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No.: ICC-01/04-02/12
Date: **21 December 2012**

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
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 public Annexes I, II, III and IV

**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**

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

SUBJECT-MATTER OF THE APPLICATION

1. As the title of the application makes clear, Mr Mathieu Ngudjolo (“the Applicant”) hereby mandates his Defence team (“the Defence”) to move Trial Chamber II (“the Chamber”) for protective measures entailing his international relocation outwith Africa and presentation to the authorities of a Schengen country for the purposes of applying for political asylum.
2. For the purposes of duly delineating the contours of its approach, the Applicant deems it necessary to expound on its factual (I) and legal (II) foundations.

I. THE FACTUAL FOUNDATIONS OF THE PRESENT APPLICATION

3. On 26 September 2008, Pre-Trial Chamber I of the International Criminal Court (“the Pre-Trial Chamber”) committed the Applicant for trial before the Trial Chamber for seven war crimes and three crimes against humanity charged by the Prosecutor (“the Prosecutor” or “the Prosecution”).¹
4. The trial of the Applicant commenced on 24 November 2009.²
5. The presentation of evidence officially closed on 7 February 2012, following the Chamber’s site visit to Ituri on 18 and 19 January 2012.³
6. The trial concluded on 23 May 2012 with the Defence closing statements, following those of the other parties and participants some days earlier. Thereafter the cause against the Applicant and Mr Germain Katanga was deliberated.
7. On 21 November 2012, the Chamber issued its *Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons*.⁴
8. On 18 December 2012, the Chamber handed down its judgment pursuant to article 74 of the Statute,⁵ wherein it acquitted Mr Mathieu Ngudjolo and ordered his immediate release.
9. That same day, the Prosecutor made an oral application to the Chamber pursuant to article 81(3)(c)(i) of the Statute to which the Defence also responded orally.⁶ At 5.30 p.m. that day, the Chamber denied the Prosecution request on the ground that it did not fulfil the

¹ ICC-01/04-01/07-716-Conf.

² ICC-01/04-01/07-T-80, 77 p.

³ ICC-01/04-01/07-3238-tENG.

⁴ ICC-01/04-01/07-3319-tENG/FRA.

⁵ ICC-01/04-02/12-3.

⁶ ICC-01/04-02/12-T-2-FRA.

criteria of said article. In its oral decision, the Chamber confirmed the acquittal and immediate release of Mr Mathieu Ngudjolo.⁷

10. On 19 December 2012, the Prosecutor entered an appeal against the oral decision and moved the Appeals Chamber to afford it suspensive effect.⁸ The Defence responded to the Prosecution appeal in filing No. ICC-01/04-02/12-9 of 20 December 2012.
11. By its *Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect*, the Appeals Chamber denied the Prosecution appeal, thereby upholding the decision to release Mr Mathieu Ngudjolo immediately.⁹
12. The Defence submits that the acquittal of the Applicant ensues essentially from the sworn testimony he gave as witness and accused. In his *viva voce* evidence to the Chamber, the Applicant made accusations against the President of the Democratic Republic of the Congo in open court, pointing to him as the actual planner of the attack on Bogoro of 24 February 2003.¹⁰ This evidence had the effect of obliterating the case presented by the Prosecution from the outset, namely that Mathieu Ngudjolo as the most senior FNI¹¹ commander and Germain Katanga as FRPI President conceived a common plan to wipe out the village of Bogoro on 24 February 2003.
13. When testifying, the Applicant tendered exhibit EVD-D03-0136, which unequivocally contains the elements of indirect co-perpetration as defined in the decision confirming the charges. The exhibit reads:

[TRANSLATION] **DEMOCRATIC REPUBLIC OF THE CONGO**
PRESIDENCY OF THE REPUBLIC
IMMEDIATE OFFICE OF THE PRESIDENT

Kinshasa, 23/11/2002
To the Head of the Joint Chiefs of Staff
Lieutenant-Gen. Liwanga Mata Nyamunyombo

Ref: 121KAB/PR/DCA/SM/2002

Subject: Instructions

⁷ ICC-01/04-02/12-T-3-FRA.

⁸ ICC-01/04-02/12-5.

⁹ ICC-01/04-02/12-12.

¹⁰ For the testimony of the Applicant, see his closing brief submitted to the Chamber, ICC-01/04-01/07- pp. 150-152, paras. 471-474.

¹¹ *Front des Nationalistes Intégrationnistes* [Nationalist Integrationist Front].

