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

Date: 16 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

**Application for re-classification of the list of victims filed by the Registry under
reference ICC-01/04-02/12-55-Conf-Anx2-Red-Corr**

Source: Legal representative of the child-soldier victims

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

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Ngudjolo Chui

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Mr Jean-Louis Gilissen

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Office of Public Counsel for Victims

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Defence**

REGISTRY

Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

Victims Participation and Reparations Section

Ms Fiona McKay

PROCEDURAL BACKGROUND

1. Prior to the severance of the case against M. Ngudjolo and G. Katanga, 364 victims were authorised to participate in the proceedings. Some of them had been authorised to participate from the pre-trial stage, Trial Chamber I (“the Chamber”) having authorised their participation at trial without requiring them to file a new application.¹ Of the former child-soldier victims, one was authorised to participate from the pre-trial stage;² the remaining nine were admitted at the trial stage by various decisions of Trial Chamber II.³
2. On 21 November 2012, the Chamber issued its *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*, wherein it stated that the victims allowed to participate in the initial proceedings were authorised to continue participating in both of the severed proceedings.⁴
3. By judgment of 18 December 2012, Mr Ngudjolo was acquitted of all charges and released. On 20 December 2012, the Prosecution lodged its appeal against the judgment.

¹ *Decision on the treatment of applications for participation*, 27 February 2009, ICC-01/04-01/07-933-tENG.

² The victims concerned are a/0333/08 (*Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/00337/07 and a/0001/08*, 2 April 2008, ICC-01/04-01/07-357) and a/0110/08 (*Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case*, 10 June 2008, ICC-01/04-01/07-578-Conf).

³ *Operative part of the Decision on the 345 applications for participation as victim in the proceedings*, 31 July 2009, ICC-01/04-01/07-1347-tENG; *Corrigendum of Operative part of the Decision on the 345 applications for participation as victim in the proceedings*, 5 August 2009, ICC-01/04-01/07-1347-Corr-tENG; *Fourth decision on two applications for victims’ participation in the proceedings*, 8 November 2010, ICC-01/04-01/07-2516-tENG, with confidential, *ex parte* annexes (see also the confidential redacted version of the annexes, ICC-01/04-01/07-2516-Conf-Anx1-Red and ICC-01/04-01/07-2516-Conf-Anx2-Red; *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, ICC-01/04-01/07-2693-Conf-Anx1-Red and ICC-01/04-01/07-2693-Conf-Anx2-Red).

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, para. 64.

4. Ruling on the participation of victims in the present appeal, by decision of 6 March 2012 the Appeals Chamber instructed the Registry to furnish a list of those victims who had participated in the case against Mr Ngudjolo and whose victim status had not been revoked:⁵

The Registrar shall file a list of the victims referred to in the preceding paragraph, indicating in respect of each of those victims:

- 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

RELIEF SOUGHT:

5. In accordance with the aforementioned Appeals Chamber decision authorising the submission by 16 April 2013 of objections or corrections to the list filed by the Registry, the legal representative of the former child-soldier victims (“the Legal Representative”) hereby seeks under regulation 23 *bis* of the Regulations of the Court the reclassification of document ICC-01/04-02/12-55-Conf-Anx2-Red-Corr, which contains a list of the victims he represents and states their identity – with the exception of Victims a/0390/09 and a/0452/09 – as a confidential, *ex parte* document only available to the Prosecution and the Defence for Mr Ngudjolo. The Legal Representative also notes that the list of former child-soldier victims may be notified to the legal representative of the main group of victims by a document, expunged of the victims’ identity and date of birth, which could therefore be made public.

⁵ *Decision on the participation of victims in the appeal against Trial Chamber II’s “Jugement rendu en application de l’article 74 du Statut”*, 6 March 2013, ICC-01/04-02/12-30.

⁶ *Ibid.*, para. 3.

GROUND:

6. Firstly, it is worth recalling that this application to the Appeals Chamber concerns only nine of the eleven represented victims, since two victims remain anonymous to all parties and participants.
7. The Legal Representative wishes to recapitulate the circumstances and scope of the lifting of the nine victims' anonymity.
8. The anonymity of eight of these victims⁷ vis-à-vis the parties was lifted following the status conference of 1 October 2009, during which Trial Chamber II emphasised the Defence teams' requests for the disclosure of the identity of those hitherto anonymous victims who did not object to their identity being revealed. The Chamber requested the legal representatives to confirm that the victims who had previously stated that they did not object to the disclosure of their identity to the parties were still so minded.⁸
9. On 20 October 2009, the Legal Representative filed a response to the Defence for Germain Katanga's motion seeking disclosure of the identity of those victims who had stated that they did not wish their identity to be withheld from the Defence.⁹ In that response, the Legal Representative requested that the anonymity of Victims a/315/09 and a/0316/09, who were expressly referred to in the motion,¹⁰ be maintained, arguing the situation in the field and the potential risk to the victims if their anonymity were lifted.

⁷ Victims a/0333/07, a/0110/08, a/0111/08, a/0112/08, a/0136/08, a/0314/09, a/0315/09 and a/0316/09. Victim a/0114/08 was not admitted to the proceedings until later, by a decision dated 9 February 2011.

⁸ ICC-01/04-01/07-T-71-Red-FRA, p. 6, lines 18-24, and p. 8, lines 7-9.

⁹ *"Réponse du Représentant légal des victimes 0315/09 et 0316/09 à la demande de la Défense visant à la communication de l'identité desdites victimes"*, 20 October 2009, ICC-01/04-01/07-1543.

