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Pénale
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**International
Criminal
Court**

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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

Corrected Version of Request for a determination concerning legal aid

Source: Victims' Legal Representatives

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

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I. LEGAL BASIS AND INTRODUCTION

1. This document is filed pursuant to rule 91(2) of the Rules of Procedure and Evidence (the “RPE”) and paragraph 33 of Pre-Trial Chamber II’s Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights (the “Decision”).¹

II. PROCEDURAL HISTORY

2. In 2004 the Court opened the Situation in Uganda. In 2005 the Court issued and unsealed arrest warrants against five commanders of the Lords’ Resistance Army, including Joseph Kony and Dominic Ongwen.
3. A number of victims were subsequently accepted to participate in these proceedings. Counsel from the Office of Public Counsel for Victims (the “OPCV”) were appointed to represent participating victims in both the Uganda Situation² and the *Kony et al.* case.³
4. In January 2015 Mr Ongwen was surrendered to the custody of the Court.

¹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015.

² *Situation in Uganda*, Decision on legal representation of Victims a/0101/06 and a/0119/06, ICC-02/04-105, 28 August 2007; *Situation in Uganda*, Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06, ICC-02/04-117, 15 February 2008; *Situation in Uganda*, Decision on victims’ applications for participation a/0066/06, a/0067/06, a/0069/06, a/0070/06, a/0083/06, a/0088/06, a/0091/06, a/0092/06, a/0102/06, a/0114/06, a/0115/06, a/0125/06 and a/0126/06, ICC-02/04-170, 17 November 2008; *Situation in Uganda*, Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07, ICC-02/04-176, 9 February 2009; *Situation in Uganda*, Decision on Victim’s Participation in Proceedings Related to the Situation in Uganda, ICC-02/04-191, 9 March 2012.

³ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06, ICC-02/04-01/05-267, 15 February 2008; *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07, ICC-02/04-01/05-366, 9 February 2009.

5. On 6 February 2015 Mr Ongwen's case was severed from the case against Mr Kony and others.⁴
6. On 3 September 2015 the then Single Judge issued his Decision concerning the procedure for admission of victims to participate in the proceedings in the present case.⁵ He instructed that victims' applications be transmitted by the Registry by 18 September and thereafter on a rolling basis.⁶
7. On 18 September 26 October and 18 November 2015, respectively the Registry transmitted reports on victims' applications, along with the applications themselves.⁷ In each report the Registry discussed the question of legal representation for participating victims. It recommended that the appointment of a legal representative as soon as possible and indicated the Registry's readiness to implement orders relating to common legal representation under rule 90(2) or rule 90(3).⁸
8. On 27 November 2015 and on 15 December 2015 the then Single Judge issued, respectively, the Decision⁹ and the Decision on issues concerning victims' participation.¹⁰ In these two decisions he admitted 2026 victims to participate in the proceedings. Of these, 1434 had appointed the Legal Representatives as their lawyers. Acting under regulation 80(1), the Single Judge appointed the OPCV to

⁴ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision Severing the Case Against Dominic Ongwen, ICC-02/04-01/05-424, 6 February 2015.

⁵ *Prosecutor v. Dominic Ongwen*, Decision concerning the procedure for the admission of victims to participate in the proceedings in the present case, ICC-02/04-01/15-299, 3 September 2015.

⁶ *Ibid.* para.10.

⁷ *Prosecutor v. Dominic Ongwen*, First Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-303, 18 September 2015; *Prosecutor v. Dominic Ongwen*, Second Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-327, 26 October 2015 ; *Prosecutor v. Dominic Ongwen*, Third Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-344, 18 November 2015.

⁸ *Prosecutor v. Dominic Ongwen*, First Report on Applications to Participate in the Proceedings, ICC-02/04-01/15-303, 18 September 2015, para. 24.

⁹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015.

