

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12 A
Date: 23 September 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

**Decision on the participation of anonymous victims in the appeal and on the
maintenance of deceased victims on the list of participating victims**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Jean-Pierre Kilenda
Mr Jean-Pierre Fofé Djofia Malewa

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

REGISTRY

Registrar
Mr Herman von Hebel

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a smaller, cursive flourish.

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Judgement pursuant to article 74 of the Statute” of 18 December 2012 (ICC-01/04-02/12-3-tENG),

Having before it 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’” of 15 April 2013 (ICC-01/04-02/12-63-tENG),

Renders unanimously the following

DECISION

1. Mr Ngudjolo’s objections to the participation of anonymous victims in the appeal are rejected.
2. The legal representative of the group of former child soldier victims is ordered to enquire into the willingness of victims a/0390/09 and a/0452/09 to have their anonymity lifted *vis-à-vis* the parties and to inform the Appeals Chamber thereon by Wednesday, 23 October 2013.
3. The Registrar is ordered to file an updated list of participating victims that excludes deceased victims a/0175/08, a/0117/09, a/0321/09, a/0373/09 a/0166/09, a/0253/09, a/0354/09 and a/0376/09 as well as any other deceased victim and persons who have been authorised to resume participation on behalf of deceased victims by Friday, 25 October 2013.
4. The “Request to resume the action initiated by deceased Victim a/0253/09” is rejected.



REASONS

I. PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II delivered the “Judgement pursuant to article 74 of the Statute”¹ (hereinafter: “Decision on Acquittal”), in which Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) was acquitted of all charges against him and ordered to be immediately released.

2. On 20 December 2012, the Prosecutor filed her appeal against the Decision on Acquittal pursuant to article 81 (1) of the Statute.²

3. On 6 March 2013, the Appeals Chamber issued the “Decision on the participation of victims in the appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’”³ (hereinafter: “Decision on Victim Participation”), whereby 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 and permitted objections to be filed, if any, to the inclusion of specific victims and/or the correctness of information on the list, by the parties and participants.

4. 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”⁴ (hereinafter: “List”), together with three confidential, *ex parte* annexes that collate the details of participating victims.⁵

¹ ICC-01/04-02/12-3-tENG.

² “Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’”, ICC-01/04-02/12-10 (A). On 19 March 2013 the Prosecutor filed the “Prosecution’s Document in Support of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’”, ICC-01/04-02/12-39-Conf-Exp (A) (hereinafter: “Document in Support of the Appeal”). On 22 March 2013 the Prosecutor filed a confidential redacted version of the Document in Support of the Appeal, ICC-01/04-02/12-39-Conf-Red (A) and on 3 April 2013 a public redacted version of the Document in Support of the Appeal was filed, ICC-01/04-02/12-39-Red2 (A).

³ ICC-01/04-02/12-30 (A).

⁴ ICC-01/04-02/12-55 (A).

5. On 12 April 2013, the common legal representative of the principal group of victims (hereinafter: "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"⁶ (hereinafter: "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,⁷ 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 [...]",⁸ (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" and would revert to the Chamber concerning the remaining three deceased victims.⁹

6. On 15 April 2013, Mr Ngudjolo 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'"¹⁰ (hereinafter: "Mr Ngudjolo's Observations"). In particular, Mr Ngudjolo makes observations concerning the continued participation of victims a/0390/09 and a/0452/09, amongst the group of former child soldier victims (hereinafter: "Victim Group II") whose identity is unknown to the Defence and Prosecutor. Mr Ngudjolo argues that if those victims wish to maintain their anonymity, they should be removed from the List as their "wholly anonymous participation is prejudicial to the Defence and incompatible with the rights of

⁵ Corrigenda to the annexes were filed as ICC-01/04-02/12-55-Conf-Exp-Anx1-Corr2-tENG, ICC-01/04-02/12-55-Conf-Exp-Anx2-Corr (hereinafter: "Annex 2 to List") and ICC-01/04-02/12-55-Conf-Exp-Anx3-Corr (hereinafter: "Annex 3 to List").

