



Original: **French**

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

URGENT application by Mathieu Ngudjolo's Defence seeking the translation of the Prosecution document in support of the appeal into French and suspension of the time limits

(Article 67(1)(a) and (f) of the Rome Statute and regulation 35(2) and 59(1) 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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Other

I PROCEDURAL BACKGROUND

1. On 18 December 2012, Trial Chamber II of the International Criminal Court (“Trial Chamber II”), rendered its judgment acquitting the Accused Mathieu Ngudjolo Chui of all the charges.¹

2. On 20 December 2012, the Prosecution filed its notice of appeal in accordance with articles 81(1)(a) and 83(2) of the Rome Statute (“the Statute”), rule 150 of the Rules of Procedure and Evidence (“the Rules”) and regulation 157 of the Regulations of the Court.²

3. On 19 March 2013, the Prosecution filed the “Prosecution’s Document in Support of the Appeal against the *Judgment pursuant to article 74 of the Statute*, (“Prosecution’s Document in Support of the Appeal”).³

4. In this application, the Defence seeks a decision from the Appeals Chamber ordering the translation of the Prosecution’s document in support of the appeal into French and suspension of the time limits for response until such time as the Defence team (“the Defence” or “the Defence team”) receive the French translation.

GROUND FOR THE APPLICATION

I. REQUEST FOR TRANSLATION

a. The right of Mr Ngudjolo to translations

5. The Defence submits, firstly, that, Mr Ngudjolo has a right to be informed clearly and in detail of the contents of the appeal in a language he speaks and understands, in this instance, French. Mr Ngudjolo barely speaks or understands

¹ *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3tENG, 18 December 2012.

² *The Prosecutor v. Mathieu Ngudjolo Chui, “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, 20 December 2012.

³ *The Prosecutor v. Mathieu Ngudjolo Chui, “Prosecution’s Document in Support of the Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’”*, ICC-01/04-02/12-39-Conf-Exp, 19 March 2013.

English. The Defence further submits that, in view of the right to a full and complete defence and the importance of fully understanding the grounds of appeal, Mr Ngudjolo has this right to be provided with a French translation of the Prosecution's Notice of Appeal. In the *Lubanga* case, Trial Chamber I confirmed that the entitlement to translations was necessary to protect the fairness of the proceedings when it ruled that because the accused neither spoke nor understood English, it was justifiable to request the translation of the decision into French.⁴

6. In support of its application, the Defence relies on article 67(1)(a) and (f) of the Statute which provides:

Article 67

Rights of the accused

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;**

[...]

(f) To have, free of any cost, the assistance of a competent interpreter and such **translations as are necessary to meet the requirements of fairness**, if any of the proceedings or documents presented to the Court are not in a **language which the accused fully understands and speaks;**

7. Therefore, it is apparent on reading this article that Mr Ngudjolo has a right to be provided with the French version of the documents that are essential for the preparation of his defence, including above all, the Prosecution's Notice of Appeal.

8. The Defence notes the jurisprudence of this Court and other international courts on this fundamental right.⁵ According to that jurisprudence, the Chamber is under no

⁴ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the translation of the Article 74 Decision and related procedural issues*, ICC-01/04-01/06-2834, 15 December 2011, para. 19.

⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Defence's Request Related to Language Issues in the Proceedings*, ICC-01/05-01/08-307, 4 December 2008, para. 12, 14 and especially para. 16: "entitled to receive the French translation of *such* documents that inform him in detail of the nature, cause and content of the charges brought against him." See also *Kamasinski v. Austria*, [ECHR], Application no. 9783/82, Judgment, 19 December 1989, para. 74: "should be such as to enable the defendant to have knowledge of the case against him and to defend himself [...]", *The Prosecutor v. Slobodan Milosevic*, no.

obligation to translate into the language of the accused all the documents in the proceedings against him, but only such documents that inform him in detail of the nature, cause and content of the charges brought against him and which are necessary for the adequate preparation of his case, as in the present case. These guarantees are so fundamental as to outweigh considerations of judicial economy.⁶ In the *Lubanga* case referred to above, the Chamber recognised the right of the accused to receive French translations of the decision on the confirmation of charges and the list of evidence.⁷ In this case, the Prosecution's Notice of Appeal contains information that is essential for the full and complete preparation of Mr Ngudjolo's defence, in which he is entitled to participate, which wholly justifies the translation into French.

