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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***

Confidential

**Decision on the maintenance of participating victim status of Victims a/0381/09
and a/0363/09 and on Mr Nsita Luvengika's request for leave to terminate his
mandate as said victims' Legal Representative**

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

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

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 Other**

Ms Fiona McKay

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 64 and 68 of the Rome Statute (“the Statute”), rules 89, 91 and 92 of the Rules of Procedure and Evidence (“the Rules”) and regulations 23 *bis* and 86 of the Regulations of the Court, decides the following.

I. Background

1. On 31 July 2009, the Chamber issued the operative part of its decision on the 345 applications for participation, also granting 288 applicants the status of victim participating in the proceedings, including Applicant a/0381/09 and Applicant a/0363/09, who was represented by pan/0363/09.¹ The grounds for that decision were published on 23 September 2009² (“Decision of 31 July 2009”).
2. On 22 July 2009, the Chamber issued an order on the organisation of common legal representation of the victims authorised to participate in the proceedings.³ Pursuant to that order, on 22 September 2009 the Registry appointed Mr Fidel Nsita Luvengika as the common legal representative of the main group of victims (“the Legal Representative”).⁴

¹ *Dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 31 July 2009, ICC-01/04-01/07-1347; *Corrigendum du dispositif de la décision relative aux 345 demandes de participation de victimes à la procédure*, 5 August 2009, ICC-01/04-01/07-1347-Corr.

² *Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, 23 September 2009, ICC-01/04-01/07-1491-Red-tENG with confidential, *ex parte* annex (see also the confidential redacted version of the annex, ICC-01/04-01/07-1491-Conf-Anx-Red).

³ *Order on the organisation of common legal representation of victims*, 22 July 2009, ICC-01/04-01/07-1328.

⁴ Registry, “*Désignation définitive de Maître Fidel Nsita Luvengika comme représentant légal commun du groupe principal de victimes et affectation des victimes aux différentes équipes*”, 22 September 2009, ICC-01/04-01/07-1488.

3. Pursuant to those decisions, and as new victims were granted leave to participate,⁵ the Legal Representative was ultimately assigned 355 victims to represent, including a/0381/09 and a/0363/09.
4. In response to an application submitted by Mr Nsita Luvengika,⁶ the Chamber issued a decision on 9 November 2010 authorising four victims to appear, including Victim a/0381/09, Victim a/0363/09 via representative pan/0363/09, and pan/0363/09 on her own behalf, as witnesses of the Chamber.⁷
5. On 31 January 2011, the Legal Representative notified the Chamber of his intention to withdraw Victim a/0381/09 from his list of witnesses “[TRANSLATION] in light of further discussions” with the victim concerned.⁸ In a document filed that same day, the Legal Representative provided the Chamber with additional information.⁹ In light of the explanations, the Chamber took note of the removal of said victim in a decision issued that same day.¹⁰

⁵ See, *inter alia*, *Operative Part of the Second Decision on the Applications by Victims for Participation in the Proceedings*, 23 November 2009, ICC-01/04-01/07-1669-tENG; *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, 22 December 2009, ICC-01/04-01/07-1737, with confidential, *ex parte* annex (see also the confidential redacted version of the annex, ICC-01/04-01/07-1737-Conf-Anx-Red); *Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure*, 17 March 2010, ICC-01/04-01/07-1967, with confidential, *ex parte* Annexes 1 to 4 (see also the confidential redacted version of the annexes); *Cinquième décision relative à 2 demandes de participation de victimes à la procédure*, 9 February 2011, ICC-01/04-01/07-2693, with confidential, *ex parte* annexes (see also the confidential redacted version of the annexes).

⁶ Common legal representative of the main group of victims, “*Requête aux fins d’autorisation de comparution des victimes a/381/09, a/0018/09, a/191/08 et pan/0363/09 agissant au nom de a/0363/09*”, 15 September 2010, ICC-01/04-01/07-2393-Conf; see also the public redacted version, ICC-01/04-01/07-2393-Red.

⁷ *Décision aux fins d’autorisation de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09*, 9 November 2010, ICC-01/04-01/07-2517.

⁸ Common legal representative of the main group of victims, “*Notification du retrait de la victime a/0381/09 de la liste des témoins du représentant légal*”, 31 January 2011, ICC-01/04-01/07-2669.

⁹ Common legal representative of the main group of victims, “*Complément d’informations relatif au retrait de la victime a/0381/09 de la liste des témoins du représentant légal*”, 31 January 2011, ICC-01/04-01/07-2668-Conf-Exp (the document was reclassified “confidential” on 1 February 2011; see also the public redacted version, ICC-01/04-01/07-2668-Red) (“Notification of the Removal of Victim a/0381/09”).

