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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 in the appellate proceedings and on maintaining deceased victims on the list of victims authorised to participate

Source: Legal Representative of the child-soldier victims

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

Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence of Mathieu

Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Mr Jean-Louis Gilissen

Mr Fidel Nsita Luvengika

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

REGISTRY

Registrar

Mr Herman von Hebel

Victims and Witnesses Unit

**Victims Participation and Reparations
Section**

Ms Fiona McKay

I. PROCEDURAL BACKGROUND

1. On 20 December 2012, the Prosecution lodged its appeal¹ against the judgment of 18 December 2012 acquitting Mr Ngudjolo of all charges and releasing him.²
2. By decision of 6 March 2013, the Appeals Chamber ("the Chamber") authorised the victims who had participated at the trial stage of the present case (and whose status had not been revoked) to participate via their respective legal representatives in the proceedings on appeal, in order to present their views and concerns affecting their personal interests.³
3. On 19 March 2013, the Prosecution filed the document in support of its appeal.⁴
4. On 6 March 2012, the Appeals Chamber issued a decision in which it requested the Registry to transmit a list of the victims who had participated in the *Ngudjolo* case and whose victim status had not been revoked.⁵ The Chamber also stated that any objections to the inclusion of specific victims or the correctness of information in the Registry's list could be raised by 16 April.
5. Pursuant to that decision, on 28 March 2012 the Registry filed its "Transmission of the List of Victims in compliance with the Decision ICC-01/04-02/12-30", Annex 2 of which contains a list of the victims represented by the Legal Representative of the child-soldier victims, and Annex 3, a list of the main group of victims, represented by Mr Fidel Luvengika. The names of two victims represented by the Legal Representative whose identity has not been disclosed

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 ICC-01/04-02/12-T-1 FRA and *Judgment pursuant to article 74 of the Statute*, 18 December 2012, ICC-01/04-02/12-3-tENG; ICC-01/04-02/12-T-3 FRA.

³ ICC-01/04-02/12-30, in particular p. 3, para. (1).

⁴ "Prosecution's Document in Support of Appeal against the 'Jugement rendu en application de l'article 74 du Statut'", ICC-01/04-02/12-45 and confidential redacted Annex A, ICC-01/04-02/12-39-Conf-Red.

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

to the parties are redacted in Annex 2; a version containing both names was filed as *ex parte*, only available to the Registry and Mr Gilissen.

6. The two lists were initially classified as confidential. At the request of the legal representatives, they were reclassified as *ex parte*.⁶
7. On 15 April 2013, Mr Ngudjolo filed his observations on the aforementioned lists of victims. He requested that two former child soldiers who had thus far remained anonymous and 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 lists of victims.⁷
8. On 26 April, the Legal Representative of the child-soldier victims sought leave to respond to the Defence observations on the issue of maintaining the anonymous victims whom he represents on the list of victims.⁸
9. On 27 May 2013, the Chamber issued its *Order on the filing of further submissions on the Registrar's List of participating victims*, whereby it directed the legal representatives to submit their observations on the legal and factual issues raised by the Defence on the participation of anonymous victims and on the inclusion of the deceased victims on the list of victims participating in the appellate proceedings, noting that these were issues which it would be considering for the first time.⁹

⁶ "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, and "*Demande de re-classification de la liste des victimes déposée par le Greffe sous la référence ICC-01/04-02/12-55-Conf-Anx2-Red-Corr*", ICC-01/04-02/12-65, 16 April 2013.

⁷ "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.

⁸ "*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.

⁹ *Ibidem*, para. 8.

II. SITUATION OF THE DECEASED VICTIMS

10. For the most part, the Legal Representative refers to the arguments set forth by the Legal Representative of the main group of victims in his submissions pursuant to the Chamber's order of 27 May 2013.¹⁰
11. In addition, the Legal Representative notes that the decision on the modalities of participation of victims in the appeal against the judgment pursuant to article 74 in respect of Mr Ngudjolo provides, *inter alia*, that the victims who participated in the trial and whose victim status was not revoked may participate in the present appeal. It would therefore appear that the issue before the Appeals Chamber is whether or not to maintain victims who died in the course of the proceedings on the list of victims authorised to participate in the proceedings. This issue must be considered on a case-by-case basis in light of four factors which the Legal Representative considers to be material:
12.
 - The deceased victims had already submitted an application for participation which was accepted by the Trial Chamber;
 - 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;
 - Whether a victim remains on the list will depend on whether there is a designated successor;
 - The existence at this juncture of two separate proceedings to which the same victims are currently admitted, as a result of the severance, and the situation of victims excluded from the proceedings against Mr Ngudjolo but still authorised to participate in the proceedings against Mr Katanga.

