

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **French**

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

Date: **20 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**

**Response of the Defence of Mathieu Ngudjolo to the observations of the Legal Representatives regarding the participation of anonymous victims and the maintenance of deceased victims on the list of victims participating in the appellate proceedings (ICC-01/04-02/12-79 and ICC-01/04-02/12-80)**

**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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## 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" or "Ngudjolo").<sup>1</sup>
2. On 20 December 2012, the Prosecution filed a notice of appeal.<sup>2</sup>
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"*<sup>3</sup> 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ordered the Registry to file a list of those victims who had participated at trial and whose victim status had not been revoked.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 "Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30".<sup>4</sup> The Defence team for Mathieu Ngudjolo ("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in Annexes 2 and 3, the lists of those victims authorised to participate in the proceedings whose victim status had not been revoked ("Lists of Victims").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 15 April 2013, the Defence submitted its observations on and objections to the Lists of Victims,<sup>5</sup> wherein it suggested, *inter alia*, the removal of victims whose

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<sup>1</sup> *Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, 18 December 2012.

<sup>2</sup> "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.

<sup>3</sup> *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.

<sup>4</sup> "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. On 4 April 2013, the Registry filed a corrigendum of the annexes thereto: "Corrigendum of Annex 2 to the Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30", ICC-01/04-02/12-55-Conf-Anx2-Red-Corr, 4 April 2013; "Corrigendum of Annex 3 to the Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30", ICC-01/04-02/12-55-Conf-Anx3-Corr, 4 April 2013.

<sup>5</sup> "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", ICC-01/04-02/12-63-tENG, 15 April 2013.

anonymity had not been lifted and sought the removal of four deceased victims who had no successor.

6. On 26 April 2013, the Legal Representative of the child-soldier victims sought leave to respond to the Defence submissions.<sup>6</sup>

7. On 27 May 2013, in its *Order on the filing of further submissions on the Registrar's List of participating victims* ("Order"), the Appeals Chamber directed the Legal Representatives of both groups of victims to submit their observations on the legal and factual issues affecting the participation of anonymous victims and on the inclusion of the deceased victims on the list of victims participating in the appellate proceedings.<sup>7</sup> It also ordered the Defence and the Prosecution to respond to the Legal Representatives.<sup>8</sup>

8. On 3 June 2013, the common legal representative of the main group of victims filed his "Observations on the participation of anonymous victims and on maintaining victims who died in the course of proceedings on the list of victims participating at appeal".<sup>9</sup> Regarding the participation of anonymous victims in the proceedings, the Legal Representative argued that this was not necessarily detrimental to the Defence and that the interests of the Defence and the protection of the victims concerned were to be balanced on a case-by-case basis.<sup>10</sup> As to the deceased witnesses, the Legal Representative took the view that the time limit for

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<sup>6</sup> "Demande du Représentant légal des victimes enfant soldats de pouvoir répondre au document de la Défense ICC-01/04-02/12-63", ICC-01/04-02/12-68, 26 April 2013.

<sup>7</sup> *Order on the filing of further submissions on the Registrar's List of participating victims*, ICC-01/04-02/12-73, 27 May 2013.

<sup>8</sup> The Chamber initially fixed the time limit for these responses on 10 June 2013. However, it granted the Defence an extension of time until 20 June 2013. (*Decision on Mr Ngudjolo Chui's request for an extension of time*, ICC-01/04-02/12-84, 7 June 2013).

<sup>9</sup> "Observations on the participation of anonymous victims and on maintaining victims who died in the course of proceedings on the list of victims participating at appeal", ICC-01/04-02/12-79, 3 June 2013.