In accordance with the most recent security meeting held on 15 September 2002 at the office of the President of the Republic concerning the operations in Nyankunde, Ituri District, and in light of the urgency of the situation, you are hereby ordered to reinforce the FAC command and troops on the ground for the purposes of pursuing the operations at the planned target sites (Mongwalu, Mandro, Bogoro and Komanda).

To that end, you are required to dispatch a team of officers to supervise and proceed with the execution of joint FAC-APC operations in the Beni and Ituri region. To ensure the success of this mission, kindly reinforce supplies to this team with the appropriate logistical material and adequate financial resources which the Head of State will make available to you.

Given the sensitivity of the situation, all of the confidential reports must be addressed to the Immediate Office of the Head of State. I append hereto the additional list of CNS intelligence officers who shall collaborate with the FAC command on the ground.

This matter is of the utmost urgency.

Prof. Samba Kaputo

Deputy Head of the Immediate Office of the President of the Republic¹²

14. This letter bears the unmistakable seal of the Presidency of the Republic. It was signed by the late Samba Kaputo, then Deputy Head of the Immediate Office of the President of the Republic, and is referenced number 121, the initials KAB, PR and DCA denoting Kabila, President and Deputy Head of the Immediate Office, respectively. The letters SM stand for the otherwise unidentified secretary who received the letter. The letter is dated 23 November 2002, shortly before the attack of 24 February 2003 on Bogoro. The letter is addressed to the Head of the Joint Chiefs of Staff, Lieutenant-General Liwanga Nyamunyombo. The final paragraph of the letter adverts to *Conseil National de Sécurité* [National Security Council] intelligence officers, who were to lend support to the FAC (*Forces Armées Congolaises* [Congolese Armed Forces]) Command on the ground.
15. Given such material, there is no doubt that the Congolese army, whose supreme commander is the Head of State, was very active in Bogoro. All logistical means were placed at its disposal. A special structure, EMOI (*Etat-major opérationnel intégré* [Operational Integrated Headquarters]), within the direct sphere of the supreme authority of President Joseph Kabila, was established to coordinate all operations.¹³
16. The acquittal judgment makes clear that the Prosecutor failed to prove, as article 66(2)(3) of the Statute requires, the guilt of the Accused Mathieu Ngudjolo beyond reasonable doubt.
17. Accordingly, as it was not satisfied of his guilt beyond reasonable doubt as article 66(3) of the Statute prescribes, the Chamber unconditionally acquitted the Applicant and

¹² EVD-D03-0136.

¹³ Paragraphs 691, 693 and 694 of the public redacted version of the Applicant's brief, ICC-01/04-01.07, are instructive in this regard.

ordered his immediate release. Such release could have entailed his equally immediate repatriation to the Democratic Republic of the Congo, the country of his birth, had he not harboured serious fears for his safety and life.

18. The Applicant objects to his return to his country of origin on account of an objective and subjective risk of persecution within in the meaning of article 1(A)(2) the Geneva Convention of 28 July 1951.
19. In this application, the Applicant furnishes detailed explanations to substantiate his fear of persecution in the event of return to the Democratic Republic of the Congo.
20. Indeed, the Applicant has not only testified under oath against the Congolese authorities who planned the attack on Bogoro, but also disclosed to the Chamber, the parties and participants public exhibit EVD-D03-0136 concerning the undeniable involvement of those authorities in the attack. The authenticity of the exhibit remains hitherto unchallenged by the Prosecutor and any other party or participant in the proceedings.
21. Regard must be had to the public nature of the exhibit whose publicity prompted the press to disseminate the news in its columns.
22. The Applicant's accusations against the Congolese authorities have remained consistent. As early as 24 November 2009 during its opening statements, his Defence team questioned whether the responsibility for the attack should not be laid at the door of the Congolese and Ugandan States, the then powermongers in Ituri.¹⁴
23. By so accusing the Head of the Congolese State and the various authorities more clearly identified in the aforesaid exhibit, the Applicant publicly expressed a political opinion within the meaning of article 1 of the Convention of Geneva of 28 July 1951 which must make him eligible for the status of political refugee, given that he has serious grounds for believing that once returned to the Congo-Kinshasa, he would be dealt with severely by thugs of the Joseph Kabila regime. The jurisprudence holds that "[a] broad and general interpretation of political opinion is 'any opinion on any matter in which the machinery of state, government, and policy may be engaged'".¹⁵
24. Insofar as it implicates the Congolese authorities and their various allies in the attack on Bogoro, the Applicant's testimony corresponds exactly to that of detained witnesses

¹⁴ ICC-01/04-01/07-T-80.

