

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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**No. ICC-01/04-02/12 A
Date: 11 February 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 document

**Decision on Mr Ngudjolo's request for review of the Registrar's decision
regarding the level of remuneration during the appeal phase and
reimbursement of fees**



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

Counsel for Mr Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

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 “Application of the Defence for Mathieu Ngudjolo Chui requesting that the Registry, further to an order of the Appeals Chamber, reconsider the division of time periods for phases A, B and C of the appeal procedure estimated in the letter of 6 September 2013 regarding the level of remuneration during the appeal phase (CSS/2012/515/MG)” of 26 September 2013 (ICC-01/04-02/12-141-Conf-Exp-tENG),

Issues the following

DECISION

The aforementioned request is rejected.

REASONS

I. PROCEDURAL HISTORY

1. On 23 March 2012, the Bureau of the Assembly of States Parties adopted a decision on the Court’s legal aid system,¹ which introduced substantial changes to the remuneration scheme under the Court’s legal aid system. The legal aid system, as amended, is set out in the “Registry’s Single policy document on the Court’s legal aid system”² (hereinafter: “Single Policy Document”). The transitional remuneration scheme for the appeal phase of proceedings provides for three segments of equal

¹ See Assembly of States Parties, “First report of the Bureau on legal aid”, 11th Session, 14-22 November 2012, 8 November 2012, ICC-ASP/11/2/Add. 1, Annex p. 8 (hereinafter: “First Report on Legal Aid”).

² International Criminal Court, Assembly of States Parties, Registry’s Single policy document on the Court’s legal aid system, ICC-ASP/12/3, 4 June 2013, previously published as CBF/20/5Rev.1, para. 8; see also ICC-01/04-02/12-141-Conf-Exp-Anx3 (A).

duration during the appeal phase (segments A, B and C), each corresponding to a different level of remuneration.³

2. On 18 December 2012, Trial Chamber II delivered the “Judgment pursuant to article 74 of the Statute”⁴ (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.

3. On 20 December 2012, the Prosecutor filed her notice of appeal against the Decision on Acquittal.⁵

4. On 8 February 2013, the Registrar sent a letter to Mr Ngudjolo’s Defence team concerning the remuneration of the team during the appeal phase in the present case. The letter confirmed that the appeal phase had started on 30 January 2013, informed Mr Ngudjolo that the revised remuneration scheme was applicable, and that, since the case was in the appeal phase, transitional remuneration applied.⁶

5. On 6 September 2013, the Registrar, notified Mr Ngudjolo by letter of the results of his consultations with the Presidency as to the estimation of the duration of the appeal phase and that he had set the dates of segments A, B and C of the appeal phase in accordance with the revised remuneration scheme, as provided in the Single Policy Document⁷ (hereinafter: “Impugned Decision”). According to the Registrar, phase A of the appeal had ended on 20 June 2013, phase B had started on 21 June 2013 and would end on 9 November 2013, and phase C would run from 10 November

³ First Report on Legal Aid, Appendix I. *See also* Single Policy Document, paras 98-100.

⁴ ICC-01/04-02/12-3-tENG.

⁵ “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). 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’”, ICC-01/04-02/12-39-Conf-Exp (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).

⁶ “Application of the Defence for Mathieu Ngudjolo Chui requesting that the Registry, further to an order of the Appeals Chamber, reconsider the division of time periods for phases A, B and C of the appeal procedure estimated in the letter of 6 September 2013 regarding the level of remuneration during the appeal phase (CSS/2012/515/MG)”, 26 September 2013, ICC-01/04-02/12-141-Conf-Exp-Anx2 (A). For the applicable regime, *see* Single Policy Document, para. 98.

⁷ “Application of the Defence for Mathieu Ngudjolo Chui requesting that the Registry, further to an order of the Appeals Chamber, reconsider the division of time periods for phases A, B and C of the appeal procedure estimated in the letter of 6 September 2013 regarding the level of remuneration during the appeal phase (CSS/2012/515/MG)”, 26 September 2013, ICC-01/04-02/12-141-Conf-Exp-Anx1 (A).

