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

Date: 29 January 2013

THE APPEALS CHAMBER

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

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: Defence Team for Mathieu Ngudjolo

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

Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence of Mr Ngudjolo

Mr Jean Pierre Kilenda Kakengi Basila
Prof. Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

Office of Public Counsel for Victims

Office of Public Counsel for the Defence

States' Representatives

Host State

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

1. On 18 December 2012, Trial Chamber II of the International Criminal Court (“Trial Chamber II” and “the Court”), sitting in its usual courtroom for public sessions at Maanweg 174, 2516 The Hague, in the presence of representatives of the host State duly invited by the Court, 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: “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. Mr Ngudjolo’s satisfaction was short-lived.
4. On 21 December 2012, the day of his release from the Scheveningen Detention Centre in execution of the aforementioned 18 December 2012 Judgment – in relation to which the Prosecutor’s applications for Mr Ngudjolo’s continued detention pending the outcome of the appeal³ and for suspensive effect of the decision ordering his immediate release⁴ both failed – Mr Ngudjolo was handed over to the host State police to be transported to Schiphol airport.
5. Against all expectations, the host State then decided to repatriate Mr Ngudjolo to the Democratic Republic of the Congo – a country with one of the worst human rights records, where human rights appear to be an exotic concept espoused by few.

¹ *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, 198 pages.

² *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment pursuant to article 74 of the Statute*, ICC-01/04-02/12-3-tENG, p. 197.

³ ICC-01/04-02/12-T-3-FRA.

⁴ *The Prosecutor v. Mathieu Ngudjolo Chui, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect*, 20 December 2012, ICC-01/04-02/12-12-OA, p. 11, para. 25: “In sum, in the absence of strong reasons in support of the ordering of suspensive effect, the Appeals Chamber finds that the interest of Mr. Ngudjolo to be released immediately prevails. Accordingly, and without prejudice to the Appeals Chamber’s eventual decision on the merits of the Prosecutor’s appeal against the impugned Decision, the Request for Suspensive Effect is rejected.”

6. In order to counter this expulsion, which would be extremely harmful to him on account of his testimony before Trial Chamber II as a witness in his own case,⁵ Mr Ngudjolo had no alternative but to exercise his right to submit an application for asylum to the host State, seeking international protection.
7. Since then, Mr Ngudjolo has remained in custody at the refugee detention centre at Schiphol airport.
8. Although he remains in detention, which is wholly unjustified, his asylum proceedings are being conducted in keeping with the proper procedure under Dutch law governing political asylum.
9. This arrest and detention, in any event in the objective view of Mr Ngudjolo's Defence, reveals that the Victims and Witnesses Unit failed to take the measures ordered by Trial Chamber II to apply rule 185 of the Rules of Procedure and Evidence ("RPE") and execute the acquittal judgment, wherein in accordance with article 68 of the Statute of the International Criminal Court ("Statute") the Chamber in particular ordered VWU to protect Mr Ngudjolo, who is also named in Annex C to the Judgment, given that he testified in his own case.
10. In an application of 10 January 2013, the Defence vainly sought to convince the host State to see reason by requesting Mr Ngudjolo's release for the purposes of continuing his asylum and appeals proceedings.⁶
11. 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
12. 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.⁸

⁵ On Mr 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.

⁶ See confidential annex I.

⁷ See confidential annex II.

⁸ See confidential annex III.

13. The Registry responded that the Appeals Chamber had hitherto given no indications as to any hearings necessitating Mr Ngudjolo's presence at the seat of the Court.⁹
14. Mr Ngudjolo therefore continues to be deprived of his liberty on the grounds that having been released, he has no residence permit entitling him to remain on the territory of the Netherlands.
15. The annexes to the present document have been filed as confidential since they include correspondence between parties containing confidential information.

