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**International
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Date: **3 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

**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**

Source: Common legal representative of the main group of victims

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

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PROCEDURAL BACKGROUND

1. On 20 December 2012, the Prosecution lodged an appeal against the judgment acquitting Mr Ngudjolo.¹
2. On 6 March 2013, the Appeals Chamber (“the Chamber”) authorised the participation of victims in the appeal. It requested the Registry to file a list of the victims who had participated in the proceedings in the case against Mr Ngudjolo and whose status had not been revoked.²
3. On 28 March 2013, the Registry filed a list of the main group of victims and a list of former-child-soldier victims, each group being represented by a different legal representative.³
4. On 12 April 2013, pursuant to the Chamber’s instructions, the present Legal Representative submitted his observations on the list of the victims he represents. He confirmed the information from the Registry that four victims had died in the course of the proceedings (a/0175/08, a/0117/09, a/0321/09 and a/0373/09). He stated that he was still seeking to obtain information about the continuation of their respective applications by a family member. He also informed the Chamber of the death of a further four victims.⁴
5. On 15 April 2013, Mr Ngudjolo filed his observations on the aforementioned lists. Firstly, he requested that two former child soldiers who remain anonymous be

¹ “Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’”, ICC-01/04-02/12-10.

² *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, p. 3.

³ “Transmission of the List of Victims in compliance with Decision ICC-01/04-02/12-30”, ICC-01/04-02/12-55. On 3 April 2013, the Registry filed a corrected version of the lists in Annexes 2 and 3, ICC-01/04-02/12-55-Conf-Anx2-Red-Corr and ICC-01/04-02/12-55-Conf-Anx3-Corr.

⁴ “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, para. 21.

removed from the list. Secondly, he requested that the four deceased victims designated by the pseudonyms a/0175/08, a/0117/09, a/0321/09 and a/0373/09 be removed from the list.⁵

6. On 27 May 2013, the Chamber invited the Legal Representatives to submit their observations on the legal and factual issues arising from Mr Ngudjolo's objections. It noted that the objections relate to "the continued participation of anonymous victims and to the inclusion of deceased victims on the list of participating victims in the proceedings on appeal" and that these were issues which it would be considering for the first time.⁶

I. PARTICIPATION OF ANONYMOUS VICTIMS IN THE PROCEEDINGS

7. Contrary to Mr Ngudjolo's contention, the participation of anonymous victims in the proceedings is not necessarily prejudicial to the Defence and is not necessarily inconsistent with a fair trial or the rights of the Defence. In accordance with article 68(1) of the Statute, the interests at stake should be balanced in light of the circumstances of each case: on the one hand, protecting the victims concerned and, on the other, respecting the rights of the Defence. The specific security situation of each case (including the objective and subjective risks to victims) and the stage of the proceedings are both determining factors in the Chamber's assessment of the appropriate protective measures, including use of anonymity, with regard for the rights of the Defence.

⁵ "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.

⁶ *Order on the filing of further submissions on the Registrar's List of participating victims*, ICC-01/04-02/12-73, para. 8.

8. Furthermore, in this regard the Legal Representative refers the Chamber to the arguments presented by the Legal Representative of the former child soldiers pursuant to the Chamber's aforementioned order of 27 May 2013.⁷

II. SITUATION OF DECEASED VICTIMS

9. Mr Ngudjolo seeks the exclusion of deceased victims a/0175/08, a/0117/09, a/0321/09 and a/0373/09, on the grounds that an excessive amount of time has passed since Trial Chamber II's order seeking additional information to rule on their applications.⁸

10. By its aforementioned order of 27 May 2013, the Appeals Chamber invited the Legal Representative to submit observations on this objection by the Defence. It also appeared to enquire more generally as to the situation, in the context of the appeal, of victims who died while proceedings were ongoing.⁹

11. The present submissions address both issues.

(a) Purported "excessive amount of time" since Trial Chamber II's order seeking additional information

12. In Mr Ngudjolo's view, "an excessive amount of time" has passed since the decision of Trial Chamber II of 11 April 2011 ordering 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 transmit to the Chamber the relevant information to enable it to rule on their applications".¹⁰ He argues that this delay justifies the

⁷ "Observations sur la participation de victimes anonymes à la procédure en appel et sur le maintien de victimes décédées sur la liste des victimes admises dans cette procédure", 3 June 2013.

⁸ "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.

⁹ ICC-01/04-02/12-73, para. 8.

¹⁰ *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.

removal of those victims from the list of victims authorised to participate in the proceedings.¹¹

13. Hence, Mr Ngudjolo objects to deceased victims remaining on the list of participating victims if no information has been transmitted within a reasonable time period as to the continuation of their applications.