¹⁰ *Decision on the notification of the removal of Victim a/0381/09 from the Legal Representative’s list of witnesses*, 31 January 2011, ICC-01/04-01/07-2674-tENG.

6. By a filing of 10 February 2011, Mr Nsita Luvengika notified the Chamber of his intention to remove Victim a/0363/09 from his list of witnesses.¹¹ He stated, *inter alia*, that the documents provided to him by pan/0363/09 included a photograph which, according to pan/0363/09's account, was taken by her friend at the Bogoro attack in February 2003, shortly after the victim's family was killed ("the photograph").¹² He added that, in light of the information provided by the Prosecutor regarding the photograph, which brought to light a contradiction, he had contacted the representative of Victim a/0363/09 and the victim's partner in order to obtain additional details on the matter, but that he had not received "[TRANSLATION] satisfactory responses which would enable him to explain the situation".¹³ The Legal Representative stated that he intended to conduct further investigations into the matter and that, if necessary, he would again raise the matter with the Chamber.¹⁴
7. In a decision of 11 February 2011 ("Decision of 11 February 2011"), the Chamber noted the removal of Victim a/0363/09 in light of the explanations provided by the Legal Representative.¹⁵ It also revoked authorisation for pan/0363/09 to appear as a witness of the Chamber in order to ensure the expeditious conduct of the trial and in light of the new information provided by the Legal Representative following the Prosecutor's disclosure.¹⁶ Furthermore, the Chamber instructed the Legal Representative to inform it of the outcome of his investigations into the files of a/0381/09 and a/0363/09 and to transmit to it by 14 March 2011 any information which might call into question their status as

¹¹ Common legal representative of the main group of victims, "Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal", 10 February 2011, ICC-01/04-01/07-2695-Conf; see also the public redacted version, ICC-01/04-01/07-2695-Red ("Notification of the Removal of Victim a/0363/09").

¹² Notification of the Removal of Victim a/0363/09, para. 21.

¹³ *Ibid.*, paras. 23-25.

¹⁴ *Ibid.*, para. 27.

¹⁵ *Décision relative à la Notification du retrait de la victime a/0363/09 de la liste des témoins du représentant légal*, 11 February 2011, ICC-01/04-01/07-2699-Conf (see also the public redacted version, ICC-01/04-01/07-2699-Red), para. 5.

¹⁶ Decision of 11 February 2011, para. 9.

participating victims.¹⁷ Lastly, it reminded the Legal Representative that it was incumbent upon him to state whether he considered that he could still represent Victim a/0363/09 as a participant in the proceedings.¹⁸

8. Following an e-mail from the Legal Representative on 11 March 2011,¹⁹ the Chamber granted him an extension of time until 18 March 2011 to provide it with the information sought in the Decision of 11 February.²⁰
9. On that date, the Chamber received a report from the Legal Representative including a request to end his mandate to represent the two victims in question (“Request”).²¹ On 25 March 2011, the Legal Representative filed additional information pertaining to the Request by attaching an e-mail to the Chamber from the President of the Brussels Bar (“Additional Information”).²²
10. At the Chamber’s request,²³ on 4 April 2011 the Registry submitted its observations on the Request and the Additional Information (“Observations of the Registry”).²⁴

¹⁷ *Ibid.*, para. 11.

¹⁸ *Ibid.*, para. 12.

¹⁹ E-mail from the Legal Representative to a Legal Officer of the Chamber on 11 March 2011 at 9.15.

²⁰ The Chamber granted said extension of time, considering both the “[TRANSLATION] delays frequently encountered in practice in investigations carried out in the Democratic Republic of the Congo in light of, *inter alia*, the limited resources of the [Legal Representative’s] team, which is also busy preparing for the latest status conferences”, and the non-urgent nature of transmitting the outcome of these investigations to the Chamber and the parties and participants. E-mail from a Legal Officer of the Chamber to the Legal Representative on 11 March 2011 at 12.04.

²¹ Common legal representative of the main group of victims, “*Rapport du représentant légal conformément à la décision ICC-01/04-01/07-2699-Conf et demande de pouvoir mettre fin à son mandat concernant deux victimes (article 18 du Code de conduite professionnel)*”, 18 March 2011, ICC-01/04-01/07-2782-Conf.

²² Common legal representative of the main group of victims, “*Information complémentaire au Rapport du représentant légal n° ICC-01/04-01/07-2782-Conf*”, 25 March 2011, ICC-01/04-01/07-2802-Conf, with confidential annex, ICC-01/04-01/07-2802-Conf-AnxA.