¹⁰ *Prosecutor v. Dominic Ongwen*, Decision on issues concerning victims' participation, ICC-02/04-01/15-369, 15 December 2015.

represent the other 592 victims who had not named any person as their legal representatives.

III. THE DECISION ON LEGAL AID

9. In the Decision, the then Single Judge recognized that victims are generally free to choose their legal representatives under rule 90(1). He considered that in this case there were “no practical reasons that would make it necessary to trump the choice made by some victims”, and therefore recognized the representation a number of participating victims by the Legal Representatives.¹¹

10. However the Single Judge went on to make the following observation regarding the availability of financial assistance for this the victims so represented:

Rule 90(5) states that “[a] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance”. Counsel chosen by victims under rule 90(1) of the Rules is not a common legal representative within the meaning of rule 90, and not chosen by the Court. Therefore, the victims that have chosen to appoint Joseph Akwenyu Manoba and Francisco Cox as their legal representatives, even if they lack the means to pay, do not qualify for financial assistance by the Court. Considering that it appears from the information provided by the Registry that counsel appointed by the victims have informed their clients that their representation would be free of charge as the associated costs could be borne by the Court and that a substantial number of victims even signed powers of attorney indicating that the lawyers would represent them on a pro bono basis, it is imperative that the appointed counsel inform their clients that they presently do not qualify for financial assistance by the Court but may, if they so wish, benefit from legal representation free of charge by the common legal representative appointed by the Single Judge.¹²

11. For the reasons elaborated below, the Legal Representatives respectfully ask that the Single Judge adopt a different approach for the trial proceedings of this case.

¹¹ *Ibid.* para.17.

¹² *Ibid.* para.18.

IV. AVAILABILITY OF LEGAL AID FOR VICTIMS BEFORE THE COURT

12. The Legal Representatives submit that the Court's framework for victims' legal aid does not intend to limit such assistance to common legal representatives appointed under rule 90(3) of the RPE.

13. Rule 90(5) of the RPE *permits* the Registrar to provide legal aid to lawyers chosen by the Court as a "common legal representative" pursuant to rule 90(3). However it does not *prevent* the provision of legal aid to victims whose lawyers are appointed under rule 90(1), or chosen by victims collectively as a "common legal representative" under rule 90(2). This interpretation is supported by reference to: (i) the broader framework for legal aid in the court's texts, (ii) international standards; (iii) previous practice before the Court; (iv) the clear intention and purpose of rule 90 as a whole; and (v) the practical consequences of denying legal aid to victims' legal representatives.

(i) The Court's legal framework concerning legal aid for participating victims

14. The RPE's principal provision dealing with legal aid is rule 21(1). It requires that criteria and procedures for assigning "legal assistance" be established by the Regulations of the Court, based on a proposal by the Registrar and following consultations with an independent representative body. The approach taken in rule 21(1) makes it clear that no other provision of the RPE was intended to limit the availability of assistance. It was clearly intended that any decisions regarding such limits should only be taken following the envisaged technical consultation. Moreover, the criteria and procedures to be established are specifically made subject to articles 55(2)(c) and 67(1)(d) of the Rome Statute. They are not made subject to any other provision of the RPE (such as rule 90(5)) in an equivalent way. It is clear that no other rules within the RPE were intended to limit the availability of "legal assistance" under the scheme which was then yet to be established in the Regulations of the Court.

15. Subsequently, the consultation envisaged by rule 21(1)¹³ was undertaken.

According to the Registry:

There was direct consultation with over 50 experts comprising the Court's external partners, independent bodies representing the legal profession and ad hoc tribunals, in a process that commenced in January 2003. Court officials undertook exploratory missions to national bars and countries such as the United Kingdom, which have in place well established domestic legal aid systems. A seminar of counsel, attended by more than 40 experts and representatives of lawyers' associations, also provided further information.¹⁴

16. The core results of this consultation were incorporated, as required by rule 21(1) into the Regulations of the Court; specifically: regulations 83 to 85. Further detail was later provided in the Regulations of the Registry as well as reports exchanged between the Registry and the Assembly of States Parties.

