

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12 A
Date: 8 October 2014**

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

**Decision and order in relation to the Prosecutor's request for reclassification and
for lesser redacted versions of the Registry's monitoring reports**



Decision and order 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 Mr Mathieu Ngudjolo Chui
Mr Jean Pierre Kilenda Kakengi Basila
Mr Jean Pierre Fofé Djofia Malewa

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 “Judgment pursuant to article 74 of the Statute” of 18 December 2012 (ICC-01/04-02/12-3-tENG),

Having before it the “Prosecution’s Request to Reclassify its Third Ground of Appeal as Public and to Access Lesser Redacted Versions of the Registry’s Monitoring Reports” of 25 September 2014 (ICC-01/04-02/12-200-Conf), the “Demande d’autorisation à pouvoir répondre à la requête du Procureur visant la reclassification du 3^{ème} motif d’appel et l’accès à des versions moins expurgées de rapports du Greffe (ICC-01/04-02/12-200-Conf)” of 26 September 2014 (ICC-01/04-02/12-203-Conf), and the “Demande d’autorisation à pouvoir déposer des observations sur la requête du Procureur ICC-01/04-02/12-200-Conf-Red et sur la réponse de la Défense à cette requête” of 29 September 2014 (ICC-01/04-02/12-204),

Issues the following

DECISION

1. The abovementioned requests of the victims are rejected.
2. The Prosecutor’s request for reclassification in relation to the third ground of her appeal as public, with relevant redactions is granted. The Prosecutor is directed to file by 16h00 on Wednesday, 15 October 2014 public redacted versions of the following documents:
 - i. ICC-01/04-02/12-39-Conf
 - ii. ICC-01/04-02/12-126-Conf
3. The victims are directed to file by 16h00 on Friday, 17 October 2014 public redacted versions of the following documents:
 - i. ICC-01/04-02/12-124-Conf-Corr
 - ii. ICC-01/04-02/12-124-Conf-Corr-Anx



- iii. ICC-01/04-02/12-125-Conf-Corr
 - iv. ICC-01/04-02/12-125-Conf-Corr-Anx
4. The Prosecutor's request for unredacted or lesser redacted versions of the Registry's monitoring reports of Mr Ngudjolo's non-privileged telephone conversations is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II (hereinafter: "Trial Chamber") delivered the "Judgment 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 19 March 2013, the Prosecutor filed, confidential *ex parte*, available only to Mr Ngudjolo, the "Prosecution's Document in Support of the Appeal against the 'Judgement rendu en application de l'article 74 du Statut'".³ A public redacted version of this document was filed on 3 April 2013, in which the third ground of appeal was redacted in full.⁴
4. On 16 May 2013, the Appeals Chamber granted the victims' request to have access to the third ground of appeal⁵ (hereinafter: "Decision of 16 May 2013"), by reclassifying the "Prosecution's Document in Support of the Appeal against the

¹ ICC-01/04-02/12-3-tENG.

² "Prosecution's Appeal against Trial Chamber II's 'Judgement rendu en application de l'article 74 du Statut'", ICC-01/04-02/12-10 (A).

³ ICC-01/04-02/12-39-Conf (A). 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).

⁴ ICC-01/04-02/12-39-Red2 (A).

⁵ "Decision on 'Requête urgente en prorogation de délai et en levée de l'*ex parte* touchant au mémoire d'appel du Procureur'", ICC-01/04-02/12-71 (A).

‘Judgement rendu en application de l’article 74 du Statut’⁶ as confidential (hereinafter: “Document in Support of the Appeal”).

5. On 21 June 2013, the Appeals Chamber granted the victims access to the relevant Court records, in particular the Registry’s reports on the monitoring of Mr Ngudjolo’s non-privileged telephone conversations (hereinafter: “Registry’s Monitoring Reports”), referred to in the Prosecutor’s third ground of appeal.⁷

6. On 18 September 2014, following a request by the Prosecutor, the Appeals Chamber, scheduled an oral hearing in this case for Tuesday, 21 October 2014.⁸