²³ E-mails from a Legal Officer of the Chamber to the Registry, on 21 March 2011, at 17.27 and 25 March 2011, at 17.13 respectively.

²⁴ Registry, “*Observations du Greffe relatives aux écritures déposées par Maître Nsita les 18 et 25 March 2011 (ICC-01/04-01/07-2782-Conf et 01/04-01/07-2802-Conf)*”, 4 April 2011, ICC-01/04-01/07-2815-Conf.

11. On 5 April 2011, the Defence for Germain Katanga submitted its response to the Chamber (“Response of the Defence for Germain Katanga”).²⁵
12. On 5 May 2011, the Defence for Mathieu Ngudjolo filed an application seeking the revocation of a/0363/09’s victim status (“Application of the Defence for Mathieu Ngudjolo”).²⁶
13. The Legal Representative responded to that application on 17 May 2011, requesting that it be denied (“Response of the Legal Representative”).²⁷

II. Arguments of the parties and participants

A. Request of the Legal Representative

14. In his Request, Mr Nsita Luvengika raises the issue of the exercise of his mandate to represent the victims authorised to participate in the proceedings and emphasises “[TRANSLATION] the specific features of the process of victims’ participation in the proceedings and the part played by the Registry and the Legal Representative in this respect”.²⁸
15. More specifically, the Legal Representative recalls that, pursuant to regulation 86 of the Regulations of the Court and regulations 104 to 109 of the Regulations of the Registry, the Registry is responsible for “[TRANSLATION] managing” applications for participation, since it receives the applications, reviews them and submits them to the Chamber along with a report. Under regulation 101 of

²⁵ Defence for Germain Katanga, “Defence Response to the *Rapport du représentant légal conformément à la décision ICC-01/04-01/07-2699-Conf et demande de pouvoir mettre fin à son mandat concernant deux victimes*”, 5 April 2011, ICC-01/04-01/04-2816-Conf.

²⁶ Defence for Mathieu Ngudjolo, “*Requête de la Défense de Mathieu Ngudjolo en vue d’obtenir de la Chambre le retrait de la qualité de victime à la victime a/0363/09*”, 5 May 2011, ICC-01/04-01/04-2866-Conf.

²⁷ Common legal representative of the main group of victims, “*Réponse du représentant légal à la requête de M. Ngudjolo visant au retrait de la qualité de victime à la victime a/0363/09*”, 17 May 2011, ICC-01/04-01/04-2902-Conf.

²⁸ Request, para. 9.

the Regulations of the Registry, the Registry is also responsible for presenting requests to withdraw an application for participation and any reasons given for the withdrawal.²⁹

16. Mr Nsita Luvengika goes on to note that a legal representative does not begin to exercise his or her mandate to represent victims within the meaning of article 68 of the Statute until such time as the applications for participation have been authorised by the Chamber. Furthermore, he recalls that, pursuant to rule 89(1) of the Rules, only the parties (the Prosecutor and the Defence) are consulted by the Chamber concerning applications for victim participation, and notes that in the vast majority of cases, where a common legal representative is appointed in a case, he or she has no prior knowledge of the files which are subsequently assigned to him or her.³⁰
17. Finally, the Legal Representative submits that his role is to defend the interests of the victims “[TRANSLATION] with full respect for his professional and ethical obligations, in particular, professional secrecy and confidentiality”.³¹ In his view, the role and obligations of the legal representative are distinct from those of the Registry, “[TRANSLATION] a neutral organ of the Court which participates in the consideration of whether to grant victim status”.³²

1. The outcome of the investigations into the files of Victims a/0381/09 and a/0363/09

18. In Mr Nsita Luvengika’s view, the counsel/client relationship is founded upon candid exchange and mutual trust as enshrined, *inter alia*, in article 14(1) of the Code of Conduct. They enable counsel to become the spokesperson for his or her client, and without them, counsel would be unable to fulfil his or her

²⁹ *Ibid.*, para. 10.

³⁰ *Ibid.*, para. 12.

³¹ Request, para. 13.

