

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-02/12**

Date: **8 October 2014**

THE APPEALS CHAMBER

Before: Judge Sanji Mmasenono Monageng, Presiding
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 with Public Annex

**Prosecution Response to the Defence Request for Authorisation for Mr Ngudjolo
to Address the Appeals Chamber (ICC-01/04-02/12-207)**

Source: Office of the Prosecutor

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

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1. The Office of the Prosecutor (“Prosecution”) does not oppose an opportunity for Mr. Ngudjolo to address the Appeals Chamber at the conclusion of the appeal hearing,¹ subject to his strict compliance with the limited parameters of a personal address by an accused person or respondent to an appeal.² In particular, such an address should neither stray into areas that would ordinarily form part of submissions by counsel,³ nor offer evidence on the facts of the case. Furthermore, consistent with the nature of proceedings on appeal and their very advanced state of progression by the conclusion of the appeal hearing,⁴ this address is no more than an opportunity for Mr. Ngudjolo to make brief personal remarks and is not an opportunity for the further development of his case.

2. In the Motion, the Defence seeks to rely upon Article 67(1)(h) of the Rome Statute (“Statute”), which guarantees the right of the accused to “make an unsworn oral or written statement in his or her defence”.⁵ Yet this provision is inapposite for these proceedings and the instant request. Although it may now be customary to permit an accused or respondent to make a brief personal address at the conclusion of the appeal hearing, both at this Court⁶ and elsewhere,⁷ this is distinct from the two means available *at trial* whereby the accused may either testify (under oath) or

¹ See ICC-01/04-02/12-207 (“Motion”), para.5.

² This is consistent with the position previously taken by the Prosecution in the *Lubanga* case. See ICC-01/04-01/06-3084, para.4 (not opposing Mr. Lubanga’s request to address the Appeals Chamber, provided that Mr. Lubanga did “not stray into areas that would ordinarily fall within the role of his Defence Counsel during the hearing, namely submissions on his conviction, his sentence and the issues on appeal”). See *further below* para.2.

³ Such matters include comment on the substantive merits of the appeal, the facts of the case, the appropriate remedy, and so forth.

⁴ See *below* paras.2-3.

⁵ Motion, para.5.

⁶ See *e.g.* ICC-01/04-01/06-3083, p.7 (permitting Mr. Lubanga to “address the Appeals Chamber”). See *also* ICC-01/04-01/06-3068, p.5.

⁷ At the ICTY, for example, see *Prosecutor v. Popović et al*, IT-05-88-A, Order for the Agenda of the Appeal Hearing, 7 November 2013, pp.4-5 (allowing an optional 10-minute “personal address” by each accused); *Prosecutor v. Đorđević*, IT-05-87/1-A, Addendum to the Scheduling Order for Appeal Hearing, 12 April 2013, p.1 (allowing an optional 10-minute “personal address” by the accused); *Prosecutor v. Šainović et al*, IT-05-87-A, Order Amending Scheduling Order and Setting the Timetable for the Appeal Hearing, 31 January 2013, p.3 (allowing an optional 10-minute “personal address” by each accused); *Prosecutor v. Perišić*, IT-04-81-A, Scheduling Order for Appeal Hearing, 24 September 2012, p.1 (allowing an optional 10-minute “personal address” by the accused); *Prosecutor v. Gotovina & Markac*, IT-06-90-A, Scheduling Order for Appeal Hearing, 4 April 2012, p.1 (allowing an optional 10-minute “personal address” by each accused); *Prosecutor v. Lukić & Lukić*, IT-98-32/1-A, Scheduling Order for Appeal Hearing, 8 July 2011, p.2 (allowing an optional 10-minute “personal address” by each accused).

otherwise offer an unsworn statement in his or her defence.⁸ Both of these devices—which may be accorded significantly varying weight⁹—enable the accused to marshal and present their defence, in order to persuade the finder of fact to reach a particular verdict. But, since an appeal is not a trial *de novo*,¹⁰ the Appeals Chamber is not amenable to these means of presentation. This is consistent with the heightened test for the admission of additional evidence on appeal,¹¹ which would otherwise be completely undermined if the accused were permitted to introduce, by means of an oral or written unsworn statement, matters formally inadmissible on appeal.

3. Furthermore, even to any extent that Article 67(1)(h) of the Statute could be applied to appellate proceedings, it is certainly inappropriate to do so in the course

⁸ See Statute, Art.67(1)(g) and (h). As demonstrated by the circumstances of this trial, accused persons may both “choose to testify under oath, as is their right under article 67(1)(g)”, and “address the Chamber, as they are authorised to do by article 67(1)(h) [...], but this time not under oath”: ICC-01/04-02/12-3-tENG, para.67. Article 67(1)(h) is also broadly analogous to ICTY Rule 84bis, which likewise does not exclude the possibility that the Accused will also testify under oath. See further Vasiliev, ‘Structure of Contested Trials’ in Acquaviva et al., ‘Trial Process’ in Sluiter et al (eds.), *International Criminal Procedure: Principles and Rules* (Oxford: OUP, 2013), pp.547-549, 550-551; Rohan, ‘Rules governing the presentation of testimonial evidence’ in Khan et al (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: OUP, 2010), pp.524-526. The ICTY Appeals Chamber has never indicated that it applies ICTY Rule 84bis in permitting an accused to make a personal address at the conclusion of an appeal hearing: see above fn.7. Nor, to the best knowledge of the Prosecution, has an ICTY Appeal Judgement ever relied upon or given any weight to the remarks of the accused made in a personal address of this kind.