⁶ ICC-01/04-02/12-62-tENG (A).

⁷ See Annex 3 to List.

⁸ Observations of Victim Group I, para. 20.

⁹ Observations of Victim Group I, para. 21.

¹⁰ ICC-01/04-02/12-63-tENG (A).

the Accused and the fairness of the trial”.¹¹ In addition, Mr Ngudjolo objects to the maintenance of the four deceased victims, a/0175/08, a/0117/09, a/0321/09 and a/0373/09, on the List in Victim Group I. Noting the “excessive amount of time” that has elapsed since the legal representative was ordered by Trial Chamber II to contact the families of the respective victims, Mr Ngudjolo requests the Appeals Chamber to remove these victims from the List.¹²

7. 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”¹³ (hereinafter: “Request to Reply”). The legal representative requested leave to respond to Mr Ngudjolo’s Observations in order to address the legal questions surrounding the status of the two anonymous victims that he represents¹⁴ and to update the Appeals Chamber on steps taken to obtain the victims’ instructions regarding their request for anonymity *vis-à-vis* the parties.¹⁵

8. On 15 May 2013, the legal representative of Victim Group I filed the “Request to resume the action initiated by deceased Victim a/0253/09”¹⁶ (hereinafter: “Request to Resume Participation”).

9. On 27 May 2013, the Appeals Chamber issued an “Order on the filing of further submissions on the Registrar’s List of participating victims”,¹⁷ granting the legal representatives of Victim Groups I and II an opportunity to make submissions on the legal and factual issues arising from Mr Ngudjolo’s objections. Mr Ngudjolo and the Prosecutor were also permitted to reply to the victims’ submissions.

10. On 3 June 2013, the legal representative of Victim Group I filed the “Observations on the participation of anonymous victims and on maintaining victims who died in the

¹¹ Mr Ngudjolo’s Observations, paras 8-9.

¹² Mr Ngudjolo’s Observations, paras 16-17.

¹³ ICC-01/04-02/12-68 (A).

¹⁴ Request to Reply, para. 13.

¹⁵ Request to Reply, first para. 14.

¹⁶ ICC-01/04/02/12-70-tENG.

¹⁷ ICC-01/04-02/12-73 (A).

course of proceedings on the list of victims participating at appeal”¹⁸ (hereinafter: “Further Observations of Victim Group I”). On the same day the legal representative of Victim Group II filed the “Observations on the participation of anonymous victims in the appellate proceedings and on maintaining deceased victims on the list of victims authorised to participate”¹⁹ (hereinafter: “Observations of Victim Group II”).

11. On 10 June 2013, the Prosecutor filed the “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”²⁰ (hereinafter: “Prosecutor’s Observations”). On 20 June 2013, following an extension of the time limit for the filing of Mr Ngudjolo’s response,²¹ he filed the “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)”²² (hereinafter: “Mr Ngudjolo’s Further Observations”).

II. MERITS

12. The Appeals Chamber notes that Mr Ngudjolo raises objections to the participation of two victims of Victim Group II (a/0390/09 and a/0452/09) whose identities are unknown to the parties and the legal representative of Victim Group I. Furthermore, Mr Ngudjolo objects to the maintenance on the List of four victims of Victim Group I (a/0175/08, a/0117/09, a/0321/09 and a/0373/09) who died prior to the conclusion of the trial proceedings. These objections will be addressed in turn.

A. The participation of victims whose identities are unknown in the appeal proceedings

13. Mr Ngudjolo submits that the wholly anonymous participation of victims in the proceedings is incompatible with the rights of the defence and the fairness of the trial. Mr

¹⁸ ICC-01/04-02/12-79 (A).

¹⁹ ICC-01/04-02/12-80 (A).

²⁰ ICC-01/04-02/12-87 (A).

²¹ “Decision on Mr Ngudjolo Chui’s request for an extension of time”, ICC-01/04-02/12-84 (A).

