

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 June 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

Prosecution's Submissions Pursuant to the Appeals Chamber's "Order on the filing of further submissions on the Registrar's List of participating Victims" dated 27 May 2013

Source: Office of the Prosecutor

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to:

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Detention Section

**Victims Participation and Reparations
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Other

Introduction

1. The Prosecution submits these observations pursuant to the Appeal Chamber's "Order on the filing of further submissions on the Registrar's List of participating victims".¹ The Prosecution requests that the Appeals Chamber reject the requests made by the Defence and retain the relevant anonymous victims and deceased victims on the list of victims authorized to participate in the proceedings.
2. The practice of the Court does not exclude the participation of anonymous victims in proceedings. However, if their identities are not disclosed to the Defence, this will impact on the degree of their participation in the proceedings.
3. According to the practice of this Court, if a victim has been authorized to participate in the proceedings and then dies, his or her close relatives may represent the deceased victims in the proceedings before the Court. Moreover, in the current case, because of the extenuating circumstances and the steps being taken on the field, the Prosecution does not consider that the period of delay in contacting the relatives of the deceased victims is excessive. Maintaining the deceased victims on the list of victims authorised to participate in the proceedings does not cause any prejudice to the Defence.

¹ ICC-01/04-02/12-73.

Procedural History

4. On 18 December 2012, Trial Chamber II delivered the "Judgement rendu en application de l'article 74 du Statut"² ("Decision on Acquittal"), in which Mr Mathieu Ngudjolo Chui ("Mr Ngudjolo") was acquitted of all charges against him. On 20 December 2012, the Prosecutor lodged the "Prosecution's Appeal against Trial Chamber IIs 'Judgement rendu en application de l'article 74 du Statut'".³
5. On 6 March 2013, the Appeals Chamber issued the "Decision on the participation of victims in the appeal against Trial Chamber II's 'Judgement rendu en application de l'article 74 du Statut'"⁴ ("Decision on victim participation"). It held that victims who had participated in the trial proceedings against Mr Ngudjolo and whose victim status was not revoked, could participate in the appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal. The Appeals Chamber also directed the Registrar to file a list identifying the participating victims.
6. On 28 March 2013, the Registrar filed the "Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30"⁵ ("Registrar's List").⁶

² ICC-01/04-02/12-3.

³ ICC-01/04-02/12-10(A).

⁴ ICC-01/04-02/12-30 (A).

⁵ ICC-01/04-02/12-55(A).

⁶ Corrigenda to the annexes were filed on 3 April 2013 as ICC-01/04-02/12-55-Conf-Exp-Anxl-Corr, ICC-01/04-02/12-55-Conf-Exp-Anx2-Corr and ICC-01/04-02/12-55-Conf-Exp-Anx3-Corr ("Annex 3 to Registrar's List").

7. On 12 April 2013, the common legal representative of the principal group of victims ("Victim Group I") filed the "Observations of the legal representative concerning the list of victims participating in the appeal proceedings transmitted by the Registrar and application for re-classification of document ICC- 01/04-02/12-55-Conf-Exp-Anx3-Corr"⁷ ("Observations of Victim Group I"). The legal representative, inter alia, informed the Appeals Chamber that (i) in relation to victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09, who the Registrar indicated were deceased,⁸ he had not yet been able to obtain all the relevant information concerning "resumption of action in relation to these cases" and that he "[would] revert to the Chamber in the near future in order to clarify whether or not action [would] be resumed in respect of these cases [...]",⁹ (ii) in addition four other victims, namely a/0166/09, a/0253/09, a/0354/09 and a/0376/09, have also since passed away. The legal representative indicated that he intended to seek "resumption of action in respect of victim a/0253/09" shortly and [would] revert to the Chamber concerning the remaining three deceased victims.¹⁰
8. On 15 April 2013, the Defence filed the "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'"¹¹ ("Defence Observations"). The Defence suggested that if victims a/0390/09 and a/0452/09 wished to maintain their anonymity as victims amongst the group of former child soldier victims ("Victim Group

⁷ ICC-01/04-02/12-62-tENG (A).

⁸ See Annex 3 to Registrar's List.

⁹ ICC-01/04-02/12-62-tENG (A), para. 20.

¹⁰ ICC-01/04-02/12-62-tENG (A), para. 21.

¹¹ ICC-01/04-02/12-63-tENG (A).