³² *Ibid.*, para. 13.

mandate.³³ He submits that, following additional discussions with Victim a/0381/09 and the person acting on behalf of Victim a/0363/09, the relationship of mutual trust has been “[TRANSLATION] undermined to such an extent that [he] is no longer able to exercise his mandate”.³⁴ He adds that, “[TRANSLATION] having duly weighed the gravity of such a decision” and having spoken with the persons in question, he considers that he must request the withdrawal of his mandate in respect of Victims a/0381/09 and a/0363/09 pursuant to article 18 of the Code of Conduct.³⁵

2. Provision of information pertaining to the victim status of a/0381/09 and a/0363/09

19. The Legal Representative recalls that it has always been his intention to inform the Chamber of the outcome of his investigations “[TRANSLATION] to an extent [...] consistent with the exercise of his mandate and the applicable ethical principles”.³⁶ He emphasises that he is obligated to respect professional secrecy and the confidentiality of all information which affects the interests of his clients. Referring to certain provisions of the Court’s basic documents, case law of international courts and Belgian domestic legislation,³⁷ the Legal Representative submits that he is “[TRANSLATION] prohibited from disclosing information without his client’s written consent which might call into question the victim status of his clients, even if his mandate is subsequently terminated”.³⁸ In his view, this obligation, which is linked to professional secrecy, is even more significant since victim status is precisely the matter which the Legal Representative has the duty to defend under his mandate.³⁹

³³ *Ibid.*, para. 15.

³⁴ *Ibid.*, para. 16.

³⁵ *Ibid.*, paras. 17 and 18.

³⁶ Request, para. 19.

³⁷ *Ibid.*, paras. 20 and 21.

³⁸ *Ibid.*, para. 22.

³⁹ *Ibidem.*

20. The Legal Representative further draws the Chamber's attention to the potential impact of an obligation to disclose vital information which affects the interests of his clients on the mandate of common legal representation. Furthermore, he emphasises that disclosure of information without the prior consent of his clients "[TRANSLATION] would irrevocably and profoundly violate the very function of the legal representative, his mission and the trust which his clients have placed in him".⁴⁰
21. The Legal Representative then submits that the Registry is the appropriate organ to advise the Chamber or to report to it on applications for participation, and thus it may advise the Chamber on "[TRANSLATION] matters concerning victim status".⁴¹
22. In support of his Request, the Legal Representative transmits a letter from the President of the Brussels Bar in response to his enquiry, informing the Chamber that he had reminded the Legal Representative that his obligation to preserve professional secrecy prohibited him from revealing any information which affects the interests of his clients, regardless of the context of his activity, and that the obligation persisted even if his mandate was subsequently terminated. The President of the Bar also reminded him that the professional secrecy obligation concerned public order and that under Belgian law "[TRANSLATION] any violation is punishable under disciplinary rules and also criminal law".⁴²

⁴⁰ *Ibid.*, paras. 23 and 24.

⁴¹ *Ibid.*, paras. 25 and 26.

⁴² Letter from the President of the Brussels Bar dated 24 March 2011, 25 March 2011, ICC-01/04-01/07-2802-Conf-AnxA.

B. Observations of the Registry

23. In its Observations, the Registry states its position on the issue of maintaining the victim status of a/0381/09 and a/0363/09 and on the withdrawal of the Legal Representative's mandate.

1. Maintaining the victim status of a/0381/09 and a/0363/09

24. The Registry notes that, although the Legal Representative did not request that authorisation to participate in the proceedings be revoked for Victims a/0381/09 and a/0363/09, he nevertheless expressed serious doubts as to the authenticity of certain information on the basis of which the Chamber granted their victim status. The Registry therefore interprets the Legal Representative's suggestion that "[TRANSLATION] the Registry is the appropriate organ to advise the Chamber or report to it on applications for participation" as reopening the discussion on those victims' authorisation to participate.⁴³

25. The Registry recalls the Chamber's decision under rule 89 of the Rules granting the status of victims authorised to participate in the proceedings to Applicants a/0381/09 and a/0363/09, and submits that, pursuant to rule 91(1) of the Rules and, in particular, in light of the information provided by the Legal Representative of the two victims, the Chamber may modify its previous ruling and rule anew on their victim status.⁴⁴

26. The Registry indicates to the Chamber that it remains at the Chamber's disposal, via the Victims Participation and Reparations Section ("VPRS"), should the Chamber find it useful to receive additional information on the respective applications for participation of the victims concerned or on the way in which they were collected, in accordance with regulation 86(7) of the

⁴³ Observations of the Registry, para. 1.

⁴⁴ Observations of the Registry, paras. 2 and 3.

