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

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 WITH PUBLIC ANNEX

URGENT application by Mathieu Ngudjolo's Defence seeking the Appeals Chamber's instructions on the modalities of preparation for the appeals procedure in view of Mathieu Ngudjolo's current situation (Article 67 of the Rome Statute)

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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I PROCEDURAL BACKGROUND

1. On 18 December 2012, Trial Chamber II of the International Criminal Court (“Trial Chamber II” and “the Court” or “the ICC”), rendered its judgment in which it acquitted the Accused Mathieu Ngudjolo Chui,¹ of all the charges set out in the 26 September 2008 decision on the confirmation of charges and ordered his immediate release.

2. On 21 December 2012, the day of his release from the Scheveningen detention centre in execution of the aforementioned Judgment of 18 December 2012, Mathieu Ngudjolo was handed over to the host State police to be transported to Schiphol Airport with the threat of being repatriated to the Democratic Republic of the Congo,² in violation of article 81(3)(c) of the Rome Statute (“the Statute”) and article 48 of the Headquarters Agreement between the Court and the Netherlands (“The Headquarters Agreement”).

3. In order to forestall this expulsion which would be extremely detrimental to him on account of his testimony as a witness in his own case³ before Trial Chamber II, Mr Ngudjolo had no alternative but to exercise his right to apply for asylum in the host State and seek international protection.

4. On 21 December 2012, the Defence for Mathieu Ngudjolo (“the Defence”) having been so informed, submitted to the Appeals Chamber, an “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”.⁴

5. On 24 December 2012,⁵ the Appeals Chamber ruled on the Defence request for relocation.

6. On 10 January 2013, the Defence submitted an application to the host State seeking the release of Mr Ngudjolo for the purposes of continuing his asylum claim and appeals proceedings.⁶

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

² ICC-01/04-02/12-16-Conf OA, Report on the developments relating to the release and asylum request made by Mathieu Ngudjolo Chui, 24 December 2012, para. 8.

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

⁴ ICC-01/04-02/12-15-tENG OA.

⁵ ICC-01/04-02/12-17-Conf OA.

⁶ ICC-01/04-02/12-20-Conf-AnxI A.

7. On 11 January 2013, the host State denied the application on the grounds that it had never received any request from the Court necessitating Mr Ngudjolo's presence in the Netherlands for the appellate proceedings concerning him.⁷

8. 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.⁸

9. In its letter of 25 January 2013, the Registry informed the Defence that the Appeals Chamber had hitherto given no indication as to any hearings necessitating Mr Ngudjolo's presence at the Seat of the Court.⁹

10. In view of Mr Ngudjolo's continued deprivation of liberty and considering that the Victims and Witnesses Unit had failed to comply with the measures ordered by Trial Chamber II to implement rule 185 of the Rules of Procedure and Evidence ("the RPE"), the Defence submitted on 29 January 2013 an application to the Appeals Chamber followed by two ADDENDA on 30 January and 8 February 2013 requesting the Appeals Chamber to 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.¹⁰

11. On 15 February 2013, the Appeals Chamber ordered the Registry to file its observations by 4.00 p.m. on 22 February 2013.¹¹

12. On 22 February 2013, the Registry filed its observations under regulation 24 *bis* of the Regulations of the Court in regard to the second ADDENDUM, requesting the Appeals Chamber to 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.¹²

13. On 26 February 2013, the Defence filed an application for leave to reply to the Registry's observations before the Appeals Chamber.¹³

⁷ ICC-01/04-02/12-20-Conf-AnxII A.

⁸ ICC-01/04-02/12-20-Conf-AnxIII A.

⁹ ICC-01/04-02/12-20-Conf-AnxIV A.

¹⁰ ICC-01/04-02/12-20 A; ICC-01/04-02/12-21 A; ICC-01/04-02/12-22-tENG A.

¹¹ ICC-01/04-02/12-24 A.

¹² ICC-01/04-02/12-25 A.

¹³ ICC-01/04-02/12-26 A.