2013 to 31 March 2014.⁸ The Impugned Decision further indicated that each member of the Defence team would have to reimburse the overpaid fees (which resulted from the fact that the Defence team had been paid according to the remuneration applicable to phase A beyond 20 June 2013) to the Court.⁹

6. On 26 September 2013, Mr Ngudjolo filed the “Application of the Defence for Mathieu Ngudjolo Chui requesting that the Registry, further to an order of the Appeals Chamber, reconsider the division of time periods for phases A, B and C of the appeal procedure estimated in the letter of 6 September 2013 regarding the level of remuneration during the appeal phase (CSS/2012/515/MG)”¹⁰ (hereinafter: “Request for Review”). Mr Ngudjolo “takes exception to the unfairness of the [Impugned Decision]”¹¹ and submits that the procedure leading up to the Impugned Decision was “formally flawed”,¹² in that the Registrar ignored the Defence in “establishing the three appeal phases”.¹³ Mr Ngudjolo further submits that “[t]he request for reconsideration of the *dies ad quem* of phase A must result in the members of [the] Defence team not being required to reimburse payment received for the alleged overpayment of fees”¹⁴ and that “[t]here is no justification for making their fees so insecure”.¹⁵ Finally, Mr Ngudjolo submits that the Impugned Decision “is an *ultra vires* administrative act [...] [and that] pursuant to the principle of non-retroactivity of administrative acts”,¹⁶ it “must be annulled in so far as it is retroactive”¹⁷ and “unfavourable to the team members”.¹⁸ The Defence further contends that such a retroactive administrative act “can take effect only upon notification, that is, after 16 September 2013 [...]”.¹⁹

7. Accordingly, Mr Ngudjolo requests that the Appeals Chamber (i) “[i]nstruct the Registry to consult with the Defence for the purposes of determining the *dies ad quem* of phase A and the *dies a quo* and *dies ad quem* of phases B and C”, (ii) “[o]rder that

⁸ Impugned Decision, p. 2.

⁹ Impugned Decision, pp. 4-7.

¹⁰ ICC-01/04-02/12-141-Conf-Exp-tENG (A).

¹¹ Request for Review, para. 11.

¹² Request for Review, para. 19.

¹³ Request for Review, para. 22.

¹⁴ Request for Review, para. 28.

¹⁵ Request for Review, para. 30.

¹⁶ Request for Review, para. 32 (emphasis omitted).

¹⁷ Request for Review, para. 34.

¹⁸ Request for Review, para. 35.

¹⁹ *Ibid.*

there should be no reimbursement by members of the Defence team for alleged overpayments” and (iii) “[s]et, after having received the results of the consultations, the *dies a quo* of phase A and the *dies a quo* and *dies ad quem* of phases B and C”.²⁰

8. On 8 October 2013, following an order from the Appeals Chamber,²¹ the Registrar filed his observations on the Request for Review²² (hereinafter: “Registrar’s Observations”). The Registrar submits that Mr Ngudjolo omitted to state the legal basis for his Request for Review and the factual and legal justification for its classification,²³ therewith breaching the provisions of regulations 23 (1) (d) and 23*bis* (1) of the Regulations of the Court²⁴ and rendering the Request for Review inadmissible.²⁵

9. The Registrar further submits that “the Impugned Decision, like the preceding decision which it applies (letter CSS/2013/90/AM of 8 February 2013), merely implements in the context of the present case the amendments adopted by the Bureau of the Assembly of States Parties on 23 March 2012 [...] [which] were notified on 28 March 2012 to all counsel acting before the Court and subsequently incorporated into the [...] [Single Policy Document]”.²⁶ The Registrar thus contends that “[s]ince the main decision of 8 February 2013 was not challenged, the Impugned Decision, which is merely the practical application of the main decision, cannot be challenged”.²⁷ The Registrar further submits that there is an exception to the principle of non-retroactivity of administrative decisions because, “where a regulation requires other regulations in order to be effective, [...] the persons concerned are informed beforehand of the subsequent retroactivity of the applicable regulations”.²⁸

10. Finally, the Registrar submits that “the Impugned Decision is not at all unlawful; it is consistent with the Court’s instruments and the interests of justice”, that “[t]he Impugned Decision falls within the ambit of the Registrar’s powers, takes

²⁰ Request for Review, p. 9.

²¹ “Order on the filing of submissions to Mr Ngudjolo’s request of 26 September 2013”, 30 September 2013, ICC-01/04-02/12-142-Conf-Exp (A).

²² “Registrar’s observations on the application of Mathieu Ngudjolo Chui’s Defence team of 26 September 2013 (ICC-01/04-02/12-141-Conf-Exp)”, ICC-01/04-02/12-144-Conf-Exp-tENG (A).

²³ Registrar’s Observations, para. 5.

²⁴ Registrar’s Observations, para. 6.

²⁵ Registrar’s Observations, paras 6, 8.

²⁶ Registrar’s Observations, para. 7.

