

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12
Date: 18 September 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

Scheduling order for a hearing before the Appeals Chamber



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 the Defence
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 Schedule the Appeal Hearing” of 29 August 2014 (ICC-01/04-02/12-193-Conf),

Issues the following

SCHEDULING ORDER

1. A hearing before the Appeals Chamber will be held on 21 October 2014 at 9h30.
2. The timetable and arrangements for the hearing will be stipulated in due course.

REASONS

I. PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II 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 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’”³ (hereinafter: “Document in Support of the

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-01/04-02/12-39-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) and on 3 April 2013 a public redacted version of the Document in Support of the Appeal was filed, ICC-01/04-02/12-39-Red2 (A).

Appeal”) to which Mr Ngudjolo responded⁴ (hereinafter: “Response to the Document in Support of the Appeal”). Thereafter, the principal group of victims⁵ (hereinafter: “Victim Group I”) and the group of former child soldier victims⁶ (hereinafter: “Victim Group II”) made observations on appeal.

3. On 29 August 2014, the Prosecutor filed the “Prosecution’s Request to Schedule the Appeal Hearing” (hereinafter: “Prosecutor’s Request for an Oral Hearing”).⁷

4. In the Prosecutor’s Request for an Oral Hearing, the Prosecutor submits that “[t]he Court’s statutory framework assumes that an oral hearing will be held for appeals against final judgements of conviction, acquittal, and sentence (Article 81 appeals, also known as final appeals)”.⁸ She submits further that “[t]his is needed to give full effect to parties’ rights to appeal a final judgement, to fully respect an accused’s rights at all stages of the proceedings, and to ensure the principle of public hearings and to safeguard the transparency of the Court’s proceedings”.⁹ The Prosecutor contends that, while the Chamber has discretion as to whether to hold an oral hearing for interlocutory appeals, “no such discretion exists for final appeals”.¹⁰ She argues further that “the statutory text setting out the procedure for final appeals in [r]ule 151 [of the Rules of Procedure and Evidence] is silent on this matter, indicating that the drafters’ intention was that an oral hearing would be the norm for final appeals”¹¹ and that, “[h]ad the drafters intended to make the holding of an oral hearing for final appeals discretionary, they would have specifically stated so, as they did for appeals under Rules 154 and 155”.¹²

5. The Prosecutor further submits that “the Appeals Chamber’s decision significantly affects the final result of the case, and determines the ultimate outcome

⁴ “Corrigendum to the Defence for Mathieu Ngudjolo’s brief in response to 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)”, 18 June 2013, ICC-01/04-02/12-90-Conf-Corr-tENG (A).

⁵ See “Corrigendum to the ‘*Observations sur le Document du Procureur déposé à l’appui de son appel et sur la Réponse de la Défense à ce Document*’”, 18 July 2013, ICC-01/04-02/12-124-Conf-Corr-tENG (A).

⁶ See “Corrigendum to the Observations on the Prosecution’s Document in Support of Appeal and the Defence Brief in Response”, 22 July 2013, ICC-01/04-02/12-125-Conf-Corr-tENG (A).

⁷ ICC-01/04-02/12-193-Conf.

⁸ Request for an Oral Hearing, para. 2; *see also* para. 5.

⁹ Request for an Oral Hearing, para. 2.

¹⁰ Request for an Oral Hearing, para. 5.

¹¹ Request for an Oral Hearing, para. 5.

¹² Request for an Oral Hearing, para. 5.

for the accused” and that “the seriousness and complexity of cases heard at this Court in final appeal proceedings involve conflicts from different parts of the world and span many years, and therefore often raise novel and challenging facts and legal issues.”¹³ The Prosecutor contends that “the parties’ oral submissions on final appeals must be heard” and that “[n]ot doing so would be incompatible with the Statute and the Rules”.¹⁴

6. Finally, the Prosecutor submits that “[a]ll three grounds of appeal require the Appeals Chamber to settle important legal issues and review factual determinations made at trial [...] [which] should be fully ventilated on appeal”.¹⁵

7. On 5 September 2014, Victim Group I filed the “Observations sur la requête du Procureur sollicitant une audience (ICC-01/04-02/12-193-Red)”¹⁶.

8. On 8 September 2014, Mr Ngudjolo filed the “Réponse de la Défense à la « Prosecution’s Request to Schedule the Appeal Hearing » (ICC-01/04-02/12-193-Red, 29-08-2014)”,¹⁷ stating that he does not oppose the convening of an oral hearing provided that the Defence is afforded the requisite time needed to respond to both the Prosecutor and the participants and that the Prosecutor not be allowed to exceed the arguments raised in her Document in Support of the Appeal.¹⁸

9. On 12 September 2014, Victim Group II filed the “Observations relatives à la demande du Procureur de tenir une audience devant la Chambre d’appel (ICC-01/04-02/12-193-Red)”¹⁹.

II. DETERMINATION BY THE APPEALS CHAMBER

1. The Victims’ Observations

10. As a preliminary matter, the Appeals Chamber notes that Victim Group I and Victim Group II filed observations on the Prosecutor’s Request for an Oral Hearing without the leave of the Chamber. The Appeals Chamber recalls that pursuant to its

¹³ Request for an Oral Hearing, para. 7.

¹⁴ Request for an Oral Hearing, para. 8.