<sup>10</sup> *Idem*, para. 7.

resuming the action of these victims was justified<sup>11</sup> and not, as the Defence for Ngudjolo had argued, excessive, in light of difficulties encountered in “identifying, locating and then contacting the deceased victims’ family members”,<sup>12</sup> and the difficulties linked to developments in the proceedings and field missions.<sup>13</sup> The Legal Representative further recalled that Trial Chamber II’s practice is to authorise the continuation of deceased victims’ applications by a successor<sup>14</sup> and that this proceeding does not infringe Defence rights or fair trial requirements.<sup>15</sup>

9. On 3 June 2013, the Legal Representative of child-soldier victims also filed his “Observations on the participation of anonymous victims in the appellate proceedings and on maintaining deceased victims on the list of victims authorised to participate”<sup>16</sup> (“observations of the Legal Representative of child-soldier victims”). Regarding the situation of deceased victims, the Legal Representative of child-soldier victims stated that the issue before the Chamber was whether deceased victims should continue to participate in the proceedings, arguing that the issue should be evaluated case by case.<sup>17</sup> Turning to the issue of the participation of anonymous victims, he stated that such participation did not in and of itself infringe Defence rights.<sup>18</sup> He went on to state “whether or not there is a need for victims to relinquish their anonymity vis-à-vis the parties will depend on the extent and circumstances of the victims’ participation”.<sup>19</sup> Finally, he submitted in respect of Victims a/0390/09 and

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<sup>11</sup> *Idem*, para. 17.

<sup>12</sup> *Idem*, para. 14.

<sup>13</sup> *Idem*, para. 15.

<sup>14</sup> *Idem*, para. 26.

<sup>15</sup> *Idem*, para. 33.

<sup>16</sup> “Observations on the participation of anonymous victims in the appellate proceedings and on maintaining deceased victims on the list of victims authorised to participate”, ICC-01/04-02/12-80-tENG, 3 June 2013.

<sup>17</sup> *Idem*, para. 11.

<sup>18</sup> *Idem*, para. 14.

<sup>19</sup> *Idem*, para. 22.

a/0452/09 that the situation on the ground and their vulnerability justified their continued anonymity.<sup>20</sup>

10. On 10 June 2013, the Prosecution submitted its observations in response to the observations of the Legal Representatives.<sup>21</sup> The Prosecution supported the general opinion of the Legal Representative of child-soldier victims<sup>22</sup> regarding the anonymous participation of victims in proceedings.<sup>23</sup> The Prosecution also endorsed the opinions of both legal representatives of victims as concerns the participation of deceased victims in the present proceedings.<sup>24</sup> In its view, the delay in the succession was justified in light of the various difficulties encountered on the ground.<sup>25</sup> It further argues that the Defence is not thereby prejudiced.<sup>26</sup>

11. In accordance with the Appeals Chamber Order, the Defence submits its observations on the anonymous participation of victims and the inclusion of deceased victims on the Lists of Victims.

## SUBMISSIONS

12. In responding to the Legal Representatives and the Prosecution, the Defence will first address the issue of the wholly anonymous participation of victims (A) and next the withdrawal of certain deceased victims from the Lists of Victims (B). The Defence will seek to show that the totally anonymous participation of victims is incompatible with the rights of the Accused and the fairness of trial. As regards the

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<sup>20</sup> *Idem*, para. 31.

<sup>21</sup> "Prosecution's Submissions Pursuant to the Appeals Chamber's 'Order on the filing of further submissions on the Registrar's List of participating Victims'", 27 May 2013, ICC-01/04-02/12-87, 10 June 2013.

<sup>22</sup> *Idem*, para. 13.

<sup>23</sup> *Idem*, para. 14.

<sup>24</sup> *Idem*, para. 19.

<sup>25</sup> *Idem*, para. 21.

<sup>26</sup> *Idem*, para. 22.

deceased victims, it requests greater diligence in monitoring on the part of the Legal Representatives in cases of succession.

13. By way of introduction, the Defence would emphasise the importance of the issue of victim participation to an accused person. As the Appeals Chamber of the Special Tribunal for Lebanon (STL) has held:

28. In order to qualify to be a VPP [victim participating in the proceedings], a person must have suffered physical, material or mental harm as a direct result of an attack within the Tribunal's jurisdiction. By accepting a victim's application and granting VPP status, the Pre-Trial Judge decides that there is *prima facie* evidence the victim has suffered harm as a result of the crimes alleged against the accused in the indictment, a finding that is then either confirmed or annulled in the final judgment. Consequently, we consider that during trial the **very existence of each VPP might be construed as constituting a specific accusation, separate** and additional to those made by the Prosecution.<sup>27</sup>

Accordingly, the Defence submits that by alleging harm suffered, each of the victims participating in the proceedings is laying a charge against the accused.