9. The Defence also refers to the judgment of the European Court of Human Rights in *Luedicke, Belkacem and Koç v Germany* where the Chamber decided that:

An accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.⁸

10. It is particularly important to receive a French translation of the Prosecution's Document in Support of the Appeal, because an appeal has an extinctive and devolutive effect. In this appeal, the Prosecution is challenging Trial Chamber II's decision of 18 December 2012 acquitting Mr Ngudjolo and seeking his conviction. Mr Ngudjolo could therefore be seriously prejudiced were Trial Chamber II's judgment to be reversed. It is especially relevant and necessary that Mr Ngudjolo comprehensively understand the grounds of appeal and fully participate in drafting a response.

IT-02-54, *Decision on Prosecution motion for permission to disclose witness statements in English*, 19 September 2001, para 10.

⁶ *Idem*, *Milosevic*, para. 10, "these guarantees are so fundamental as to outweigh considerations of judicial economy".

⁷ *The Prosecutor v. Thomas Lubanga Dyilo, Decision on the Requests of the Defence of 3 and 4 July 2006*, ICC-01/04-01/06-268, 4 August 2006, pp. 5-8.

⁸ Judgment, *Luedicke, Belkacem and Koç v Germany*, [ECHR], Application no. 6210/73; 6877/75; 7132/75 (1978), para. 48.

11. In view of Mr Ngudjolo's right to actively participate in the proceedings, and considering the seriousness of the charges against him, which are currently under appeal and of which he was acquitted, the Defence submits that he is entitled to receive a French translation of the Prosecution's Document in Support of the Appeal.

b. The right of Counsel to translations

12. Secondly, Counsel considers that he would be greatly disadvantaged were he to receive only the English version of the Prosecution Document in Support of the Appeal. Mr Ngudjolo's Lead Counsel and all the members of the Defence team are francophone and/or have French as their first language. French is the only working language used by the Defence team. For these reasons, the Defence consistently specified its preference to work in French and the Defence team expressed themselves only in French throughout the proceedings, in both oral and written submissions to Trial Chamber II. Furthermore, the Defence recalls that Trial Chamber II, seized with the case against Mr Ngudjolo was French-speaking, as were the Prosecution and the participants.

13. The Defence submits that it is under no obligation to be fluent in both working languages of the Court, French and English, and that according to rule 22(1) of the Rules of Procedure and Evidence, counsel for the Defence shall have excellent knowledge of at least one of the working languages.

14. To support this argument, the Defence refers to the decisions rendered by the International Criminal Court itself. The Defence particularly recalls that in the *Mbarushimana* case, the Appeals Chamber extended the time limit following its authorisation for the translation into French of all documents essential to the Prosecution appeal against the Pre-Trial Chamber's decision. The Chamber authorised the translation in fairness to the accused, having noted that Mr

Mbarushimana fully understood and spoke French, but was not fluent in English. The Chamber also noted that defence counsel was exclusively francophone.⁹

15. For all the above-mentioned reasons, the Defence considers that is justifiable to receive the French version of the Prosecution's Document in Support of the Appeal, in order to fully understand the implications and have the opportunity to draft a suitable response reflecting Mr Ngudjolo's right to a full and complete defence.

II. SUSPENSION OF THE TIME LIMITS UNDER REGULATION 59(1)

16. Pursuant to regulation 59(1) of the Regulations of the Court, the Defence must file a response within 60 days from the date of notification of the Prosecution document in support of the appeal. In accordance with this provision, the Defence must file a response by 20 May 2013. The Defence requests a suspension of this time limit for the following two reasons: the Prosecution Document in Support of the Appeal has been drafted entirely in English and Mr Ngudjolo's detention conditions are inappropriate due to the lack of adequate facilities.

(i) The Prosecution Document in Support of the Appeal was drafted entirely in English

17. Firstly, given that the Prosecution's Document in Support of the Appeal is in English only, the Defence considers that the 60-day time limit should be suspended until it receives the complete French translation of this document.