¹⁵ Request for an Oral Hearing, para. 21.

¹⁶ ICC-01/04-02/12-195 (A).

¹⁷ ICC-01/04-02/12-196 (A) (hereinafter: “Mr Ngudjolo’s Response”).

¹⁸ Mr Ngudjolo’s Response, para. 17.

¹⁹ ICC-01/04-02/12-197 (A).

“Decision on the participation of victims in the appeal against Trial Chamber II’s ‘Judgement rendu en application de l’article 74 du Statut’”²⁰ victims were permitted to participate in the appeal. However, the modalities of their participation were limited to victims filing observations, with respect to their personal interests in the issues, on the Document in Support of the Appeal and the Response to the Document in Support of the Appeal.²¹ The Appeals Chamber also stipulated that “[s]hould the need arise to specify the modalities of victim’s participation in the pending appeals [*sic*] further, the Appeals Chamber will give supplementary directions, either upon its own motion or upon application by the legal representative of victims”.²²

11. In the absence of an application from Victim Group I or Victim Group II for leave to make such observations, or the *proprio motu* issuance of supplementary directions from the Appeals Chamber with respect to the Prosecutor’s Request for an Oral Hearing, the victims’ observations are disregarded by the Appeals Chamber.

2. *The Prosecutor’s Request for an Oral Hearing*

12. At the outset, the Appeals Chamber finds the Prosecutor’s submissions on the statutory assumption that oral hearings in final appeal proceedings are mandatory to be unpersuasive. While rule 151 of the Rules of Procedure and Evidence is indeed silent on the question of whether an oral hearing should be held in final appeals, the Appeals Chamber notes that the Prosecutor provides no reference for her contention that this statutory silence is indicative of “the drafters’ intention [...] that an oral hearing would be the norm for final appeals”.²³ Equally unsupported is the Prosecutor’s contention that “[h]ad the drafters intended to make the holding of an oral hearing for final appeals discretionary, they would have specifically stated so, as they did for appeals under [r]ules 154 and 155”.²⁴ The Appeals Chamber considers that, in fact, the opposite is true. Had the drafters intended to make the holding of an oral hearing for final appeals *mandatory*, they would have specifically stated so. While the case law of other international criminal tribunals and, to a certain extent, the jurisprudence on internationally recognised human rights lend support to the notion that an oral hearing *may* be held, they do not support the Prosecutor’s

²⁰ 6 March 2013, ICC-01/04-02/12-30 (A), (hereinafter: “Decision on victim participation”).

²¹ Decision on victim participation, para. 5.

²² Decision on victim participation, para. 5.

²³ Request for an Oral Hearing, para. 5.

²⁴ Request for an Oral Hearing, para. 5.

contention that not holding a hearing is “incompatible with the Statute and the Rules”.²⁵ In this context, the Appeals Chamber notes that the International Criminal Tribunal for Rwanda,²⁶ the International Criminal Tribunal for the former Yugoslavia,²⁷ the Extraordinary Chambers in the Courts in Cambodia²⁸ and the Special Tribunal for Lebanon²⁹ have mandatory hearings because their rules expressly require such hearings, whereas at the Special Court for Sierra Leone an oral hearing is held “unless [the Pre-Hearing Judge] decides to recommend to the Appeals Chamber that no oral hearing is necessary”.³⁰ Accordingly, absent an explicit provision in the Court’s statutory framework mandating an oral hearing, any such hearing can only be discretionary.

13. The Appeals Chamber considers that the decision to hold an oral hearing in appeal proceedings against final judgments is discretionary and made on a case-by-case basis. Such decisions should be based primarily on the potential utility of an oral hearing, namely whether it would assist the Appeals Chamber in clarifying and resolving the issues raised in the appeal. In the present case, the Appeals Chamber finds that a hearing, limited to hearing the parties and participants on the confined issues raised on appeal, would be useful in assisting the Appeals Chamber in its decision-making process. Thus, the Prosecutor’s Request for an Oral Hearing is granted.

14. Accordingly, the Appeals Chamber decides to convene an oral hearing, to be held on 21 October 2014 at 9h30. A decision on the timetable and arrangements for the hearing will be issued in due course.

²⁵ Request for an Oral Hearing, para. 8.

²⁶ *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, 29 June 1995, last amended on 14 March 2008, rule 114.

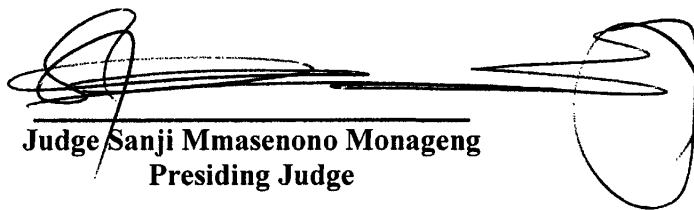
²⁷ *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, 11 February 1994, last amended on 10 December 2009, rule 114.

²⁸ *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia*, 5 September 2008, rule 108 (3).

²⁹ *Rules of Procedure and Evidence of the Special Tribunal for Lebanon*, 20 March 2009, last amended on 9 April 2013, rule 185.

³⁰ *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, 16 January 2002, last amended on 27 May 2008, rule 109 (B) (ii) (b).

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 18th day of September 2014

At The Hague, The Netherlands

