

ANNEX D

THE CASE OF MATHIEU NGUDJOLO: A CHALLENGE FOR THE INTERNATIONAL CRIMINAL COURT, THE HOST STATE AND STATES PARTIES.

by
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Your Excellencies,

Ladies and Gentlemen,

I would like to thank the organisers of this colloquium for inviting me to talk about the case of my client, Mr Mathieu Ngudjolo Chui, and the challenge it has presented and continues to present for the International Criminal Court, the host State and all States Parties to the Rome Statute. As proceedings in this case are ongoing concurrently before two jurisdictions – the Appeals Chamber of the International Criminal Court, for the criminal proceedings, and the administrative bench of the Kingdom of the Netherlands, for the asylum proceedings – may I crave your indulgence to adopt a moderate tone and stance on some topics in line with my duty as Counsel. That said, I shall approach the heart of the matter without evasiveness.

Introduction

By way of introduction, allow me to recall that between 18 and 20 December 2012, three judicial decisions found for Mathieu Ngudjolo Chui: the 18 December Judgment pursuant to article 74 of the Rome Statute¹ acquitting him, the oral decision rendered on the same day dismissing the Prosecution's application for continued detention of the acquitted person pending the outcome of appeals² and lastly, the 20 December Appeals Chamber decision upholding the oral decision and hence finding the Prosecution's appeal against it groundless.³

In light of the foregoing decisions, the Registry considered that there was no legal justification for the continued detention of the acquitted person in the ICC⁴ Detention Centre in Scheveningen. On 21 December 2012 it released him.

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¹ ICC-01/04-02/12-3-tENG, *Judgment pursuant to article 74 of the Statute*.

² ICC-01/04-02/12-T-3-FRA ET WT 18-12-2012, pp. 1-6.

³ ICC-01/04-02/12-12, 20-12-2012, *Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect*.

⁴ International Criminal Court.

On the same day, the host State also considered that there was no legal basis for Ngudjolo's continued stay in The Netherlands. After his official release by the Registry, Ngudjolo was handed over to the Dutch Police, undoubtedly at the request of the host State, and taken forthwith to Schiphol airport for repatriation to the Democratic Republic of the Congo.

Fearing persecution in his country of origin within the meaning of article 1 of the 28 July 1951 Geneva Convention, Ngudjolo was compelled to seek political asylum in the Netherlands. Hence, he was transferred to the administrative detention centre for asylum seekers and detained from 21 December 2012 to 3 May 2013, when the Court of Amsterdam ordered his release. Since then Ngudjolo has been free and under the charge of the relevant services of the ICC.

So, as you can see, for nearly six months, our client's acquittal instead became a nightmare. The trauma of his incarceration increased by the day. He was on the verge of depression as he had trouble understanding how such treatment could be inflicted on an acquitted person for whom everyone wanted a fair trial, when he was arrested.

Ngudjolo only savoured the joys of acquittal on 4 May 2012, when he effectively left the administrative detention centre for asylum seekers. During his long detention, my legal assistants⁵ and I noted several facts: (1) the ICC Registry's inability to implement rule 185 of the RPE⁶ due to action by the host State; (2) the International Criminal Court's reluctance to confront the host State; (3) the failure of the other States Parties to call the host State to account over compliance with the ICC's rulings(4)⁷ and lastly, a form of legal vacuum regarding the administrative status of acquitted persons who are released, whereas all States Parties to the Rome Statute are responsible for administrative handling of acquitted persons. (4).

I shall briefly expand on the above four points.

⁵ Andrea Valdivia, Counsel, Godefroid Bokolombe, Lecturer, and our interns Jessica Hebert and Mireille Lengoc.

⁶ Rules of Procedure and Evidence

⁷Hence the Defence application no. ICC-01/04-02/12-22-tENG, 8 February 2013 "Defence Request that the Appeals Chamber order the Victim and Witness Unit to execute and the host State to comply with the acquittal judgement of 18 December 2012 issued by Trial Chamber II of the International Criminal Court"

1. The inability of the Registry of the International Criminal Court to implement rule 185 of the Rules of Procedure and Evidence due to action by the host State

Rule 185 of the RPE stipulates as follows:

Subject to sub-rule 2, where a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, the case is inadmissible under article 17 paragraph 1 (b), (c) or (d), the charges have not been confirmed under article 61, the person has been acquitted at trial or on appeal, or for [an]other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State. In this case, the host State shall facilitate the transfer in accordance with the agreement referred to in article 3, paragraph 2, and the related arrangements.