18. The Defence points out that it is worth noting that in other decisions, such as in the *Mbarushimana* case cited at paragraph 14, there was a suspension of the time limits until the receipt of the translation of the confirmation of charges. In fact, in the *Bemba* case, the Pre-Trial Chamber decided that the five-day period set out in rule 155(1) to present an application for leave to appeal would start running as of the date

⁹ *The Prosecutor v. Callixte Mbarushimana, Decision on Mr Mbarushimana's request for time extension*, ICC-01/04-01/10-497 OA4, 9 March 2012 para. 6.

of notification of the French translation of the decision.¹⁰ Similarly, in the *Abu Garda* case, the time limit was suspended until receipt of the Arabic version of the decision.¹¹

19. The Defence further relies on the jurisprudence of the Appeals Chamber of the International Criminal Tribunal for Rwanda. In the *Nzabonimana* case, the Chamber approved the translation of the judgment into French and in so doing granted the Defence an extension of time to file his appeal brief and response brief. To support the application, the Defence had argued that the accused's knowledge of English was very limited and that the working language of the Defence team was French.¹²

(ii) Mr Ngudjolo's detention conditions – lack of adequate facilities

20. More significantly, the Defence wishes to draw the Chamber's attention to the difficulties with which it is faced in view of Mr Ngudjolo's current detention conditions. Mr Ngudjolo has been held at a detention centre at Schiphol since 21 December 2012, as stated in the Defence application of 20 March 2013 to the Appeals Chamber.¹³ The 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.

21. The Defence argues that Mr Ngudjolo is currently not able to communicate freely and in confidence with counsel and thereby adequately prepare his defence, in breach of article 67(1)(b) of the Statute, which provides:

¹⁰ *The Prosecutor v Jean-Pierre Bemba*, Pre-Trial Chamber, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, 15 June 2009, p.185.

¹¹ *Prosecutor v. Abu Garda*, Pre-Trial Chamber, *Decision on the confirmation of charges*, ICC-02/05-02/09-243-Red, 8 February 2010, p. 9.

¹² *Callixte Nzabonimana v. The Prosecutor*, *Decision on extension of time limits*, ICTR-98-44D-A, 7 September 2012.

¹³ *The Prosecutor v. Mathieu Ngudjolo Chui*, "Requête de la Défense de Mathieu Ngudjolo sollicitant les instructions de la Chambre d'appel sur les modalités de préparation de l'appel au regard de la situation actuelle de Mathieu Ngudjolo (Article 67 du Statut de Rome)," ICC-01/04-02/12, 20 March 2013.

Article 67

Rights of the accused

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:

[...]

(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;

22. The Defence does not have easy access to Mr Ngudjolo, since it must allow three hours travelling time to reach the detention centre where he is currently held.

23. Mr Ngudjolo does not have access to his case file. These circumstances cause numerous complications for the Defence, which has to personally deliver to Mr Ngudjolo, in piecemeal, the documents necessary for the preparation of his Defence, as Mr Ngudjolo does not have access to his electronic case file.

24. Mr Ngudjolo must now share his cell with another detainee who is seeking asylum. 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.

25. The Defence cannot communicate directly with Mr Ngudjolo; only Mr Ngudjolo can telephone his Defence team, and not without incurring costs.¹⁴ Furthermore, the calls Mr Ngudjolo makes from the detention centre to the members of his Defence team are not privileged and confidentiality is not guaranteed.

26. The Defence recalls 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.¹⁵

¹⁴ As indicated in the Defence application of 19 March 2013, footnote 13.

¹⁵ 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 No. ICC-01/04-02/12

27. Accordingly, the Defence wishes to emphasise that under regulation 35(2) of the Regulations of the Court, an extension to the time limits is permissible if good cause is shown. Given receipt of the Prosecution's Document in Support of the Appeal which is drafted entirely in English, the Defence deems it reasonable to make this application to the Appeals Chamber.

28. In the circumstances, the Defence submits that Mr Ngudjolo has been deprived of his right to a full and complete defence. For the above-mentioned reasons, the Defence considers that it has good cause to seek an extension to the time limit until the French version of the Documents in Support of the Appeal is filed.

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>.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

ENTERTAIN this application and find it to be wholly founded;

GRANT the Defence application to receive the French translation of the Prosecution document filed in support of the appeal;

ORDER that the time limit for response shall effectively commence for the Defence only from the date of receipt of the French translation of the Prosecution document in support of the appeal;

ISSUE any orders which it considers necessary in the circumstances.

RESPECTFULLY SUBMITTED.

[signed]

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

Dated this 20 March 2013, at Brussels