14. On 19 March 2013, the Office of the Prosecutor filed its document in support of the appeal filed on 20 December 2012, in accordance with article 81(1)(a) of the Statute, rule 150(1) of the RPE and regulation 58 of the Regulations of the Court¹⁴ (“the RC”).¹⁵

15. Pursuant to regulation 59(1) of the RC, the Defence must in principle file a response within 60 days of notification of the Prosecution document in support of the appeal. In this instance, the Defence must file its response by 20 May 2013¹⁶ unless the Appeals Chamber extends the time limit.

16. Considering that Mr Ngudjolo is currently in administrative detention at the detention centre at Schipol; the distance, costs and conditions of the detention prevent his Defence team from working with him in conditions that comply with the basic texts of the ICC and international fair trial standards. Furthermore, given that Mr Ngudjolo’s release is unlikely in the short term,¹⁷ the Defence hereby seeks the Appeals Chamber’s instructions on the manner in which it should proceed with the appeal within the time limit and conditions which are consistent with the rights of the Defence.

II. THE GROUNDS FOR THE APPLICATION

17. This application is founded on: (A) legal grounds under article 67(1)(b) and (B) factual grounds relating to Mr Ngudjolo’s prison conditions.

A. The legal grounds of the application

18. Article 67(1)(b) of the Statute provides:

Rights of the accused

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:

[...]

¹⁴ ICC-01/04-02/12-10-A.

¹⁵ ICC-01/04-02/12-39-Conf-Exp A.

¹⁶ Regulation 59(1), RC: “A participant may file a response within 60 days of notification of the document in support of the appeal described in regulation 58 as follows: (a) Each ground of appeal shall be answered separately, stating whether it is opposed, in whole or in part, together with the grounds put forward in support thereof; it shall also be stated whether the relief sought is opposed, in whole or in part, together with the grounds of opposition in support thereto; (b) When facts are relied on that are not already set out in the appeal or the document in support of the appeal, reference shall be made to the relevant part of the record or any other document or source of information; (c) Each legal reason relied on in support of the response shall be set out together with reference to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof.” See also, ICC-01/04-02/12-34-A.

¹⁷ ICC-01/04-02/12-35-Conf-Exp-Anx2 A.

(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;

19. This provision faithfully replicates article 6(3)(b) of the European Convention on Human Rights¹⁸ and article 14(3)(b) of the International Covenant on Civil and Political Rights¹⁹ which both establish the basic requirements of a fair trial, that is, the provision of adequate time and facilities to the accused for the preparation of the defence, as well as the guarantee of free and confidential communications between the accused and counsel.

20. In addition, the “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa” provide non-exhaustively for the right to have adequate time and facilities for the preparation of the defence.²⁰ According to Section N(3), the right to adequate time and facilities for the preparation of a defence requires that:

(a) The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(e) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

1. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.

2. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

3. The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.

4. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide

¹⁸ Article 6(3)(b): “Everyone charged with a criminal offence has: [...], (b) to have adequate time and the facilities for the preparation of his defence.”

¹⁹ Article 14(3)(b): “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.”

²⁰ “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa” available at: African Commission on Human and Peoples’ Rights, <http://www.achpr.org/instruments/fair-trial/>.

effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

5. The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.

6. Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know and challenge all the evidence which may be used to support the decision. All evidence submitted must be considered by the judicial body.

7. Following a trial and before any appellate proceeding, the accused or the defence counsel has a right of access to (or to consult) the evidence which the judicial body considered in making a decision and the judicial body's reasoning in arriving at the judgement.

21. The right to adequate time and facilities for the preparation of the defence therefore implies, firstly, the accused's right to access his case file. Moreover, in its judgement in *Foucher v. France*,²¹ the European Court of Human Rights ("ECHR") held that:

it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him. [...] As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3.

22. A determination of the availability of time and facilities for the preparation of the defence depend not only on the proportion, complexity and accessibility of information relating to the matter in question, but also on the conditions and capacity of the accused to exercise the right to defend himself.