¹⁰ "Observations sur la participation de victimes anonymes et sur le maintien de victimes décédées, depuis l'introduction de la procédure, sur la liste des victimes participant à la procédure d'appel".

III. PARTICIPATION OF ANONYMOUS VICTIMS

1. Principle of participation of anonymous victims in the appellate proceedings:

13. In its 15 April 2013 observations on the lists of victims, the Defence notes:

In the event that Victims a/0390/09 and a/0452/09 wish to maintain their anonymity, the Defence suggests that they be removed from the Lists of Victims. It is of the view that their wholly anonymous participation is prejudicial to the Defence and incompatible with the rights of the Accused and the fairness of the trial.¹¹

Furthermore, it states that although the practice and previous rulings of the ICC do not expressly prohibit the wholly anonymous participation of victims, the appeals chamber of the Special Tribunal for Lebanon noted that it is prejudicial to the rights of the accused, and cites a decision of that chamber which prohibits the wholly anonymous participation of victims.¹²

14. The Legal Representative contends, on the contrary, that the participation of anonymous victims cannot in and of itself be considered prejudicial to the rights of the Defence. This is also the position of the Pre-Trial and Trial Chambers who have ruled on the matter at this Court.

15. Article 68(1) of the Statute expressly states that chambers may take measures to protect victims (including anonymity), with the sole proviso that such measures shall respect the rights of the defence and a fair and impartial trial.

16. Moreover, article 68(3) of the Statute sets out the overall principle of victims' participation in proceedings before the Court. It permits 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 prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

¹¹ ICC-01/04-02/12-63, para. 9.

¹² *Ibidem*, para. 10.

17. The practice of the chambers reflects the balance which must be struck between respect for the rights of the Defence and a fair and impartial trial – in particular, with regard to any protective measures ordered – and the need to ensure that victims have an opportunity to present their views and concerns at appropriate stages of the proceedings when their personal interests are affected.
18. In the present case, Trial Chamber II made it quite clear that it would not exclude the participation of anonymous victims in the proceedings. In a decision of 12 November 2009 on the disclosure of victims' identities to the parties, it stated that, if it authorised the participation of anonymous victims, it would consider whether their anonymity should be lifted if, at a subsequent stage of the proceedings, any such anonymous victims should wish to participate individually, in accordance with the arrangements for participation to be fixed by the Trial Chamber.¹³
19. It later stated that "[i]n the event that [the victims] are called to appear as witnesses [...], they must relinquish their anonymity".¹⁴ In so doing, it confirmed in its *Decision on the Modalities of Victim Participation at Trial*¹⁵ the rule it had previously established in its *Directions for the conduct of the proceedings and testimony in accordance with rule 140*¹⁶ that it would not authorise any testimony from victims wishing to remain anonymous vis-à-vis the Defence.¹⁷ These decisions must be construed *a contrario* as authorising anonymous victims' participation in the proceedings and all other forms of participation, within the framework established by the Chamber in the two aforementioned decisions.
20. Trial Chamber II's position is wholly consonant with Trial Chamber I's rulings in the case of *The Prosecutor v. T. Lubanga*. In its *Decision on victims' participation*,

¹³ Corrigendum to the "Decision on the Disclosure to the Parties of the Identities of the Victims" (ICC-01/04-01/07-1607), ICC-01/04-01/07-1607-Corr-tENG, para. 20.

¹⁴ 1788-tENG, para. 93.

¹⁵ ICC-01/04-01/07-1788-tENG, 22 January 2010.

¹⁶ ICC-01/04-01/07-1665-Corr, 1 December 2009.

