



Original: **French**

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

Date: **22 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
with confidential, *ex parte* annex
only available to VWU and the Defence for Mathieu Ngudjolo**

Registry's observations pursuant to regulation 24 *bis* of the Regulations of the Court on the "SECOND ADDENDUM to 'Defence request that the Appeals Chamber order the Victims and Witnesses Unit 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'"

Source: The Registrar

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

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

States' Representatives

Host State

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Mr Paddy Craig

The Registrar of the International Criminal Court ("the Court");

NOTING Trial Chamber II's 18 December 2012 *Judgment pursuant to article 74 of the Statute*¹ in the case of *The Prosecutor v. Mathieu Ngudjolo Chui* whereby it acquitted Mr Mathieu Ngudjolo Chui and ordered his immediate release;

NOTING the "Urgent Defence 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 International Criminal Court for the purposes of expediting his asylum application"² filed by the Defence team on 21 December 2012 ("Urgent Application");

NOTING the Registry report on Mr Ngudjolo's release and asylum application, registered in the record on 24 December 2012;³

NOTING the Appeals Chamber's decision of 24 December 2012 on the Defence's Urgent Application of 21 December 2012;⁴

NOTING the "SECOND ADDENDUM to 'Defence request that the Appeals Chamber order the Victims and Witnesses Unit 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'"⁵ dated 8 February 2013 ("Second Addendum");

¹ ICC-01/04-02/12-3-tENG.

² ICC-01/04-02/12-15-tENG OA.

³ 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").

⁴ ICC-01/04-02/12-17-Conf OA.

⁵ ICC-01/04-02/12-22-tENG OA.

NOTING the Appeals Chamber's order dated 8 February 2013 ("Order");⁶

NOTING articles 43(6), 68(1) and 68(4) of the Rome Statute, rules 16 to 19 and 185 of the Rules of Procedure and Evidence, regulations 23 *bis*, 24 *bis* and 41 of the Regulations of the Court, and regulations 79 to 96 of the Regulations of the Registry;

CONSIDERING that in its Order, the Appeals Chamber directed the Registry to file, by Friday 22 February 2013, its written submissions on the Second Addendum, in particular on Mr Ngudjolo's request that the Appeals Chamber enjoin the Victims and Witnesses Unit ("VWU") to afford him protection provided for in article 68 of the Rome Statute;⁷

CONSIDERING that the Registry is of the view that the present document should be notified to the host State, since it raises legal issues of interest to the host State;

CONSIDERING that the findings of the VWU assessment of Mr Ngudjolo's security situation contain confidential information not to be disclosed to the public and that they are therefore set out in a confidential, *ex parte* annex hereto which is available only to the Registry and the Defence for Mr Ngudjolo.

RESPECTFULLY SUBMITS the Registry's observations pursuant to regulation 24 *bis* of the Regulations of the Court on the Second Addendum:

⁶ ICC-01/04-02/12-24 OA (Order on the filing of submissions by the Registrar on the Defence request).

⁷ "The Registrar shall file written submissions on the above-mentioned application by 16h00 on Friday, 22 February 2013. In particular, the Registrar is directed to make submissions on Mr Ngudjolo's request that the Appeals Chamber instruct the Victims and Witnesses Unit to afford him the protection provided for in article 68 of the Statute."

Preliminary observations:

1. Firstly, it is worth noting that while the Defence for Mr Ngudjolo relies on Trial Chamber II's order to the Victims and Witnesses Unit "to take the measures necessary to ensure the protection of the witnesses pursuant to article 68 of the Statute",⁸ it raises a plethora of issues which greatly exceed the matter of Mr Ngudjolo's protection and the mandate of VWU.
2. In fact, VWU's mandate under article 43(6) of the Rome Statute is restricted to counselling, assisting and protecting victims, witnesses and others who are at risk on account of testimony given by such witnesses.
3. Thus, the issues of the necessity of Mr Ngudjolo's presence on the territory of the Netherlands and the lawfulness of his stay on this territory are not related to the issue of his protection as a witness in his own case. Similarly, the issues of the application of rule 185 of the Rules of Procedure and Evidence and Mr Ngudjolo's release are wholly unrelated to the issue of his protection as a witness, since the benefits under rule 185 attach not to the status of witness but to that of acquitted person. Moreover, such issues greatly exceed VWU's mandate.
4. The Registry is of the view that the present submissions should address only the issue of Mr Ngudjolo's protection under article 68. However, the following points are noteworthy:

⁸ Final operative provision of Trial Chamber II's *Judgment pursuant to article 74 of the Statute* (ICC-01/04-02/12-3-tENG).

- Issuance by the Registry of a document attesting to the necessity of Mr Ngudjolo's presence on the territory of the Netherlands:

It should be recalled here that the Registry is unapprised of how the Chamber will proceed, in particular whether it is contemplating an appearance by Mr Ngudjolo or merely written submissions. Were the Appeals Chamber to inform the Registry of a hearing requiring Mr Ngudjolo's presence at the seat of the Court, the Registry would immediately inform the Defence and make every effort to facilitate his presence. The previous notification to the Defence that Mr Ngudjolo must remain on the territory of the host State until the United Nations Security Council travel ban had been lifted was related not to the necessity of his presence at the seat of the Court, but to the impossibility of his travel without a lifting of the ban, which was imposed by the United Nations independently of the Court.

- Lawfulness of Mr Ngudjolo's presence on the territory of the Netherlands:

The issue of the lawfulness of Mr Ngudjolo's presence on the territory of the Netherlands does not fall within the jurisdiction of the Court, but the sovereignty of the host State.

- Mr Ngudjolo's release:

The Registry recalls that this issue was already addressed in its report of 24 December 2012⁹ and that, as far as the Registry is concerned, Mr Ngudjolo was released on 21 December 2012. The issue of his release from a Dutch detention centre does not fall within the competence of the Registry of the Court.

⁹ *Ibidem.*

- Unresolved legal issues

The Registry cannot make arrangements for Mr Ngudjolo's transfer until the Security Council has lifted his travel ban. The host State has stated that the ban can be lifted only if a receiving State has been found. It must be noted that the reception of both an acquitted person and a protected witness is completely reliant on the voluntary cooperation of a State.

Mr Ngudjolo's request to the Appeals Chamber to enjoin VWU to afford him protection pursuant to article 68:

5. On 16 January 2013, the Defence team submitted to VWU an application for protection and participation in the Court's protection programme on behalf of Mr Ngudjolo.
6. On 23 and 24 January, VWU therefore undertook the requisite assessment interviews in order to consider the application.
7. Mr Ngudjolo's application for protection was therefore processed according to the usual procedure followed by VWU, which undertook an assessment of Mr Ngudjolo's security situation.
8. As with any witness for whom an application for protection is submitted, protective measures may be implemented by the Registry only if an independent assessment by VWU finds such measures necessary.
9. In the Registry's view, this is the only possible interpretation of Trial Chamber II's order to protect witnesses having testified before it.
10. The Registry is therefore of the opinion that the Defence for Mathieu

Ngudjolo's request to the Appeals Chamber to enjoin VWU to afford him the

protection provided for in article 68 of the Statute is nugatory, since VWU had already received an application from the Defence team which is being processed (the findings of the VWU security assessment are annexed hereto).

11. In any event, the Registry notes that since Mr Ngudjolo has submitted an application for asylum to the Dutch authorities and is in a detention centre in the Netherlands, he does not currently and for such time as he remains on its territory face any direct risk to his safety on account of his testimony.

[signed]

Marc Dubuisson, Director of the Division of Court Services
p.p. Silvana Arbia, Registrar

Dated this 22 February 2013

At The Hague, The Netherlands