Regulations of the Court.⁴⁵ However, it informs the Chamber that the VPRS has “[TRANSLATION] neither the mandate nor the ability” to conduct a more in-depth investigation in order to, *inter alia*, verify or corroborate information provided by the victims or to interview third parties. It emphasises that, since the VPRS’s mandate under regulation 86(7) of the Regulations of the Court is to assist victims and groups of victims, the Section would be “[TRANSLATION] placed in a delicate situation if it had to carry out an in-depth investigation into the veracity of the information provided by victims”, since there would be a risk of compromising the neutrality of the Registry.⁴⁶

2. The Legal Representative’s withdrawal request

27. In its Observations, the Registry states that it is not in a position to make submissions as to the basis of such an application and that it has insufficient information since it does not have access to all of the information exchanged between the victims and the Legal Representative, which is covered by professional secrecy.⁴⁷
28. The Registry then proposes certain options in the event that the Chamber decides to maintain a/0381/09’s and a/0363/09’s victim status in light of the additional information received.⁴⁸ Furthermore, the Registry recalls that, pursuant to regulation 82 of the Regulations of the Court, the Chamber has the discretion to authorise a counsel’s application to withdraw from his representation mandate. It considers that “[TRANSLATION] balancing the interests of the parties and participants should take account of [...] the seriousness of the justifications provided by counsel for such withdrawal and

⁴⁵ *Ibid.*, para. 4.

⁴⁶ *Ibid.*, paras. 5-7.

⁴⁷ Observations of the Registry, para. 12.

⁴⁸ *Ibid.*, paras. 13-16.

the procedural and practical consequences on the representation of the rights of victims before the Court".⁴⁹

29. Lastly, in the event that Victims a/0381/09 and a/0363/09's victim status is maintained and the Chamber authorises the Legal Representative to terminate his mandate to represent them, the Registry identifies three options for their legal representation.⁵⁰

C. Response of the Defence for Germain Katanga

30. In its Response, the Defence team for Germain Katanga requests the Chamber to order Mr Nsita Luvengika to comply with the Decision of 11 February 2011, in particular paragraph 11 and the operative part.⁵¹
31. Firstly, the Defence for Germain Katanga requests the Chamber to reclassify all filings on the matter of the removal of the two victims concerned – which have thus far been confidential – on the basis of the Accused's right to a fair and public trial pursuant to articles 67(1) and 68(3) of the Statute.⁵²
32. The Defence first recalls that, according to an accepted general principle of law, discussions on a matter which has already been decided cannot be reopened without the demonstration of a change in circumstances which could not have reasonably been addressed in the original pleadings. In this instance, the Defence stresses that the issue of professional secrecy upon which the Legal Representative relies to avoid complying with the Chamber's request was known to him on 11 February 2011.⁵³ In the Defence's submission, the Chamber undoubtedly took this aspect into account when it issued the Decision of 11 February 2011. The Defence argues that the Legal Representative therefore

⁴⁹ *Ibid.*, para. 17.

⁵⁰ *Ibid.*, paras. 18-27.

⁵¹ Response of the Defence for Germain Katanga, p. 6.

⁵² Response of the Defence for Germain Katanga, para. 4.

⁵³ *Ibid.*, paras. 5 and 6.

had an opportunity to seek leave to appeal that decision, but chose not to do so.⁵⁴ Accordingly, it concludes that Mr Nsita Luvengika is no longer able to reopen discussions on the issue.⁵⁵

33. The Defence for Germain Katanga goes on to note that, in the event of inconsistency, article 4 of the Code of Professional Conduct has primacy over a national code of conduct.⁵⁶ It recalls that article 8 of the Code of Conduct provides for the respect for professional secrecy and confidentiality, and that, under paragraphs 2 and 4 of that article, the Chamber may order disclosure of information.⁵⁷ The Defence thereby alleges that it is incorrect to assert an absolute duty of professional secrecy in counsel's dealings with the Court, and adds that, if such an obligation did exist, the Legal Representative would already be in breach by admitting before the Chamber that, during his additional interviews with the representative pan/0363/09, he did not receive a satisfactory explanation for the contradiction relating to the photograph.⁵⁸ In the Defence's view, the Chamber must ensure that the professional obligations of counsel in relation to his client is balanced with the fact that his client's participation in the proceedings must not compromise the right to a fair trial.⁵⁹ It concludes that the Chamber's order was legitimate and that the Legal Representative must comply with it, notwithstanding the view of the President of the Brussels Bar.⁶⁰

34. Lastly, the Defence for Germain Katanga considers that the difficulties raised by the Registry with respect to conducting an in-depth investigation into the information provided by victims reinforces the importance of the Legal

⁵⁴ *Ibid.*, para. 7.

⁵⁵ *Ibid.*, para. 8.

⁵⁶ *Ibid.*, para. 9.

⁵⁷ *Ibid.*, para. 10.

⁵⁸ Response of the Defence for Germain Katanga, para. 11.

⁵⁹ *Ibid.*, para. 12.

⁶⁰ *Ibid.*, para. 13.