²⁷ *Ibid.*

²⁸ Registrar’s Observations, para. 19.

fairness into account and is based solely on the relevant facts” and that “[t]he Impugned Decision is undoubtedly the appropriate measure which would have been taken by any reasonable person considering the matter judiciously”.²⁹

II. DETERMINATION BY THE APPEALS CHAMBER

A. Preliminary issues

1. *Alleged lack of legal basis for the Request for Review and lack of factual and legal justification for its classification*

11. The Registrar submits that the Request for Review is inadmissible,³⁰ *inter alia*, because Mr Ngudjolo omitted to state the legal basis for his Request for Review and to provide the factual and legal justification for its classification,³¹ which, according to the Registrar, constitutes a breach of regulations 23 (1) (d) and 23*bis* (1) of the Regulations of the Court.³²

12. The Appeals Chamber notes that, although it refers extensively to the factual issues, the Request for Review does not contain any reference to the relevant provisions of the Court’s legal framework, as required by regulation 23 (1) (d) of the Regulations of the Court. The Appeals Chamber notes, however, that Mr Ngudjolo indicates a time-period of 15 days as the deadline to file “an appeal against such a decision”,³³ which is the deadline to file a request for review of a decision by the Registrar on disputes relating to fees to the relevant Chamber, pursuant to regulation 135 (2) of the Regulations of the Registry, to which the Single Policy Document, which is annexed to the Request for Review, also refers.³⁴

13. In addition, the Appeals Chamber recalls that pursuant to regulation 23*bis* (1) of the Regulations of the Court, “any document filed by the Registrar or a participant and marked ‘*ex parte*’, ‘under seal’ or ‘confidential’, shall state the factual and legal basis for the chosen classification”. The Appeals Chamber notes that the Request for Review does not comply with this provision.

²⁹ Registrar’s Observations, para. 22.

³⁰ Registrar’s Observations, paras 6, 8.

³¹ Registrar’s Observations, para. 5.

³² Registrar’s Observations, para. 6.

³³ Request for Review, para. 14.

³⁴ Single Policy Document, para. 126.

14. In the case of non-compliance with a regulation of the court the Appeals Chamber recalls regulation 29 (1) of the Regulations of the Court pursuant to which “[...] the Chamber may issue any order that is deemed necessary in the interests of justice”.

15. In the case at hand, the Appeals Chamber considers that Mr Ngudjolo’s non-compliance with regulations 23 (1) (d) and 23*bis* (1) of the Regulations of the Court does not *per se* render the Request for Review inadmissible. In the circumstances, the Appeals Chamber considers that the legal basis for the Request for Review together with the need for the confidential, *ex parte* classification of the request may be discerned and considers that the interests of justice are best served by condoning such non-compliance. Therefore, the Appeals Chamber pursuant to regulation 29 (1) of the Regulations of the Court accepts the Request for Review as admissible.

16. In this regard, the Appeals Chamber considers that the present decision may be classified as public as in its view, no information contained herein infringes on confidentiality.

2. *Alleged failure to challenge the main decision*

17. The Appeals Chamber recalls the Registrar’s submission, summarised in paragraph 9 above, that the Impugned Decision is merely the practical application of the decision of the Bureau on legal aid and the Registrar’s decision of 8 February 2013 and therefore cannot be challenged, given that the earlier decisions have not been challenged.³⁵

18. The Appeals Chamber is not persuaded by this argument. The decision of 8 February 2013 merely informed Mr Ngudjolo that the transitional remuneration scheme was *applicable* to his Defence team, since the case had moved to the appeal phase. The specifics of the remuneration scheme for Mr Ngudjolo’s Defence team, however, were provided to them only in the Impugned Decision, which *set the dates of the three segments* of the appeal phase. It is thus the Impugned Decision that has a direct bearing on the remuneration of the members of the Defence team. The Appeals Chamber recalls regulation 135 of the Regulations of the Registry on disputes relating to fees, pursuant to which “[t]he Registrar shall take a decision on any dispute

³⁵ Registrar’s Observations, para. 7. *See also* para. 18.

concerning the calculation and payment of fees or the reimbursement of expenses at the earliest possible juncture and notify counsel accordingly”. The Appeals Chamber notes that, in the present case, Mr Ngudjolo disputes the Impugned Decision in that it sets the end date of segment A and the start and end dates of segments B and C, which results in Mr Ngudjolo challenging the corresponding calculation of fees and claimed reimbursements. Therefore, the Appeals Chamber considers that Mr Ngudjolo’s challenge of the Impugned Decision constitutes a dispute concerning the calculation and payment of fees within the meaning of regulation 135 (1) of the Regulations of the Registry and may thus be reviewed, upon request of counsel, by “the Chamber”.³⁶

B. Merits

19. Turning to the merits of the Request for Review, Mr Ngudjolo submits that “failure to consult the Defence regarding the said appeal phases must nullify the [Impugned Decision]”.³⁷