14. As the Legal Representative explained in his observations of 12 April 2013,¹² he has faced (and continues to face) particular problems in identifying, locating and then contacting the deceased victims' family members. The victims' applications often contain scant detail about the composition of their family. Contact details then have to be found for the family members. In addition, communication infrastructure in certain remote areas where victims live is poorly developed, making it difficult to locate and then contact them. Moreover, in certain cases, a family member indicates a desire to continue the action of the deceased victim but experiences practical problems in contacting other family members to obtain their consent, in accordance with the practice established by Trial Chamber II.¹³

15. These difficulties are compounded by other factors linked to developments in the proceedings and the impossibility of conducting certain field missions. For example, during the trial stage, work priorities meant that the Legal Representative was often compelled to focus his team's resources mainly on following witness testimonies and on developments in the proceedings which required various filings to be drafted. Certain field missions could not be undertaken either because they had not received the Registry's approval or for security reasons.

¹¹ ICC-01/04-02/12-63-tENG, paras. 16-17.

¹² "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, para. 20.

¹³ "Request to resume the action initiated by deceased Victim a/0253/09", ICC-01/04-02/12-70-tENG, 15 May 2013, paras. 15-17.

16. Furthermore, the Legal Representative has been carrying out the aforementioned order of the Chamber since 11 April 2011. For example, he has taken a series of steps in order to contact the families of the deceased victims and to decide whether to resume the four applications. However, the steps could not be completed for the aforementioned reasons, which explains why the Legal Representative has been unable to provide Trial Chamber II with the required information. Contacts are currently under way in the field. The Legal Representative will soon revert to the Chamber to state whether the applications of the deceased victims are to be resumed and, if so, to request authorisation.

17. In light of these particular circumstances, there is no cause to consider that an excessive amount of time has passed which might justify excluding Victims a/0175/08, a/0321/09, a/0117/09 and a/0373/09.

18. Furthermore, Mr Ngudjolo fails to show how maintaining these victims on the list of victims authorised to participate in the proceedings would be prejudicial to him or inconsistent with a fair trial.¹⁴ He is already apprised of the content of their applications.

19. Moreover, maintaining a/0175/08, a/0321/09, a/0117/09 and a/0373/09 on the list of participating victims is closely linked to a resumption of their applications by a successor. In the event that the applications are not resumed, the issue of maintaining them on the list of victims authorised to participate in the proceedings will become moot. Without a designated person to represent a deceased victim's interests, 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.

¹⁴ Article 68(3) of the Statute sets out the overall principle of victim participation "at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial" [emphasis added]; see also the arguments at point (b) below.

20. Lastly, it is worth noting that these four victims remain on the list of victims authorised to participate in the proceedings before Trial Chamber II.¹⁵ If the Appeals Chamber were to allow Mr Ngudjolo's objection, these victims would be in an exceptional situation where they could no longer participate in the appellate proceedings concerning Mr Ngudjolo but could nevertheless continue to participate in the proceedings against Mr Katanga, whereas both were charged with the same crimes.

(b) Issue of maintaining deceased victims on the list of victims participating in the proceedings on appeal

21. The Legal Representative notes that in its decision of 6 March 2013, the Chamber authorised "[t]he victims who participated in the trial proceedings in the case of *Prosecutor v. Mathieu Ngudjolo Chui* and whose victim status was not revoked" to participate in the present appeal.¹⁶ To this end, it requested the Registry to provide it with a list of said victims.¹⁷ In the instant case, none of the deceased victims has thus far been removed from the list of victims authorised to participate in the proceedings. Accordingly, the Legal Representative understands that by its order of 27 May 2013 (ICC-01/04-02/12-73), the Chamber addresses the issue of whether to maintain (not include or add) the deceased victims on the list of victims authorised to participate in the appellate proceedings.

22. Article 68(3) of the Statute sets out the overall principle of victims' participation in proceedings before the Court. It authorises victims whose personal interests are affected to present their views and concerns "at stages of the proceedings determined to be appropriate by the Court and in a manner which is not

¹⁵ *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, para. 64.

¹⁶ *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, p. 3 [emphasis added].

¹⁷ *Ibidem*.

prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

23. Under rule 85(a) of the Rules of Procedure and Evidence (“Rules”), the term “victims” means, *inter alia*, “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.

24. Under rule 89 of the Rules, read jointly with regulation 86 of the Regulations of the Court, victims make written application to the Registrar to participate in the proceedings, specifically using a standard application form. The Registrar then transmits the application forms to the relevant Chamber.