¹⁵ "Interpretation of the convention refugee definition in the case law" at <http://www.irb-cisr.gc.ca/eng/brdcom/references/legjur/pages/def2010.aspx>, accessed on 16/0/2012.

Floribert Ndjabu and Pitchou Iribi¹⁶ who, fearing persecution on return to the Democratic Republic of the Congo, are currently pursuing asylum proceedings in the Netherlands.¹⁷

25. By surrendering the Applicant to the Court pursuant to the warrant for his arrest, the Congolese State discharged its duty to cooperate, clearly aware that Mr Ngudjolo would answer for the crimes of which he stood charged. As proof thereof, the Applicant refers to the furore whipped up by the media mouthpieces of the current administration, with President Kabila himself taking pride in having been the first president in the world to have so cooperated with this high criminal court. President Joseph Kabila, who had not the slightest inkling that the focus of Prosecution investigations would be Bogoro, therefore had not the least suspicion that his involvement in the attack on Bogoro would be revealed to all and sundry.
26. The Applicant's testimony pointed the finger straight at President Joseph Kabila, rightly singling him out as having unmitigated responsibility for the attack as part of his plan to quell the UPC's secessionist and separatist tendencies¹⁸ in Ituri.
27. In the Democratic Republic of the Congo, any challenge, even legitimate, to the President of the Republic is viewed as a lese-majesty offence, which may be met with the utmost brutality. In a country where the Head of State is unacquainted with a culture of human rights,¹⁹ such action costs the person who takes it most dearly. Congolese citizens Armand Tungulu and Floribert Chebeya, to name but two, paid the price: they were sent to meet their Maker.
28. The Applicant's testimony and the Samba letter implicating the office of the Congolese Head of State in the attack on Bogoro are likely to attract the wrath of the brutal Congolese government.
29. The Congolese authorities will not countenance such an attack on the Head of State.
30. In a recent decision, the Belgian Aliens Disputes Board [*Conseil du contentieux des étrangers*], vested with full competence in all matters of asylum, recalled that the general legal principle that "the burden of proof lies on the person submitting a claim" finds application in the adjudication of asylum applications (Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, 1979, p. 51, para. 196). Whereas the concept

¹⁶ See public redacted version of the Applicant's brief, ICC-01/04-01.07, paragraphs 134-144, 145-148 and 155-158. See also paras. 701 and 702.

¹⁷ See ICC-01/04-01/07-2830, Conf.

¹⁸ *Union des Patriotes Congolais* [Union of Congolese Patriots].

¹⁹ The Ministry of Justice, the Keeper of the Seals and Human rights is mere window-dressing.

of evidence must indeed be flexibly construed in respect of such matters, it rests nonetheless with the applicant to satisfy the authority that he or she meets the criteria for the protection sought.” (CCE (Aliens Disputes Board, Decision 103173 of 28 November 2012, p. 2).

31. The Applicant is mindful that although the Chamber is not empowered to adjudge applications for asylum, he must for the purposes of this application nonetheless furnish the Bench with all of the probative material for it to grant the relief sought by the present application in its entirety.
32. The Applicant wishes to underscore that the Congolese authorities have acted with arbitrariness towards him for a number of years. Following his transfer to The Hague, despite enjoying the presumption of innocence, the Applicant’s military salary was withheld. Only when the Defence repeatedly pursued the matter did payment of the salary to his wife and children resume.²⁰
33. As of September 2012, the salary was withheld anew. Defence endeavours to take up the matter directly with the commander of the Ituri operational zone in Bunia to whom the Applicant was assigned prior to his arrest, as well as with the Chief of Staff of the Armed Forces of the Democratic Republic of the Congo, the Minister for Defence and even the Head of the Congolese State have, to date, been to no avail.²¹ What would befall the Applicant were he to be ill-advisedly returned to the Democratic Republic of the Congo, having raised President Joseph Kabila’s responsibility for the attack on Bogoro of 24 February 2003?

II. THE LEGAL FOUNDATIONS OF THE PRESENT APPLICATION

34. Two sources of law ground the present application, namely the Rome Statute establishing the International Criminal Court (“the Statute”) (A) and the other international human rights instruments ratified by the Member States of the European Union amongst others (B).

A. The Rome Statute

35. Article 68 of the Statute empowers the Court to protect witnesses by safeguarding their physical and mental welfare.
36. This statutory provision may ground an order of the Chamber for the international relocation of the Applicant to one of the European States Parties to the Statute.