14. The Legal Representatives argue that if the Appeals Chamber were to allow the removal of some of the victims from the Lists of Victims, these victims would be excluded from the proceedings against Ngudjolo, but would be able to continue participating in the proceedings against Germain Katanga.<sup>28</sup> The Defence emphasises that the *Katanga* and *Ngudjolo* cases have been severed since 21 November 2012.<sup>29</sup> Hence, proceedings against them are separate and distinct and the Lists of Victims can therefore be equally separate and distinct. This should not preclude the Appeals

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<sup>27</sup> Emphasis added. Special Tribunal for Lebanon, Appeals Chamber, *Prosecutor v. Ayyash et al.*, Decision on appeal by Legal Representative of Victims against Pre-Trial Judge's Decision on Protective Measures, STL-11-01/PT/AC/AR126.3 F0009-AR126.3/20130410/R000096-R000130/EN/af, 10 April 2013, para. 28 ("*Ayyash* Judgment on protective measures").

<sup>28</sup> Observations of the Legal Representative of the main group of victims, para. 20; Observations of the Legal Representative of child-soldier victims, para. 12.

<sup>29</sup> Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319-tENG/FRA, 21 November 2012.

Chamber from ruling on the maintenance or withdrawal of the status of victim participating in the proceedings.

### **A- The totally anonymous participation of victims**

15. The Defence is not unaware that neither the law nor the practice of the International Criminal Court (“ICC”) expressly prohibit the totally anonymous participation of victims.

16. As this issue has not yet been argued before the Appeals Chamber, the Defence avails itself of this opportunity to call on the Appeals Chamber to distance itself from this practice and play a part in the development of law<sup>30</sup> in the opposite direction by taking account of the prejudicial effect on the Accused of the totally anonymous participation of victims.

17. The Defence recalls that whilst it is important to protect the victims, “the accused’s right to a fair trial must always prevail”.<sup>31</sup> Thus, the interests of the victims, whilst they are important, are subordinate to those of an accused. Article 68(1) of the

<sup>30</sup> “Laws may and should be improved if they are not up to reality.” Antonio Cassese in H. Verrijn Stuart and M. Simons, *The Prosecutor and the Judge, Benjamin Ferencz and Antonio Cassese: Interviews and Writings*, Amsterdam, Pallas Publications, 2009, p. 89

<http://books.google.nl/books?id=kxzVVwwNwtcC&pg=PA89&lpg=PA89&dq=cassese+%22Laws+may+and+should+be+improved+if+they+are+not+up+to+reality.%22&source=bl&ots=6B4ePXL-lk&sig=5s3ZiqMerSjcy3iORoeMfGJ5XnE&hl=en&sa=X&ei=EazBUYDKMIXVPJOIgYgK&ved=0CDgQ6AEwAw>; See also M. Childs, “Antonio Cassese: Visionary judge who brought war criminals to justice”, *The Independent*, 5 November 2011, <http://www.independent.co.uk/news/obituaries/antonio-cassese-visionary-judge-who-brought-war-criminals-to-justice-6257419.html>.

“At the ad hoc tribunals, the Statutes provide only the bare bones and the Rules of Evidence and Procedure have quite properly required constant review and amendment to meet the evolving challenges that new cases inevitably generate in dynamic areas of law. Critics of that evolving process ignore the fact that in national jurisdictions such evolution is common-place even in long-established legal environments (take the very wide-ranging reforms in the UK Criminal Justice Act of 2003 as a prime example), and that national jurisprudence inevitably possesses a form of legislature to act as architects for necessary change. Conversely most international courts and tribunals possess no such body and it is left to the judges, assisted by legal debate from concerned lawyers, to modify and refine procedures to ensure fair and expeditious trials.” Judge Howard Morrison in H. Morrison, *The Role of Defence in International Criminal Trials, Foreword*, (2010) 8, *Journal of International Criminal Justice* 449, p. 450.