A. THE VICTIMS AND WITNESSES UNIT HAS FAILED TO EXECUTE THE FINAL OPERATIVE PROVISION OF THE 18 DECEMBER 2013 DECISION

16. In the Defence's view, the aforementioned response of the Registry¹⁰ appears to disregard the relevant provisions of the Statute and reveals an incomprehensible lack of diligence on the part of the Registry and one of its services, the Victims and Witnesses Unit, which was instructed in the 18 December 2012 decision to protect witnesses, including Mathieu Ngudjolo.
17. It is not mandatory for the Registry to have received from the Appeals Chamber "[TRANSLATION] indications as to any hearings which would require Mr Ngudjolo's presence at the seat of the Court" before granting authorisation to Mr Ngudjolo. A teleological interpretation of articles 83(1), 83(2)(b) and 64 allows for the holding of one or more hearings necessitating the presence of an acquitted person. Article 83(1) provides that the Appeals Chamber is vested with the powers of the Trial Chamber, which, under article 64 and in particular subparagraph (6)(b) thereof, may require the attendance and testimony of witnesses and production of documents and other evidence.
18. Furthermore, the Registry has on other occasions rightfully taken measures to relocate and protect Prosecution witnesses even before the Trial Chamber had ruled on the necessity of their presence. Witness 28 even made his international relocation a prerequisite for his testimony.¹¹

⁹ See confidential annex IV.

¹⁰ See confidential annex IV.

¹¹ ICC-01/04-01/07-T-222-Red-FRA, 24 November 2010, p. 47, line 12, to p. 58, line 10.

19. Moreover, under article 83(2)(b), the Appeals Chamber may order a new trial before a different Trial Chamber, in which case Mr Ngudjolo's presence would be absolutely indispensable.
20. If he is repatriated, nothing and no one can guarantee his appearance at appellate proceedings concerning him. It is worth bearing in mind that despite the Defence's insistence and all the Registry's efforts, Defence Witness DRC-D03-0480 was unable to travel to The Hague to testify before the Trial Chamber and that the Defence therefore had to forgo the testimony of a key witness in its case.
21. Under article 81(3)(c), in case of an acquittal, the accused is to be released immediately. Yet Mr Ngudjolo has not been released. In the event of a conviction and completion of the sentence, article 107(1) provides for the person's transfer to another State which agrees to receive him or her. Yet Mr Ngudjolo was not convicted. It follows that pursuant to the decision of 18 December 2012 and the relevant provisions of the Statute, the Victims and Witnesses Unit is bound to take steps to guarantee his liberty, safety and relocation.

B. MR NGUDJOLO'S ARREST AND DETENTION ARE ARBITRARY AND UNLAWFUL

22. Mr Ngudjolo was arrested in Kinshasa on 6 February 2008 pursuant to the warrant of arrest issued by the International Criminal Court. He was transferred to the Netherlands on 7 February 2008 in accordance with all rules governing the transfer of detained persons under the Headquarters Agreement between the International Criminal Court and the host State, in particular article 44.
23. Mr Ngudjolo did not enter the territory of the host State unlawfully.
24. The argument that he remained in the country unlawfully on the day of his release is fallacious in that it is inconsistent with the facts, given that Mr Ngudjolo was on the territory of the Netherlands for the purposes of his trial.
25. His acquittal does not automatically make him an illegal alien on the territory of the Netherlands, since he has not either materially or intentionally breached Dutch law

governing entry into Dutch territory, residency, settlement and the removal of foreigners.

26. Mr Ngudjolo had special status during his stay in the Netherlands and cannot automatically be stripped of this status following his acquittal on 18 December 2012, because his acquittal is currently under appeal¹² and the appeal is both an extinctive and devolutive remedy.
27. The devolutive nature of the Prosecutor's appeal in and of itself requires Mr Ngudjolo's presence on the territory of the host State, to prevent it from using as a pretext the Court's failure to take a démarche beforehand.
28. The existence of the appeal is public knowledge. Having been represented in the courtroom when the acquittal judgment was handed down, the host State cannot claim that the appeal does not exist or that it was unaware of its existence in order to resort to the argument that the Registry ought to have obtained a document certifying that the appeals proceedings are continuing before the Appeals Chamber.

C. THE HOST STATE MUST COMPLY WITH ITS INTERNATIONAL UNDERTAKINGS

29. The Defence moves the Appeals Chamber to remind the host State, on whose territory the International Criminal Court operates, of its international undertakings. Such action by the Appeals Chamber would not signify any interference in the ongoing asylum proceedings, which fall outside the material and personal jurisdiction of the ICC.
30. The host State's international undertakings include those defined in the Headquarters Agreement between the Court and the Host State,¹³ which entered into force on 1 March 2008.
31. Under article 2 of said Agreement, the host State is bound to facilitate the proper functioning of the Court on its territory, provide for the long-term stability and

¹² *The Prosecutor v. Mathieu Ngudjolo Chui*, "Prosecution's Appeal against Trial Chamber II's '*Jugement en application de l'article 74 du Statut*'", 20 December 2012, ICC-01/04-02/12-10-OA.