In Ngudjolo's case, the Registry had planned to lodge him in a hotel in The Hague pending the UN's lifting of the travel ban imposed on him pursuant to Security Council resolution 1596.⁸ Thereafter, it was to duly transfer him. However, the host State took a different view. As Ngudjolo had become an illegal alien there was no question of leaving him at liberty. He had to be immediately removed from Dutch territory.

Needless to say the host State's point of view was shared neither by the Defence for Ngudjolo, the ICC nor by our Dutch colleagues in charge of his application for asylum. Ngudjolo was a legal resident of the Netherlands under the Headquarters Agreement which binds the State of the Netherlands vis-à-vis the ICC. His acquittal alone does not make him *ipso facto* an illegal alien in The Netherlands. This holds particularly true in that article 48(1) of the Headquarters Agreement between the International Criminal Court and the host State,⁹ entitled "Release without Conviction", stipulates:

Subject to paragraph 2 of this article, where a person surrendered to the Court is released from the custody of the Court because the Court does not have jurisdiction, the case is inadmissible under article 17, paragraph 1(b), (c) or (d), of the Statute, the charges have not been confirmed under article 61 of the Statute, the person has been acquitted at trial or on appeal, or for any other reason, the Court shall, as soon as possible, make such arrangements as it considers appropriate for the transfer of the person, taking into account the views of the person, to a State which is obliged to receive him or her, to another State which agrees to receive him or her, or to a State which has requested his or her extradition with the consent of the original surrendering State.

⁸ "[TRANSLATION] The freezing of assets and travel ban were initially imposed pursuant to paragraphs 13 and 15 of Security Council resolution 1596(2005) and subsequently extended or amended by resolutions 1649(2005), 1698 (2006), 1768(2007), 1771(2007), 1799(2008), 1807(2008), 1857(2008), 1896(2009), 1952(2010), 2021(2011) and 2078(2012). The criteria for inclusion on the list are stipulated in paragraph 4 of resolution 2078 (2012)." Found online.

⁹ This article is a carbon copy of rule 185 of the RPE

In light of the foregoing, the Defence for the acquitted person failed to comprehend the ICC's apparent compunction, or rather unease, about confronting the host State over the issue.

2. The International Criminal Court's reluctance to confront the host State

Ngudjolo's acquittal raised the issue of his administrative status with respect to his residence in the Netherlands. As mentioned earlier, the host State's point of view was that the acquitted person had no residence permit entitling him to remain on its territory after his release.

As a result of the host State's stance, the Registry was unable to execute the acquittal judgment of 18 December 2012. The Registry viewed the application for asylum and the resulting administrative detention as a form of diriment impediment stripping it of any ability to apply rule 185. It further considered that so long as the acquitted person remained in the Netherlands in connection with the application for asylum, his security would not be threatened. Lastly, the Registry noted that the implementation of rule 185 depends on cooperation from States Parties and, regarding Ngudjolo, the lifting of the UN travel ban.¹⁰

The residence of foreigners is the clear preserve of host State sovereignty. However, did the host State have legal justification to reject Ngudjolo's presence in the Netherlands so soon after his release? We believe not. As the ICC is wholly reliant on State cooperation, it is equally self-evident that the ICC has no military or police force to wrest Ngudjolo from the custody of the host State.

Therefore, we understand the ICC's decision to leave Ngudjolo in the custody of the host State for the duration of his asylum proceedings. However, what would have happened had Ngudjolo not applied for asylum? He would no doubt have been deported from the Netherlands irrespective of rule 185 of the RPE and article 48(1) of the Headquarters Agreement.

In the instant case, it would have been perfectly reasonable for the ICC to insist that the host State comply with the Court's decisions, in particular the decision acquitting Ngudjolo, irrespective of the asylum proceedings, especially as the proceedings did not unavoidably require taking Ngudjolo into custody in the Schiphol administrative detention centre.

¹⁰ ICC-01/04-02/12-25-tENG, 22-03-2013, "Registry's observations pursuant to regulation 24 *bis* of the Regulations of the Court on the 'SECOND ADDENDUM to "Defence request that the Appeals Chamber order the Victims and Witnesses Unit to execute and the host State to comply with the acquittal judgment of 18 December 2012 issued by trial Chamber II of the International Criminal Court"'".

In our opinion, a manifest issue arises from the interpretation of rule 185 of the RPE and article 48(1) of the Headquarters Agreement. According to the Defence, the host State did not comply with the judgment acquitting Ngudjolo and article 48(1) of the Headquarters Agreement. In our view, this situation ought to have led the ICC clearly to insist that the host State comply with both the Judgment and the Headquarters Agreement. Alternatively to such compliance, it should have referred the matter to the arbitral tribunal as stipulated in article 55(2) of the Headquarters Agreement between the host State and the ICC.¹¹ Through the indifference of the other States Parties, the situation has become entrenched.

