

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/04-02/12 A

Date: 16 May 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 “Requête urgente en prorogation de délai et en levée de l’*ex parte*
touchant au mémoire d’appel du Procureur”**



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
Me Andrea Valdivia

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

REGISTRY

Registrar
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Jugement rendu en application de l’article 74 du Statut” of 18 December 2012 (ICC-01/04-02/12-3),

Having before it the “Requête urgente en prorogation de délai et en levée de l’*ex parte* touchant au mémoire d’appel du Procureur” dated 25 March 2013 and registered on 26 March 2013 (ICC-01/04-02/12-49-Conf),

Renders unanimously the following

DECISION

1. The Registrar shall re-classify 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) as confidential and notify it to the legal representatives of the victims.
2. The time limit for the filing of the victims’ observations on the Prosecutor’s document in support of the appeal and Mr Mathieu Ngudjolo Chui’s response thereto is extended by thirty days to 18 July 2013.
3. The time limit for the filing of the Prosecutor’s and Mr Ngudjolo’s respective responses to the victims’ observations is also extended by thirty days to 19 August 2013
4. The victims’ request for an additional four-day extension is rejected.

REASONS

PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II delivered the “Jugement rendu en application de l’article 74 du Statut”¹ (hereinafter: “Decision on Acquittal”), in which Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) was acquitted of all charges against him. On 20 December 2012, the Prosecutor lodged an appeal against the Decision on Acquittal.²
2. On 6 March 2013, the Appeals Chamber rendered 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’”³ (hereinafter: “Decision on Victim Participation”).
3. 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’”⁴ (hereinafter: “Document in Support of the Appeal”). This document was filed as confidential, *ex parte* available to the Prosecutor and Defence only.
4. On 20 March 2013, Mr Ngudjolo filed the “URGENT application by Mathieu Ngudjolo’s Defence seeking the translation of the Prosecution document in support of the appeal into French and suspension of the time limits (Article 67(1)(a) and (f) of the Rome Statute and regulation 35(2) and 59(1) of the Regulations of the Court)”⁵ (hereinafter: “Mr Ngudjolo’s Request”).
5. On 22 March 2013, the Prosecutor filed a confidential redacted version of the Document in Support of the Appeal⁶ (hereinafter: “Redacted Document in Support of the Appeal”), of which the legal representatives of both groups of participating victims were notified on that day. The Prosecutor stated that the Document in Support

¹ ICC-01/04-02/12-3.

² “Prosecution’s Appeal against Trial Chamber II’s ‘Jugement rendu en application de l’article 74 du Statut’, 20 December 2012, ICC-01/04-02/12-10 (A).

³ ICC-01/04-02/12-30 (A).

⁴ ICC-01/04-02/12-39-Conf-Exp (A).

⁵ ICC-01/04-02/12-14-tENG (A).

⁶ “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, with confidential redacted Annex A (ICC-01/04-02/12-39-Conf-Red). A public redacted version of the Document in Support of the Appeal was filed on 3 April 2013 as ICC-01/04-02/12-39-Red2 (A).

of the Appeal was originally classified as confidential, *ex parte* available to the Prosecutor and Defence only, due to the fact that her third ground of appeal primarily referred to information already under this classification.⁷ For that reason, the entire third ground of appeal is redacted in the Redacted Document in Support of the Appeal. The Prosecutor also noted that she had “no objection to the information that is referred to under the Third Ground of Appeal and that is currently classified *ex parte*, being classified as public”.⁸

6. The victims filed a joint request dated 25 March 2013 and notified on 26 March 2013, entitled “Requête urgente en prorogation de délai et en levée de l’*ex parte* touchant au mémoire d’appel du Procureur”⁹ (hereinafter: “Victims’ Request”). The Victims’ Request is twofold. First, they request that, should the Appeals Chamber grant Mr Ngudjolo’s Request, an equivalent extension of time should be granted to them to enable the submission of their observations on the Redacted Document in Support of the Appeal and Mr Ngudjolo’s response to the Document in Support of the Appeal. In addition, they request a further extension of the time limit by four days to account for the delay in receiving access to the Redacted Document in Support of the Appeal.¹⁰ Second, the legal representatives request that the Document in Support of the Appeal be re-classified to allow for their access to the third ground of appeal and for them to submit observations thereon.¹¹ In support of this request the victims submit that the third ground of appeal concerns a fundamental issue, namely the fairness of the proceedings towards the Prosecutor.¹² They argue that, as long as the third ground of appeal is classified *ex parte*, the victims are deprived of a substantial part of the Document in Support of the Appeal, which might have a significant impact on the assessment of the Decision on Acquittal.¹³

7. On 8 April 2013, following an order of the Appeals Chamber,¹⁴ Mr Ngudjolo filed the “Defence response to the ‘Requête urgente en prorogation de délai et en

⁷ *Ibid.*, para. 2.

⁸ *Ibid.*, para. 3.

⁹ ICC-01/04-02/12-49-Conf (A).

¹⁰ Victims’ Request, para.10 and p. 9.

¹¹ Victims’ Request, p. 9.

¹² Victims’ Request, para.22.

¹³ Victims’ Request, para. 23.