20. The Appeals Chamber notes that, according to the Single Policy Document, for the purposes of the gradual implementation of the revised remuneration regime, “[the] estimation exercise [concerning the duration of the relevant appellate phase] is the responsibility of the Registry, which shall consult with the Presidency and the relevant teams, *where appropriate*”³⁸ (emphasis added). Therefore, while consultations between the Registry and the relevant Defence team(s) may be appropriate in some instances, they are not mandatory. Furthermore, it appears that in February 2013, consultations between the Registrar and the Defence team of Mr Ngudjolo concerning the phases of appeal, in fact, took place.³⁹

21. This aspect of the Request for Review is therefore unpersuasive.

22. Turning to the remainder of Mr Ngudjolo’s arguments, the Appeals Chamber recalls that, according to article 43 (1) of the Statute, the Registry is “responsible for the non-judicial aspects of the administration and servicing of the Court” which

³⁶ Regulation 135 (2) of the Regulations of the Registry.

³⁷ Request for Review, para. 25.

³⁸ Single Policy Document, para. 99.

³⁹ See Request for Review, paras 5, 24; Registrar’s Observations, paras 12 *et seq*, in particular para. 13.

includes the management of legal assistance.⁴⁰ According to regulation 83 (1) of the Regulations of the Court, “[l]egal assistance paid by the Court” is *determined by the Registrar*. From the foregoing, it follows that the Registrar enjoys a relatively wide margin of discretion in the area of legal assistance, in particular in relation to the calculation and payment of fees. Given this discretion, the Appeals Chamber considers that it should interfere with decisions of the Registry in this area only if there are compelling reasons for doing so.⁴¹

23. The Appeals Chamber notes that the request for reimbursement of overpaid fees in the Impugned Decision is an *ad interim* decision based on the Presidency’s estimate that the appeal proceedings in the *Ngudjolo* case would last “as a minimum until the end of the first trimester of 2014”.⁴² The Appeals Chamber further notes that pursuant to paragraph 100 of the Single Policy Document, “[v]ariations between the average length of time estimated by the Registry and the actual duration of the matter will be balanced out *at the end of the case*, so as to address any excess or reduced payments” (emphasis added). Therefore, a final review of the levels of remuneration has yet to take place, possibly involving subsequent rearrangements at the end of the appeal phase.

24. Given the aforementioned, the Appeals Chamber finds that there are no compelling reasons to interfere with the Registrar’s decision. This aspect of the Request for Review is therefore rejected.

25. In light of this, the Appeals Chamber refrains from addressing the remainder of the Request for Review i.e. to “[s]et, after having received the results of the

⁴⁰ See rules 20 (3) and 21 (1) of the Rules of Procedure and Evidence; see also regulation 130 of the Regulations of the Registry, which states that “[t]he Registrar shall manage the legal assistance paid by the Court [...]”. See also Single Policy Document, para. 11, citing Presidency, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the ‘Demande urgente en vertu de la Règle 21-3 du Règlement de procédure et de preuve’ and on the ‘Urgent Request for the Appointment of a Duty Counsel’ filed by Thomas Lubanga Dyilo before the Presidency on 7 May 2007 and 10 May 2007, respectively”, 29 June 2007, ICC-01/04-01/06-931-Conf-Exp, reclassified as public pursuant to ICC-01/04-01/06-935, ICC-01/04-01/06-937, para. 16 which states that “[i]t is the Registrar in whom primary responsibility for managing the legal assistance scheme of the Court is vested [...]”.

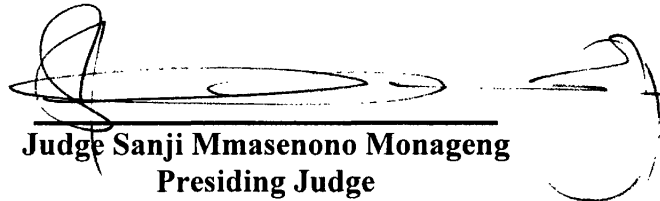
⁴¹ The Appeals Chamber notes that this is also the approach taken by Trial Chamber II in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar’s Decision of 3 April 2012 regarding Legal Aid”, 23 April 2012, ICC-01/04-01/07-3277, para. 9, in relation to “the day-to-day operating of defence counsel or legal representatives and their teams”.

⁴² Registrar’s Observations, ICC-01/04-02/12-144-Conf-Exp-Anx2 (A).

consultations, the *dies a quo* of phase A and the *dies a quo* and *dies ad quem* of phases B and C”.

26. Accordingly, the Request for Review must be rejected in its entirety.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 11th day of February 2014

At The Hague, The Netherlands