23. Furthermore, the right to adequate time and facilities for the preparation of the defence requires that all material, physical and even psychological considerations likely to impede the full exercise of this right be taken into account. The ECHR even ruled that the accused's physical and mental resistance were lowered due to fatigue when they:

had to face a trial that was vitally important for them, in view of the seriousness of the charges against them and the sentences that might be passed, in a state which must have been one of lowered physical and mental resistance. Despite the assistance of their lawyers, who had the opportunity to make submissions, this circumstance, regrettable in itself, undoubtedly weakened their position at a vital moment when they needed all their resources to defend themselves and, in particular, to face up to questioning at the very start of the trial and to consult effectively with their counsel.²²

24. In order to meet the requirements of the right to have adequate time and facilities for the preparation of the defence and to ensure that the accused fully exercises this right, the ICC system has established practical modalities and effective mechanisms set out under

²¹ *Foucher v. France*, Application No. 22209/93, [1997] II ECHR, para. 36, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58017>.

²² *Barberà, Messegué et Jabardo v. Spain*, Application no. 10590/83, [1988] 146 ECHR (Series A), para. 70, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57429>.

regulations 174 to 180 of the Regulations of the Registry and regulation 98 of the RC. These facilities do not exist or have not been implemented in the Dutch system of administrative detention at Schiphol.

B. The factual grounds

25. For almost three months now, Mr Ngudjolo has been living in detention conditions which are not conducive to the calm and acceptable preparation of his defence. Since 21 December 2012, he has been held in a detention centre at Schiphol. This detention centre is not designed to hold detainees facing criminal proceedings; it is a temporary holding place specifically intended for asylum seekers. The detention conditions are not adequate in the long term and Mr Ngudjolo has been there since 21 December 2012.

26. The Defence submits that, in contravention of article 67(1)(b) of the Statute, Mr Ngudjolo is not currently able to communicate freely and in confidence with his counsel and thereby adequately prepare his defence.

27. The Defence does not have easy access to Mr Ngudjolo, since it must allow three hours of travel to reach the detention centre where he is currently held.²³ The travel and hotel costs are colossal and are not covered by legal assistance; timing is also important.

28. When Mr Ngudjolo was detained at the Scheveningen detention centre, counsel were issued with a standing visiting permit.²⁴ At the Schiphol detention centre, counsel must give notice of their visits and, despite this formality, the wait is sometimes long and access to our client difficult.²⁵

29. Mr Ngudjolo does not have access to his case file, while when he was detained at the Scheveningen detention centre, a computer connected to Defence team's network was available to him, whereby he had access to his entire case file.²⁶ These circumstances cause numerous complications for the Defence, which must travel to the Schiphol detention centre in person in order to provide Mr Ngudjolo with the documents necessary for the preparation

²³ The team must allow one and a half hours of travel to reach Mr Ngudjolo and one and a half hours for the return journey. Travelling both ways costs the members of the Defence team between 15 and 20 Euros, an amount which the team pays for personally, but which it considers it should not have to pay in order to see its client.

²⁴ See regulations 177-180 of the Regulations of the Registry.

²⁵ During its last visit, the Defence was granted access to its client after over one hour of waiting.

²⁶ He had electronic access to all the evidence, including video excerpts. In the document filed in support of its Appeal, the Prosecution refers to video excerpts, items of evidence and passages from transcripts. The Scheveningen detention centre would ensure the confidentiality of the documents transmitted by counsel. See regulations 181 and 182 of the Regulations of the Registry.

of his Defence, a few documents at a time. Mr Ngudjolo has only one small cabinet in his cell, which is much too small to contain the whole of his case file, especially since he does not have a computer to use for work.

30. Furthermore, Mr Ngudjolo must now share his cell with another detainee who is seeking asylum, which prevents him from being able to work on his case file in full confidentiality at the times he wishes to do so. Despite his request to the Director of the centre for a cell on his own, nothing has been done. Mr Ngudjolo has advised the Defence that his co-detainee is a national of the Democratic Republic of the Congo (the “DRC”) and speaks Lingala and French; it is therefore impossible for Mr Ngudjolo to study his case file privately or to communicate confidentially with his lawyers when his co-detainee is present because the telephone is in the same room. Mr Ngudjolo is locked in the cell which he shares with the other Congolese national between 9.30 p.m. and 8 a.m. and therefore is not able to work on the preparation of his defence during that time.

