

**Cour
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Court**



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

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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 of the legal representative concerning the list of victims
participating in the appeal proceedings transmitted by the Registry and
application for re-classification of document ICC-01/04-02/12-55-Conf-Exp-Anx3-
Corr**

Source: The common legal representative of the main group of victims

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

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Ms Fatou Bensouda

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

Legal Representatives of Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

REGISTRY

Registrar
Ms Silvana Arbia

Victims and Witnesses Unit

Victims Participation and Reparations Section
Ms Fiona McKay

PROCEDURAL BACKGROUND

1. Mr Ngudjolo's trial opened on 25 November 2009 before Trial Chamber II. Initially, it formed part of a joint case, also brought against G. Katanga.¹ During the trial, Trial Chamber II authorised 364 victims to participate in the proceedings. The main group of victims, comprising 353 individuals, is represented by Mr F. Nsita Luvengika, and a group of 11 individuals, made up of child-soldier victims, is represented by Mr Gilissen.²

2. On 21 November 2012, Trial Chamber II decided to sever the charges against Mr Ngudjolo so as to deliver the judgment concerning him without waiting to return a verdict against G. Katanga. The Chamber stated that the victims allowed to participate in the initial proceedings were authorised to continue participating in both of the severed cases.³

3. On 18 December 2012, Trial Chamber II acquitted Mr Ngudjolo of all charges against him and ordered his immediate release.⁴ On 20 December 2012, the Prosecutor filed a notice of appeal against that judgment.⁵

¹ *Decision on the confirmation of charges*, ICC-01/04-01/07-717, 30 September 2008.

² Pre-Trial Chamber I, *Decision on the applications for participation in the proceedings of applicants a/0327/07 to a/0337/07 and a/0001/08*, ICC-01/04-01/07-357, 2 April 2008; *Decision on the 97 applications for participation at the Pre-Trial Stage of the Case*, ICC-01/04-01/07-578-Conf, 10 June 2008; *Decision on the application for participation of witness 166*, ICC-01/04-01/07-631-Conf, 23 June 2008; Pre-Trial Chamber II, *Corrigendum of Operative Part of the Decision on the 345 applications for participation as victims in the proceedings*, ICC-01/04-01/07-1347-Corr-tENG, 31 July 2009; *Grounds for the Decision on the 345 applications for participation in the proceedings submitted by victims*, ICC-01/04-01/07-1491-Conf-tENG, 23 September 2009; *Operative Part of the Second Decision on the Applications by Victims for Participation in the Proceedings*, ICC-01/04-01/07-1669-tENG, 23 November 2009; *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, ICC-01/04-01/07-1737, 22 December 2009; *Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure*, ICC-01/04-01/07-1967, 17 March 2010; *Fourth Decision on two applications for victims' participation in the proceedings*, ICC-01/04-01/07-2516-tENG, 8 November 2010; *Cinquième décision relative à 2 demandes de participation de victimes à la procédure*, ICC-01/04-01/07-2693, 9 February 2011; *Décision relative au maintien du statut de victime participant à la procédure des victimes a/0381/09 et a/0363/09 et à la demande de Me Nsita Luvengika en vue d'être autorisé à mettre fin à son mandat de Représentant légal desdites victimes*, ICC-01/04-01/07-3064, 7 July 2011.

³ *Decision on the implementation of regulation 55 of the regulations of the Court and severing the charges against the accused persons and dissenting opinion of Judge C. Van den Wyngaert*, ICC-01/04-01/07-3319-tENG/FRA, para. 64.

⁴ *Judgment pursuant to Article 74 of the Statute*, 18 December 2012, ICC-01/04-02/12-3-tENG.

4. By a decision of 6 March 2013 on the participation of victims in that appeal, the Appeals Chamber enjoined the Registry to transmit the list of victims having participated in the proceedings in the case against Mr Ngudjolo and whose status was not revoked. It specified that that list should contain the following information:

- a. The number assigned and any identifying information, subject to any protective measures ordered by Pre-Trial Chamber I or Trial Chamber II, as well as the date on which the victim was granted the right to participate in the proceedings; and
- b. The legal representative representing the victim.⁶

5. The Chamber invited the parties and participants to raise any objections as to the accuracy of that list by 4 p.m. on 16 April 2013.