²⁰ ANNEXES I, II and III to the present application.

²¹ ANNEXE IV to the present application.

37. The present application finds further support in the fact that in other circumstances, the Court has ordered the relocation of Prosecution witnesses for improbable and minute risks, compared to those facing the Applicant, who will have to contend with the full machinery of State repression. Hence, it is worth recalling the international relocation of Prosecution witness P-28.
38. For practical reasons of adaptation and integration, it would be desirable for the Applicant to be relocated to a European or American francophone country.
39. The Applicant prefers Belgium for a number of reasons: Belgium is a State Party to the Rome Statute; it has ratified the European Convention on Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the Charter of the European Union.
40. Through such ratification, Belgium has undertaken to give full effect to these instruments on its territory. In this vein, this State, which cooperated in the execution of the warrant for the Applicant's arrest, will now, perforce, do its utmost to comply with the judgment which has just acquitted the Applicant. It is duty-bound to respect the Court's decision. Belgium need not fear for its internal security or public order. The presence of the Applicant on its soil is wholly unthreatening in this regard. Indeed it must be considered that Belgium is home to a sizeable Congolese community which is committed to peace and justice and abhors the policy of massive human rights violations of the Joseph Kabila regime. This Congolese community campaigns for the rule of law in the DRC and fights against impunity. The Applicant's in-court testimony rightly condemns the misdeeds of the Kabila regime. In so doing, the Applicant has afforded the international community the opportunity to combat impunity for those international crimes which shock the conscience of humanity by prosecuting the true perpetrators of the criminal attack on Bogoro. The accusations levelled by the Applicant and the evidence on which they rest should impel the international prosecutorial authority so empowered to satisfy the Court one day, beyond reasonable doubt, of the guilt of those responsible for the massacre.

B. Other international human rights instruments

41. The Applicant prays to be presented to those Belgian authorities vested with the power to adjudge asylum applications.
42. Indeed, the Court operates in the Schengen area, whose States' respect for human rights is entrenched. A bench of international criminal judges previously showed itself capable of

applying the highest human rights standards when it presented to the Netherlands the three detained witnesses who had testified for the Applicant.

43. Identical grounds found the Applicant's present motion to the Chamber. All things being equal, the Chamber should grant him the relief sought in its entirety. There is nothing to compel the Chamber to dismiss this particular prayer: not hypothetical diplomatic reassurances which the Democratic Republic of the Congo may offer, nor the specious statements of its political authorities who are ill-accustomed to keeping their word. The Democratic Republic of the Congo's reputation for human rights is atrocious: it is not a safe country for the Chamber to return the Applicant.
44. The Bench should not let itself be inveigled by any insincere reassurances from the Congolese authorities: we have only to recall the obstacles they mounted to impede the appearance of Defence Witness DRC-D03-0480.
45. In its oral submissions of 26 August 2010, the Defence for Thomas Lubanga raised the mistreatment of certain witnesses in the DRC after their testimony in The Hague, as follows:

[TRANSLATION] *Furthermore, is it a coincidence that the most recent Defence Witness, Witness 0036, a collectivité chief who testified before this Court, was suddenly relieved of his administrative duties when the Congolese authorities learned that he had agreed to testify for the Defence?*

*Is it also a coincidence that Defence Witness D6 was arrested by the Congolese army, the FARDC, shortly after testifying and was severely ill-treated? Would it also be a coincidence if the Congolese media were to report in the days that follow our ... our hearing today on the unwarranted arrest of Defence Witness D7, Mr Origène Lokana, by the FARDC on 12 August? We think not.*²²

46. Article 1 of the 4 November 1950 Convention for the Protection of Human Rights and Fundamental Freedoms provides: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", thereby enshrining the duty to respect human rights (Belgian official government gazette, 19. VIII. 1995; *Erratum* Official Gazette 29. VI. 1961).
47. Article 78(1) of the Treaty on the Functioning of the European Union mandates: "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July

²² ICC-01/04-01/06-T-357-FRA, p. 12, lines 8-19.