¹⁴ “Order on the filing of submissions by Mr Ngudjolo in relation to the classification of the Prosecutor’s Document in Support of the Appeal”, 28 March 2013, ICC-01/04-02/12-53-Conf (A).



levee de l' *ex parte* touchant au mémoire d'appel du Procureur (ICC-01/04-02/12-49-Conf)''¹⁵ (hereinafter: "Mr Ngudjolo's Response"). Mr Ngudjolo, while not opposed to the victims' request for an extension of time, opposes the request for re-classification of the Document in Support of the Appeal.¹⁶ Mr Ngudjolo submits that the victims should not be allowed to seek re-classification since they were "*penitus extranei*" to the issue raised under the third ground of appeal, which, in his view, is an issue that is also *res judicata*.¹⁷

8. On 11 April 2013, the Appeals Chamber rendered the "Decision on Mr Ngudjolo's request for translation and suspension of the time limit",¹⁸ granting Mr Ngudjolo a thirty-day extension of the sixty-day time limit, stipulated in regulation 59 of the Regulations of the Court, to 18 June 2013 to respond to the Document in Support of the Appeal.

MERITS

A. The request for re-classification of the Document in Support of the Appeal

9. Under regulation 23 *bis* (1) of the Regulations of the Court, a document shall be treated throughout the proceedings according to the classification chosen by the participant filing the document "unless otherwise ordered by a Chamber". As noted at paragraph 5 above, the Document in Support of the Appeal is filed as confidential *ex parte* because the third ground of appeal refers to information that is currently classified as confidential *ex parte*. In the Appeals Chamber's view, disclosure of this information could undermine protective measures in respect of certain witnesses. Nevertheless, the Appeals Chamber considers that, for the victims to enjoy full participation in the present appeal, they should be granted access to the third ground of appeal, in order for them to present their views and concerns in that regard. The Appeals Chamber considers that their access to the third ground would not jeopardise the confidentiality of the information,¹⁹ in particular because the victims are

¹⁵ ICC-01/04-02/12-58-Conf-tENG (A).

¹⁶ Mr Ngudjolo's Response, paras 13 and 18.

¹⁷ Mr Ngudjolo's Response, para. 19.

¹⁸ ICC-01/04-02/12-60 (A).

¹⁹ See also "Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence of Procedure and Evidence)", ICC-

prohibited from disclosing the content of the third ground of appeal to third parties. However, given that the information to which the third ground relates should, at least at this stage of the proceedings, remain confidential, and that any public redacted version of that ground would have to be heavily redacted, the Appeals Chamber does not order the filing of a public redacted version of the third ground.

10. Accordingly, the Appeals Chamber orders the Registrar to re-classify the Document in Support of the Appeal as confidential and to notify the legal representatives of it.

B. The request for an extension of time

11. As noted at paragraph 6 above, the victims request that, if Appeals Chamber extends Mr Ngudjolo's time limit to file his response to the Document in Support of the Appeal, the victims should be granted an identical extension of time to file their observations. In addition, the victims request a further four-day extension to account for the delay incurred in obtaining access to the Redacted Document in Support of the Appeal.

12. The Appeals Chamber notes that in the Decision on Victim Participation the Appeals Chamber originally ordered the victims to file their observations to both the Document in Support of the Appeal and Mr Ngudjolo's response thereto on 20 June 2013, i.e. thirty days after the anticipated date of the filing of the latter. As the Appeals Chamber has extended the time limit for Mr Ngudjolo to file his response to the Document in Support of the Appeal (from 20 May 2013 to 18 June 2013), good cause within the meaning of regulation 35 (2) of the Regulations of the Court has been shown for an extension of the time limit for the filing of the observations of the victims. Therefore, the time limit for the victims to file their observations is extended by thirty days to 18 July 2013, which, in the view of the Appeals Chamber, gives the victims ample time to address the Document in Support of the Appeal, and in particular, also the third ground of appeal as well as Mr Ngudjolo's eventual response thereto. In this regard the Appeals Chamber consequently extends the time limit for

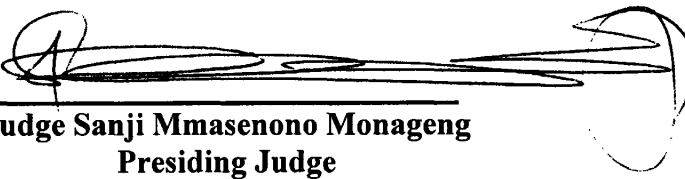
01/04-01/07-1667-Conf-tENG. See also "Judgment pursuant to article 74 of the Statute", ICC-01/04-02/12-3-tENG, para. 63.



the Prosecutor and Mr Ngudjolo to file their respective responses to the victims' observations to 19 August 2013.

13. In relation to the request for an extension by an additional four days, the Appeals Chamber notes, first, that the Redacted Document in Support of the Appeal was notified to the victims on 22 March 2013, i.e. only three days after the Document in Support of the Appeal was filed (although the Redacted Document in Support of the Appeal was notified in the early evening of 22 March 2013, which was a Friday). Second, the Appeals Chamber notes that the Redacted Document in Support of the Appeal contains two of the three grounds of appeal. By extending their time limit to 18 July 2013 the victims now have approximately four months to prepare their observations on these two grounds. In the circumstances, the Appeals Chamber cannot discern why an additional four-day extension would be justified. The request is therefore rejected for lack of good cause.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 16th day of May 2013

At The Hague, The Netherlands