II"), they should be removed from the Registrar's List.¹² The Defence also objected to the continued participation of the four deceased victims in Victim Group I.¹³

9. On 26 April 2013, the legal representative of Victim Group II filed the "Demande du Représentant légal des victimes enfant soldats de pouvoir répondre au document de la Défense ICC-01/04-02/12-63"¹⁴ ("Request to Respond") to address the legal questions surrounding the status of the two anonymous victims whom he represents¹⁵ and to update the Appeals Chamber on steps taken to obtain the victims' instructions regarding their request for anonymity vis-à-vis the parties.¹⁶

10. On 27 May 2013, the Appeals Chamber issued its "Order on the filing of further submissions on the Registrar's List of participating victims".¹⁷ ("Order on Further Submissions"). It held that as the Appeals Chamber will be considering these issues for the first time, it is appropriate to afford the legal representatives of Victim Groups I and II an opportunity to make submissions on the legal and factual issues arising from the Defence's objections.¹⁸ The Appeals Chamber also permitted the Defence and the Prosecutor to reply to the submissions of the victims.¹⁹ On 3 June 2013 the Legal Representatives of Victim Group I²⁰ and Victim Group II²¹ submitted their observations. Both representatives requested that the Appeals

¹² ICC-01/04-02/12-63-tENG (A), paras 8-9.

¹³ ICC-01/04-02/12-63-tENG (A), paras 16-17.

¹⁴ ICC-01/04-02/12-68(A).

¹⁵ ICC-01/04-02/12-68(A), para.13.

¹⁶ ICC-01/04-02/12-68(A), para.14.

¹⁷ ICC-01/04-02/12-73.

¹⁸ ICC-01/04-02/12-73, para.8

¹⁹ ICC-01/04-02/12-73, para.9

²⁰ ICC-01/04-02/12-79.

²¹ ICC-01/04-02/12-80.

Chamber reject the Defence Observations and retain the relevant anonymous victims and deceased victims on the list of victims authorized to participate in the proceedings.

11. On 5 June 2013, the Defence requested a postponement of the deadline set for the Defence in the Order on Further Submissions until 26 June 2013.²² On 7 June, the Appeals Chamber extended the relevant deadline until 20 June 2013.²³

Prosecution Submissions

Participation of the anonymous victims in the current proceedings.

12. The Defence recalled that the Trial Chamber instructed the legal representative of Victim Group II 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. It noted 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.²⁴ The Defence suggested that in the event that Victims a/0390/09 and a/0452/09 wish to maintain their anonymity, they be removed from the Lists of Victims. It argued that wholly anonymous participation is prejudicial to the Defence and incompatible with the rights of the Accused and the fairness of the trial.²⁵ The Defence conceded that

²² ICC-01/04-02/12-82.

²³ ICC-01/04-02/12-84 A.

²⁴ ICC-01/04-02/12-63-tENG, para.8.

²⁵ ICC-01/04-02/12-63-tENG.

ICC jurisprudence does not prohibit the anonymous participation of victims, but relied on a ruling of the Special Tribunal for Lebanon.²⁶

13. The Prosecution concurs in general with the position taken by the Common Legal Representative for Victims Group II that the practice of the Court does not exclude the participation of anonymous victims in proceedings;²⁷ rather, the modalities of participation of anonymous victims will be determined in a manner that a fair trial is guaranteed.²⁸ The caselaw of the Special Tribunal for Lebanon is not applicable since victims have broader rights at that tribunal.²⁹ The Representative also noted the volatile situation on the ground and the vulnerability of the victims involved³⁰ and added that efforts continue to lift the anonymity of both victims.³¹ The Legal Representative for Victim Group I incorporate the same arguments by reference.³²

14. Chambers of the ICC have explicitly rejected submissions that anonymous victims should never be permitted to participate in the proceedings. In the *Lubanga* case, the Trial Chamber rejected the submissions of the parties that anonymous victims should never be permitted to participate in the proceedings. Although the Trial Chamber recognized that “it is preferable that the identities of victims are disclosed in full to the parties”, the Chamber was also “conscious of the particularly vulnerable position of

²⁶ ICC-01/04-02/12-63-tENG, para.10.

²⁷ ICC-01/04-02/12-80, para.18.

²⁸ ICC-01/04-02/12-80, para.21.

²⁹ ICC-01/04-02/12-80, para.26.

³⁰ ICC-01/04-02/12-80, para.31.

³¹ ICC-01/04-02/12-80, para.30.

³² ICC-01/04-02/12-79, para.8.

many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety.”³³

15. Similarly, the Trial Chamber in the *Katanga and Ngudjolo* case held that it “...does not rule out the possibility of anonymous victims participating in the proceedings.”³⁴ This approach was also approved by the Trial Chamber in *Bemba*.³⁵

16. The jurisprudence of the Court has adopted an approach that focuses on whether anonymity is compatible with *certain forms* of participation and is a *proportional* protective measure in the circumstances. According to this, the need to disclose a victim's identity will be proportional to their *degree* of participation.³⁶ The Prosecution notes in this context that the modalities set for participating in the current appeal are limited to presenting the victims' views and concerns with respect to their personal interests in the issues on appeal by each filing observations on the document in support of the appeal and the response to the document in support of the appeal.³⁷ In light of the volatile situation on the ground and the vulnerability of the victims involved, anonymity is compatible with this form of participation and is a proportional protective measure in the circumstances. The Prosecution notes however that, in line with prior case-law, anonymous victims should not have access to the confidential part of the record of the present case.³⁸

³³ ICC-01/04-01/06-1119, para.130.