Representative revealing the results of his investigations.⁶¹ It adds that, insofar as those victims were intending to give evidence of an incriminating nature, it is in the interests of justice that any attempt to manufacture false evidence against the Accused must be exposed.⁶² The Defence concludes that communication of information to the Chamber accords with the spirit of paragraph 13 of the Decision of 11 February 2011, and that it would provide the Defence and the public with access to the information to enable the Defence to fulfil its mission.⁶³

D. Application of the Defence for Mathieu Ngudjolo

35. In its Application, the Defence for Mathieu Ngudjolo submits that the facts concerning the falseness of the statement of the representative pan/0363/09 and the photograph submitted in support of that statement are sufficient to justify the revocation of a/0363/09's victim status, without the need for the Legal Representative to reveal information about his clients which was obtained under cover of confidentiality.⁶⁴
36. The Application is founded on rule 89(2) of the Rules, under which the Chamber, on its own initiative or on the application of the Prosecutor or the Defence, may reject an application for participation in the proceedings. The Defence stresses the *prima facie* nature of the review before victims are authorised to participate in the proceedings, and takes the view that, if information presented as evidence turns out to be false, it cannot establish victim status.⁶⁵
37. The Defence notes that, in the case of Victim a/0363/09, the photograph submitted was taken in June 2003 in Kasenyi, and not on 24 February 2003 in Bogoro. It adds that, in the absence of this photograph, the representative's

⁶¹ *Ibid.*, para. 15.

⁶² *Ibid.*, para. 16.

⁶³ *Ibidem.*

⁶⁴ Application of the Defence for Mathieu Ngudjolo, paras. 19-29.

⁶⁵ *Ibid.*, paras. 32-35.

account is “[TRANSLATION] stripped of a large part of its substance”.⁶⁶ It concludes that the presentation of a piece of evidence which is outside the temporal and geographic limits of the Chamber’s jurisdiction or the falseness of the evidence presented cannot constitute admissible evidence before the Court.⁶⁷

38. The Defence for Mathieu Ngudjolo therefore requests the Chamber to find that the representative pan/0363/09 submitted a false document and statement in support of Victim a/0363/09’s application for participation, and to revoke a/0363/09’s victim status.⁶⁸

E. Response of the Legal Representative

39. In his Response, the Legal Representative states that, insofar as the Chamber has not yet ruled on his Request, he is still obligated to represent the interests of Victim a/0363/09.⁶⁹ He informs the Chamber that Victim a/0363/09 opposes the Application of the Defence for Mathieu Ngudjolo, reiterates her previous submissions and requests that her standing be maintained.⁷⁰

III. Discussion

40. It is for the Chamber to rule on: (i) Mr Nsita Luvengika’s request for leave to terminate his mandate to represent Victims a/0381/09 and a/0363/09; and (ii) whether to maintain the victim status of a/0381/09 and a/0363/09. The Chamber will first discuss the second issue.

⁶⁶ *Ibid.*, para. 36.

⁶⁷ *Ibidem.*

⁶⁸ Application of the Defence for Mathieu Ngudjolo, p. 11.

⁶⁹ Response of the Legal Representative, para. 7.

⁷⁰ *Ibid.*, para. 9.

1. Whether to maintain the victim status of a/0381/09 and a/0363/09

41. The Chamber recalls that, in its Decision of 31 July 2009,⁷¹ it granted victim status to Applicants a/0381/09 and a/0363/09, pursuant to rule 89 of the Rules, after considering the information they had provided in their respective applications for participation, and on the basis of a *prima facie* review of the conditions stipulated in rule 85. At that time, it considered that it was incumbent upon the applicants to establish that said conditions and the criteria laid down by the Appeals Chamber were fulfilled *prima facie* “without any need for it to conduct an in-depth assessment of the credibility of their statements”.⁷²
42. The current situation is that, following interviews with Victims a/0381/09 and a/0363/09 via her representative pan/0363/09 with a view to their appearance before the Chamber as witnesses in February 2011, the Legal Representative decided to remove the two victims from his list of witnesses, informing the Chamber of serious doubts as to the veracity of their accounts.
43. More specifically, in relation to Victim a/0381/09, the Legal Representative indicated to the Chamber that the information he had obtained during individual interviews with said victim and additional analyses had “[TRANSLATION] led him [...] to question the veracity, in part or in whole, of the person’s account”.⁷³ He stated that, despite these “[TRANSLATION] serious doubts”, he had not yet reached the conclusion that the person in question “[TRANSLATION] had lied and was not a victim of the crimes with which the Accused have been charged in the present case”.⁷⁴ Accordingly, he informed the Chamber of his intention to continue to investigate the matter,

⁷¹ See *supra*, para. 1.