6. On 28 March 2013, the Registry filed the lists of the relevant victims. Those lists contain the identities of the victims represented by each of the legal representatives.⁷ They were disclosed in their entirety both to the Prosecutor and Defence for Mr Ngudjolo and to the two legal representatives.⁸

7. The legal representative hereby requests the Appeals Chamber to re-classify the lists of victims so as to restrict access thereto to the Prosecutor, the Defence for Mr Ngudjolo and the sole legal representative representing the victims at issue (1). Furthermore, he wishes to provide further information regarding (2) Victims a/0038/08, a/0040/08 and a/0078/08; (3) Victim a/0210/08 (a/0208/09) and (4) the situation of victims who are now deceased.

1. RE-CLASSIFICATION OF THE LIST OF VICTIMS FILED BY THE REGISTRY

8. The lists of victims filed by the Registry disclose the identities of the victims represented by one legal representative to the other legal representative (with the

⁵ "Prosecution's Appeal against Trial Chamber II's 'Jugement rendu en application de l'article 74 du Statut'", ICC-01/04-02/12-10.

⁶ *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, p. 3 (emphasis added).

⁷ With the exception of two victims represented by the legal representative of the "former child-soldiers" group of victims, whose identities have not yet been disclosed to the Prosecutor and the Defence for Mr Ngudjolo.

⁸ "Transmission of the List of Victims in compliance with Decision ICC-01/04-02/12-30", ICC-01/04-02/12-55. On 3 April 2013, the Registry filed a corrected version of the lists in annexes 2 and 3, ICC-01/04-02/12-55-Conf-Anx2-Red-Corr and ICC-01/04-02/12-55-Conf-Anx3-Corr.

exception of two individuals represented by Mr Gilissen, whose identities have not yet been disclosed to the Prosecutor and to the Defence for Mr Ngudjolo).

9. During the discussions on these issues before Trial Chamber II, each legal representative consulted his clients (and obtained their authorisation) as regards disclosing their identity only to the Prosecutor and the Defence teams for Mr G. Katanga and for Mr Ngudjolo, respectively. They indicated to Trial Chamber II that their clients had agreed to lift their anonymity with regard only to the Prosecutor and the Defence teams.⁹

10. It was on that basis that Trial Chamber II then ordered disclosure of the identity of the victims to the Prosecutor and the Defence teams only.¹⁰ Thus, in decision no. 1731, the Chamber stated:

9. The Chamber considers that the identities of the 36 victims to whom Mr Luvengika refers in paragraph one of his filing dated 23 November 2009 must be disclosed to the Prosecutor and the two Defence teams. [...]

[...]

11. The Chamber recalls that, at this stage of the proceedings and in the light of the information available to it concerning the current security situation in the Democratic Republic of the Congo, the anonymity of all of the victims authorised to participate in the present case must be maintained in relation both to the public and any other participant in the proceedings.¹¹

11. At no time during the trial did either of the legal representatives have access to the identities of the victims represented by the other legal representative.

12. The two legal representatives referred that matter to the Victims Participation and Reparations Section (VPRS), inviting them to correct that error. The VPRS

⁹ Corrigendum to the “Decision on the Disclosure to the Parties of the Identities of the Victims”, ICC-01/04-01/07-1607-Corr-tENG, 12 November 2009; Second Decision on the Disclosure to the Parties of the Identities of the Victims, ICC-01/04-01/07-1650-tENG, 18 November 2009; Third Decision on the Disclosure of the Identities of Victims to the Parties, ICC-01/04-01/07-1731-tENG, 17 December; Decision on the Applications to resume action submitted by the family members of deceased victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09, ICC-01/04-01/07-3018-tENG, 14 June 2011; Corrigendum of the Decision on the applications to resume action submitted by the family members of deceased victims a/0025/08 and a/0311/09, ICC-01/04-01/07-3185-Corr-tENG, 24 October 2011.

¹⁰ ICC-01/04-01/07-1731-tENG, paras. 9 and 11. See also, ICC-01/04-01/07-3018-tENG, paras. 30-35; ICC-01/04-01/07-3185-Corr-tENG, paras. 6-7.

¹¹ ICC-01/04-01/07-1731-tENG, paras. 9 and 11.

replied, however, that the legal representatives would have to refer the matter to the Appeals Chamber.¹²

13. In its order no. ICC-01/04-02/12-30 of 6 March 2013, the Appeals Chamber made no change to those protective measures but rather confirmed them. It asked the Registry to file the lists of victims, indicating in particular for each one, any identifying information, subject to any protective measures ordered by the Pre-Trial Chamber or Trial Chamber II.¹³

14. In accordance with article 68(1) of the Statute, for reasons relating to the well-being and safety of the victims, and owing to the inherent conflict of interest involving the two groups of victims authorised to participate in these proceedings, the legal representative considers that the anonymity of the victims whom he represents must be maintained vis-à-vis the legal representative of the “former child-soldiers” group of victims. The list of victims contained in document ICC-01/04-02/12-55-Conf-Anx3-Corr must consequently be re-classified, in accordance with regulation 23 *bis* of the Regulations of the Court.

