

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-02/12

Date: 15 April 2013

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

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

Public Document

**Observations and objections of the Defence team for Mathieu Ngudjolo as to the
Registry document “Transmission of the List of Victims in compliance with the Decision
ICC-01/04-02/12-30”**

Source: Defence team for Mathieu Ngudjolo

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

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Legal Representatives of Victims

Mr Jean-Louis Gilissen
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

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States' Representatives

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Defence Support Section

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Ms Maria Luisa Martinod-Jacome

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Section**

Ms Fiona McKay

Other

PROCEDURAL BACKGROUND

1. On 18 December 2012, Trial Chamber II of the International Criminal Court (“Trial Chamber”) acquitted the accused Mr Mathieu Ngudjolo Chui (“Acquitted Person”).¹
2. On 20 December 2012, the Prosecution filed a notice of appeal.²
3. On 6 March 2013, the Appeals Chamber issued its *Decision on the participation of victims in the appeal against Trial Chamber II’s “Jugement rendu en application de l’article 74 du Statut”* (“Decision”),³ by which it, *inter alia*, ordered the Registry to file a list of those victims who had participated at trial and whose victim status had not been revoked.
4. On 28 March 2013, the Registry filed the document “Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30”.⁴ The Defence team for Mathieu Ngudjolo (“the Defence”) received a version of this document comprising in Annexes 2 and 3 the lists of those victims authorised to participate in the proceedings whose victim status had not been revoked (“Lists of Victims”).
5. On 4 April 2013, the Registry filed a corrected version of the annexes: the corrigendum to Annex 2 (“Annex 2”) and the corrigendum to Annex 3 (“Annex 3”).⁵
6. In accordance with the Decision, the Defence hereby submits its observations on and objections to the Lists of Victims.

¹ *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, 18 December 2012.

² *The Prosecutor v. Mathieu Ngudjolo Chui*, “Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’”, ICC-01/04-02/12-10, 20 December 2012.

³ *The Prosecutor v. Mathieu Ngudjolo Chui, Decision on the participation of victims in the appeal against Trial Chamber II’s “Jugement rendu en application de l’article 74 du Statut”*, ICC-01/04-02/12-30, 6 March 2013.

⁴ *The Prosecutor v. Mathieu Ngudjolo Chui*, “Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30”, ICC-01/04-02/12-55, 28 March 2013.

⁵ Corrigendum of Annex 2, confidential, redacted, ICC-01/04-02/12-55-Conf-Anx2-Red-Corr, 4 April 2013; Corrigendum of Annex 3, confidential, ICC-01/04-02/12-55-Conf-Anx3-Corr, 4 April 2013.

DEFENCE OBSERVATIONS

A – Annex 2: List of victims represented by Mr Jean-Louis Gilissen

7. First of all, the Defence wishes to make the following observation concerning Annex 2 of the document filed by the Registry.

8. The Defence hereby informs the Appeals Chamber that on 11 April 2011, the Trial Chamber instructed the legal representative of the group of child-soldier victims “to ascertain as soon as possible the position of Victims a/0390/09 and a/0452/09 in respect of the disclosure of their identity to the parties”.⁶ It would appear that the legal representative of the group of child-soldier victims has not complied with that order in the interim and the identity of Victims a/0390/09 and a/0452/09 remains anonymous.

9. In the event that Victims a/0390/09 and a/0452/09 wish to maintain their anonymity, the Defence suggests that they be removed from the Lists of Victims. It is of the view that their wholly anonymous participation is prejudicial to the Defence and incompatible with the rights of the Accused and the fairness of the trial.

10. In this regard, although the practice and previous rulings of the International Criminal Court do not explicitly prohibit the wholly anonymous participation of victims, the Appeals Chamber of the Special Tribunal for Lebanon noted that it is prejudicial to the rights of the accused:⁷

[...] While we have considered this jurisprudence, which despite some limitations does not explicitly prohibit total anonymity of participating victims, we do not find it persuasive as in our view it does not take fully into account the potential of prejudice arising to the accused if the identity of the participating victims were to be withheld from them, as set out below. We also note that until now there has been no conclusive decision by the ICC Appeals Chamber on this issue.

Hence, on 10 April 2013 the Appeals Chamber of the Special Tribunal for Lebanon decided to prohibit the total anonymity of participating victims.⁸

⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the disclosure of the identity of victims to the parties and order to the Prosecutor and the Defence to submit additional observations in respect of certain deceased victims*, ICC-01/04-01/07-2827-tENG, 11 April 2011.

⁷ *Special Tribunal for Lebanon, Prosecutor v. Ayyash et al., Decision on appeal by legal representative of victims against pre-trial judge’s decision on protective measures*, Appeals Chamber, STL-11-01/PT/AC/AR126.3 F0009-AR126.3/20130410/R000096-R000130/EN/af, 10 April 2013, para. 26.

⁸ *Supra*, footnote 7, para. 39.

11. The Defence requests this Appeals Chamber to issue any orders which it considers necessary to this end.

B – Annex 3: List of victims represented by Mr Fidel Nsita Luvengika

12. Secondly, the Defence submits the following observation concerning Annex 3 of the document filed by the Registry.

13. The Defence wishes to bring to light an error in the date of birth of Victim a/0345/09, who was born in 1946, not 1949 as indicated in Annex 3. The correction submitted by the Defence is consistent with the victim's date of birth as stated in a document dated 18 December 2009 disclosing to the parties the identity of a fourth group of victims.⁹

DEFENCE OBJECTION

14. The Defence objects to the continued participation of four deceased victims referred to in Annex 3: a/0175/08, a/0117/09, a/0321/09 and a/0373/09.

15. On 15 February 2011, the common legal representative of the main group of victims notified the Trial Chamber of the death of five victims authorised to participate in the proceedings, including Victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09.¹⁰ He informed the Trial Chamber that the families of Victims a/0175/08 and a/0321/09 had been unable to complete their applications and that he had been unable to contact the families of Victims a/0117/09 and a/0373/09.¹¹

16. On 11 April 2011, the Trial Chamber ordered the legal representative "to continue his efforts to contact the respective families of Victims a/0175/08, a/0321/09, a/0117/09 and a/0373/09 and to transmit to the Chamber the relevant information to enable it to rule on their

⁹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, confidential, *ex parte*, only available to the Prosecution, the Defence and Mr Nsita, "Divulgarion de l'identité d'un quatrième groupe de victimes aux parties", ICC-01/04-01/07-1733-Conf-Exp, 18 December 2009, p. 4.

¹⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Cinquième soumission du représentant légal relative à la notification du décès de cinq victimes, à la reprise des dossiers de certaines victimes décédées et à la divulgation de l'identité de victimes et/ou de repreneurs d'action de certaines victimes", ICC-01/04-01/07-2706, 15 February 2011, para. 10.

¹¹ *Supra*, footnote 10, paras. 17 and 18.

applications”.¹² Unless the Defence is mistaken, the legal representative has yet to comply with that order.

17. Since an excessive amount of time has now passed, the Defence requests the Appeals Chamber to order that deceased victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09 be removed from the list of victims authorised to participate in the proceedings.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ORDER that the date of birth of Victim a/0345/09 be corrected, if necessary after verification;

ORDER that deceased victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09 be removed from the list of victims authorised to participate in the proceedings;

TAKE NOTE of the Defence’s observations;

ISSUE any orders which it considers necessary.

RESPECTFULLY SUBMITTED

[signed]

Mr Jean-Pierre Kilenda Kakengi Basila
Lead Counsel for Mr Mathieu Ngudjolo Chui

Done at Brussels, this 15 April 2013

¹² *Supra*, footnote 6.