¹⁷ *Ibidem*, para. 92, and Decision 1665, para. 22(c).

Trial Chamber I made clear its opposition to the suggestion that anonymous victims should never be permitted to participate in the proceedings.¹⁸ Ruling on the Defence and Prosecution requests for leave to appeal that decision, it also stated that the possibility of anonymous victims' participation (which it deemed exceptional) is not an issue that could significantly affect either the fairness or the expeditiousness of the proceedings or the outcome of the trial.¹⁹

21. The arrangements for the participation of anonymous victims will nevertheless always be carefully determined in order to safeguard the fairness of the trial for all parties.²⁰ Trial Chamber I states that the extent of participation by a victim on any issue that has a bearing on the chamber's determination of the charges will be limited if a victim is anonymous.²¹
22. In other words, 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. Hence, the chamber will consider the prejudice which may be caused to the parties and other participants with regard to those precise circumstances (a victim's living environment, whether a victim is particularly vulnerable and requires specific protective measures, and so on) and the extent of participation sought by an anonymous victim. Where prejudice to the fairness of the trial arises, the chamber may also determine whether there are

¹⁸ *Decision on victims' participation*, 18 January 2008, ICC-01-04/01-06-1119, para. 130. In that decision, the Chamber also refers to the case law of the European Court of Human Rights, citing the case of *Doorson v. the Netherlands*: "a conviction should not be based either solely or to a decisive extent on anonymous statements" (*Doorson v. the Netherlands*, Judgment (Merits), 20 February 1996, Application No. 20524/92, para. 76). *A contrario*, it is possible to infer that calling anonymous witnesses or the presence of anonymous victims is authorised, provided that an appropriate balance is struck between the rights of the accused and those of the witnesses or victims called to give evidence, using compensatory measures if need be.

¹⁹ ICC-01-04/01-1191, para. 37.

²⁰ ICC-01-04/01-06-1119.

²¹ ICC-01-04/01-06-1191, para. 37.

steps to mitigate sufficiently the prejudice that fall short of revealing the victim's identity.²²

23. Furthermore, the Legal Representative notes that the participation of anonymous victims has not been an issue in the context of the appeal against the *Judgment pursuant to article 74 of the Statute in Lubanga*. Victims' anonymity toward the parties and the Defence in particular was challenged only in the context of the appeal against the *Decision establishing the principles and procedures to be applied to reparation* (ICC-01-04/01-06-2904) and solely in connection with applications for reparations.²³
24. Trial Chamber III has decided to follow the overall approach of Trial Chambers I and II.²⁴ It has required victims to relinquish their anonymity only if they wished to testify under oath or present their views and concerns personally before the Chamber, but has authorised *a contrario* continued anonymity for all other forms of participation.²⁵
25. The Legal Representative also refers the Appeals Chamber to the 5 August 2011 decision of Pre-Trial Chamber II on the participation of victims in the confirmation of charges. That chamber dismissed the Defence argument that permitting anonymous victims to examine witnesses or present submissions concerning the evidential foundation of the parties' respective cases constitutes *per se* prejudice to the rights of the suspects. The chamber stated that it would make a determination on a case-by-case basis in light of the previously stated criteria: (i) the victims' personal interests as alleged by the legal representative;

²² ICC-01-04/01-06-1119, para. 131

²³ See "Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decisions establishing the principles and procedures to be applied to reparations » rendue par la Chambre de première instance le 7 août 2012", ICC-01-04/01-06-2972, 5 February 2013, paras. 48 et seq.

²⁴ Corrigendum to 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-Corr, 12 July 2010, paras. 65-69.

²⁵ Second order regarding the application of the legal representatives of victims to present evidence and the views and concerns of victims, ICC-01/05-01/08-2027, para. 19.