²² ICC-01/04-02/12-91-tENG (A).

Ngudjolo submits that “[s]ince the very existence of victims participating in the proceedings might ‘be construed as constituting a specific accusation, separate and additional’ the accused should be afforded the opportunity to defend himself or herself against such accusations”.²³ In his view, such anonymous participation would amount to an anonymous accusation against the accused, in breach of fair trial rights.²⁴ In the case of wholly anonymous participation at the reparations stage, Mr Ngudjolo submits that the rights of the defence are equally affected as 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 In addition, Mr Ngudjolo argues that the legal representative of Victim Group II “has shown no good cause for his allegation of a clear and personal risk” to the two victims to warrant the continuation of their anonymous participation.²⁶

14. In response to Mr Ngudjolo’s arguments, the legal representative of Victim Group II indicates that he has received “no clear mandate from his clients to relinquish their anonymity, despite the efforts made with regard to these victims”.²⁷ Furthermore, he submits that given the “volatility of the situation on the ground and the extreme vulnerability of the victims concerned (child soldiers who suffered extremely traumatic experiences and have been stigmatised by both communities), [...] he considers that they still wish to remain anonymous”.²⁸ Therefore, the approach to anonymous victim participation authorised by Trial Chamber II should be maintained by the Appeals Chamber.²⁹ Furthermore, the legal representative takes issue with Mr Ngudjolo’s reliance on an Appeals Chamber judgment of the Special Tribunal for Lebanon (hereinafter: “STL”), which rejected anonymous participation of victims as being prejudicial to the rights of the defence. In his view, victim participation at the STL is far broader in that

²³ Mr Ngudjolo’s Further Observations, para. 21, referring to an Appeals Chamber Judgment of the Special Tribunal for Lebanon, *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/Appeals Chamber/AR126.3 F0009-AR126 3/20130410/R000096-R000130/EN/af, 10 April 2013, para. 28.

²⁴ Mr Ngudjolo’s Further Observations, para. 21.

²⁵ Mr Ngudjolo’s Further Observations, para. 24.

²⁶ Mr Ngudjolo’s Further Observations, para. 26.

²⁷ Observations of Victim Group II, para. 30.

²⁸ Observations of Victim Group II, para. 31.

²⁹ Observations of Victim Group II, para. 26.

victims are “directly vested with rights which victims before the ICC are granted only by means of decisions rendered by each chamber, subject to that chamber’s stringent oversight”.³⁰

15. The Prosecutor, largely concurring with the submissions of the legal representative of Victim Group II, submits that anonymity is compatible with the form of victim participation permitted and is a proportional protective measure in the circumstances of this case.³¹

16. The Appeals Chamber recalls that article 68 (1) of the Statute provides that the “Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims [...]. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.³² Thus, while the safety and security of victims is a key responsibility of the Court, when protecting victims the Court must ensure that the rights of the defence are respected and that the trial remains fair.

17. The Appeals Chamber notes that in the case at hand Trial Chamber II, following the approach adopted by Trial Chamber I,³³ authorised the participation of victims *whose* identities were unknown to the parties on the basis that they would have to relinquish their anonymity should they be called to appear as a witness.³⁴ Thus the need to disclose a victim’s identity was contingent upon his/her modality of participation in the proceedings.

18. Turning to the participation of anonymous victims at the appellate stage of the proceedings, the Appeals Chamber recalls that the modalities of victim participation in the appeal is limited to victims filing observations on the Document in Support of the Appeal and the response to the Document in Support of the Appeal.

³⁰ Observations of Victim Group II, para. 26.

³¹ Prosecutor’s Observations, paras 13-16.

³² See also rule 87 of the Rules of Procedure and Evidence.

³³ See *Trial Chamber I*, “Decision on victims’ participation, 18 January 2008, ICC-01/04-01/06-1119, paras 130-131.