⁷² See, *inter alia*, *Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, 23 September 2009, ICC-01/04-01/07-1491-Red-tENG, para. 57.

⁷³ Notification of the removal of Victim a/0381/09, para. 14.

⁷⁴ *Ibid.*, para. 18.

“[TRANSLATION] so that the whole truth is established”, and to report to the Chamber and the Registry on the outcome of the investigations.⁷⁵

44. As regards Victim a/0363/09, the Legal Representative indicated, *inter alia*, that in light of the information disclosed by the Prosecutor bringing to light a contradiction on the photograph submitted by pan/0363/09, he had contacted the representative of Victim a/0363/09 and the victim in order to obtain further explanations on the matter, but that “[TRANSLATION] after several discussions with those persons, [he] did not obtain satisfactory responses which would allow him to explain the situation”.⁷⁶ He therefore concluded that “[TRANSLATION] all of this affects his relationship of trust with the representative of the victim, pan/0363/09, such that, at this stage, he is not in a position to defend effectively the interests of the victim in question”.⁷⁷
45. The Chamber has noted the removal of a/0381/09 and a/0363/09 from the list of victims it had authorised to appear, in light of the explanations provided by the Legal Representative, thereby giving credence to the questions he raised as to their credibility. In respect of a/0363/09, the Chamber also decided, in its Decision of 11 February 2011, not to authorise the appearance of the person acting on the victim’s behalf as a witness of the Chamber, on the basis of the information provided by the Legal Representative. As a result of the contradiction observed between that person’s statements and the photograph submitted in support of those statements, the Chamber found that “[TRANSLATION] everything leads [it] to believe that pan/0363/09 did not tell the entire truth on at least one aspect of her account”.⁷⁸ In light of the specific nature of the circumstances, and Mr Nsita Luvengika’s submissions in particular, the Chamber was moved to conclude that “[TRANSLATION] the credibility of pan/0363/09 has been questioned by her own Legal Representative to such an

⁷⁵ Ibid., para. 19.

⁷⁶ Notification of the removal of Victim a/0363/09, paras. 23-25.

⁷⁷ Ibid., para. 25.

⁷⁸ Decision of 11 February 2011, para. 7.

extent that it is impossible for him, or the Chamber, to consider that her testimony could make a useful contribution to the determination of the truth”.⁷⁹

46. In response to Mr Nsita Luvengika’s stated intention to have his team conduct in-depth investigations into these two files, the Chamber requested the Legal Representative to inform it of the “[TRANSLATION] outcome of its investigations and in particular any information which could call into question a/0381/09’s and a/0363/09’s status of victim participating in the proceedings [...]”.⁸⁰
47. The Legal Representative has since informed the Chamber, in his Application of 25 March 2011, that, following additional interviews with both Victim a/0381/09 and the person acting on behalf of Victim a/0363/09, the relationship of mutual trust between them had been “[TRANSLATION] so undermined” that he considered that he was no longer able to exercise his mandate to represent them and hence was compelled to withdraw it. Relying on his professional obligations towards his clients, he submits that he cannot disclose information concerning the victim status of the two persons in question.
48. Although it does not possess as much information about the situation of a/0381/09 as that of a/0363/09, the Chamber nevertheless notes that the Legal Representative has expressed doubts as to the veracity of the statements provided by both persons in question, and that he made no distinction between the two when he requested to terminate his mandate to represent both victims, using exactly the same, significant wording to express the loss of the trust which must exist between counsel and client. The Chamber must therefore conclude that neither Victim a/0381/09 nor the representative pan/0363/09 provided a satisfactory explanation to assuage the Legal Representative’s doubts as to the veracity of the accounts. The Chamber sees no reason to doubt

⁷⁹ *Ibid.*, para. 9.

⁸⁰ Decision of 11 February 2011, para. 11.

the Legal Representative's good faith and hence needs no further information in order to rule on the status of the two persons concerned.

49. Accordingly, in light of all of the information currently available to it, the Chamber considers, pursuant to rule 91(1) of the Rules, which provides that a chamber may modify a previous ruling under rule 89, that it must amend the part of the Decision of 31 July 2009 granting a/0381/09 and a/0363/09 the status of victim participating in the proceedings, and hence decides to revoke their standing.
50. Furthermore, it follows from this decision that there is no longer a need to implement the aforementioned Decision of 11 February 2011, since it concerned the communication of the outcome of Mr Nsita Luvengika's investigations. In this regard, the Chamber emphasises that the main purpose of the investigations was to determine whether there was cause to call into question their status of victims participating in the proceedings. Insofar as these victims have not testified and are no longer participating in the proceedings, the Chamber considers that it no longer requires such information, and nor does the Defence, which may in any event conduct any verification it still considers absolutely necessary.

