



Original: **French**

No.: ICC-01/04-02/12
Date: 26 February 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

Application to reply to 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’acquittallement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »*”

(Regulation 24 of the Regulations of the Court)

Source: Defence team for Mathieu Ngudjolo

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

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**Victims Participation and Reparations
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Other

I. PROCEDURAL BACKGROUND

1. On 18 December 2012, Trial Chamber II (“the Chamber”) of the International Criminal Court (“the Court” or “the ICC”) acquitted the Accused Mathieu Ngudjolo Chui,¹ clearing him of all the charges set forth in the 26 September 2008 *Decision on the confirmation of charges* and ordering his immediate release.

2. The final operative provision of the Judgment reads: “[TRANSLATION] ORDERS the Victims and Witnesses Unit to take the measures necessary to ensure the protection of the witnesses pursuant to article 68 of the Statute”.²

3. On 21 December 2012, the day on which he was to be released from Scheveningen Detention Centre in execution of the 18 December 2012 Judgment, Mr Ngudjolo was handed over to the host State police and transported under close escort to Schiphol Airport and the threat of expulsion to the Democratic Republic of the Congo, in violation of articles 81(3)(c) of the Statute and 48 of the Headquarters Agreement between the International Criminal Court and the host State (“the Headquarters Agreement”).

4. In order to counter this expulsion, which would be extremely harmful to him on account of his testimony before Trial Chamber II as both witness and accused in his own case,³ Mr Ngudjolo had no alternative but to exercise his right to submit an application for asylum to the host State, seeking international protection.

5. Upon being notified of this, Mr Ngudjolo’s defence team (“the Defence”) filed an “Urgent Application for the international relocation of Mathieu Ngudjolo outwith the African continent and his presentation to the authorities of one of the States Parties to the ICC for the purposes of expediting his asylum application” before the Appeals Chamber on 21 December 2012.

6. The Appeals Chamber ruled on the application on 24 December 2012.

¹ *The Prosecutor v. Mathieu Ngudjolo Chui, Jugement rendu en application de l'article 74 du Statut*, ICC-01/04-02/12-3, 216 p.

² *The Prosecutor v. Mathieu Ngudjolo Chui, Jugement rendu en application de l'article 74 du Statut*, ICC-01/04-02/12-3, p. 215.

³ On Mr Ngudjolo’s testimony, see his closing brief filed before Trial Chamber II, ICC-01/04-01/07-3265-Corr2-Red, pp. 148-150, paras. 469-473.

7. On 10 January 2013, the Defence submitted to the host State an application for Mr Ngudjolo's release for the purposes of pursuing his asylum application and appeal.

8. On 11 January 2013, the host State denied the application on the grounds that it had received no request from the Court necessitating Mr Ngudjolo's presence in the Netherlands for the appellate proceedings concerning him.

9. On 15 January 2013, the Defence requested the Registry to issue a document attesting to the necessity of Mr Ngudjolo's presence in accordance with article 29(2) of the Headquarters Agreement between the Court and the host State.

10. In a letter dated 25 January 2013, the Registry responded to the Defence that the Appeals Chamber had hitherto given no indications as to any hearings necessitating Mr Ngudjolo's presence at the Seat of the Court.

11. On 7 February 2013, with Mr Ngudjolo still deprived of his liberty, the Defence, which contends that the Victims and Witnesses Unit ("VWU") failed to take the measures ordered by Trial Chamber II to apply rule 185 of the Rules of Procedure and Evidence, filed before the Appeals Chamber a request, supplemented on 7 and 8 February 2013 by two addenda, that the Appeals Chamber order VWU to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court.

12. On 8 February 2013, the Appeals Chamber ordered the Registry to file its observations by 4 p.m. on 22 February 2013.

13. On that date, pursuant to regulation 24 *bis* of the Regulations of the Court, the Registry filed its observations in respect of the second addendum moving the Appeals Chamber to order VWU to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by Trial Chamber II of the International Criminal Court ("Observations").