17. Regarding victims, regulation 83(2) of the Regulations of the Court provides that: "[t]he scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate." Applications to review the Registrar's decision may be made to a Chamber.¹⁵ The Regulations contain nothing to indicate that legal assistance is only available where a lawyer is appointed under rule 90(3). No distinction is made at all between the three methods of designating lawyers under rule 90 paragraphs (1), (2) and (3) respectively.

18. The Regulations of the Registry provide that the Registry shall inform victims of the possibility to apply for legal assistance, and set out criteria to be used by the Registry in determining such applications.¹⁶ Again, no suggestion is made in this document that legal assistance is only available where a lawyer is appointed under rule 90(3) or that any distinction be drawn between victims' lawyers depending on how they are designated.

¹³ See also rule 20(3) RPE.

¹⁴ Report of the Registry on the Comprehensive Review of the Legal Aid System of the Court, ICC-ASP/12/21, 4 June 2103, footnote 8.

¹⁵ Regulations of the Court, regulation 83(4).

¹⁶ Regulations of the Registry, regulation 113.

19. Even in the Court's most detailed and comprehensive document concerning legal aid no suggestion of this kind can be found. The Registry's single policy document on the Court's legal aid system was requested by the Assembly of States Parties ("ASP") in 2012¹⁷ and "[f]or all intents and purposes constitutes the legal aid scheme of the Court."¹⁸ In that document the Registry sets out the resources it considers to be necessary in the ordinary course for the representation of victims at various stages of proceedings. The document addresses the question of appropriate team composition where common legal representation has been organized,¹⁹ but also talks about team composition in other victims' teams.²⁰ The document nowhere suggests that lawyers appointed under rules 90(1) or 90(2) are ineligible for legal aid. To the contrary, it is clear that the Single Policy Document is speaking broadly when it explains that "experience before the Court has demonstrated that in order to ensure the effective exercise of the rights afforded to victims under the Court's legal framework, the Court must ensure that legal aid resources are made available to indigent victims."²¹
20. The Registry is required by its Regulations to comply with documents adopted or approved by the ASP in matters concerning the remuneration of counsel.²² Trial Chamber II has indicated that ASP reports are "useful indicators for the Court, which the Court will take into account to the extent possible."²³ Arguably the position should be stronger even in relation to the Single Policy Document which attempts to codify the legal aid scheme of the Court. Consistent application of the Single Policy Document (subject of course to any amendments²⁴) is important not

¹⁷ Resolution ICC-ASP/11/Res.1, Program Budget for 2013, the Working Capital Fund for 2013, scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2013 and the Contingency Fund, 21 November 2012, section H, para. 5.

¹⁸ Registry's single policy document on the Court's legal aid system, ICC-ASP/12/3, 4 June 2013, para.2.

¹⁹ *Ibid.* paras 59-61

²⁰ *Ibid.* paras 55-58.

²¹ *Ibid.* para.20.

²² Regulations of the Registry, regulation 133.

²³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript of oral order, ICC-01/04-01/07-T-341-ENG, 18 June 2012, p9.

²⁴ See Registry's single policy document on the Court's legal aid system, ICC-ASP/12/3, 4 June 2013, para. 3.

only for reasons of fairness but also because it enables participants in ICC proceedings, including victims and those who represent them, to anticipate how legal aid issues will be dealt with.