⁹ See ICC-01/04-02/12-3-tENG, para.67 (“[w]hilst to a certain extent the Chamber took into account their statements under article 67(1)(h), only those statements made under oath must be considered to be part of the case record within the meaning of article 74(2)”). See also Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: OUP, 2010), pp.814-815; Schabas, ‘Article 67: Rights of the Accused’ in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd Ed. (München/Oxford/Baden-Baden: C.H.Beck, Hart and Nomos, 2008), pp.1268-1269.

¹⁰ See e.g. ICC-02/05-03/09-295 OA2, para.20; ICC-01/09-02/11-202 OA, para.11; ICC-01/09-01/11-234 OA, para.12.

¹¹ See Regulations of the Court, Reg.62. As the Prosecution has elsewhere argued before the Appeals Chamber, especially in *Lubanga*, the admission of additional evidence on appeal is exceptional. Regulation 62, read in light of the existing international criminal practice on the admission of additional evidence on appeal, is the essential condition for the admission of evidence on appeal. All such evidence must meet the threshold that it was unavailable at trial to duly diligent counsel, it is relevant and credible, and it could have been a decisive factor in the decision. See e.g. ICTY, Rules of Procedure and Evidence, Rule 115; ICTR, Rules of Procedure and Evidence, Rule 115; ICTY, *Prosecutor v. Stanišić & Župljanin*, IT-08-91-A, Decision on Mićo Stanišić’s Motion Seeking Admission of Additional Evidence Pursuant to Rule 115, 14 April 2014, paras.12-16; ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41-A, Decision on Anatole Nsengiyumva’s Motions for the Admission of Additional Evidence, 21 March 2011, paras.5-7; ICTR, *Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para.379; ICTR, *Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-A, Decision on Augustin Bizimungu’s Rule 92bis Motion and on his Rule 115 Motion for Admission of Additional Evidence, 11 June 2012, paras.5, 8; ICTY, *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 October 2001, paras.49, 57. See also further ICC-01/04-01/06-3091, paras.7-9, especially fns.13-14; ICC-01/04-01/06-2969-Red, para.38.

of an address by the accused closing the proceedings,¹² a means which by its timing denies the Prosecution the opportunity to test the assertions made through cross-examination and/or to respond to those assertions.¹³

4. Given the accused's apparent uncertainty on the proper scope of his remarks in the appeal hearing in *The Prosecutor v. Lubanga*,¹⁴ the Prosecution requests that the Appeals Chamber provides an express direction establishing the parameters for Mr. Ngudjolo's address, 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. This direction should be made in sufficient time for counsel to explain it in clear terms to Mr. Ngudjolo, who should then be required to comport himself accordingly.

5. Should Mr. Ngudjolo breach the terms of this direction, the Prosecution further requests a brief opportunity at the conclusion of the address to respond to any such new matter raised, to the extent it has not already been fully addressed in the course of the hearing.

Word count: 1,798¹⁵

¹² See ICC-01/04-01/06-3084, para.4 (citing ICC-01/04-01/06-T-356-ENG, p.2, and recalling that, at trial in the *Lubanga* case, the Trial Chamber permitted Mr. Lubanga to make an Article 67(1)(h) statement at the end of his trial but ruled that, "if any significant consequential matters arise from his observations, the Prosecution will be entitled to address us on the issue"). The Prosecution emphasises that its reference in this filing to the Trial Chamber's discussion of Article 67(1)(h) was by way of analogy only.

¹³ Nor should the personal address by an accused or respondent on appeal be confused with the right for the Defence "to speak last" protected by Rule 141(2), which from its context in Chapter 6 of the Rules of Procedure and Evidence clearly relates to "Trial Proceedings" and the right of the Defence to speak last when making evidentiary submissions to the primary finder of fact. Rule 141(2) is inconsistent with generally accepted appellate procedure, wherein the appellant—which can be either party—is afforded the right of reply. In any event, the possibility for the accused or respondent to make a brief personal address at the conclusion of the appeal hearing cannot—for the reasons previously described—be considered as an opportunity to give evidence of any kind, whether sworn or unsworn.

¹⁴ See ICC-01/04-01/06-T-363-Red-ENG, pp.68-69 (in which the Prosecution expressed "profound[] concern[]" that Mr. Lubanga was "giving evidence", "abusing his opportunity to give his version of events at a time where we cannot cross-examine him and at a time where basically all proceedings are over", and objected to such a procedure).

¹⁵ It is certified that this document contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court. This statement (53 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565, para.32.



Fatou Bensouda, Prosecutor

Dated this 8th day of October 2014

At The Hague, The Netherlands