³⁴ See *Trial Chamber II*, “Decision on the Modalities of Victim Participation at Trial”, 22 January 2011, ICC-01/04-01/07-1788-tENG, paras 92-93.

19. In this regard it is noted that in the “Corrigendum aux Observations relatives au document déposé par le Procureur à l’appui de son appel et au mémoire en réponse de la Défense”³⁵, the legal representative has made observations on the issues in the appeal in general and collectively, on behalf of all the victims, including the two anonymous victims, with no differentiation between individual victims’ views and concerns. Thus, Mr Ngudjolo’s argument that wholly anonymous participation constitutes an “anonymous accusation” which he is unable to fully defend himself against, is unpersuasive in the circumstances. Victims’ a/0390/09 and a/0452/09 have not submitted individual observations to which Mr Ngudjolo is required to respond. Given this limited form of participation and the legal representative’s submissions on the vulnerability of victims a/0390/09 and a/0452/09, the Appeals Chamber finds that the protective measure of anonymity does not violate Mr Ngudjolo’s right to a fair trial. However, should the anonymous victims wish to participate as individuals at a hearing or to make individual observations they would have to disclose their identities to the parties.

20. Nevertheless, the Appeals Chamber considers it expedient to order the legal representative of Victim Group II to make contact with victims a/0390/09 and a/0452/09 and to enquire into their willingness to have their anonymity lifted *vis-à-vis* the parties and to inform the Appeals Chamber thereon by Wednesday, 23 October 2013.

B. Maintenance of deceased victims on the List of participating victims in the appeal and resumption of participation

21. Mr Ngudjolo objects to the continued participation of four victims belonging to Victim Group I, who died before the conclusion of the trial proceedings, namely a/0175/08, a/0117/09, a/0321/09 and a/0373/09.³⁶ He recalls that the legal representative of those victims informed Trial Chamber II on 15 February 2011 of their deaths.³⁷ In that filing, the legal representative also informed Trial Chamber II that he had tried to contact the families of the deceased victims in order to ascertain whether they wished to

³⁵ 22 July 2013, ICC-01/04-02/12-125-Conf-Corr (A).

³⁶ Mr Ngudjolo’s Observations, para. 14.

³⁷ Mr Ngudjolo’s Observations, para. 15.

participate in the proceedings on behalf of the deceased victims.³⁸ Mr Ngudjolo recalls that despite a reminder by Trial Chamber II, the legal representative has yet to provide any information and in light of the “excessive” amount of time that has passed the four victims should be removed from the List.³⁹

22. In response, the legal representative of Victim Group I indicates that apart from victims (a/0175/08, a/0117/09, a/0321/09 and a/0373/09) who are deceased, a further four victims (a/0166/09, a/0253/09, a/0354/09 and a/0376/09) have also since died.⁴⁰ He explains that the reasons for the delay in resuming participation on behalf of the deceased victims are, *inter alia*, difficulties experienced in obtaining information about potential successors, locating them and obtaining the consent of other family members in accordance with the practice established by Trial Chamber II.⁴¹ In addition, the legal representative argues that maintaining deceased victims on the List does not prejudice Mr Ngudjolo. He submits that until a successor is authorised to continue the action of the deceased victim there “will be no one to participate in the proceedings which might lead to the acquittal being overturned and/or to receive any form of reparations on the victim’s behalf”.⁴² In addition, he submits that the issue of maintaining deceased victims on the List must be “reviewed on a case-by-case basis and cannot be governed by a policy decision which fails to take account of the circumstances of each application”.⁴³

23. The Prosecutor submits, *inter alia*, that the maintenance of deceased victims on the List “does not cause any prejudice to the Defence” since they “are not new applicants whose details and personal interests are unknown”.⁴⁴

24. The Appeals Chamber observes that in the present case, Trial Chamber II has maintained the victims, who died before the conclusion of the trial, on the list of

³⁸ “Cinquième soumission du représentant légal relative à la notification du décès de cinq victimes, à la reprise des dossiers de certaines victimes décédées et à la divulgation de l’identité de victimes et/ou de repreneurs d’action de certaines victimes”, 15 February 2011, ICC-01/04-01/07-2706, para. 14.