(ii) *International standards*

21. International standards and comparative experience support the provision of legal aid to victims who participate in criminal proceedings. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems provides that legal aid should be made available to victims of crime, *inter alia*, to enable their views and concerns to be presented and considered where their personal interests are affected in criminal proceedings.²⁵ The broader need to provide legal aid for indigent participants in legal proceedings is also provided for in other instruments issued by the UN,²⁶ as well by the EU¹ and the Commonwealth.²⁷ In the Inter-American system judicial recognition has been given of the fundamental connection between a fair trial and access to legal aid.²⁸ In Africa relevant regional guidelines provide that legal aid should be available in legal proceedings where the interests of justice require it and should be made available free of charge where the represented person does not have sufficient means to pay for it.¹

22. A 2015 study of legal aid practices in 26 countries revealed that many now provide legal aid to victims of crime (among them the majority of European states surveyed, as well as some developing states).²⁹

23. Where international best practice clearly supports the provision of legal aid to victims of crime, the Court should be at the forefront of such practice. This is

²⁵ UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, General Assembly Resolution 67/187, 20 December 2012, principle 4, guideline 7, especially para.48(e).

²⁶ UN Basic Principles on the Role of Lawyers 1990, principle 3; UN General Assembly Resolution 50/181 on Human rights in the administration of Justice, 28 February 1996, para.4.

²⁷ Commonwealth Principles on the Three Branches of Government (Latimer House Principles) 2003, article VII.4.

²⁸ Inter-American Court of Human Rights, Advisory Opinion OC-11/90 on Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, paras 22-31.

²⁹ *International Access to Justice: Legal Aid for the Accused and Redress for Victims of Violence, A Report by the Bingham Centre for the Rule of Law*, International Bar Association, October 2015, p30.

particularly so given the clear intention of the Rome Statute's drafters (evidenced by article 68(3)) to provide an active role to victims in the Court's proceedings. Moreover, the size and complexity of cases before the Court, and the usually large distances (both geographical and cultural) between the Court and affected communities make victims' legal aid even more essential in ICC proceedings than in domestic criminal cases.

24. As Human Rights Watch explained in its commentary on the work of the ICC's Preparatory Commission:

It is broadly recognized that an essential component of providing access to justice is removing barriers, including economic barriers, that make the exercise of rights illusory. Affording access by victims to the ICC should involve providing such assistance as may prove necessary to ensure that victims can participate and be represented. Absent provision for legal support, including of a financial nature, the Rules will create a hierarchical system that effectively excludes many victims or jeopardizes their ability to effectively protect their essential interests. Making access to international justice contingent on ability to pay is unacceptable, particularly given the context of victimization, the circumstances in which many may find themselves, exacerbated by the economic detriment that they will have suffered as a result of the crimes in question.³⁰

25. Indeed there is a growing trend to ensure that victims have access to legal aid in order to guarantee their effective and meaningful participation in criminal proceedings. This applies just as much where victims have selected their own lawyer as it does when one is appointed for them.

(iii) Previous practice at the Court

26. Prior to the Decision, practice at the court was consistent. Legal aid was provided to the lawyers of indigent participating victims regardless of whether they were chosen by the Court or by the victims themselves.

27. In a number of previous cases participating victims have been represented by external counsel appointed under rule 90(1), particularly during the early stages

³⁰ Human Rights Watch Commentary to the Second Preparatory Commission on Rules of Procedure and Elements of Crimes, July 1999, p41.

of proceedings. This was the case in the *Lubanga*, *Katanga*, *Abu Garda*, *Banda and Jerbo*, and *Mbarishimana* cases. According to the information available to the Legal Representatives, all of those counsel who requested legal aid were granted it.³¹ Registry decisions on financial assistance are usually not made public. However, some practice is mentioned in Registry reports and documents provided by the Court to the ASP. The latter documents demonstrate the provision of financial assistance to external counsel appointed under rule 90(1) in several cases.³² To the best of the Legal Representatives' knowledge, the denial of legal aid to their clients in respect of pre-trial proceedings in this case was the only time this has ever occurred at the Court.³³

28. It is also notable that despite ongoing debate about other aspects of the Court's legal aid policy, this issue has never been contentious. Criticisms of past practice on victims' legal aid have not included any suggestion that victims who choose counsel under rule 90(1) should be denied financial assistance. While concern has previously been expressed by the Registry that lawyers may engage in unethical solicitation,³⁴ there does not appear to be any suggestion that this occurred in the

³¹ As far as the Legal Representatives have been able to ascertain, all external counsel representing participating victims at the trial phase have previously requested and been granted legal aid. A small number of external teams have undertaken representation during the pre-trial phase with the assistance of external financial support from a non-government organization or similar source, and therefore did not request legal aid. It is believe this was the case for some counsel in the *Lubanga*, *Katanga* and *Banda and Jerbo* cases. Regrettably, the Legal Representatives have not been able to obtain similar financial support, despite efforts to do so.

