



Original: English

No.: ICC-01/04-01/07

Date: 13 June 2014

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding Judge
Judge Sang-Hyun Song
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Joyce Aluoch

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public

**Defence Response to the Legal Representatives of Victims Requests to Participate
in the Appeal Proceedings**

Source: Defence for Mr Germain Katanga

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

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**Victims Participation and Reparations
Section**

Other

Mr Jean-Louis Gilissen

Procedural background

1. On 7 March 2014, the Majority of the Trial Chamber found Mr Katanga guilty of one count of crimes against humanity, and four counts of war crimes. The Chamber unanimously acquitted him of all other charges, including the charge of using children under the age of 15 years to participate actively in hostilities as a war crime under article 8(2)(e)(vii) of the Statute.¹
2. The Trial Chamber issued an order defining the proceedings leading to sentencing and stating:

*4. La Chambre tient à relever que la position qu'elle a prise sur la charge d'utilisation d'enfants soldats ne permet plus au Représentant légal de ce groupe de victimes de participer désormais à la procédure.*²
3. On 9 April 2014, the defence filed its Notice of Appeal asking that each conviction be reversed.³ The prosecution appealed the acquittals for rape and sexual slavery⁴ but did not appeal the acquittal for the charge of using children under the age of 15 years to participate actively in hostilities.
4. On 23 May 2014, the Chamber sentenced Mr Katanga to 12 years imprisonment.⁵
5. On 27 May 2014, the Legal Representative of the group of former child soldiers filed his '*Soumission concernant la participation des victimes à la procédure d'appel relative au jugement rendu en application de l'article 74 du Statut à l'encontre de Germain Katanga.*'⁶
6. On 5 June 2014, the Legal Representative of the main group of victims submitted his '*Soumission relative à la participation de victimes à la procédure d'appel contre le*

¹ ICC-01/04-01/07-3436, *Jugement rendu en application de l'article 74 du Statut*.

² ICC-01/04-01/07-3437, *Ordonnance portant calendrier de la procédure relative à la fixation de la peine (article 76 du Statut)*.

³ ICC-01/04-01/07-3459, Defence Notice of Appeal against the decision of conviction '*Jugement rendu en application de l'article 74 du Statut*' rendered by Trial Chamber II, 7th March 2014.

⁴ ICC-01/04-01/07-3462, Prosecution's Appeal against Trial Chamber II's "*Jugement rendu en application de l'article 74 du Statut*".

⁵ ICC-01/04-01/07-3484, *Décision relative à la peine (article 76 du Statut)*.

⁶ ICC-01/04-01/07-3486.

*jugement concernant G. Katanga.*⁷

7. The defence for Germain Katanga (“defence”) hereby responds to these submissions.

Submissions

Response to the submissions of the Legal Representative of the main group of victims

8. The defence accepts that the victims which are part of the main group of victims represented by Mr Nsita, and admitted to participate in the trial stage, are entitled to participate in the appeal stage, their interests being affected in light of the notices of appeal of the Parties.

9. While the Legal Representative requests the Appeals Chamber to authorise the participation in the appeal proceedings of the heirs or successors of the victims who died before the conclusion of the proceedings, the Appeals Chamber has ruled, in the *Ngudjolo* case, that such participation be excluded:

25. [...] Victims who are deceased can no longer be said to be participating and they should therefore be removed from the List [of participating victims in the appeal]. [...]

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 case record under review, the Appeals Chamber considers that resumption of a deceased victim's participation by an heir / successor is not deemed appropriate.⁸

The defence requests the Appeals Chamber to adopt a similar position in the *Katanga* case and to dismiss the Legal Representative request in this regard.

10. Regarding the participation of anonymous victims in the appeal stage, the defence has *a priori* no objection to the extent that their rights are limited in comparison with non-anonymous victims. In light of the practice adopted in the *Ngudjolo* case,⁹ the defence requests the Appeals Chamber to order the Legal Representative of victims to make contact with the anonymous victims and to enquire into their willingness to have their anonymity lifted *vis-à-vis* the party and to inform the Appeals Chamber thereon.