<sup>31</sup> *Ayyash Judgment* on protective measures, concurring opinion of Judge Baragwanath, para. 28.



Statute allows the Court to take “appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims [...]”. Nonetheless, these measures, as the article further stipulates, must be neither “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

18. The STL Appeals Chamber considers that ICC jurisprudence “does not fully take into account the potential of prejudice arising to the accused if the identity of the participating victims were to be withheld from them”.<sup>32</sup>

19. The STL Appeals Chamber adds: “[...] totally anonymous participation by victims is inherently prejudicial to the accused, regardless of how active or passive their desired method of participation and even for victims who do not seek to give or tender evidence”.<sup>33</sup>

20. Judge Baragwanath states:

From the overarching requirement of fairness to the accused follows that the possibilities of unfairness, coupled with the public trial and *audi alteram partem* principles, point to a general principle that there should be disclosure of victims’ names. That is because anonymity of VPPs *vis-à-vis* the accused might not allow them a full defence.<sup>34</sup>

21. Since the very existence of victims participating in the proceedings might “be construed as constituting a specific accusation, separate and additional”,<sup>35</sup> the accused should be afforded the opportunity to defend himself or herself against such accusations. As the STL Appeals Chamber explains, “If VPPs are not required to disclose their identity at all, this would amount to an anonymous accusation against the accused, in breach of fair trial rights”.<sup>36</sup>

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<sup>32</sup> *Ayyash* Judgment on protective measures, para. 26.

<sup>33</sup> *Idem*, para. 27.

<sup>34</sup> *Ayyash* Judgment on protective measures, concurring opinion of Judge Baragwanath, para. 18.

<sup>35</sup> *Ayyash* Judgment on protective measures, para. 28.

<sup>36</sup> *Idem*, para. 28.

22. The STL Appeals Chamber cites several possible infringements of the accused's right to a full and unfettered defence in the event of a totally anonymous participation of victims:<sup>37</sup>

- Inability to "effectively challenge the status of individual victims";
- "It would be impossible [...] to challenge the veracity of victims' statements on their applications for participation";
- The lack of relevant information "to uncover any false declarations or fabricated identities";
- A limited "ability to challenge the extent of victim participation, as they would not be in a position to properly assess whether or not the proposed participation relates to the victims' "personal interests";
- A limited "ability of the Defence to request the disclosure of relevant exculpatory information from the LRV [Legal Representative of Victims], as the Defence is unable to identify relevant material that may be in the possession of VPPs and target their requests accordingly";
- Preclusion of the Defence from "identifying and raising before the court other challenges [...] connected to VPPs".

23. Moreover, experience at the ICC has also shown that, thanks to the lifting of anonymity, for some victims, Court organs have been able to detect certain "false victims". In *Lubanga*, Trial Chamber I withdrew the victim status of three purported

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<sup>37</sup> *Idem*, paras. 29-30.

victims who came to testify.<sup>38</sup> In the instant case, Trial Chamber II also withdrew victim status from two other persons after they were investigated in greater detail.<sup>39</sup>

24. The anonymity of victims participating in the proceedings equally affects the rights of the accused at the reparations for victims stage in that the victims are principally concerned. In the case of totally anonymous participation, the Defence would be unable to verify the veracity of the allegations made by victims participating in the proceedings and, if appropriate, challenge their claims.

25. Furthermore, victims participating in the proceedings may be afforded other important protective measures (closed sessions, collection of testimony by electronic or other special means, redaction of confidential information, confidentiality vis-à-vis the public, etc.). Such measures, which are granted according to the circumstances of each victim participating in the proceedings, should suffice to provide adequate protection of victims' interests while preserving the accused's right to a fair trial.