2. VICTIMS A/0038/08, A/0040/08 AND A/0078/08

15. In its Annex 3, the Registry describes Victims a/0038/08, a/0040/08 and a/0078/08 as “*individuals acting on behalf of another victim*” who has died.

16. However, in their respective decisions, Pre-Trial Chamber I and Trial Chamber II authorised those individuals to participate as victims in respect of the direct harm to their person, and not in respect of harm suffered by the deceased victims on whose behalf they had originally filed their application.¹⁴

¹² Telephone conversation with VPRS on 5 April 2013; e-mail sent by the legal representatives to VPRS dated 9 April 2013 and reply from VPRS dated 12 April 2013.

¹³ ICC-01/04-02/12-30, p. 3, paragraph (2)(a): “any identifying information, subject to any protective measures ordered by Pre-Trial Chamber I or Trial Chamber II” (emphasis added).

¹⁴ Pre-Trial Chamber I, *Public Redacted Version of the “Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”*, ICC-01/04-01/07-579, 10 June 2008, paras. 60-63, para. 88, para. 110 and

17. They are not therefore “*individuals acting on behalf of the victim*”, but individuals acting on their own behalf, even though the form whereon such authorisation was granted was completed for action on behalf of another victim. For the sake of procedural expediency, the aforesaid Chambers did not require submission of a new form.

3. SITUATION OF VICTIM A/0210/08 (A/0208/09)

18. Recent checks have established that Victim a/0210/08 subsequently completed (and submitted) a second application form for participation and was allocated a new reference number, a/0208/09.

19. The legal representative is currently trying to contact that person to ascertain which form should be used for his or her participation. He will revert to the Chamber with the additional information at the earliest opportunity.

4. DECEASED VICTIMS

20. The legal representative confirms the information provided by the Registry in relation to the death of Victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09.¹⁵ To date, given that previously reported obstacles persist (problems with identifying, locating and then reaching members of the deceased victims’ families), the legal representative has not yet been able to obtain all the relevant information concerning resumption of action in relation to these cases. Contact is underway in the field. The legal representative will revert to the Chamber in the near future in order to clarify whether or not action will be resumed in respect of these cases and, if so, to file an application in that connection.

21. Meanwhile, four other victims have also passed away: a/0166/09, a/0253/09, a/0354/09 and a/0376/09. In a separate application to be filed shortly, the legal

paras. 127-128; Trial Chamber II, *Corrigendum of the Operative Part of the Decision on the 345 applications for participation as a victim in the proceedings*, ICC-01/04-01/07-1347-Corr-tENG, 5 August 2009, paras. 86-87.

¹⁵ ICC-01/04-02/12-55, footnote 2.

representative will seek resumption of the action in respect of Victim a/0253/09. Once the necessary information has been obtained, he will revert to the Chamber concerning a possible resumption of action in respect of Victims a/0166/09, a/0354/09 and a/0376/09.

22. In so far as the aforementioned victims are participating in both the appeal proceedings against the judgment concerning Mr Ngudjolo and the proceedings still pending before Trial Chamber II, the legal representative will disclose all the aforementioned information to Trial Chamber II in a separate filing.

FOR THESE REASONS, the legal representative **RESPECTFULLY PRAYS** the Appeals Chamber:

- (1) Pursuant to regulation 23 *bis* of the Regulations of the Court, **TO RE-CLASSIFY** document ICC-01/04-02/12-55-Conf-Anx3-Corr, containing the list (and identities) of the victims represented by the common legal representative of the main group of victims, as confidential, *ex parte* Prosecutor and Defence for Mr Ngudjolo and, as appropriate, **TO ORDER** the filing of a confidential version, with the identities of the said victims having been redacted, accessible to the legal representative of the “former child-soldiers” group of victims;
- (2) **TO TAKE FORMAL NOTE** of the additional information referred to above and, consequently,
- (3) **TO ORDER** any appropriate change to the list of victims whom he represents.

[signed]

Fidel Nsita Luvengika

Common legal representative
of the main group of victims

Done at Brussels, Belgium, this 12 April 2013.