⁷ ICC-01/04-01/07-3483-Conf-Red2-Corr.

⁸ ICC-01/04-02/12-140, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, paras 25-26.

⁹ ICC-01/04-02/12-140, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, para. 20.

11. The Legal Representative of the main group of victims further asks the Appeals Chamber to authorise the participation at this stage of 14 applicants who applied to participate in the proceedings between 2009 and 2010.¹⁰ The defence notes that, according to the Legal Representative's submissions, six application forms were only completed in May 2014.¹¹ These extended delays are unjustified and should constitute a bar to the admissibility of these applications. In any event, the Registry has not disclosed to the defence these six application forms,¹² rendering the defence unable to make full observations as to whether the necessary criteria for admission as a victim is satisfied in each case.
12. In the *Lubanga* case, the Appeals Chamber authorised several 'new' applicants to participate in the proceedings,¹³ considering that their applications were not transmitted to the Chamber, at least for the sentence stage, through no fault of the applicant and that, in such circumstances, it was in the interests of the proper administration of justice that they be considered. However, it urged both the Registrar and the relevant Chambers, in the future, to apply diligence in respect of ensuring that applications for participation are transmitted and considered properly and in a timely fashion.¹⁴
13. It is submitted that the 14 applications were not considered properly and in a timely fashion in the *Katanga* case and that in light of the order of the Appeals Chamber in this regard, these applicants should not be authorised to participate in the appeal proceedings.

¹⁰ ICC-01/04-01/07-3483-Conf-Red2-Corr, paras. 25-54: a/0464/09, a/2736/10, a/2737/10, a/2738/10, a/2739/10, a/2741/10, a/2742/10, a/2743/10, a/2744/10 et a/2745/10 ; a/1205/10 et a/1206/10 ; a/803/09 et 804/09.

¹¹ See ICC-01/04-01/07-3483-Conf-Red2-Corr, para. 33 for a/0464/09, para. 37 for a/2736/10, a/2739/10, a/2742/10 and a/2745/10, para. 46 for a/0804/09.

¹² See also ICC-01/04-01/07-3483-Conf-Red2-Corr, para. 50.

¹³ ICC-01/04-01/06-3045-Red2, Decision on 32 applications to participate in the proceedings, 27 August 2013.

¹⁴ ICC-01/04-01/06-3026, Decision on the request of the Registrar relating to the transmission of applications for participation in the appeal proceedings and on related issues, 6 May 2013, para. 5: "The Appeals Chamber notes that the 32 applicants submitted or completed their applications to the Registrar during the trial proceedings. The Trial Chamber had not set a time limit for receiving new applications for participation in the proceedings and issued a decision, stating that the Trial Chamber would rule on the applications for the purposes of the sentencing proceedings, if any. However, for reasons unknown to the Appeals Chamber, the Registrar did not re-submit the applications for the purposes of the sentencing proceedings, nor did the Trial Chamber rule on them. If the Trial Chamber had dealt with these applications, those applicants who would have been granted a right to participate in the trial proceedings would also have been granted the right to participate in the appeal proceedings from the start. The Appeals Chamber therefore considers that, by no fault of the applicants, the applications were not transmitted to the relevant Chamber. Therefore, in this specific case, it is in the interests of the proper administration of justice that the Appeals Chamber considers the applications in the present proceedings. However, the Appeals Chamber urges both the Registrar and the relevant Chambers to apply diligence in respect of ensuring that applications for participation are transmitted and considered properly and in a timely fashion."