25. Certain Chambers, relying on the case law of the Inter-American Court of Human Rights, have authorised the participation of victims who died as a result of crimes prosecuted by the Court and who were therefore unable to submit applications for participation personally. Those victims were able to participate via an application submitted by a close family member.¹⁸

26. In the present case, Trial Chamber II’s practice has been to maintain on the list of victims those who were authorised to participate in the proceedings but who are since deceased, and to authorise the continuation of their applications by a representative, provided that certain conditions are met.¹⁹

¹⁸ See, *inter alia*: Pre-Trial Chamber III, *The Prosecutor v. J-P. Bemba Gombo, Fourth Decision on Victim’s Participation*, ICC-01/05-01/08-320, 12 December 2008, paras. 39-40; Trial Chamber III, *The Prosecutor v. J-P. Bemba Gombo, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings*, ICC-01/05-01/08-807, 30 June 2010, paras. 83-85.

¹⁹ The applications concerned are a/0207/08, a/0120/09, a/0051/08, a/0197/08, a/0025/08 and a/0311/09, which were admitted by the following decisions: *Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure*, ICC-01/04-01/07-1737, 22 December 2009; *Motifs de la troisième décision relative à 8 demandes de participation de victimes à la procédure*, ICC-01/04-01/07-1967, 17 March 2010; *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, 14 June 2011; *Corrigendum of*

27. In this case, the victims concerned are individuals who died in the course of the proceedings. All explicitly consented to participate in the proceedings and personally submitted an application for participation. All were authorised to participate in the proceedings, given that the conditions of rules 85 and 89 were fully met.²⁰

28. These victims' wish to participate in the proceedings, the reasons for their application and the evidence of their personal interest in the case are all contained in the application for participation. The applications are known to the Prosecution and the Defence.

29. Maintaining these applicants on the list of victims is also closely linked to the possibility of their application being continued by a successor. If their applications are not resumed, there will be no need to maintain them on the list of victims authorised to participate in the proceedings.

30. In the event that the action is continued by a successor, that individual will merely continue the application on behalf of the deceased victim and within the boundaries of the application for participation which is already known to the Defence and the Prosecution. For the parties, the continuation of a deceased victim's application by a representative will itself have no real bearing on the subsequent proceedings in relation to the application. It will, however, ensure the effective participation of victims in the Court's work of rendering justice in accordance with the Statute,²¹ and in particular, will prevent such participation from being unjustly

the decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08 and a/0311/09, ICC-01/04-01/07-3185-Corr-tENG, 24 October 2011.

²⁰ Trial Chamber II, *Corrigendum of Operative part of the Decision on the 345 applications for participation as victim in the proceedings*, ICC-01/04-01/07-1347-Corr-tENG, 31 July 2009; Trial Chamber II, *Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims*, ICC-01/04-01/07-1491-Conf-tENG, 23 September 2009.

²¹ By analogy in this connection, ICC-01/05-01/08-807, para. 83: "The death of a victim should not extinguish the opportunity for the Chamber to consider his or her views and concerns, in that it would be markedly unjust if an alleged perpetrator in these circumstances prevented the ICC from receiving

revoked because some victims did not survive until the end of the trial owing to the length of proceedings.

31. It is worth recalling that the Legal Representative has already submitted an application to resume the action initiated by deceased victim a/0253/09 to this Chamber (and to Trial Chamber II).²²

32. Furthermore, the issue of whether to maintain on the list of participating victims a victim who died in the course of the proceedings 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. For example, in certain instances, in order to avoid multiple applications for participation, several members of the same family may decide to designate one family member to submit one application for participation representing the interests of the various members of that family. If that applicant were to die in the course of the proceedings and therefore be removed from the list of victims authorised to participate, the result would be to deprive all other members of the family of the possibility of participating in the proceedings before the Court and ultimately of presenting their views and concerns.

33. In light of all of the above, maintaining deceased applicants on the list of victims authorised to participate in the instant proceedings is in no way prejudicial to the rights of the Defence or a fair trial. Hence the conditions of article 68(3) of the Statute and rule 89(1) are indeed satisfied.

relevant representations from the person fatally affected. Participation by victims is not a one-sided exercise: although it is specifically intended to benefit those whose personal interests are engaged, it also enhances the Court's understanding of the relevant events" [emphasis added].

²² ICC-01/04-02/12-70-tENG and ICC-01/04-01/07-3372, 15 May 2013.

FOR THESE REASONS,

MAY IT PLEASE THE CHAMBER TO

(1) DISMISS Mr Ngudjolo's requests, and consequently,

(2) MAINTAIN the anonymous victims and the deceased victims on the list of victims authorised to participate in the proceedings.

[signed]

Fidel Luvengika Nsita

Common legal representative of the main group of victims

Dated this 3 June 2013 at Brussels, Belgium