³⁴ ICC-01/04-01/07-1788-tENG, para.93.

³⁵ ICC-01/05-01/08-807-Corr, para.69.

³⁶ ICC-01/04-01/06-1119, para.131. *See also*: ICC-01/04-01/06-1556, paras 126-133; ICC-01/05-01/08-807-Corr, paras 70-73.

³⁷ ICC-01/04-02/12-30, para.5.

³⁸ *See for example* ICC-01/04-01/07-537, pages 12-13. *See further* ICC-01/04-01/07-474, paras.149-150. Since the legal representative for Victim Group II represents both anonymous

17. Given that the Appeals Chamber will know the victims' true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.³⁹

Participation of the deceased victims in the current proceedings.

18. The Defence objects to the continued participation of four deceased victims: a/0175/08, a/0117/09, a/0321/09 and a/0373/09.⁴⁰ The Defence noted that on 15 February 2011 the common legal representative of the main group of victims 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/0373/09.⁴¹ It noted further that 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 applications.⁴² The Defence states that the legal representative has yet to comply with that order.⁴³ 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

and non-anonymous victims, it is necessary that he refrains from sharing any non-public material with the two anonymous victims.

³⁹ See in this context ICC-01/04-01/06-1119, para.131.

⁴⁰ ICC-01/04-02/12-73, para.14.

⁴¹ ICC-01/04-02/12-63-tENG, para. 15.

⁴² ICC-01/04-02/12-63-tENG, para.

⁴³ ICC-01/04-02/12-63-tENG, para. 16.

removed from the list of victims authorised to participate in the proceedings.⁴⁴

19. The legal representatives for Victims Group I and II oppose the Defence Observations, citing extenuating circumstances that justify the delay and describing the steps currently being taken on the field.⁴⁵ The Prosecution concurs in general with the positions taken by the legal representatives.

20. The Prosecution notes, as a preliminary matter, that case-law allows for a person to apply for victims' participation on behalf of deceased persons.⁴⁶ For example, the Trial Chamber in the *Katanga and Ngudjolo* case held that close relatives of a victim authorised to participate who is now deceased may decide to continue the action initiated by the victim before the Court, but that they may do so only on behalf of the deceased victim and within the limits of the views and concerns expressed by the victim in his or her initial application.⁴⁷

21. The Prosecution submits that the significant extenuating circumstances faced by the legal representative of Victim Group I justify the delay in contacting family members of the deceased victims. These include difficulties in identifying, locating, and contacting family members of the deceased victims, difficulties in obtaining consent from all relevant family members,⁴⁸ inability to conduct certain field missions and the prior

⁴⁴ ICC-01/04-02/12-63-tENG, para. 17.

⁴⁵ See generally the submissions in ICC-01/04-02/12-79.

⁴⁶ ICC-01/04-01/07-1737, para. 30; ICC-01/04-01/07-3018, para.20; ICC-01/04-01/07-1737, para.30.

⁴⁷ ICC-01/04-01/07-1737, para. 30, see further ICC-01/04-01/07-3018, para.20.

⁴⁸ ICC-01/04-02/12-79, para.14.

concentration of team resources on trial litigation.⁴⁹ The Prosecution notes that a series of steps have been taken to contact the families of the deceased victims and decide on a possible course of action regarding the relevant applications.⁵⁰ Indeed, since “*[d]es contacts sont actuellement en cours sur le terrain*” and the legal representative states that he will revert to the Chamber “*...de préciser si ces dossiers feront l’objet d’une reprise d’action*”⁵¹, it appears likely that the issue of continuing the action initiated by the deceased victims will soon be resolved.

22. Moreover, the Prosecution submits that the maintenance of the deceased victims on the list of victims authorised to participate in the proceedings does not cause any prejudice to the Defence.⁵² These victims were already admitted to participate in the proceedings and are not new applicants whose details and personal interests are unknown to the Defence. In line with current jurisprudence,⁵³ any steps that will eventually be taken by a family member to continue the action initiated by the deceased victim will be within the limits of the views and concerns expressed by the deceased victim in his or her initial application.

⁴⁹ ICC-01/04-02/12-79, para.15.

⁵⁰ ICC-01/04-02/12-79, para.16.

⁵¹ ICC-01/04-02/12-79, para.16.

⁵² See in this context ICC-01/04-02/12-79, para.19.

⁵³ ICC-01/04-01/07-1737, para. 30, see further ICC-01/04-01/07-3018, para.20.

Conclusion

23. For the reasons set out above, the Prosecution requests that the Appeals Chamber reject the Defence Observations and retain the relevant anonymous victims and deceased victims on the list of victims authorized to participate in the proceedings.



Fatou Bensouda
Prosecutor

Dated this 10th day of June 2013
At The Hague, The Netherlands