¹³ Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08.

independence of the Court and facilitate “**its smooth and efficient functioning, including, in particular, its needs with regard to all persons required by the Court to be present at its seat [...]**”¹⁴ [emphasis added].

32. Within the framework of that Agreement, the Registry may, on the basis of the acquittal judgment and the Prosecutor’s appeal, provide the host State with a document certifying that Mr Ngudjolo’s presence is required at the seat of the Court to prepare for and participate in appellate proceedings concerning him.
33. This measure falls within the scope of article 29(2) of the Headquarters Agreement, which stipulates: “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.”
34. Pursuant to article 29(5), persons referred to in article 29 “shall not be subjected by the host State to any measures which may affect their presence before the Court”.
35. The host State is bound to take any measures necessary for the full implementation of the relevant provisions of the Statute of the Court to which it is party.
36. Furthermore, Dutch domestic law provides for a harmonious resolution of Mr Ngudjolo’s situation.
37. In light of the host State’s response of 11 January 2013, it is germane to analyse Dutch asylum law and thereby to examine the host State’s compliance with its international undertakings.

¹⁴ The final recital of the preamble to the Headquarters Agreement reads as follows: “Whereas the Court and the host State wish to conclude an agreement **to facilitate the smooth and effective functioning of the Court in the host State**”. Article 2 defines the purpose and scope of the Agreement in the following terms: “This Agreement shall regulate matters relating to or arising out of the establishment and **the proper functioning of the Court in the host State. It shall, inter alia, provide for the long-term stability and independence of the Court and facilitate its smooth and efficient functioning, including, in particular, its needs with regard to all persons required by the Court to be present at its seat [...]**” [emphasis added].

38. Under the Dutch Constitution, in particular articles 91 to 95 thereof, self-executing international provisions – i.e. those which are sufficiently precise to be applied directly – shall take precedence over any and all domestic regulations, including the provisions of the Constitution. To this end, articles 93 and 94 establish a compliance test and require that domestic law, even the Constitution, be consistent with international law.
39. Consequently, the Dutch legal system is monistic, with international law enjoying primacy. Domestic and international law form one indivisible whole and self-executing international law takes precedence over domestic law.
40. The Universal Declaration, the International Covenant on Civil and Political Rights, the Second Optional Protocol, and some fifty resolutions adopted by the General Assembly, the Economic and Social Council and the Commission on Human Rights all provide for the abolition of the death penalty. Within the UN, European States are amongst the most active in the international campaign to abolish the death penalty. The European Parliament “[TRANSLATION] considers the death penalty to be a form of inhuman and cruel punishment and unworthy of modern societies”.¹⁵
41. Similarly, on 6 June 1995 the South African Constitutional Court issued a momentous 243-page judgment with none of the 11 judges dissenting, in *The State v. Makwanyane*,¹⁶ wherein the death penalty was equated to torture and cruel, inhuman and degrading punishment. This landmark case has set a precedent for several constitutional courts.
42. It is worth noting that the Netherlands has ratified almost all international instruments prohibiting the death penalty, including Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in times of peace (ratified on 26 April 1986), Protocol No. 13 concerning the abolition of the death penalty in all circumstances (ratified on 10 February 2006)

¹⁵ European Parliament, Annual Report on Human Rights, 1998-1999, adopted by the Council in October 1999, point 29.

¹⁶ *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), available at: <http://www.saflii.org/za/cases/ZACC/1995/3.html>.

and Protocol No. 2 of the International Covenant on Civil and Political Rights (ratified on 26 May 1991).

43. Under article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁷ which entered into force on 26 June 1987:

[1]. No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

[2]. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

44. The Democratic Republic of the Congo does not have a good human rights reputation.
45. All reports of all national and international human rights organisations denounce the Congolese State and authorities for widespread and serious human rights violations.
46. Furthermore, within Europe and the Schengen area, the host State has ratified all international legal instruments which require respect for human rights and deplore *refoulement* to unsafe countries.¹⁸
47. Consequently, the Dutch authorities and courts cannot breach international conventions on the death penalty and torture, which in their case constitute not only the applicable law but also the law which enjoys primacy. Furthermore, the prohibition of torture forms part of *jus cogens* and cannot be breached.
48. For these reasons, Mr Ngudjolo, in respect of whom an appeal is pending before the Appeals Chamber, cannot be repatriated to the DRC – a country which not only

¹⁷ Office of the High Commissioner for Human Rights, available at: <http://www2.ohchr.org/english/law/cat.htm>.

