

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 March 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 the defence request to reply to the Registrar's observations pursuant
to regulation 24 *bis* of the Regulations of the Court
(ICC-01/04-02/12-25 A)**



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 Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

REGISTRY

Registrar

Ms Silvana Arbia



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 “Demande de réplique aux « Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du “SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »”» (Norme 24 du Règlement de la Cour)” of 26 February 2013 (ICC-01/04-02/12-26),

Pursuant to regulation 28 of the Regulations of the Court,

Renders unanimously the following

DECISION

Mr Ngudjolo may file submissions on the “Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du « SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale » »” and the “Report on the developments relating to the release and asylum request made by Mathieu Ngudjolo Chui” together with its annexes by 16h00 on Monday, 25 March 2013.

REASONS

I. 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.
2. On 20 December 2012, the Prosecutor filed her appeal against the Decision on Acquittal.²
3. On 24 December 2012, the Registrar filed the “Report on the developments relating to the release and asylum request made by Mathieu Ngudjolo Chui” with three confidential, *ex parte* annexes (hereinafter: “Report of 24 December 2012”).³
4. On 8 February 2013, Mr Ngudjolo filed the “SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »”.⁴
5. On 22 February 2013, following an order of the Appeals Chamber,⁵ the Registrar filed the “Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du « SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première

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’”, ICC-01/04-02/12-10.

³ ICC-01/04-02/12-16-Conf-Exp with three annexes.

⁴ ICC-01/04-02/12-22. *See also* “Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale”, 29 January 2013, ICC-01/04-02/12-20 and; “ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »”, 30 January 2013, ICC-01/04-02/12-21.

⁵ “Order on the filing of submissions by the Registrar on the Defence request of 8 February 2013”, 15 February 2013, ICC-01/04-02/12-24.



instance II de la Cour pénale internationale » »” (hereinafter: “Registrar’s Observations”).⁶

6. On 26 February 2013, Mr Ngudjolo filed the “Demande de réplique aux « Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du “SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquittallement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »”» (Norme 24 du Règlement de la Cour)” (hereinafter: “Request to Reply”),⁷ requesting (i) leave to reply to the Registrar’s Observations and (ii) access to the Report of 24 December 2012 and the annexes in order to respond to them.⁸ In support of his request, Mr Ngudjolo submits that the Registrar’s Observations raise important and/or new questions that require clarification such as: (i) the mandate of the Victims and Witnesses Unit, (ii) the legality of the presence of Mr Ngudjolo in The Hague, (iii) the release of Mr Ngudjolo, and (iv) the new information provided by the Registrar regarding the lifting of the travel ban.⁹

7. On 6 March 2013, the Appeals Chamber ordered the reclassification of the Report of 24 December 2012 to allow Mr Ngudjolo access to the document and ordered the Registrar to consult with the authorities of the Kingdom of The Netherlands to ascertain its views on whether the three confidential, *ex parte* annexes, appended to the Report of 24 December 2012 may be reclassified.¹⁰

8. On 20 March 2013, the Appeals Chamber reclassified the annexes appended to the Report of 24 December 2012 as confidential.¹¹

⁶ ICC-01/04-02/12-25.

⁷ ICC-01/04-02/12-26.

⁸ Request to Reply, para. 24.

⁹ Request to Reply, para. 16.

¹⁰ “Order on the reclassification of a document and to consult with the authorities of the Kingdom of the Netherlands”, ICC-01/04-02/12-31.

¹¹ “Decision on the reclassification of documents and the second request for disclosure of a confidential Registry report to Dutch asylum lawyer representing Mr Ngudjolo Chui”, 20 March 2013, ICC-01/04-02/12-42-Conf-Exp, para. 8.



II. DETERMINATION OF THE APPEALS CHAMBER

9. The Appeals Chamber notes that Mr Ngudjolo seeks leave to reply to the Registrar's Observations as well as the Report of 24 December 2012 and its annexes, which were filed pursuant to regulation 24 *bis* of the Regulations of the Court. As a legal basis for his Request to Reply, Mr Ngudjolo relies on regulation 24 (1) and (5) of the Regulations of the Court. Regulation 24 of the Regulations of the Court provides in relevant part as follows:

- (1) The Prosecutor and the defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

[...]

- (5) Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations.

10. Regulation 24 *bis* (1) of the Regulations of the Court provides:


The Registrar, when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings, may make oral or written submissions to a Chamber with notification to the participants.

11. The Appeals Chamber finds Mr Ngudjolo's reliance on regulation 24 of the Regulations of the Court as a legal basis for his Request to Reply to be misguided. Regulation 24 of the Regulations of the Court is not applicable to submissions made by the Registrar under regulation 24 *bis* of the Regulations of the Court since the Registrar cannot be considered to be a "participant in the case". In this regard, article 43 (1) of the Statute stipulates that "the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court [...]" while rule 13 (1) of the Rules of Procedure and Evidence states that "[...] the Registrar shall serve as the channel of communication of the Court". The Registrar therefore has no statutory power to participate in judicial proceedings as a participant. For that reason, submissions of the Registrar under regulation 24 *bis* cannot be considered a "document filed by a participant" in terms of regulation 24 (1) of the Regulations of the Court, to which the Prosecutor and the defence may automatically respond. In the same vein, as the Registrar cannot be considered a participant in the proceedings, the submissions of the Registrar under regulation 24 *bis* of the Regulations of the Court cannot be considered a response or reply in the sense envisaged under regulation

24 (4) and (5) of the Regulations of the Court. As a consequence, submissions of the Registrar pursuant to regulation 24 *bis* of the Regulations of the Court are *sui generis* in nature and outside the ambit of regulation 24 of the Regulations of the Court.

12. Nevertheless, the Appeals Chamber has previously held that it has discretion to order further submissions by parties or participants when it is “necessary for the proper disposal of the appeal [...] bearing in mind the principle of equality of arms and the need for expeditious proceedings”.¹² In the case at hand, the Appeals Chamber considers that for the proper disposal of the Request to Reply, and considering the interests of fairness, the exercise of its discretion under regulation 28 of the Regulations of the Court is warranted. Accordingly, Mr Ngudjolo may file submissions on the Registrar’s Observations and the Report of 24 December 2012 together with its annexes by 16h00 on Monday, 25 March 2013. In making his submissions Mr Ngudjolo is reminded to respect the confidentiality of the Report of 24 December 2012 and its annexes.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 20th day of March 2013

At The Hague, The Netherlands

¹² “Decision on the Prosecutor’s ‘Application for Leave to Reply to “Conclusions de la défense en réponse au mémoire d’appel du Procureur””, 12 September 2006, ICC-01/04-01/06-424 (OA 3), para. 7. *See also* “Decision on the ‘Prosecution’s Application under Regulation 28 to provide Clarification or Additional Details which Impact on the Appeals against the Decisions to Stay the Proceedings and Release the Accused”, 13 October 2008, ICC-01/04-01/06-1476 (OA 12 and OA 13), para. 3 and “Decision on the Application on behalf of the Government of Kenya for Leave to Reply to the ‘Prosecution’s response to the “Appeal of the government of Kenya against the Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute””, 1 August 2011, ICC-01/09-01/11-239 (OA), para. 9.