14. In the Observations, the Registry put forward a number of considerations to which the Defence will reply in order to enable the Appeals Chamber to render an enlightened decision. These considerations pertain particularly to the respective mandates of VWU and the Registry as well as the lawfulness of Mr Ngudjolo's presence in The Hague.

15. This document is filed pursuant to regulation 24(1) and 24(5) of the Regulations of the Court.

II. POINTS TO BE ADDRESSED BY THE REPLY

16. In the Defence's assessment, four points in the Registry's Observations require clarification insofar as they raise significant and/or new issues, to wit, the mandates of VWU and the Registry (A), the lawfulness of Mr Ngudjolo's presence in The Hague (B), Mr Ngudjolo's release (C), and new information provided by the Registry relating to the lifting of the travel ban (D).

A. The mandates of the Victims and Witnesses Unit and the Registry

17. In paragraph 1 of its Observations, the Registry submits that the issues raised by the Defence exceed the matter of Mr Ngudjolo's protection and the mandate of VWU.

18. The Defence will endeavour to demonstrate that its request of the Registry, within whose purview VWU falls, is indeed consonant with the matter of Mr Ngudjolo's protection and the mandate of VWU. The Registry's response suggesting it was unable to fulfil the request has opened the door for the Defence to demonstrate the Registry's lack of diligence in applying the existing relevant provisions to give full effect to Trial Chamber II's 18 December 2012 Judgment. VWU and the Registry as a whole are not subject solely to the provisions of article 43(6) of the Statute in affording victims protection.

19. What is more, the Registry is duty-bound to execute the Judgment in respect both of the order to release Mr Ngudjolo and the order to protect him as a witness in his own case. These two orders are inseparable.

B. The lawfulness of Mr Ngudjolo's presence in The Hague

20. At the second bullet point of paragraph 4 of its Observations, the Registry stated the following: "[TRANSLATION] The issue of the lawfulness of Mr Ngudjolo's presence on the territory of the Netherlands falls not within the jurisdiction of the Court but within the sovereignty of the host State."

21. If the Appeals Chamber grants leave to reply, the Defence will endeavour to establish, on the basis of the relevant provisions of the Statute and the Headquarters Agreement, in particular article 67(1)(a)-(e)⁴ of the Statute and articles 29(1)-(3),⁵ 38(1),⁶ 47,⁷ 48(1),⁸ and 55⁹ of the Headquarters Agreement, that this issue of the lawfulness of Mr Ngudjolo's

⁴ Article 67: 1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; (c) To be tried without undue delay; (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;

⁵ Article 29: **Other persons required to be present at the seat of the Court** 1. Other persons required to be present at the seat of the Court shall, to the extent necessary for their presence at the seat of the Court, be accorded the privileges, immunities and facilities provided for in article 27 of this Agreement, subject to production of the document referred to in paragraph 2 of this article. 2. Persons referred to in this article shall be provided by the Court with a document certifying that their presence is required at the seat of the Court and specifying a time period during which such presence is necessary. Such document shall be withdrawn prior to its expiry if their presence at the seat of the Court is no longer required. 3. The privileges, immunities and facilities referred to in paragraph 1 of this article shall cease to apply after fifteen consecutive days following the date on which the presence of such other person concerned is no longer required by the Court, provided that such other person had an opportunity to leave the host State during that period.

⁶ Article 38: **Visas for witnesses, victims, experts, interns, visiting professionals and other persons required to be present at the seat of the Court** 1. All persons referred to in articles 24, 26, 27, 28 and 29 of this Agreement, as notified as such by the Registrar to the host State, shall have the right of unimpeded entry into, exit from and, subject to paragraph 3 of this article, movement within the host State, as appropriate and for the purposes of the Court.

⁷ Article 47: **Interim release** 1. The host State shall facilitate the transfer of persons granted interim release into a State other than the host State. 2. The host State shall facilitate the re-entry into the host State of persons granted interim release and their short-term stay in the host State for any purpose related to proceedings before the Court. 3. The Court and the host State shall make practical arrangements as to the implementation of this article.