¹⁸ *The Prosecutor v. Mathieu Ngudjolo Chui*, “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”, 21 December 2012, ICC-01/04-02/12-15-tENG OA, paras. 46, 47, 48, 49 and 50.

includes the death penalty in its arsenal of penalties and applies it, but also frequently resorts to extra-judicial executions.

D. THE DEFENCE MOVES THE APPEALS CHAMBER TO REQUIRE THE HOST STATE TO COMPLY WITH THE 18 DECEMBER 2012 JUDGMENT OF TRIAL CHAMBER II OF THE INTERNATIONAL CRIMINAL COURT

49. There is no legal or factual justification for the host State's arrest and detention of Mr Ngudjolo after his acquittal on 18 December 2012. Apart from the fact that he cannot be considered to be remaining unlawfully on the territory of the Kingdom of the Netherlands, Mr Ngudjolo is not in violation of the laws, public order or morality of the Netherlands. Given that he came to this country for the requirements of his trial, he must remain here until the end of his trial at the appeals stage.
50. Since he must therefore not be repatriated to his country of origin, Mr Ngudjolo must enjoy complete freedom of movement on Dutch territory for the purposes of both his asylum proceedings and the appeal.
51. Contrary to what it states in its response to the aforementioned Defence application, the Schiphol detention centre where Mr Ngudjolo is being held does not provide him with the facilities he requires to properly defend his interests at the appellate stage.
52. The host State should be reminded that the judicial proceedings of the International Criminal Court differ from proceedings governing misdemeanours or even indictable offences in the domestic criminal courts. The ICC uses an electronic court system, and persons brought before the Court are taught to navigate its complexities and learn to peruse the record of their case. Such arrangements are unknown at Mr Ngudjolo's current place of detention.
53. It is also worth noting the substantial volume of Mr Ngudjolo's case record, which could not be physically moved to his current place of detention.
54. The Registry is required to execute the aforementioned judgment insofar as it pertains to witness protection and must be free to direct its efforts to that end having Mr Ngudjolo

at its disposal for the purposes of properly assessing the aforementioned provisions of rule 185 of the RPE.

55. The host State is required to comply with the Judgment of 18 December 2012, which is an *erga omnes* criminal judgment and hence binding upon all. This includes the host State, which has no legal basis on which to circumvent judicial orders issued by the Court, whose Statute and other founding legal instruments it has ratified.
56. In the view of the Defence, the host State's current conduct toward Mr Ngudjolo is liable to undermine the prestige and authority of the decisions of the International Criminal Court, whose image will be tarnished universally and its prestige demolished if the host State is permitted to flout its judgments.
57. The Court's judgments are issued on behalf of the international community, which intended that suspects and accused persons be tried in accordance with the law.
58. Detaining Mr Ngudjolo – who has been cleared of any suspicion of having committed war crimes and crimes against humanity – without valid grounds contravenes the rule of law, thereby giving the erroneous impression that the Court has failed in its duty.

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

- **ENTERTAIN** this application and find it to be wholly founded;
- Consequently, **REQUIRE** the host State to comply with the operative provision of the 18 December 2012 judgment ordering the Victims and Witnesses Unit to protect witnesses, including Mr Ngudjolo;
- **INSTRUCT** the Victims and Witnesses Unit to afford Mr Ngudjolo the protection provided for in article 68 of the Statute;
- **RULE** that such protection must be provided by the Registry of the International Criminal Court, which must have Mr Ngudjolo at its disposal in observance of said Judgment;
- **REQUIRE** the host State to hand Mr Ngudjolo over to the authorities of the International Criminal Court, agreeing on his place of abode pending the outcome of his asylum proceedings and the appeal;
- **ORDER** the Registry of the Court to issue to the host State, on the basis of the acquittal judgment and the appeal lodged by the Prosecutor, a document certifying that Mr Mathieu Ngudjolo Chui's presence is required at the seat of the Court so that he may prepare for and participate in the appellate proceedings concerning him.

AND JUSTICE WILL BE DONE.

RESPECTFULLY SUBMITTED.

[signed]

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

Dated this 29 January 2013, at Brussels