14. In the alternative, if the Appeals Chamber determines that it should consider these 14 applications, despite the timing of the present request, the defence requests that the Registry be ordered to provide the defence with all relevant documents pertaining to the six undisclosed application forms in order for the defence to assess whether they satisfy the relevant criteria.
15. The defence is currently in possession of the application forms of a/0803/09,¹⁵ a/2737/10,¹⁶ a/2738/10,¹⁷ a/2741/10,¹⁸ a/2743/10,¹⁹ a/2744/10,²⁰ a/1205/10²¹ and a/1206/10.²² They all allege having been the victims of crimes committed at Bogoro in February 2003, therefore their connection with the case is *a priori* established. However the defence cannot verify whether their identifying information is corroborated by their identity or electoral cards, since they are redacted, and must therefore rely on the judgement of the Chamber in this regard.
16. The defence notes that the participation of a/1205/10, alias P-132, as a prosecution witness in the trial may affect the extent of her rights as victim in the appeal proceedings. As P-132 would become a witness with a dual status, she and her Legal Representative should respect the conditions previously defined in the *Katanga* case, such as the prohibition, for P-132, to access, and for the Legal Representative, to disclose, the content of the statements or testimony of the other witnesses.²³
17. Regarding the modalities of victim participation, the Appeal Chamber in the *Ngudjolo* case stated it to be “limited to victims filing observations on the Document in Support of the Appeal and the response to the Document in Support of the Appeal.”²⁴ Thus, contrary to the

¹⁵ ICC-01/04-01/07-3395-Conf-Exp-Anx6.

¹⁶ ICC-01/04-01/07-3395-Conf-Exp-Anx1.

¹⁷ ICC-01/04-01/07-3395-Conf-Exp-Anx2.

¹⁸ ICC-01/04-01/07-3395-Conf-Exp-Anx3.

¹⁹ ICC-01/04-01/07-3395-Conf-Exp-Anx4.

²⁰ ICC-01/04-01/07-3395-Conf-Exp-Anx5.

²¹ ICC-01/04-01/07-2194-Conf-Exp-Anx1-Red.

²² ICC-01/04-01/07-2194-Conf-Exp-Anx2-Red.

²³ ICC-01/04-01/07-632, (PTCI) Decision on the Application for Participation of Witness 166, 23 June 2008; ICC-01/04-01/07-1788, Décision relative aux modalités de participation des victimes au stade des débats sur le fond, 22 January 2010.

²⁴ ICC-01/04-02/12-140, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, para. 18. See also ICC-01/04-02/12-30, Decision on the participation of victims in the appeal against Trial Chamber II's "*Jugement rendu en application de l'article 74 du Statut*", para. 5, where the same Appeals Chamber determined “that the victims may participate in the present appeals in the following manner: the legal representatives of victims may present the victims' views and concerns with respect to their personal interests in the issues on appeal by each

assertions of the Legal Representative of the main group of victims,²⁵ the modalities of participation defined by Trial Chamber II, which included, *inter alia*, a right to tender evidence, do not apply automatically. The Appeals Chamber is invited to follow its practice in the *Ngudjolo* case.

Response to the submissions of the Legal Representative of the group of former child soldiers

18. The defence submits that the victims which form part of the group of former child soldiers represented by Mr Gilissen are not entitled to participate in the appeal stage because their interests are not affected. Mr Katanga has been acquitted of the charge of using child soldiers, and the prosecution has not appealed this acquittal. The issue of child soldiers will not form part of the appeal proceedings.
19. The Legal Representative of the main group of victims will be entitled to submit observations on the other crimes allegedly committed during the Bogoro attack by Mr Katanga. During the trial stage, both Legal Representatives respected this demarcation, aimed at judicial economy. The fact that the eventual participation of the Legal Representative of the group of former child soldiers in the appeal proceedings would not be prejudicial to the defence²⁶ is irrelevant.
20. This reasoning is further supported by the decision of the Trial Chamber following Mr Katanga's acquittal for the charge of using child soldiers. By Rule 91 of the Rule of Procedure and Evidence "a Chamber may modify a previous ruling under rule 89" which deals, *inter alia*, with the admission or rejection of an application for participation of victims in the proceedings. The Trial Chamber did so, stating that the Legal Representative of the group of former child soldiers was not entitled to participate in the sentence proceedings while the Legal Representative of the main group of victims was authorised to submit his views.²⁷ The Legal Representative of the group of former child

filing observations on the document in support of the appeal and the response to the document in support of the appeal. Mr Ngudjolo and the Prosecutor may each file a consolidated response to the victims' observations. Should the need arise to specify the modalities of victims' participation in the pending appeals further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the legal representatives of victims."