⁸ Article 48: **Release without conviction** 1. Subject to paragraph 2 of this article, where a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, the case is inadmissible under article 17, paragraph 1(b), (c) or (d), of the Statute, the charges have not been confirmed under article 61 of the Statute, the person has been acquitted at trial or on appeal, or for any other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State.

⁹ Article 55: **Settlement of differences on the interpretation or application of this Agreement or supplementary arrangements or agreements** 1. All differences arising out of the interpretation or application of this Agreement or supplementary arrangements or agreements between the Court and the host State shall be settled by consultation, negotiation or other agreed mode of settlement. 2. If the difference is not settled in accordance with paragraph 1 of this article within three months following a written request by one of the parties to the difference, it shall, at the request of either party, be referred to an arbitral tribunal according to the procedure set forth in paragraphs 3 to 5 of this article. 3. The arbitral tribunal shall be composed of three members: one to be chosen by each party and the third, who shall be the chairman of the tribunal, to be chosen by the other two members. If either party has failed to make its appointment of a member of the tribunal within two months of the appointment of a member by the other party, that other party may invite the President of the International Court of Justice to make such appointment. Should the first two members fail to agree upon the appointment of the chairman of the tribunal within two months following their appointment, either party may invite the President of the International Court of Justice to choose the chairman. 4. Unless the parties otherwise agree, the arbitral tribunal shall determine its own procedure and the expenses shall be borne by the parties as assessed by the tribunal. 5. The arbitral tribunal, which shall decide by a majority of votes, shall reach a decision

presence has already been settled by the Court and the host State. It is not a matter solely within the host State's purview.

C. Mathieu Ngudjolo's release

22. At paragraph 4 of its Observations, the Registry raises a significant issue which is contested by the Defence: it argues that it released Mr Ngudjolo on 21 December 2012.¹⁰

23. The Defence wishes to respond to this argument and demonstrate that the Registry did not release Mr Ngudjolo on 21 December 2012. Instead, it handed him over to the host State police, who transported him under close escort to the airport. In this connection, and with the Appeals Chamber's leave, the Defence will move the Bench for a status conference, during which Mr Ngudjolo will be able to give an account of the circumstances surrounding his transfer to the airport and the filing of his asylum application. Then, the Defence will set out the content of its discussions with the Registry before Mr Ngudjolo was handed over to the host State police.

24. The Defence is surprised that an *ex parte* report on the release has been submitted to the Chamber but that neither it nor Mr Ngudjolo has received a copy. It respectfully requests that the report be disclosed to it to enable it to respond.

D. The lifting of the travel ban

25. The Defence, astonished at the news which the Registry has received from the host State that the travel ban will be lifted only if a State is willing to receive Mr Ngudjolo, will ask specific questions, including what will happen if Mr Ngudjolo withdraws his asylum application and whether the Registry will ensure application of rule 185 and find a receiving State as agreed in the discussions between the Registry and the Defence.

on the difference on the basis of the provisions of this Agreement and subsequent arrangements or agreements and the applicable rules of international law. The decision of the arbitral tribunal shall be final and binding on the parties.

¹⁰ ICC-01/04-02/12-16-Conf-Exp OA ("Report on the developments relating to the release and asylum request made by Mathieu Ngudjolo Chui").

III. PRAYER

26. The Defence respectfully requests leave to reply to the Registry's Observations and annex in order to enable the Appeals Chamber to rule properly on its Application ICC-01/04-02/12-22.

27. The Defence further requests the disclosure of the Registry's *ex parte* report¹¹ of 24 December 2012.

AND JUSTICE WILL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]

Mr Jean Pierre Kilenda Kakengi Basila
Lead Counsel for Mr Mathieu Ngudjolo Chui

Dated this 26 February 2013, at Brussels

¹¹ "Report on the developments relating to the release and asylum request made by Mathieu Ngudjolo Chui", 24 December 2012, ICC-01/04-02/12-16-conf-Exp OA.