31. Thus, at the time of filing this Application, Mr Ngudjolo is suffering from health problems, for which he must take medication which causes him to fall asleep at around 10.00 p.m. The co-detainee with whom he shares his cell disturbs him: late at night, at around 2 a.m. he often turns on and watches the television. This prevents Mr Ngudjolo from resting and the Defence considers that his health and psychological well-being are being compromised as a result.

32. Lastly, the Defence cannot communicate directly with Mr Ngudjolo; only Mr Ngudjolo can telephone his Defence team, and not without incurring considerable costs. Mr Ngudjolo only has ten euros of telephone credit per week, however,²⁷ which is completely inadequate for him to participate actively in the preparation of his Defence.²⁸ When Mr Ngudjolo was detained in Scheveningen, the calls he made to the Defence were not only free, but also unlimited.²⁹ Our client could call the members of his Defence team when he wanted, and vice-versa. Furthermore, he benefited from privileged contact with the Defence as his calls were confidential. This no longer the case as the calls that Mr Ngudjolo makes to the

²⁷ Annex 1: [TRANSLATION], Rules and Regulations, Detention Centres for Foreign Nationals, article 3.3: “You will receive €10.00 of pocket money per week” and article 4.5.2: “The centre will give you €10 of pocket money per full week towards purchases such as phone cards”.

²⁸ It costs Mr Ngudjolo 84¢/min. to call his family in the DRC; 23¢/min. to call his Lead Counsel in Belgium; 0.03/min. to call the office at the ICC; and 0.18¢/min. to call the mobile telephones of the members of his team who live in The Hague, Belgium and France.

²⁹ He was allowed 200 minutes per month to call his family in the DRC and he could call his Defence team free of charge and confidentially; his Defence team could also call him almost at any time between 9 a.m. and 7 p.m. See also regulation 176 of the RC which states that the costs of telephone calls shall be borne by the Court to an extent decided by the Registrar.

members of his Defence team at the ICC are not privileged and confidentiality is not guaranteed.³⁰ There have been occasions where guards at the centre have refused requests by members of the Defence team to remove their documents and to be afforded an appropriate location. These privileges are purportedly reserved for Dutch counsel.

33. The Defence would recall that the principles of international law are clear as to the crucial nature of client-counsel privilege and the Accused's right to access all the material in his case file.³¹ Furthermore, the United Nations High Commissioner for Human Rights enshrined those principles in a General Assembly resolution stating the right of an Accused to "be allowed adequate time and facilities for consultations with his legal counsel".³² At the time of writing, Mr Ngudjolo is unable to exercise these rights and the Defence has no means at its disposal to remedy the situation.

³⁰ Annex 1: [TRANSLATION], Rules and Regulations, Detention Centres for Foreign Nationals, article 3.8.2: "Where necessary and feasible, you may have telephone contact with so-called privileged contacts, such as your lawyer, during the appointed hours. You are responsible for the costs of those telephone calls, unless the Director provides otherwise. There is no other surveillance of those calls than that necessary to establish the identity of the person, or the authority with whom you wish to communicate if the centre is covering the costs [*sic*]. In the instant case, the Defence team is, however, not considered a privileged contact. See also, for comparison, regulation 97(1) of the RC, which allows full communication between a detained person and their defence counsel, and 97(2): "All communication between a detained person and his or her defence counsel [...] shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre".

³¹ Human Rights Committee, *General Comment No. 32: Article 14. Right to equality before courts and tribunals and to fair trial*, Doc UN CCPR/C/GC/32 (2007) para. 33: "'Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. [...]", para. 34: "The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. [...]" available at: <http://www.unhcr.org/refworld/type,GENERAL,HRC,,478b2b2f2,0.html>.

³² *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly, resolution 43/173 of 9 December 1988, principle 18: "1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. 2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel. 3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order. 4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official." See also SCSL, President, CH/PRES/2009/01, *Order on Conditions of Detention*, 21 April 2009, paras. 13-20.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER:

TO INSTRUCT the Defence on the manner in which it should work with its client under the aforementioned conditions with respect to the right to a fair trial;

TO ISSUE any orders which it considers necessary to protect the rights of Mr Ngudjolo.

RESPECTFULLY SUBMITTED.

[signed]

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

Dated this 20 March 2013, at Brussels