26. The Defence therefore fails to understand the grounds underpinning the request of the Legal Representative of child-soldier victims for the continued anonymity of his witnesses. In the absence of express statutory provisions, the interpretation of article 68(5) may offer some indication as to the only valid ground:

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<sup>38</sup> Trial Chamber I, *Prosecutor v. Lubanga, Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 14 March 2012, para. 502: "In all the circumstances, the Chamber has concluded that D-0033 and D-0034 were consistent, credible and reliable witnesses and it accepts that there is a real possibility that victims a/0229/06 and a/0225/06 (at the instigation or with the encouragement of a/0270/07) stole the identities of Thonifwa Uroci Dieudonné (D-0032) and Jean-Paul Bedijo Tchonga (D-0033) in order to obtain the benefits they expected to receive as victims participating in these proceedings. The Chamber is persuaded there are significant weaknesses as regards the evidence of a/0225/06, a/0229/06, and a/0270/07, to the extent that their accounts are unreliable. Given the material doubts that exist as to the identities of a/0229/06 and a/0225/06, which inevitably affect the evidence of a/0270/07, the permission originally granted to a/0229/06, a/0225/06, and a/0270/07 to participate as victims is withdrawn. In general terms, if the Chamber, on investigation, concludes that its original *prima facie* evaluation was incorrect, it should amend any earlier order as to participation, to the extent necessary. It would be unsustainable to allow victims to continue participating if a more detailed understanding of the evidence has demonstrated they no longer meet the relevant criteria."

<sup>39</sup> *Decision on the maintenance of participating victim status of Victims a/0381/09 and a/0363/09 and on Mr Nsita Luvengika's request for leave to terminate his mandate as said victims' Legal Representative*, ICC-01/04-01/07-3064-tENG, 7 July 2011.

the risk of seriously endangering a witness or his or her family members – which ground is in any event superseded by defence rights and fair trial requirements. The Defence submits that the Legal Representative of child-soldier victims has shown no good cause for his allegation of a clear and personal risk to Victims a/0390/09 and a/0452/09 at paragraphs 30 and 31 of his observations.

27. Moreover, the Legal Representative of child-soldier victims acknowledged the importance of knowing the identities of the victims in light of the rights of the Defence where the action of deceased victims is continued.<sup>40</sup>

28. The Legal Representative of child-soldier victims maintains that the STL jurisprudence is not relevant in that at the STL, victims are afforded broader participation rights than at the ICC.<sup>41</sup> However, this argument fails in the instant case because the STL Appeals Chamber is considering total anonymity, regardless of mode of participation, including “passive” or “silent observer” participation.<sup>42</sup> Hence, even if the ICC Appeals Chamber were to accept that victims participating in the proceedings have more rights at the STL than at the ICC, this in no wise affects the reasoning of the STL Appeals Chamber on the issue of total anonymity for victims participating in the proceedings since all forms of participation are taken into account.

29. To illustrate the distinction between the STL and the ICC, the Legal Representative of child-soldier victims states: “In fact, under rule 87 of the Rules of Procedure and Evidence of the STL, victims are authorised to call witnesses and to tender other evidence”.<sup>43</sup> Yet, in the instant case, the same Legal Representative of

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<sup>40</sup> See observations of the Legal Representative of child-soldier victims, para. 12: “Any prejudice to the rights of the Defence must be considered *inter alia* bearing in mind that the Defence **is fully aware of the identity of the deceased** and will be informed of the identity of any successor” [emphasis added].

<sup>41</sup> Observations of the Legal Representative of child-soldier victims, para. 26.

<sup>42</sup> *Ayyash* Judgment on protective measures, para. 39.

<sup>43</sup> Observations of the Legal Representative of child-soldier victims, para. 26.

child-soldier victims had the opportunity to move the Trial Chamber to call witnesses.<sup>44</sup>

30. The Legal Representative of child-soldier victims states that in theory, anonymous victims have already been authorised to participate in the proceedings and that their anonymity should only be reviewed if a victim were to wish to amend the modalities of his or her participation.<sup>45</sup> Yet, on 11 April 2011, the Trial Chamber requested the Legal Representative 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”.<sup>46</sup> These two victims were the only ones who sought to remain anonymous. As this order was not followed, the Defence was denied the opportunity to challenge the position of these victims.