²⁵ ICC-01/04-01/07-3483-Conf-Red2-Corr, paras 14-15.

²⁶ ICC-01/04-01/07-3486, para. 14.

²⁷ ICC-01/04-01/07-3437, *Ordonnance portant calendrier de la procédure relative à la fixation de la peine* (article 76 du Statut), para. 4 quoted above.

soldiers did not challenge this decision.

21. In support of his request to participate in the appeal proceedings, the Legal Representative of former child soldiers refers to decisions of the Appeals Chamber in the *Ngudjolo* and the *Lubanga* cases ;²⁸

The Appeals Chamber notes that Mr Mathieu Ngudjolo Chui was acquitted of all the charges brought against him and that the appeal proceedings against the Acquittal Decision affect victims' personal interests in the same way as during the trial. Therefore, the Appeals Chamber finds that the victims who participated in the trial and whose victim status was not revoked, may participate in the present appeal, which concerns the merits of the case and is brought under article 81 (1) (a) of the Statute."²⁹

And

The Appeals Chamber notes that Mr Lubanga was convicted on all charges brought against him and that his appeal against the Conviction Decision is directed against the entirety of the decision. Therefore, the Appeals Chamber finds that the 120 victims who participated in the trial proceedings and whose right to participate in the proceedings was not withdrawn may participate in the appeal proceedings against the Conviction Decision, as their personal interests are affected by the appeal in the same way as during trial.³⁰

22. These rulings cannot be applied *mutatis mutandis* to the *Katanga* case. Mr Katanga was not convicted, nor acquitted, of all the charges, but only of certain charges, and the appeal is not directed against the entirety of the decision. In particular, no party appealed Mr Katanga's acquittal for the charge of child soldiers, which is now definitive and will not be discussed in appeal.

23. The Legal Representative of former child soldiers also relies on his involvement in the proceedings leading to the requalification of the mode of liability, and in the appeal against the Notice Decision.³¹ This argument is without merit since the Trial Chamber could not exclude a party or participant from the proceedings before issuing its Article 74 Judgement. However, as soon as this Judgement was delivered, the Trial Chamber stated that the Legal Representative of the group of former child soldiers was not entitled to participate in the sentence proceedings.

²⁸ ICC-01/04-01/07-3486, para. 6, footnote 6.

²⁹ ICC-01/04-02/12-30, 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, para. 3.

³⁰ ICC-01/04-01/06-2951, Decision on the participation of victims in the appeals against Trial Chamber I's conviction and sentencing decisions, 13 December 2012, para. 3.

³¹ ICC-01/04-01/07-3319-tENG/FRA, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012.

Conclusion

24. For the reasons stated above, the defence requests the Appeals Chamber:

- a. To authorise the victims represented by the Legal Representative of the main group of victims, who participated in the trial proceedings in the *Katanga* case, whose right to participate in the proceedings as victims was not revoked, and who are still alive, to participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal, to the extent of filing, through their Legal Representative, observations on the parties' documents in support of the appeal and the responses to the documents in support of the appeal;
- b. To reject the application to participate in the proceedings by the heirs/successors of the deceased victims (a/0025/08, a/0051/08, a/0197/08, a/0207/08, a/0120/09, a/0253/09 et a/0311/09);
- c. To reject the application to participate in the proceedings by the 14 applicants (a/0464/09, a/2736/10, a/2737/10, a/2738/10, a/2739/10, a/2741/10, a/2742/10, a/2743/10, a/2744/10 et a/2745/10; a/1205/10 et a/1206/10; a/803/09 et 804/09);
- d. To order the Legal Representative of the main group of victims to make contact with the anonymous victims and to enquire into their willingness to have their anonymity lifted *vis-à-vis* the party and to inform the Appeals Chamber thereon;
- e. To reject the application to participate in the proceedings by the victims represented by the Legal Representative of the group of former child soldiers.

Respectfully submitted,



David HOOPER Q.C.

Dated this 13 June 2014

At The Hague