³⁹ Mr Ngudjolo’s Observations, paras 16-17.

⁴⁰ Observations of Victim Group I, para. 21.

⁴¹ Further Observations of Victim Group I, paras 14-17.

⁴² Observations of Victim Group I, para. 19.

⁴³ Observations of Victim Group I, para. 32.

⁴⁴ Prosecutor’s Observations, para. 22.

participating victims with the aim of allowing close relatives of the deceased victims to resume participation on their behalf.⁴⁵ In this regard, the Appeals Chamber notes that while Mr Ngudjolo does not *per se* object to the resumption of participation of deceased victims,⁴⁶ he does however object to the “excessive” delay in resuming participation on behalf of certain victims who have long since died. He therefore submits that not only should deceased victims for whom resumption of participation is still pending be removed from the List, but that a time bar be put in place beyond which resumption of participation should not be permitted.⁴⁷

25. The Appeals Chamber considers that the issue for determination is whether victims who died prior to the conclusion of the proceedings may be maintained on the List of participating victims in the appeal. First and foremost, the Appeals Chamber notes that the purpose of the List provided by the Registry is to reflect the details of all victims who are participating in the appellate proceedings against Mr Ngudjolo. Victims who are deceased can no longer be said to be participating and they should therefore be removed from the List. However, this is not to say that the views and concerns expressed by the victims prior to their death are now disregarded. On the contrary, the Appeals Chamber acknowledges that prior to their deaths the victims concerned actively participated in the trial by expressing their views and concerns which were ultimately considered by the Trial Chamber in its Decision on Acquittal, the subject of the appeal against Mr Ngudjolo. These views and concerns remain a part of the case record under review even if the deceased victim is no longer participating.

26. In so far as the requirements of article 68 (3) mandate that victim participation be based on their personal interests that are affected and since the views and concerns of deceased victims continue to be considered in the appellate proceedings as part of the

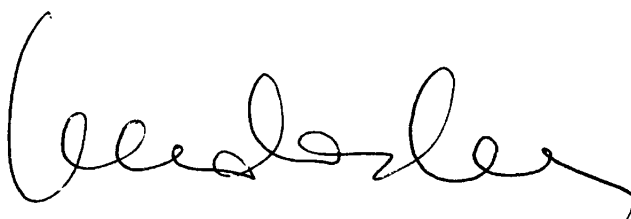
⁴⁵ See *Trial Chamber II*, “Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure”, 22 December 2009, ICC-01/04-01/07-1737, paras 11 and 30; “Decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08, a/0051/08, a/0197/08 and a/0311/09”, ICC-01/04-01/07-3018-tENG, para. 20; “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”, 24 October 2011, ICC-01/04-01/07-3185-Corr-tENG

⁴⁶ Mr Ngudjolo’s Further Observations, para. 32.

⁴⁷ Mr Ngudjolo’s Further Observations, paras 38-41.

case record under review, the Appeals Chamber considers that resumption of a deceased victim's participation by an heir / successor is not deemed appropriate.⁴⁸ Accordingly, the Appeals Chamber directs the Registrar to file an updated List, by Friday 25 October 2013, of participating victims that excludes deceased victims a/0175/08, a/0117/09, a/0321/09, a/0373/09 a/0166/09, a/0253/09, a/0354/09 and a/0376/09 as well as any other deceased victim and persons who have been authorised to resume participation on behalf of deceased victims. Consequently, the Appeals Chamber also rejects the Request to Resume Participation with respect to deceased Victim a/0253/09.

Done in both English and French, the English version being authoritative.



Judge Cuno Tarfusser
On behalf of the Presiding Judge

Dated this 23rd day of September 2013

At The Hague, The Netherlands

⁴⁸ This is without prejudice to any determination on the resumption of participation on behalf of deceased victims in relation to reparation proceedings.