³² *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Report recommending a decision concerning the common legal representation of victims participating in the case, ICC-02/05-03/09-134, 15 April 2011, para.7; Report on the operation of the Court's legal aid system and proposals for its amendment, ICC-ASP/6/4, 31 May 2007, para.7 (regarding the *Lubanga* case); Interim report of the Court on legal aid: legal and financial aspects for funding victims' legal representation before the Court, ICC-ASP-8/3, 6 May 2009, para.21 (regarding the *Lubanga* and *Katanga* cases).

³³ Given the limited material publicly available, it is respectfully recommended that relevant submissions be requested from the Registry should Chamber require confirmation regarding the Registry's previous practice in this area.

³⁴ *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Legal framework and Registry's approach on common legal representation, ICC-02/05-03/09-203-Anx1, 25 August 2011, para.8; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Legal framework and experience to date on common legal representation, ICC-01/09-01/11-243-Anx1, 1 August 2011, paras 8-9; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammad Hussein Ali*, Legal framework and experience to date on common legal representation, ICC-01/09-02/11-214-Anx1, 5 August 2011, para.8-9.

present case. Indeed one of the Legal Representatives has a long-standing relationship with the victim communities. In any event, as previously recognized by the Registry, the appropriate methods to address that concern are consultations with victims and the use of proper procedures under rule 90(2) and (3). The Court should be concerned to ensure a high quality of legal representation for victims: while inappropriate solicitation practices by ill-suited lawyers may undermine this goal, so too does the withholding of legal aid for external counsel.

(iv) Policy questions and the intention of rule 90

29. Strong policy reasons exist to support the availability of legal aid outside the context of court-appointed common legal representation. Limiting victims' financial assistance to situations of court-appointed common legal representation would undermine scheme intended by rule 90 and render its paragraphs (1) and (2) meaningless in practice.

30. Rule 90 establishes a unique scheme intended to balance victims' ability to select their own counsel against the need for expeditious proceedings. Presumptively, under rule 90(1), participating victims may choose their own legal representative. However it was recognized that cases before the Court are likely to involve large numbers of victims. Were they all to choose different lawyers under rule 90(1), victims' participation would become unwieldy, slow and expensive. Rules 90(2) and (3) were introduced to address this concern. Where "there are a number of victims", and the Chamber considers necessary "for the purpose of ensuring the effectiveness of the proceedings", it may initiate the arrangement of "common legal representation". This first involves allowing victims an opportunity to agree on their own legal representation under rule 90(2), if appropriate with assistance from the Registry. Where such agreement proves impossible, the Chamber may act under rule 90(3) to request the Registrar to choose a common legal representative.

