

²⁵ E-mail from VWU to a Legal Officer of the Chamber, 29 October 2010 at 18:58.

²⁶ The common legal representative of the main group of victims, "*Requête aux fins d'obtention d'une déclaration d'une victime participante recueillie par la Défense de Germain Katanga*", 24 September 2010, ICC-01/04-01/07-2416.

matter of the present decision, Mr Luvengika's application will be considered in a separate decision.

II. ANALYSIS

16. Although the Chamber restricted itself in its decision of 17 December 2009 to inviting the parties and participants to reach a mutual agreement on the arrangements for informing the Legal Representatives in advance where a party wishes to contact one of the victims they represent, it notes that, during the discussions on the Draft Protocol, other matters were raised, including the organisation and conduct of witness interviews, the presence of the Legal Representatives at such interviews and the question of disclosure to the Legal Representatives of documents emanating from the interviews.

17. Taking account of all of the arguments submitted by the parties and participants and noting their failure to reach an agreement, the Chamber therefore intends to resolve the issues at stake. Before defining the specific arrangements for initiating contact, the Chamber considers that it must state the relevant legal framework.

18. Firstly, the Chamber notes that article 1 of the Code of Conduct provides: "This Code shall apply to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court, hereinafter referred to as 'counsel'." In the Chamber's view, the provisions of the code, which set forth a series of obligations binding on all counsel practising at the Court, apply both to Defence counsel and the Legal Representatives.

19. Under article 28 of the Code of Conduct, “[c]ounsel shall not address directly the client of another counsel except through or with the permission of that counsel”. Such obligation, which has been stated by the Chamber on several occasions,²⁷ allows the victim to receive all useful information from the legal representative defending his or her interests, and allows the legal representative fully to exercise his or her representation mandate.

20. Under article 15(1) of the Code of Conduct, “[c]ounsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation”. In this respect, the Chamber emphasises that the duty to assist and advise is not restricted to submitting applications for reparations for harm suffered, as the Defence for Germain Katanga maintains; it may be exercised at all stages of the proceedings. With respect to the concern raised by the Defence for Mathieu Ngudjolo, the Chamber must emphasise that, in exercising their mandate, legal representatives – and all members of their team – are bound to comply with the obligations of the Code of Conduct and must not adopt any attitude which would be prejudicial to the determination of the truth.

21. The Chamber nevertheless recognises the specific nature of the counsel-client relationship in the particular context of the legal representation of victims before the Court. It also acknowledges that the Code of Conduct must be interpreted in light of the provisions of the Statute and the Rules governing the participation of victims in the proceedings through legal representatives, while emphasising that

²⁷ *Third Decision on the Disclosure of the Identities of Victims to the Parties*, 17 December 2009, ICC-01/04-01/07-1731-tENG, para. 13; see also ICC-01/04-01/07-T-104-Red-FRA, 18 February 2010, pp. 33 and 34; ICC-01/04-01/07-T-138-Red-FRA WT, 10 May 2010, pp. 8 and 9; ICC-01/04-01/07-T-141-Red-FRA WT, 14 May 2010, pp. 5 and 6, 12 and 13.

such participation must not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.²⁸

22. In respect of victims’ participation in the proceedings, the Chamber refers, *inter alia*, to the provisions of article 68(3) of the Statute and rules 89 to 93 of the Rules, and to its decision on the modalities for victim participation.²⁹

23. The Chamber is nevertheless alive to the Defence’s argument that the application of the provisions of the Code of Conduct and, in particular, the relationship between legal representatives and their clients must not prejudice the fair conduct of the trial and hence the rights of the Accused, including their right to silence and the opportunity they should be afforded to conduct investigations in conditions respecting the equality of arms.

24. Furthermore, whilst mindful of the specific nature of the situation of victims represented by counsel, the Chamber finds that it must refer to its Decision 1134 of 14 May 2009 governing, *inter alia*, contact between witnesses called by another party who are not covered by the Court’s protection programme,³⁰ and to the relevant decisions rendered by Trial Chamber I in *Lubanga*.³¹

25. As to the presence of a legal representative of a victim when the victim is interviewed by a party, the Chamber emphasises that it is for the victim to decide

²⁸ See, *inter alia*, article 68(3) of the Statute.

²⁹ *Decision on the Modalities of Victim Participation at Trial*, 22 January 2010, ICC-01/04-01/07-1788-tENG.

³⁰ *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134; see in particular paras. 25-31.

³¹ Trial Chamber I, *Decision on the prosecution’s application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses*, 4 June 2008, ICC-01/04-01/06-1372, para. 11; *Decision on certain practicalities regarding individuals who have the dual status of witness and victim*, 5 June 2008, ICC-01/04-01/06-1379.

whether he or she wishes to be assisted by his or her counsel.³² The legal representative and the party in question must comply with the victim's decision. As regards the Legal Representatives' proposal that, in certain cases, the entire content of the interview or any document obtained from the victim should be disclosed to them, the Chamber is of the view that such an obligation to disclose the results of investigations, including incriminating evidence in some instances, could be detrimental to the Defence teams' investigations and, consequently, the efficient preparation of the Defence itself. It recalls that the only disclosure obligations the Chamber has placed on the Defence are those set out in Decision 2388 of 14 September 2010.³³

26. In this respect, the Chamber considers that, in principle, the party conducting the interview, having previously discharged its obligation to inform the legal representative in advance, is in no way obligated to disclose a statement or any other document prepared during the interview with the victim concerned. Either the legal representative will have had an opportunity to be present at the interview or, if absent, will have an opportunity to ask the client subsequently to provide him or her with any relevant information on the content of the interview. In the event that a party omits to inform the legal representative of the victim concerned in advance and thereby fails to satisfy the obligation to inform, it must not only notify the legal representative as soon as practicable that the interview was held but must also, where applicable, provide him or her with certain information, specified below, pertaining to how it progressed.