7. On 25 September 2014, the Prosecutor filed the “Prosecution’s Request to Reclassify its Third Ground of Appeal as Public and to Access Lesser Redacted Versions of the Registry’s Monitoring Reports”⁹ (hereinafter: “Prosecutor’s Request”). In relation to her request for reclassification of the third ground of appeal, the Prosecutor submits that, pursuant to regulation 23*bis* (3) of the Regulations of the Court, “[t]he basis for the confidential classification of the Prosecution’s third ground of appeal no longer exists”.¹⁰ In support of this argument the Prosecutor avers that since Mr Ngudjolo’s various public redacted filings in the appeal proceedings have already put the substance of her third ground of appeal into “the public domain”, “retaining its confidential status at this late stage is manifestly unjustified”.¹¹ The Prosecutor further submits that the Appeals Chamber should reclassify the third ground of the appeal as public (with the necessary redactions) because the proceedings are nearing closure and the proceedings in the related Katanga case are

⁶ 19 March 2013, ICC-01/04-02/12-39-Conf (A).

⁷ “Decision on the request by the victims to have access to the documents founding the Prosecutor’s third ground of appeal”, (hereinafter: “Decision of 21 June 2013”) ICC-01/04-02/12-92-Conf (A).

⁸ “Scheduling order for a hearing before the Appeals Chamber”, 18 September 2014, ICC-01/04-02/12-199 (A), p. 3.

⁹ ICC-01/04-02/12-200-Conf (A).

¹⁰ Prosecutor’s Request, paras 4-5.

¹¹ Prosecutor’s Request, para. 6, referring to “Corrigendum du mémoire de la défense de Mathieu Ngudjolo en réponse à « Prosecution’s Document in Support of the Appeal against the ‘Judgement rendu en application de l’article 74 du Statut’ » (ICC-01/04-02/12-39-Conf-Exp)”, dated 23 October 2013 and registered on 24 October 2013, ICC-01/-4-02/12-90-Corr2-Red, paras 236-358; “Réponse de la Défense de Mathieu Ngudjolo à « Prosecution Reply to the Defence Response to the Prosecution’s Appeal Brief » (ICC-01-/04-02/12-126-Conf)”, 28 October 2013, ICC-01/04-02/12-134-Red, paras 55-61; and “Réponse de la Défense de Mathieu Ngudjolo aux Observations du Représentant légal commun du groupe principal des victimes (ICC-01/04-02/12-124-Conf-Corr) et du Représentant légal des victimes enfants soldats (ICC-01/04-02/12-125-Conf-Corr) su le Mémoire d’appel du Procureur et le Mémoire en réponse de la Défense”, 25 October 2013, ICC-01/04-02/12-131-Red, paras 126-138.

now terminated so no impact or risk exists in relation to that case.¹² She avers that “[o]n balance, the public interest must prevail, especially when full confidentiality is effectively no longer required”.¹³

8. In relation to her request for unredacted or lesser redacted versions of the Registry’s Monitoring Reports, the Prosecutor submits that access to these versions of the Registry’s Monitoring Reports would enable her “to properly assist the Appeals Chamber” in “assessing the information” in the reports when making its determination on the third ground of appeal.¹⁴ In the Prosecutor’s view this would not affect the scope of the appeal because she would limit her submissions to “the confined issues raised on appeal”, as directed by the Appeals Chamber.¹⁵

9. On 29 September 2014, Mr Ngudjolo filed the “Réponse de la Défense à « Order on the filing of a response to the Prosecutor’s request for reclassification of the third ground of appeal and for access to lesser redacted versions of the Registry’s Monitoring Reports » (ICC-01/04-02/12-202-Conf)”¹⁶ (hereinafter: “Mr Ngudjolo’s Response”). Whilst Mr Ngudjolo has no objections to the reclassification of the third ground of appeal as public, he requests that, in the event the Appeals Chamber granted the Prosecutor’s request for lesser redacted versions of the Registry’s Monitoring Reports, the Registrar be instructed to redact the portions of the monitoring reports that pertain to Mr Ngudjolo’s private life.¹⁷

10. On 26 September 2014, the legal representative for the principal group of victims filed the “Demande d’autorisation à pouvoir répondre à la requête du Procureur visant la reclassification du 3^{ème} motif d’appel et l’accès à des versions moins expurgées de rapports du Greffe (ICC-01/04-02/12-200-Conf)”¹⁸ (hereinafter: “Request of Victim Group I”), requesting that the Appeals Chamber allow the victims to make observations on the Prosecutor’s Request.¹⁹

¹² Prosecutor’s Request, para. 11.