31. It is noteworthy that rule 90(5) refers specifically to the circumstances in which rule 90(3) is invoked: that is, to “a common legal representative chosen by the Court”. To treat this reference as limiting rather than permissive would mean denying legal aid to participating victims in circumstances where there are no sound policy reasons to do so.
32. First, interpreting rule 90(5) as limiting would have the effect of denying legal aid to participating victims where a common legal representation process has not been initiated. Rule 90 does not make the arrangement of common legal representation automatic. Rather the organization of common legal representation is initiated under rule 90(2) at the discretion of a Chamber (on the basis of the considerations referred to above in paragraph 30). Consequently, proceedings will occur in some cases without common legal representation having been initiated (as has happened in the present case). If rule 90(5) is interpreted as having a limiting effect, then victims in such cases are completely denied financial assistance for their legal representation. On this approach, the availability of legal aid to victims is made contingent on the Chamber exercising a procedural discretion which is unrelated to the victims’ indigence, the complexity of the case, or other questions usually considered material to legal aid.
33. Secondly, a limiting interpretation of rule 90(5) would deny financial assistance for legal representation to participating victims who are able to choose a common legal representative for themselves under rule 90(2). In such cases it could not be said that the common legal representative was “chosen by the Court” in the terms of rule 90(5). Thus, although the RPE treats court-ordered legal representation as a last resort necessary only when victims are divided over their choice of lawyers, a limiting interpretation of rule 90(5) would mean that *only* in the last resort case could victims obtain financial assistance. In other words, it would mean that victims could access legal aid if they *disagree* on their legal representation, but could not access legal aid if they all *agree*.

34. Indeed, the present case is potentially one in which victims might have agreed on their choice of counsel. A large number of victims appointed the Legal Representatives to represent them. The remaining victims chose no lawyer. They might also have agreed to be represented by the Legal Representatives had rule 90(2) been invoked and the matter put to them. If this were the case, there would be no need for the court to act under rule 90(3). Yet this would be an arbitrary reason to deny legal aid to victims who are almost certain to be considered indigent by the Court.
35. Victims who have participated before the Court to date have been overwhelmingly (indeed, perhaps universally) unable to pay for their own legal representation. The Court has yet to publicly document an instance in which a participating victim was determined to be non-indigent. Refusing legal aid where victims choose their own lawyer (whether under rule 90(1) or collectively under rule 20(2)) would therefore dramatically limit victims' ability to exercise such a choice.
36. It is true that the right of victims under rule 90(1) to select their own lawyers is not absolute, being subject to the possibility for common legal representation to be imposed.³⁵ However the language of rule 90(2) makes clear the rationale for the latter limitation. As explained above, where numerous victims participate and have chosen various counsel to represent them separately, there may be a need to consolidate legal representation so as to ensure expeditious proceedings.³⁶

³⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, ICC-01/04-01/07-1328, 22 July 2009, para.11; *Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on common legal representation of victims for the purpose of trial, ICC-01/05-01/08-1005, 10 November 2010, paras 15-16; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on common legal representation, ICC-02/05-03/09-337, 25 May 2012, paras 12-14; *Prosecutor v Laurent Gbagbo*, Pre-Trial Chamber I, Decision on Victims' Participation and Victims' Common Legal Representation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-02/11-01/11-138, 4 June 2012, para.35.

³⁶ This is made clear by the fact that under the scheme established by rules 90(2) and (3) the court may only intervene and impose counsel on victims where they are unable to agree on common legal representation among themselves.

37. It is noteworthy that the present case presented no problematic multiplicity of legal representation. The Legal Representatives (working together as a team) were the only lawyers appointed by participating victims under rule 90(1). Their appointment did not threaten the expeditiousness of the proceedings and there was therefore no reason to initiate common legal representation. Indeed, the Pre-Trial Chamber did not invoke rule 90(2).
38. Instead, the approach taken by the Pre-Trial Chamber introduced a new and entirely different limitation on victims' ability to appoint a counsel of their choosing. Denying legal aid where counsel is appointed under rule 90(1) or rule 90(2) has the consequence in practice that victims may only choose their own counsel in two scenarios: where the counsel is able to shoulder the considerable financial burden of *pro bono* representation throughout lengthy and intensive ICC proceedings;³⁷ or in the even more unlikely event that the victims are themselves able to afford this cost. Such circumstances are unlikely to arise. Even if they did, the Court should avoid an approach which gives substantially greater freedom of choice in legal representation to victims with significant financial means, or to those victims who have connections to lawyers with such means. It should likewise recognise that victims may feel inhibited to even attempt to exercise their choice under rule 90(1) if they fear the personal cost of doing so, or realise that it means asking their chosen lawyer to expend personal funds and forego a basic income.
39. It may be said in response to these points that no such problems arise, because the OPCV remains available to provide legal representation to victims free of charge. However, this discounts entirely the importance to victims of having a choice in their legal representation. Moreover, closer scrutiny reveals that offering representation by the OPCV as an fully funded alternative to unfunded representation under rule 90(1) strains the interpretation given to rule 90(5) in the

