

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12 A
Date: 17 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 on the Prosecutor's request to establish parameters for Mr Ngudjolo's
personal address at the appeal hearing**



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 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 Response to the Defence Request for Authorisation for Mr Ngudjolo to Address the Appeals Chamber (ICC-01/04-02/12-207)” of 8 October 2014 (ICC-01/04-02/12-208),

Renders the following

DECISION

Mr Ngudjolo may personally address the Appeals Chamber without restriction. However, his statement will not be considered to be evidence before the Appeals Chamber.

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 18 September 2014, the Appeals Chamber issued the “Scheduling order for a hearing before the Appeals Chamber” convening a hearing in this case for Tuesday, 21 October 2014.³

¹ ICC-01/04-02/12-3-tENG.

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

³ ICC-01/04-02/12-199 (A).

4. On 6 October 2014, Mr Ngudjolo filed the “Requête de la Défense tendant à obtenir de la Chambre d’appel l’autorisation pour Monsieur Ngudjolo de s’adresser aux Honorables Juges lors de l’audience d’appel”⁴ (hereinafter: “Mr Ngudjolo’s Request to Address the Appeals Chamber at the Hearing”), in which he requests that he be authorised to personally address the Appeals Chamber during the hearing of 21 October 2014.

5. On 8 October 2014, the Prosecutor filed the “Prosecution Response to the Defence Request for Authorisation for Mr Ngudjolo to Address the Appeals Chamber (ICC-01/04-02/12-207)”⁵ (hereinafter: “Prosecutor’s Request”), indicating that she is not opposed to Mr Ngudjolo’s Request to Address the Appeals Chamber at the Hearing. The Prosecutor submits, however, that such a personal address “should not stray into areas that would ordinarily form part of submissions by counsel, nor offer evidence on the facts of the case”.⁶ In a footnote, the Prosecutor elaborates that matters falling within the purview of “submissions by counsel” include “comment on the substantive merits of the appeal, the facts of the case, the appropriate remedy, and so forth”.⁷ In addition, the Prosecutor avers that Mr Ngudjolo’s reliance on article 67 (1) (h) of the Statute to found his request (which affords the accused the right to “make an unsworn oral or written statement in his or her defence”) is an “inapposite” provision for these proceedings.⁸ In her view, it is applicable to trial proceedings, where such an unsworn statement may be accorded weight to “persuade the finder of fact to reach a particular verdict”.⁹ The Prosecutor asserts that since an appeal is not a trial *de novo*, the Appeals Chamber “is not amenable to these means of presentation”.¹⁰ Moreover, the Prosecutor avers that even if article 67 (1) (h) of the Statute could be applied to appellate proceedings it would be inappropriate to do so as given the stage of the proceedings the Prosecutor would be denied an “opportunity to test the assertions made through cross-examination and/or to respond to those assertions”.¹¹ Accordingly, the Prosecutor requests that the Appeals Chamber provide “express direction establishing the parameters for Mr. Ngudjolo’s address,

⁴ ICC-01/04-02/12-207(A).

⁵ ICC-01/04-02/12-208 (A).

⁶ Prosecutor’s Request, para. 1.

⁷ Prosecutor’s Request, footnote, 3.

⁸ Prosecutor’s Request, para. 2.

⁹ Prosecutor’s Request, para. 2.

¹⁰ Prosecutor’s Request, para. 2.

¹¹ Prosecutor’s Request, para. 3.

distinguishing it from an Article 67 (1) (h) statement, and making clear in any event that no weight will be given by the Appeals Chamber to any assertions made on matters of fact”.¹²

6. On 8 October 2014, the Appeals Chamber rendered the “Order in relation to the conduct of the hearing before the Appeals Chamber”¹³ (hereinafter: “Order of 8 October 2014”), *inter alia*, granting Mr Ngudjolo’s Request to Address the Appeals Chamber at the Hearing without, however, pronouncing itself on the Prosecutor’s Request.

II. DETERMINATION OF THE APPEALS CHAMBER

7. As a preliminary matter, the Appeals Chamber notes that to date Mr Ngudjolo has not filed a response to the Prosecutor’s Request. However, in light of the fact that the hearing is scheduled for 21 October 2014, the Appeals Chamber considers it appropriate to dispose of the Prosecutor’s Request without a response from Mr Ngudjolo.

8. As noted above, the Appeals Chamber, in its Order of 8 October 2014, granted Mr Ngudjolo an opportunity to personally address the Appeals Chamber at the hearing.

9. The Appeals Chamber notes, however, the concerns raised by the Prosecutor in relation to the parameters of such a personal address and the evidentiary weight, if any, that may or may not be accorded to it. First and foremost, the Appeals Chamber wishes to clarify that the opportunity afforded to Mr Ngudjolo to make a personal address does not qualify as an unsworn oral or written statement within the meaning of article 67 (1) (h) of the Statute, which may attract evidentiary weight. As such the Appeals Chamber will not treat this address as evidence when determining the merits of the appeal. Consequently, Mr Ngudjolo is unrestricted in his address to the Court and he may address any issue that he deems relevant to his defence, subject, of course, to the Appeals Chamber’s power to regulate the conduct of the proceedings and the hearing.

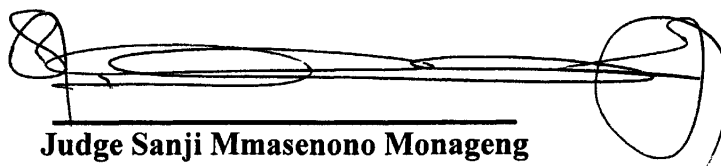
¹² Prosecutor’s Request, para. 4.

¹³ ICC-01/04-02/12-210 (A).



10. The Appeals Chamber considers that in granting Mr Ngudjolo's Request to Address the Appeals Chamber at the Hearing, the Appeals Chamber gives full effect to his right, as the subject of the appeal proceedings, to "speak last" as provided for in rule 141 (2) read with rule 149 of the Rules of Procedure and Evidence. In this regard, the Appeals Chamber disagrees with the Prosecutor's submission that Mr Ngudjolo's personal address "should not be confused with the right for the Defence to 'speak last'".¹⁴ In the Appeals Chamber's view rule 141 (2) of the Rules of Procedure and Evidence is not confined to the accused or respondent speaking last only in relation to "evidentiary submissions to the primary finder of fact".¹⁵ The Prosecutor has presented no cogent argument in support of this contention, nor has she explained why such a right would be contrary to "generally accepted appellate procedure".¹⁶ In this context, the Appeals Chamber notes that the Prosecutor has put several of her substantive arguments in a footnote. The Appeals Chamber reminds the Prosecutor that it disapproves of this practice;¹⁷ a party's substantive submissions should be contained in the main text of the filing.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 17th day of October 2014

At The Hague, The Netherlands

¹⁴ Prosecutor's Request, footnote, 13.

¹⁵ Prosecutor's Request, footnote, 13.

¹⁶ Prosecutor's Request, footnote 13.

¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Decision on the re-filing of the document in support of the appeal", 22 July 2008, ICC-01/04-01/06-1445 (OA 13), para. 6.