¹³ Prosecutor’s Request, para. 11.

¹⁴ Prosecutor’s Request, paras 13-14.

¹⁵ Prosecutor’s Request, para. 15.

¹⁶ ICC-01/04-02/12-205-Conf (A).

¹⁷ Mr Ngudjolo’s Response, p. 4.

¹⁸ ICC-01/04-02/12-203-Conf (A).

¹⁹ Request of Victim Group I, p. 7.

11. On 29 September 2014, the legal representative for the former child soldier victims filed the “Demande d’autorisation à pouvoir déposer des observations sur la requête du Procureur ICC-01/04-02/12-200-Conf-Red et sur la réponse de la Défense à cette requête”²⁰ (hereinafter: “Request of Victim Group II”), also seeking authorisation on behalf of Victim Group II to make observations on the Prosecutor’s Request as well as Mr Ngudjolo’s Response.²¹

II. DETERMINATION OF THE APPEALS CHAMBER

12. The Appeals Chamber notes that the legal representatives of both groups of victims request authorisation to make observations on the Prosecutor’s Request and/or Mr Ngudjolo’s Response. In addition, the Prosecutor’s Request is twofold in that she requests (i) reclassification of her third ground of appeal as public with necessary redactions and (ii) access to unredacted or lesser redacted versions of the Registry’s Monitoring Reports. The Appeals Chamber will address these requests in turn.

A. The Victims’ Requests to file Observations

13. With respect to the Request of Victim Group I and the Request of Victim Group II for authorisation to make observations on the Prosecutor’s Request and/or Mr Ngudjolo’s Response, the Appeals Chamber recalls that on 28 May 2013, the victims’ made joint submissions before the Appeals Chamber on the importance of reclassifying the documents founding the Prosecutor’s third ground of appeal as well as the need for the substance of the third ground to be made public.²² In the Decision of 21 June 2013, the Appeals Chamber addressed the victims Submissions of 28 May 2013 and reclassified the documents founding the third ground of appeal as confidential so that the victims could gain access to them whilst the confidentiality of the substance of the third ground of appeal was maintained.

14. Given that the subject-matter of the Prosecutor’s Request with which the Appeals Chamber is currently seized relates to substantially the same issues already addressed by the victims in their Submissions of 28 May 2013, the Appeals Chamber considers that the victims have been appropriately heard and no further submissions

²⁰ ICC-01/04-02/12-204 (A).

²¹ Request of Victim Group II, p. 8.

²² See “Application for the amendment of the *ex-parte* classification of the documents founding the Prosecutions third ground of appeal and for a partial lifting of its confidentiality”, (hereinafter: “Submissions of 28 May 2013”) 28 May 2013, ICC-01/04-01/02-76-Conf-tENG (A), paras 5 *et seq.*

are warranted. Accordingly, the Request of Victim Group I and the Request of Victim Group II are rejected.

B. The Prosecutor's Request for reclassification of the third ground of the appeal

15. The Appeals Chamber recalls that the Prosecutor's third ground of appeal is classified as confidential as it refers to information that the Trial Chamber deemed sensitive to Mr Ngudjolo's interests and in particular the protection of witnesses.²³ For the aforementioned reasons and considering that, at that stage of the proceedings witness protection matters outweighed the public interest in this aspect of the appeal, the Appeals Chamber, in its Decision of 16 May 2013 and its Decision of 21 June 2013, maintained the confidentiality of the third ground of appeal.²⁴

16. The Appeals Chamber notes that Mr Ngudjolo disregarded the confidential classification of the substance of the Prosecutor's third ground of appeal when he filed public redacted versions of his documents in response to the various documents filed by the Prosecutor and the victims.²⁵ However, in so doing Mr Ngudjolo made public, information that the Trial Chamber deemed to be sensitive to *his* interests. Furthermore, it appears that he did not compromise the protective measures in place with respect to certain witnesses. In these circumstances, the Appeals Chamber finds that the basis for the confidential classification attached to the third ground of appeal no longer exists. As a result, the third ground of appeal may be reclassified as public pursuant to regulation 23*bis* of the Regulations of the Court subject to (i) redactions that pertain to protective measures ordered with respect to certain witnesses and (ii)