¹⁰ *"Defence Motion Requesting the Disclosure of the Identity of Applicants Having Obtained the Status of Victims"*, 7 September 2009, ICC-01/04-01/07-1461.

10. By decision of 6 November 2009, the Chamber ordered the Legal Representative to specify the intentions of the victims whom he represents regarding disclosure of their identity to the parties.¹¹

11. By submissions dated 13 November 2009, the Legal Representative informed the Chamber:

[TRANSLATION] After consultation with the victims authorised to participate in the proceedings who are represented by Mr Gilissen, it would appear that they are currently of the view that their identity may be disclosed to the Defence teams and the Office of the Prosecutor. The victims concerned are: a/0333/07, a/0110/08, a/0111/08, a/0112/08, a/0136/08, a/0314/09, a/0315/09 and a/0316/09.¹²

12. Taking note of these submissions, the Chamber ordered by decision of 18 November 2009 the disclosure to both Defence teams and the Prosecution of the identity of the former child-soldier victims represented in the current proceedings.¹³ Disclosure was effected by a Registry filing of 20 November 2009, classified as *ex parte*, only available to the Prosecutor, the Defence and the legal representative of the victims concerned.¹⁴

13. The Legal Representative emphasises that in the decision of 18 November 2009, the Chamber states “[that it] considers that, at this stage of the proceedings, and in light of the information available to it on the current security situation in the Democratic Republic of the Congo, anonymity must be maintained in relation to the general public, and to all other participants in

¹¹ *Decision on the Disclosure to the Parties of the Identities of the Victims*, 6 November 2009, ICC-01/04-01/07-1607-tENG.

¹² “*Soumission du représentant légal du groupe des victimes « enfants-soldats » relative à la communication de l’identité des victimes représentées aux parties et portant demande de report du délai imparti par la Chambre pour déposer une requête en mesures de protection (Norme 35 du Règlement de la Cour)*”, 13 November 2009, ICC-01/04-01/07-1632, para. 9.

¹³ *Second Decision on the Disclosure to the Parties of the Identities of the Victims*, 18 November 2009, ICC-01/04-01/07-1650-tENG, para. 13.

¹⁴ “*Divulgence de l’identité d’un troisième groupe de victimes aux parties*”, 20 November 2009, ICC-01/04-01/07-1663-Conf-Exp.

the proceedings, in respect of all of the victims represented by Mr Luvengika and Mr Gilissen” [emphasis added].¹⁵

14. As for the ninth victim to whom the present application pertains (Victim a/0114/08), the Legal Representative informed the Chamber by e-mail of 18 February 2011 that he would not seek further time for his submissions on whether that victim’s anonymity should be maintained – as he had for Victims a/0390/09 and a/0452/09 – insofar as the application form for participation states that Victim a/0114/08 has no objection to disclosure of identity to the Defence teams;¹⁶ he added that the victim had not subsequently made any request to the contrary.

15. Taking note of this position, the Chamber reminded the Registry in particular by decision of 11 April 2011 that “once the Legal Representatives have informed the Chamber that the victims have consented to the disclosure of their identity to the parties, it must proceed immediately with said disclosure, in particular with respect to Victim a/0114/08”.¹⁷

16. In executing the decision of 11 April 2011, the Registry disclosed the identity of 0114/08 to the parties on 15 April 2011,¹⁸ noting, moreover, that “[TRANSLATION] this document is notified as ‘confidential’, ‘*ex parte*’, only available to the Prosecutor, the Defence and Mr Gilissen pursuant to the Chamber’s Decision of 18 December 2009 ordering the disclosure of the identity of the victims having given their prior consent to the parties alone” [emphasis added].¹⁹

¹⁵ ICC-01/04-01/07-1650-tENG, para. 15.

¹⁶ E-mail from Mr Gilissen’s team to the Chamber, 18 February 2011, at 11.22 a.m.

¹⁷ *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*, 11 April 2011, ICC-01/04-01/07-2827-tENG.

¹⁸ “*Divulgence de l’identité de la victime a/0114/08 aux parties*”, 15 April 2011, ICC-01/04-01/07-2838-Conf-Exp.

¹⁹ *Ibid.*

17. The Legal Representative therefore concludes that the Registry's notification of the lists of victims via the annexes to document ICC-01/04-02/12-55 was, for certain victims, effected in violation of the protective measures, as maintained by the Chamber for victims authorised to participate. In particular, concerning the victims he represents, the Legal Representative notes that document ICC-01/04-02/12-55-Conf-Anx2-Red-Corr was notified without consideration of the protective measures previously ordered by the Chamber pursuant to the Appeals Chamber's decision on the participation of victims.

18. Furthermore, the Legal Representative refers to the arguments set forth by the legal representative of the main group of victims in his submissions of 12 April 2013 as to the need to protect the victims' safety and well-being, with due consideration for the "inherent conflict of interest involving the two groups of victims authorised to participate in these proceedings".²⁰

FOR THESE REASONS, the Legal Representative respectfully requests the Appeals Chamber to:

- Reclassify document ICC-01/04-02/12-55-Conf-Anx2-Red-Corr as confidential, *ex parte*, only available to the Prosecution and the Defence for Mr Ngudjolo, pursuant to regulation 23 *bis* of the Regulations of the Court;
- If necessary, order the filing of a public version of that document, expunged of any references to the identity and date of birth of the former child-soldier victims listed.

²⁰ "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", 12 April 2013, ICC-01/04-02/12-62-tENG, para. 14.

[signed]

Seraing, 16 April 2013

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