2. The Legal Representative's request to terminate his mandate to represent Victims a/0381/09 and a/0363/09

51. Since the Chamber has hereby decided to withdraw victim status from a/0381/09 and a/0363/09, it considers that Mr Nsita Luvengika's request for leave to terminate his mandate to represent said victims has become moot.

3. Reclassification of filings

52. Since it is desirous of ensuring that the proceedings are publicly accessible, the Chamber considers it important to make public the filings on the issues discussed in this decision.
53. Firstly, the Chamber notes that in accordance with the Decision of 11 February 2011, the Legal Representative had proposed a number of redactions with a view to the filing of public versions of the filings setting out the reasons for the removal of Witnesses a/0363/09 and a/0381/09,⁸¹ and that, in his view, those redactions, which were primarily intended to protect his forthcoming investigations into the two files, could be lifted once the investigations were completed and his final findings had been communicated.⁸² The Chamber also notes that the Legal Representative, the Registry and Germain Katanga's defence team submit that nothing in their filings of 18 and 25 March and 4 and 5 April 2011, respectively, precludes their classification as public documents.⁸³
54. Hence it appears to the Chamber that there is generally no further justification for maintaining the confidentiality of a large part of the proceedings concerning these two victims. It therefore considers that, barring any substantiated objection submitted by the parties and participants by 4 p.m. on 15 August 2011, and unless VPRS, after consulting with the Victims and Witnesses Unit, expresses a contrary opinion, the following confidential filings should be reclassified as public:

- ICC-01/04-01/07-2688-Conf
- ICC-01/04-01/07-2695-Conf
- ICC-01/04-01/07-2699-Conf

⁸¹ Common legal representative of the main group of victims, confidential Annex A to "*Propositions d'expurgations des écritures ICC-01/04-01/07-2695-Conf, ICC-01/04-01/07-2668-Conf, ICC-01/04-01/07-2688-Conf, ICC-01/04-01/07-2699-Conf et ICC-01/04-01/07-2701-Conf'*", 14 February 2011, ICC-01/04-01/07-2702-Conf.

⁸² *Ibid.*, paras. 5 and 6.

⁸³ ICC-01/04-01/07-2782-Conf, para. 8; ICC-01/04-01/07-2802-Conf, para. 7; ICC-01/04-01/07-2815-Conf, p. 5; ICC-01/04-01/07-2816-Conf, para. 4.

- ICC-01/04-01/07-2782-Conf
- ICC-01/04-01/07-2802-Conf
- ICC-01/04-01/07-2815-Conf
- ICC-01/04-01/07-2816-Conf
- ICC-01/04-01/07-2866-Conf and
- ICC-01/04-01/07-2902-Conf.

55. The Chamber also requests the Legal Representative to file, by 4 p.m. on 15 August 2011, a new public version, with fewer redactions, of filing ICC-01/04-01/07-2668-Conf, after seeking, if appropriate, the Chamber's leave to maintain redactions; the Chamber hereby states that, in its view, the redactions to paragraphs 16, 24 and 26 of the existing public redacted version (ICC-01/04-01/07-2668-Red) should be maintained. Lastly, it invites the parties and participants and the Registry to consult and, where appropriate, jointly propose any redactions, along with grounds, in view of the filing of a public version of this decision.

FOR THESE REASONS, THE CHAMBER

DECIDES to revoke a/0381/09's and a/0363/09's victim status;

DECLARES the Legal Representative's request for leave to terminate his mandate to represent Victims a/0381/09 and a/0363/09 to be moot;

GRANTS the Application of the Defence for Mathieu Ngudjolo seeking the revocation of a/0363/09's victim status;

ORDERS the Registry immediately to notify this decision to a/0381/09 and to a/0363/09 via her representative pan/0363/09;

ORDERS the Registry to reclassify as public documents the confidential filings listed at paragraph 54 of this decision, subject to any objections filed by 4 p.m. on 15 August 2011;

INSTRUCTS the Legal Representative to file a new public redacted version of filing ICC-01/04-01/07-2668-Conf, in accordance with paragraph 55 of this decision, by 4 p.m. on 15 August 2011; and

INVITES the parties and participants and the Registry to agree on any redactions they consider necessary for the filing of a public version of the present decision, by 4 p.m. on 15 August 2011.

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 7 July 2011
At The Hague, The Netherlands