²³ See for example "Order Instructing the Registry to File Documents on the Influence that the Accused may have Retained in the DRC and on the Pressure that they might Currently Exert on Victims and Witnesses", 18 December 2008, ICC-01/04-01/07-800-Conf-tENG, p. 9-11; "Report of the Registrar pursuant to the Chamber's Order of 18 December 2008", 14 January 2009, ICC-01/04-01/07-829, p. 3; "Prosecution's urgent application to hold an *ex parte* hearing on the protection of witnesses and victims", 14 January 2009, ICC-01/04-01/07-831-Conf-Exp-tENG.

²⁴ See Decision of 16 May 2013, para. 9 and Decision of 21 June 2013, para. 21.

²⁵ See "Corrigendum du mémoire de la défense de Mathieu Ngudjolo en réponse à « Prosecution's Document in Support of the Appeal against the 'Jugement rendu en application de l'article 74 du Statut' » (ICC-01/04-02/12-39-Conf-Exp)", dated 23 October 2013 and registered on 24 October 2013, ICC-01/4-02/12-90-Corr2-Red, paras 236-358; "Réponse de la Défense de Mathieu Ngudjolo à « Prosecution Reply to the Defence Response to the Prosecution's Appeal Brief » (ICC-01/04-02/12-126-Conf)", 28 October 2013, ICC-01/04-02/12-134-Red, paras 55-61; and "Réponse de la Défense de Mathieu Ngudjolo aux Observations du Représentant légal commun du groupe principal des victimes (ICC-01/04-02/12-124-Conf-Corr) et du Représentant légal des victimes enfants soldats (ICC-01/04-02/12-125-Conf-Corr) su le Mémoire d'appel du Procureur et le Mémoire en réponse de la Défense", 25 October 2013, ICC-01/04-02/12-131-Red, paras 126-138.

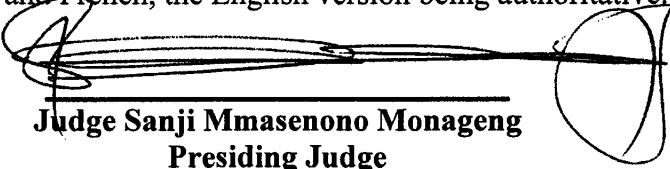
the maintenance of the confidentiality of the documents founding the third ground of appeal. Accordingly, the Prosecutor is directed to file public redacted versions of her respective documents by Wednesday, 15 October 2014 and Victim Groups I and II are directed to file public redacted versions of their respective documents by Friday, 17 October 2014.

C. The Prosecutor's Request for Lesser Redacted Versions of the Registry's Monitoring Reports

17. The Appeals Chamber notes that under the third ground of appeal the Prosecutor relies in detail on the versions of the Registry Monitoring Reports to which she has access,²⁶ including the Trial Chamber's decisions relevant to these reports,²⁷ to substantiate her argument on appeal that the Trial Chamber's "refusal to allow the Prosecution full access to the materials and to permit the use of any reference to Ngudjolo's conversations as evidence, including for the purposes of impeaching witnesses, affected the Prosecution's right to a fair trial and necessarily calls the outcome of the trial into doubt".²⁸

18. The Appeals Chamber thus considers the Prosecutor's request for unredacted or lesser redacted versions of the Registry Monitoring Reports to be intrinsically linked to the very question that the Prosecutor seeks resolution of on appeal. The Appeals Chamber is unpersuaded by the Prosecutor's assertion that fuller access to the Registry Monitoring Reports prior to the hearing would "not affect the scope of the appeal".²⁹ For these reasons, the request for unredacted or lesser redacted versions of the Registry Monitoring Reports is rejected.

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


Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 8th day of October 2014

At The Hague, The Netherlands

²⁶ See Document in Support of Appeal paras 143-187.

²⁷ See Document in Support of Appeal paras 188-203.

²⁸ Document in Support of Appeal, para. 204.

²⁹ Prosecutor's Request, para. 15.