



Original: **French**

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

Date: **8 February 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

Joint request of the Legal Representatives concerning access to confidential documents

Source: The Legal Representatives of the Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence of 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

Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

REGISTRY

Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

BACKGROUND

1. The present trial commenced on 25 November 2009 before Trial Chamber II against G. Katanga and M. Ngudjolo, both accused of the joint commission of crimes proscribed by the Statute.¹
2. By oral decision of 1 October 2009, Trial Chamber II granted the Legal Representatives of Victims access to all of the documents in the record, be they public or confidential.² Its 22 January 2010 Decision No. 1665 on the modalities of victim participation affirmed this ruling.³ Throughout the proceedings, interlocutory appeals included, and until most recently, the Registry systematically notified the Legal Representatives of any document filed as confidential, irrespective of its author and in accordance with the aforesaid participation modalities.
3. Further to its 21 November 2012 decision, Trial Chamber II severed the charges against Mr Ngudjolo on purely technical grounds – the proposed recharacterisation of the mode of liability held against the co-accused, G. Katanga – and so as not to defer the verdict in respect of the former.⁴ The decision did not modify the modalities of victim participation in the proceedings in any respect. Trial Chamber II further ruled that the victims allowed to participate in the initial proceedings were authorised to continue participating in both of the severed cases.⁵ The Appeals Chamber recently noted furthermore the victims' continued authorisation to participate in each of the severed cases.⁶

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

² Status conference of 1 October 2009, ICC-01/04-01/07-T-71-FRA, pp. 5 and 6.

³ *Decision on the Modalities of Victim Participation at Trial*, ICC-01/04-01/07-1788-tENG, 22 January 2010.

⁴ *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.

⁵ ICC-01/04-01/07-3319-tENG/FRA, para. 64.

⁶ *Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court*, ICC-01/04-01/07-3346, para. 8.

4. On 18 December 2012, the Chamber acquitted Mr Ngudjolo of all charges and ordered his immediate release.⁷ On 20 December 2012, the Prosecution brought an appeal against the judgment pursuant to article 81(1) of the Statute.⁸
5. Meanwhile, the Defence entered a first motion connected to Mr Ngudjolo's post-release situation.⁹
6. On 29 January 2012, the Defence entered a second motion requesting that the Victims and Witnesses Unit be enjoined to execute the judgment in acquittal and to protect Mr Ngudjolo since he had been a witness in his own trial. It also prayed the Appeals Chamber to enjoin the host State to return Mr Ngudjolo to the custody of the Court so as to determine his place of stay during the asylum and appellate proceedings.¹⁰
7. The motion was filed as public with four annexes classified by the Defence as "confidential". Upon notification thereof, the Legal Representatives however observed that they did not have access to said annexes.
8. The problem was raised with the competent service of the Registry, which replied that "[TRANSLATION] [a]t the request of the Defence, the Legal Representatives have access only to the public motion".¹¹ The common Legal Representative of the main group of victims thanked the Registry for its prompt reply. However, he pointed out that the Legal Representatives had been granted access to all of the documents in the record of the present case, including confidential documents, and that it was not for the Defence to decide that they

⁷ ICC-01/04-02/12-T-1 FRA and *Jugement rendu en application de l'article 74 du Statut*, 18 December 2012, ICC-01/04-02/12-3; ICC-01/04-02/12-T-3 FRA.

⁸ "Prosecution's Appeal against Trial Chamber II's '*Jugement rendu en application de l'article 74 du Statut*'", ICC-01/04-02/12-10.

⁹ "Urgent Defence Application for the international relocation of Mathieu Ngudjolo outwith the African continent and his presentation to the authorities of one of the States Parties to the International Criminal Court for the purposes of expediting his asylum application", ICC-01/04-02/12-15-tENG, 21 December 2012.

¹⁰ "*Requête de la Défense tendant à obtenir de la Chambre d'appel une injonction donnée à l'Unité d'aide aux victimes et aux témoins d'exécuter, et à l'Etat hôte de respecter le jugement d'acquiescement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénal internationale*", ICC-01/04-02/12-20, 29 January 2013.

¹¹ CMS's response, 30 January 2013 at 11.36 (emphasis added).

would henceforth be denied access thereto.¹² Accordingly, he requested access to the documents concerned.

9. The Registry replied that it gave access to documents “[TRANSLATION] in accordance with the author’s instructions at the time of filing”, which it would only amend where so ordered by the chamber seized of the case. The Registry referred the Legal Representative to the Defence to find out the reasons for restricting access to the four confidential documents. The Registry further advised the Legal Representative to raise the matter before the Appeals Chamber.¹³
10. Following a discussion between the Legal Representative and the Defence, the Defence acknowledged that a misunderstanding had arisen and contacted the Registry to have it take the necessary steps to give the Legal Representatives access to the documents concerned.
11. The Legal Representative then contacted the Registry anew to confirm the discussion with the Defence and its agreement to the Legal Representatives’ accessing the confidential documents. The Legal Representative also inquired of the Registry as to the existence of further confidential documents, possibly unnotified to the Legal Representatives, and underscored the participation modalities which find application here in accordance with regulation 86(8) of the Regulations of the Court.¹⁴
12. The Registry confirmed having had a discussion with the Defence and having informed the Appeals Chamber. It stated that “[TRANSLATION] the Legal Representative was notified of the documents which were sent to him”. The Legal Representatives still do not have access to the four confidential documents to this day.¹⁵

¹² E-mail to CMS from the Legal Assistant of the common Legal Representative of the main group of victims, 30 January 2013 at 12.02.