³⁷ In this respect it is relevant to note that counsel acting *pro bono* are not merely required to go without remuneration for time worked. Rather, substantial *expenditures* must be made in order to cover costs such as interpretation and translation as well as travel to meet with clients who are numerous and geographically remote from each other (see further below at paragraph 41).

Decision. It is recalled that in the present case rule 90(2) and (3) have not been invoked. No determination was made by the Pre-Trial Chamber that common legal representation was necessary to ensure the effectiveness of the proceedings; no request was made to victims to agree among themselves on a legal representative; and the Chamber did not request the Registrar to choose a common legal representative. Indeed, in appointing the OPCV, the Single Judge expressly acted under rule 80(1), and not under rule 90(3). In such circumstances the OPCV cannot properly be considered a “common legal representative chosen by the Court” in the sense intended by rule 90(5). If rule 90(5) were truly to be interpreted as setting out exhaustively the circumstances in which participating victims can receive “financial assistance” from the Court for their legal representation, it should equally have prevented such assistance from being provided through the OPCV. Consistently applied, this interpretation would deny participating victims with any funded legal interpretation unless and until the court acted under rule 90(3), despite the fact that the RPE’s drafters clearly intended such a step to be taken a last resort.

(v) Practical impact of denying legal aid to lawyers chosen by victims

40. Denying legal aid to legal representatives chosen by victims is likely to reduce the effectiveness of victims’ participation in almost every instance. For example, as recognized in the Single Policy Document, maintaining communication with clients is an essential feature of effective representation, but one for which resources are required.³⁸ Likewise, while counsel and team members may be willing to contribute time *pro bono* for the representation of victims, it is unlikely that the cost of representing more than 1400 victims could be fully borne and sustained for the duration of a full trial by any legal team. Effective representation at trial requires victims’ legal teams to undertake many time-intensive tasks, among them: regularly meeting with and communicating with victims, maintaining records of such meetings, conducting legal research and drafting,

³⁸ Registry’s single policy document on the Court’s legal aid system, ICC-ASP/12/3, 4 June 2013, paras 51-52 and 62-63.

reviewing large volumes of disclosed evidence, reading filings from the parties and decisions from the Chamber, discussing and determining case strategy, preparing questions for witnesses, attending hearings, and liaising with officials at the Court. To undertake these tasks effectively requires either a sizeable team or full-time staff. However finding team members able to work *pro bono* is difficult, and none can be expected to work unpaid full-time throughout a long trial.

41. Moreover, undertaking victims' legal representation effectively requires not only contributions of time but also expenditures of money. For example, missions to meet with clients can require, among other things, vehicle hire and petrol, the use of drivers and interpreters, accommodation, venue hire, printing and photocopying, phone calls, transport reimbursements for victims and light refreshments for long meetings. While such missions conducted by external counsel need not reach the cost levels of an equivalent mission undertaken by ICC staff (since the latter are entitled to daily subsistence allowance at fixed levels), nonetheless it is a substantial cost to be borne by a small team of lawyers. While best efforts have been made during pre-trial to ensure that this does not impact on the quality of legal representation provided, self-funding is likely to prove difficult to sustain throughout what may be a lengthy trial.
42. No doubt precisely for these sorts of reasons, the Hague Working Group of the ASP has recognized that legal aid is necessary to give effect to the rights of victims to participate in ICC proceedings.³⁹ Indeed, the Working Group reported that it considered this a reason for interpreting the language in rule 90(5) as "permissive".⁴⁰
43. Finally, questions of fairness seem certain to arise where two groups of (presumably indigent⁴¹) victims are separately represented and yet receive