(ii) the scope of the procedural right requested; and (iii) the principle of fairness and expeditiousness of the proceedings.²⁶

26. In the present case, the Legal Representative considers that there is no basis for departing from the principle recognised both by the Pre-Trial Chambers and the Trial Chambers of this Court that participation of anonymous victims in the proceedings must be permitted. The Defence's reference in its observations on the list of victims to the decision of the appeals chamber of the Special Tribunal for Lebanon (STL) of 10 April 2013 is irrelevant in this regard. In fact, the founding documents of the ICC and of the STL differ as to the modes of participation of victims in the proceedings. In the instruments governing proceedings before the STL, 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.²⁷ 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. Hence, the STL appeals chamber's decision to reject the principle of anonymous victim participation was made within such a legal framework. Its position is by no means inconsistent with that of the chambers of the ICC and certainly cannot serve as a basis for applying by analogy a principle prohibiting the participation of anonymous victims before this Court.

27. Furthermore, the Legal Representative notes that in the present proceedings, the Chamber stated in its decision on the participation of victims in the appeal against the judgment pursuant to article 74 pertaining to Mr Ngudjolo: (1) that victims who participated in the trial and whose victim status was not revoked may participate in the present appeal and (2) that the Legal Representatives of Victims may present their clients' views and concerns with respect to their

²⁶ *Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings*, ICC-01/09-01/11-249, 5 August 2011, para. 126.

²⁷ See, *inter alia*, rule 87 of the Rules of Procedure and Evidence of the STL.

personal interest in the issues on appeal by filing observations on the Prosecution's document in support of the appeal and the Defence's response to the document in support of the appeal.²⁸

28. The Chamber also stated that, should the need arise to specify the modalities further, it would give supplementary directions, either upon its own motion or upon application by the Legal Representatives.²⁹
29. If the victims who participated in the trial are authorised to participate in the present appeal, including anonymous victims as long as the principle of their participation in the appellate proceedings is uncontested, it follows from the arguments set out above and previous Court rulings that the Chamber should review the issue of anonymity only if a victim expresses a desire to exercise individually any form of participation which might be prejudicial to the rights of the Defence. It would then be for the Appeals Chamber to rule on a case-by-case basis, in light of the particular circumstances (the victim's situation), the extent of participation sought, and the established risk of prejudice to the rights of the Defence and, more generally, to the fairness of the trial.

2. Grounds for maintaining the anonymity of Victims a/0390/09 and a/0452/09 in the present proceedings

30. In light of information in his possession, the Legal Representative considers that he has received no clear mandate from his clients to relinquish their anonymity, despite the efforts made with regard to these victims. He also wishes to inform the Chamber that he is continuing his efforts in this regard.

²⁸ *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, para. 5.

²⁹ *Ibidem*.

31. 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), the Legal Representative has so far erred on the side of caution and considers that they still wish to remain anonymous.
32. The Legal Representative would reiterate that, should the Chamber decide to balance the need to safeguard the rights of the Defence (insofar as there is a concrete risk of infringement of its rights) against the need to protect the safety of the anonymous child-soldier victims, their status as particularly vulnerable victims within the meaning of rule 88 should be taken into account.
33. In the alternative, should the Chamber decide to exclude on principle the participation of anonymous victims in the present proceedings or to deprive them, on grounds of their anonymity, of some or all forms of participation afforded to other victims, the Legal Representative would request time to approach the victims he represents, prior to the adoption of any such decision.
34. The Legal Representative considers that he would have to inform those clients about the potential adverse effect on their interests and to enquire whether they wished to remain anonymous, given the impact which such a decision would have.
35. Furthermore, the Legal Representative refers to regulation 42(4) of the Regulations of the Court, under which a chamber which decides to vary protective measures ordered previously shall seek to obtain, whenever possible, the consent of the person to whom the variation applies.
36. Lastly, the Legal Representative refers to the submissions in paragraph 11 above as to the need to take into account the fact that there are two proceedings pertaining to the same facts which currently include the same victims, and to

contemplate the consequences of excluding certain victims from one of the two proceedings.

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

- DISMISS Mr Ngudjolo's requests and, consequently;
- MAINTAIN the anonymous victims and the deceased victims on the list of victims authorised to participate in the proceedings;
- In the alternative, on the issue of the participation of anonymous victims in the proceedings, in the event that Chamber decides on principle to exclude the participation of anonymous victims or to deprive them of some or all forms of participation, GRANT the Legal Representative time to approach the anonymous victims he represents and to enquire whether they wish to remain anonymous.

[signed]

Seraing, 3 June 2013

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