1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

48. Article 18 of the Charter of Fundamental Rights of the European Union (Official Journal No. C 83, 30 March 2010) reads: “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community”.
49. Article 19(2) of the same Charter prescribes: “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”
50. Having regard to the prohibition on torture and inhuman or degrading treatment or punishment, article 3 of the European Convention on human rights is considered to form part of European *jus cogens*. Hence, the serious possibility of torture in the country of origin raised by an asylum claimant is always afforded consideration when staying expulsion at the behest of a court or federal refugee office.
51. In this respect the Federal Constitutional Court of Germany found articles 3 of the ECHR and 7 of the ICCPR instructive in interpreting or sustaining the application of article 16 of the Basic Law on the right to asylum.²³
52. In the case at bar, the Bench will remain mindful of both the status of the Head of the Congolese State and that of the Applicant. Article 68 of the Congolese Constitution casts the former as the preeminent institution of the Democratic Republic of the Congo. It is the Head of State who, under article 81(2) of the same Constitution appoints, relieves of their duties, and upon Cabinet proposal and where necessary, dismisses: general and senior officers of the armed forces and the national police force, after having sought the opinion of the Supreme Defence Council. Article 83 of the Constitution lays down: “[TRANSLATION] The President of the Republic is the supreme commander of the Armed Forces. He chairs the Supreme Defence Council.”
53. The latter, that is the Applicant, is a senior officer in the Armed Forces of the Democratic Republic of the Congo, the armed forces which promoted him to a higher rank. At the time of his arrest, the Applicant was a student at the *Centre Supérieur Militaire* in Kinshasa. By transferring him to the International Criminal Court pursuant to an arrest warrant issued by the Pre-Trial Chamber, the Congolese military courts, which fall within

²³ BverfGE [German Constitutional Court], Vol 94, No. 4 pp. 115 *et seq.*

the supreme command of the Head of State, could not have conceived that the Applicant would expose the liability of the President of the Republic.

54. The Defence speculates as to the potential state of mind of the Head of the Congolese State, the supreme commander of the FARDC, upon seeing within its ranks, in the DRC, the²⁴ Applicant, who revealed to the world that he was indeed responsible for the Bogoro massacre. Scores will be settled with the Applicant, if not by the Head of the State himself, then certainly by his inner circle with its characteristic overzealousness, while the international community looks on with indifference.
55. “[TRANSLATION] In adjudication of a possible violation of article 3 of the ECHR, the Aliens Disputes Board made repeated reference to an ECHR judgment of 18 January 1978, wherein the Court ruled that the risk of torture or inhuman or degrading treatment or punishment must be proven ‘beyond reasonable doubt’. Some decisions of the Aliens Disputes Board make further reference to the *Y. v. Russia* judgment which established that a claim of exposure to torture or inhuman treatment must be substantiated by at least a modicum of evidence of a concrete nature or related to the claimant’s personal situation.”
56. Turning specifically to the Applicant, as stated hereabove, only months after his transfer to the Scheveningen detention centre in The Hague, his military salary was stopped by the military hierarchy.²⁵ All of the Defence’s endeavours to pursue the matter at various levels of the Congolese military hierarchy were in vain.
57. Only recently, in October 2012, the military salary of the Applicant was once more and remains withheld.²⁶ What would befall him, should he return to the Democratic Republic of the Congo after having – as the government put it – sullied the image of the Congolese “*Rais*”?
58. It must be recalled that the Defence gave assurances to the Chamber that Mr Mathieu Ngudjolo would appear during the appellate process, assurances to which the Chamber afforded consideration in examining the Prosecution application for Mr Ngudjolo’s

²⁴ Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, “*Le juge national du contentieux des étrangers entre normes nationales et européennes*”, Belgium, Aliens Disputes Board, Brussels, 16 and 17 December 2010, seminar held with the support of the European Commission, pp. 16-17 including jurisprudential references.

²⁵ ANNEXES I, II and III.

²⁶ ANNEXE IV.

continued detention.²⁷ Such assurances would cease to be valid were he to be repatriated to the Democratic Republic of the Congo.

FOR THESE REASONS

59. The Defence respectfully moves the Chamber to:

- **GRANT** the present Application;
- **GRANT** the Applicant the protection under article 68(1) of the Statute by ordering his international relocation to Belgium; and
- **PRESENT** the Applicant to Belgium for the purposes of applying for asylum.
- May it please the Chamber to suspend any measures to repatriate Mr Mathieu Ngudjolo to the Democratic Republic of the Congo.

RESPECTFULLY SUBMITTED.

[signed]

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

Dated this 21 December 2012

At The Hague

²⁷ ICC-01/04-02/12-T-3-ENG ET, 18-12-2012, p. 5, lines 5-7: “Furthermore, the Chamber wishes to point out that Mr Ngudjolo's Defence team clearly indicated that Mr Ngudjolo would comply with his obligations. In particular, the Chamber particularly noted that particular remark that you made, sir.”