³⁹ Report of the Bureau on legal aid for victims' legal representation, ICC-ASP/8/38, 28 October 2009, para. 12

⁴⁰ *Ibid.*

⁴¹ Because of the impact of the Decision, the question of indigence has yet to be assessed by the Registry in the context of a legal aid application, but given what is known about the victim

drastically different levels of financial assistance from the Court. There is a risk of victims perceiving that they are being punished for having exercised their right under rule 90(1) to choose external counsel.

V. THE APPROPRIATE DECISION-MAKER ON LEGAL AID MATTERS

44. Regulation 83(2) of the Regulations of the Court provides that decisions on the scope of legal assistance paid by the Court shall be determined by the Registrar, who may consult with the Chamber where appropriate. Regulation 85 of the Regulations of the Court provides that the Registrar shall decide “whether legal assistance should be paid by the Court.” Further support for the proposition that it is the Registry which determines the availability of legal aid is provided by the Regulations of the Registry, regulations 131 and 132.

45. No provision exists which provides such a decision-making role in respect of victims’ legal aid to a Chamber. Indeed, because it is the Chamber and the Presidency respectively which may review determinations taken under Regulations 83(4) and 85(3),⁴² they should not be involved in taking a first-instance decision in respect of those matters. To do so has the effect of depriving victims of the possibility to seek review of a decision on financial assistance, thus defeating the intention of regulations 83 and 85.

46. However, because the Decision has been issued, the Registry is not in a position to exercise its mandate. The Legal Representatives have approached the Registry to indicate their intention to apply for legal aid, but have been advised that the Registry is currently unable to grant legal aid because of the Decision.⁴³ Accordingly, the Legal Representatives respectfully request the Single Judge to rule on the availability of legal aid for lawyers chosen by participating victims in this case, and to direct the Registry accordingly.

communities it seems extremely unlikely that all participating victims would not be considered indigent.

⁴² Regulations of the Court, regulation 83(4).

⁴³ Meeting between Legal Consultant for the Legal Representatives of Victims and members of the Counsel Support Section on 8 April 2016.

47. The Legal Representatives appreciate that the Single Judge will likely wish to review the question of victims' legal representation and receive submissions on that matter from the Registry, potentially with a view to initiating the organization of common legal representation under rule 90. However that process may take months to complete. In the meanwhile, the effectiveness and continuity of victims' legal representation should be protected. With proceedings moving into the trial phase there is a need for significant work to be undertaken. This includes consulting clients in the field, but also evidence review and analysis. Resources are required in order to ensure that this work can be completed in time for trial. The Legal Representatives therefore respectfully request that a determination on the availability of legal aid be rendered immediately, so that legal aid may be made available until such time as any further decision on victims' legal representation is taken.

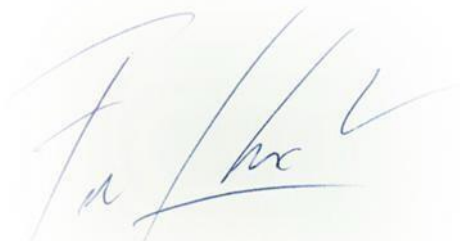
VI. CONCLUSIONS AND RELIEF SOUGHT

48. For the reasons set out above, the Legal Representatives respectfully request the Single Judge to direct the Registry:

- (i) that legal aid is available for lawyers appointed under rule 90(1) or rule 90(2);
and
- (ii) that accordingly any application for legal aid submitted by the Legal Representatives must be decided on its merits by the Registry under the Regulations of the Court, the Regulations of the Registry and any applicable policy documents.



Joseph Akwenyu Manoba



Francisco Cox

Dated this 23th day of May 2016
At Kampala, Uganda and Santiago, Chile