¹³ CMS’s response at 12:46 on 30 January 2013, (emphasis added).

¹⁴ E-mail to CMS from the Legal Assistant of the common Legal Representative of the main group of victims, 31 January 2013 at 17.52.

¹⁵ CMS’s response, 1 February at 13.32.

13. As to the matter of further unnotified confidential documents, the Registry replied that “[TRANSLATION] having consulted one of the legal officers of the Appeals Chamber, it would be desirable for any such request to be formally addressed in writing to the Appeals Chamber”.¹⁶
14. Hence the present joint request, which also deals with the four documents to which the Legal Representatives still do not have access, despite the Registry’s claim that notification thereof had been effected.

FOUNDATION OF THE REQUEST

15. Regulation 86(8) of the Regulations of the Court reads: “[the] decision taken by a Chamber under rule 89 [of the Rules of Procedure and Evidence] shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1”.
16. Otherwise put, victim participation modalities ordained by a chamber apply to all stages of the proceedings, unless modified by the chamber whereto the matter was referred.
17. The instant request is directly related to the judgment in acquittal and release of Mr Ngudjolo. It is an integral part of the proceedings concerning Mr Ngudjolo.
18. The severance of his case from that of G. Katanga has no bearing on the victims’ participation in the proceedings or the modalities thereof.¹⁷ It forms part of proceedings in the same case within the meaning of regulation 86(8) aforesaid.
19. Nor does adjudication of the request by the Appeals Chamber in and of itself have any bearing on victim participation modalities. It merits recalling that the matter was referred to the Appeals Chamber simply on account of the transferral of the case record from the court *a quo* pursuant to rule 151(1) of the Rules as a

¹⁶ *Ibid.*

¹⁷ ICC-01/04-01/07-3319-tENG/FRA; see also: ICC-01/04-01/07-3346.

result of the judgment in acquittal.¹⁸ Further still, it must be recalled that the Legal Representatives' access to confidential documents was never disputed in the interlocutory appeals. Nor was access contested by either of the parties. The situation remains unchanged inasmuch as the Defence for Mathieu Ngudjolo authorised the Registry to notify the four confidential annexes in question.

20. Lastly, but most importantly, the Appeals Chamber made no ruling under rule 91(1) of the Rules of Procedure and Evidence ("the Rules") to modify victim participation modalities in the case at bar.
21. Accordingly, under regulation 86(8) of the Regulations of the Court, the Legal Representatives remain entitled to access all of the public and confidential documents in the record. Absent any ruling pursuant to rule 91(1) of the Rules, to consider otherwise would be contravening the participation modalities granted to the victims in the present case, regulation 86(8) of the Regulations of the Court, rules 89 and 91 of the Rules and article 68(3) of the Statute.
22. The Legal Representatives note that as a consequence and absent any ruling of the Appeals Chamber modifying victim participation modalities, the Registry should abide by earlier orders in force and not depart from the practice hitherto followed of notifying every document, public or confidential, to them.
23. Should the Chamber contemplate modification of the participation modalities afforded to the Legal Representatives as regards access to confidential documents, they would wish to advance joint observations to substantiate their interest in the right remaining unchanged.
24. The Legal Representatives wish to underline their particular interest in all matters brought before the Appeals Chamber, ensuing from the referral of the proceedings concerning Mr Ngudjolo *ad quem* and sequential to the appeal against the verdict of his case. This interest extends also to the matter of Mr

¹⁸ *Decision on the "Requête urgente de la Défense en vue de solliciter la relocalisation internationale de Mathieu Ngudjolo hors du continent africain et sa présentation devant les autorités d'un des Etats parties au Statut de la Cour pénale internationale aux fins de diligenter sa procédure d'asile"*, ICC-01/04-02/12-14, 21 December 2012.

Ngudjolo's post-release situation, now pending before the Chamber, insofar as it concerns his locus and capacity to attend his appeals proceedings. The victims have a particular interest in ensuring that Mr Ngudjolo's release does not prejudice the integrity of the appeals proceedings, including the enforcement of a possible sentence and reparations, should the judgment be reversed. They have a further interest in seeing that his release does not prejudice the integrity of the proceedings in respect of G. Katanga. It bears recalling that although the two cases are now severed, the entire evidence is common to both and it cannot be ruled out that Trial Chamber II may need to recall some witnesses or call new ones.¹⁹

¹⁹ ICC-01/04-01-07-3319-tENG/FRA.

FOR THESE REASONS, the Legal Representatives **RESPECTFULLY PRAY THE CHAMBER**

In the main

- 1) **TO RECALL** that the Legal Representatives have access to all of the documents in the record, public and confidential, and accordingly,
- 2) **TO ORDER** the Registry to abide by the modalities aforementioned, notify the Legal Representatives of any public or confidential document filed in the instant case and grant them access thereto, including the four documents appended to Mr Ngudjolo's motion No. ICC-01/04-02/12-20 and any other confidential document filed in the present case and to which they are not privy;

In the alternative, should the Chamber envision modification of the victims' right to access to confidential documents,

TO AUTHORISE them to file submissions on the matter.

[signed]

[signed]

Mr Fidel Nsita Luvengika
Legal Representative of the main group
of victims

Mr Jean-Louis Gilissen
Legal Representative of the group of
child-soldier victims

Dated this 8 February 2013, at Brussels and Liège, Belgium