31. Were the Appeals Chamber to allow the totally anonymous participation of victims, the Defence would support the Prosecution view that anonymous victims should not have access to the confidential part of the case file.<sup>47</sup>

## **B- Withdrawal of certain deceased witnesses from the Lists of Victims**

32. The Defence would first like to emphasise that it is not opposed to the succession *per se* of a victim by a close family member.

33. The situation at hand relates to a decision of the Trial Chamber on 11 April 2011 in which it 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

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<sup>44</sup> “Proposition du représentant légal du groupe des victimes enfants soldats quant à la comparution de témoins supplémentaires à citer par la Chambre”, ICC-01/04-01/07-3206, 21 November 2011.

<sup>45</sup> Observations of the Legal Representative of child-soldier victims, paras. 27-29.

<sup>46</sup> *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.

<sup>47</sup> Observations of the Prosecution, para. 16.

transmit to the Chamber the relevant information to enable it to rule on their applications".<sup>48</sup>

34. The Legal Representative of the main group of victims only sought to execute this order on 12 April 2013, two years after the Trial Chamber's decision.<sup>49</sup> The Legal Representative explained that this delay had been occasioned by certain difficulties he had faced.<sup>50</sup>

35. The Defence submits that the delay appears excessive in the circumstances: the case is now before a different bench, the Appeals Chamber, whereas the Legal Representative is yet to execute the order of the Trial Chamber and the parties are only informed two years later of the difficulties he claims to have faced.

36. The Defence has only the Legal Representative's word as to the difficulties faced and the efforts actually made during the past two years.

37. The Defence is alive to the difficulties encountered by the Legal Representatives. However, it would prefer such situations to be monitored with more diligence and promptness.

38. There is a time bar on the failure to exercise any right. The Defence submits that succession of a deceased victim should also only be allowed within a prescribed time limit, especially as the Trial Chamber specifically ordered the Legal Representative of the main group of victims to keep abreast of the situation in 2011. The Defence recalls that the Trial Chamber is no longer even seized of the case.

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<sup>48</sup> *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.

<sup>49</sup> "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", ICC-01/04-02/12-62-tENG, 12 April 2013.

<sup>50</sup> *Idem*, para. 20.

39. Given the extended time already elapsed, the Defence respectfully requests the Appeals Chamber to withdraw deceased Victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09 from the Lists of Victims.

40. The Defence emphasises that maintaining these victims on the Lists of Victims is prejudicial to the Acquitted Person. Since each victim participating in the proceedings “might be construed as constituting a specific accusation, separate and additional to those made by the Prosecution”,<sup>51</sup> the number of victims participating in the proceedings may affect the determination of the sentence. Under rule 145 of the Rules of Procedure and Evidence, the Court “give[s] consideration, *inter alia*, to [...] the extent of the damage caused, in particular the harm caused to the victims and their families [...]”.<sup>52</sup>

41. Should any of the other participating victims die, the Defence would request the Appeals Chamber to fix a strict time bar for the Legal Representatives to lodge applications for succession. Succession should fall within the prescribed time limits. The successor may only be exempted from the time bar in case of force majeure.

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

**TO ORDER** the withdrawal of totally anonymous victims, in particular a/0390/09 and a/0452/09, from the List of Victims authorised to participate in the proceedings;

**TO ORDER** the withdrawal of deceased Victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09 from the List of Victims authorised to participate in the proceedings whose status has not been revoked;

<sup>51</sup> *Ayyash* Judgment on protective measures, para. 28.

<sup>52</sup> Rules of Procedure and Evidence, rule 145(1)(c).

**TO FIX** a time strict limit within which the Legal Representatives should henceforth submit applications for the succession of deceased victims;

**TO MAKE** such order as it may consider necessary.

RESPECTFULLY SUBMITTED.

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[signed]

**Jean-Pierre Kilenda Kakengi Basila**

**Lead Counsel for Mr Mathieu Ngudjolo Chui**

Done at Brussels, 20 June 2013