³² *Decision on a number of procedural issues raised by the Registry*, 14 May 2009, ICC-01/04-01/07-1134, para. 28; see also, *Decision on Prosecution's request regarding an interview with two potential Defence witnesses*, 13 July 2010, ICC-01/04-01/07-2269-Conf, para. 12.

³³ *Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)"*, 14 September 2010, ICC-01/04-01/07-2388.

27. Accordingly, the Chamber wishes the victims participating in the proceedings to be afforded effective legal representation without the rights of the Accused being prejudiced. In order to reconcile these dual requirements and the circumstances specific to this case, the Chamber has carefully balanced the rights of the Accused with the interests of the victims in deciding on the guidelines below.

28. The arrangements below shall apply without prejudice to Decisions ICC-01/04-01/07-1134 and ICC-01/04-01/07-2388, where the victim concerned also has witness status.

III. ARRANGEMENTS FOR CONTACT BETWEEN A PARTY AND A REPRESENTED VICTIM

1. Specific arrangements for making contact

29. A party wishing to contact a person with participating victim status must so inform his or her legal representative in advance. It is then for the legal representative to approach the victim concerned as soon as practicable in order to provide him or her, pursuant to article 15(1) of the Code of Conduct, with all explanations reasonably needed to make informed decisions, including decisions concerning an interview with a party, making a statement to that party or agreeing, where applicable, to appear as an exculpatory witness. The legal representative and all members of his or her team are bound to comply with the obligations set out in the Code of Conduct and must not adopt an attitude which is prejudicial to the determination of the truth.

30. Where a client has informed the legal representative that he or she consents to meeting the party and stated whether he or she wishes the legal representative to be present at the interview, the latter shall immediately inform the party concerned.

31. Where the victim is particularly vulnerable and/or his or her security situation gives cause for concern, the legal representative shall immediately inform VWU and the party wishing to hold the interview so that all appropriate measures may be taken, *inter alia*, an assessment by VWU of the victim's physical and psychological wellbeing, the conditions in which the interview should be conducted and the need for a VWU representative to be present at the interview.

32. The party wishing to meet a victim shall inform his or her legal representative and, where applicable, VWU, of the place, date and time of the meeting, once the legal representative has sought the views of the victim on the matter. It shall discharge this obligation as promptly as possible, and in any event at least one week before the date on which the interview is scheduled.

33. If the victim, legal representative or VWU consider that the interview should not take place at the proposed location, it will be for VWU, in consultation with the party wishing to conduct the interview, to find a new meeting place which is both neutral and appropriate. In such case, VWU will exceptionally arrange for the victim to be transported from his or her place of residence to the appointed meeting place and accompany him or her during transit. VWU must receive any such request at least 15 days in advance. If the victim is participating in the Court's protection programme, VWU will assume responsibility for making the practical arrangements for the meeting.

2. Interview with a party and a represented victim

34. The interview may take place only if the victim has been duly informed and has consented of his or her own accord.

35. At the start of the interview, the party conducting it shall present itself and explain in what capacity it is acting. It shall also state that any statement made by the victim may be used before the Court and that he or she may potentially be called to appear as a witness for that party's case.

36. The presence of the legal representative at a meeting between the represented victim and a party is subject to a request from the victim, who must have been informed in advance of the scope of the interview. Counsel must comply with the victim's position. If the victim does not wish his or her legal representative to be present, the legal representative will not therefore attend. If the legal representative considers it useful and if the client consents, it will be up to the legal representative to request the client subsequently to provide him or her with all relevant information about the content of the interview.

37. If, however, the victim concerned wishes to have him or her present, the legal representative may attend the interview and shall take care not to disrupt it. Similarly, he or she shall refrain from any conduct which would influence any of the client's responses or, once again, which might obstruct the determination of the truth.

38. If a legal representative authorised to attend an interview wishes to have a substitute attend, he or she may designate a team member or, exceptionally and in close consultation with the services of the Registry, a person who is included on

the Registry's list of counsel to attend on his or her behalf. The name and contact details of the substitute or team member shall be communicated to the parties and he or she shall be bound by the same professional conduct obligations as the legal representative. The legal representative will be held accountable for any breach of the Code of Conduct which his or her substitute or team member commit under the conditions set out in article 32.

39. Should the party omit to inform the victim's legal representative in advance, it must notify him or her as soon as possible that the interview was held. If the legal representative is unable to obtain from the victim a copy of the statement made or, failing that, oral information about its content, he or she may contact the party which held the interview to request that any document which would compensate for the lack of prior notification be sent to him or her on a confidential basis – where applicable, in redacted or summary form. The legal representatives are bound by confidentiality obligations and may use any information received from the Defence only in order to exercise their mandate to advise and assist.

FOR THESE REASONS, the Chamber

FINDS the Legal Representatives' filing of 15 July 2010, ICC-01/04-01/07-2279, to be admissible; and

DIRECTS the parties and participants to comply with the instructions set out in the present decision.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 23 November 2010

At The Hague, The Netherlands