3. Failure of the other States Parties to call the host State to account over compliance with the International Criminal Court's rulings

Not a single entreaty came from States Parties for compliance with the judgment acquitting Ngudjolo. The Defence commends the Rwandan Minister of Foreign Affairs, the lone voice who spoke out at the United Nations Security Council.

Yet the credibility of ICC judgments depends on compliance by States Parties. Unlike a conviction, the acquittal of an accused is of little concern to the States Parties. It should be noted that Part 10 of the Rome Statute devotes nine or so articles to enforcement of sentences of imprisonment. Pursuant to rule 200 of the RPE, the ICC has concluded several agreements with

¹¹ Article 55, "Settlement of differences on the interpretation or application of this Agreement or supplementary arrangements or agreements":

1. All differences arising out of the interpretation or application of this Agreement or supplementary arrangements or agreements between the Court and the host State shall be settled by consultation, negotiation or other agreed mode of settlement.
2. If the difference is not settled in accordance with paragraph 1 of this article within three months following a written request by one of the parties to the difference, it shall, at the request of either party, be referred to an arbitral tribunal according to the procedure set forth in paragraphs 3 to 5 of this article;
3. The arbitral tribunal shall be composed of three members: one to be chosen by each party and the third, who shall be the chairman of the tribunal, to be chosen by the other two members. If either party has failed to make its appointment of a member of the tribunal within two months of the appointment of a member by the other party, that other party may invite the President of the International Court of Justice to make such appointment. Should the first two members fail to agree upon the appointment of the chairman of the tribunal within two months following their appointment, either party may invite the President of the International Court of Justice to choose the chairman.
4. Unless the parties otherwise agree, the arbitral tribunal shall determine its own procedure and the expenses shall be borne by the parties as assessed by the tribunal.
5. The arbitral tribunal, which shall decide by a majority of votes, shall reach a decision on the difference on the basis of the provisions of this Agreement and subsequent arrangements or agreements and the applicable rules of international law. The decision of the arbitral tribunal shall be final and binding on the parties.

various States Parties regarding enforcement of sentences of imprisonment. We shall return to this shortly.

All other things being equal, Ngudjolo's case may set a precedent which may reoccur in the future. Beyond the instant case, the attention of States Parties should turn to future acquitted persons before the ICC. They must give full effect to acquittal judgments rendered by various chambers of the Court. For the ICC decision-making process to command respect, its judicial decisions must be voluntarily executed by States Parties.

It is high time that the acquittal of accused persons be placed on the agenda of States Parties. Indeed, it must be recognised that a person acquitted before an international criminal court is no ordinary acquitted person: stigmatisation endures even after acquittal. This is apparent from the position espoused by certain NGOs which consider Ngudjolo's acquittal as strengthening impunity and in so doing discredit the judgment by a competent, judicious bench versed in criminal law. These NGOs, often echoed by the victims' legal representatives, condemn the acquittal of a "war lord" whereas he was tried in accordance with the law applicable before the Court. Thus, the acquitted person will be exposed to the wrath from uncontrolled quarters should he return to his native country.

To avoid such a situation, it is imperative for the Registry to be assisted by States Parties in properly executing acquittal judgment pursuant to rule 185 of the RPE and article 48(1) of the Headquarters Agreement. Execution of an acquittal judgment is the shared responsibility of the ICC itself, the host State and States Parties. The Prosecution, as guarantor of the basic legal texts of the ICC, should contribute by seeking compliance with the acquittal judgment irrespective of the appeal it lodged.

This, I believe, is the shared responsibility of all who believe in the ICC and who wish to see the accused tried in accordance with the law. They must desist from discrediting judgments rendered by the chambers of the Court. They should not cast unjustified doubt on the work of the bench which played a leading role in the judgement.

4. Administrative handling of the acquitted person is the responsibility of all States Parties to the Rome Statute

Unlike acquittal, enforcement of sentences is governed by specific provisions of the Rome Statute which reflect the importance that the States Parties attached to convicted persons. Part 10 of the Rome Statute is specifically entitled “Enforcement”. Relying on rule 200 of the RPE, the Court often signs agreements with States Parties on enforcement of sentences of imprisonment.¹²

No such provision is made for acquitted persons, whose administrative situation, as Mathieu Ngudjolo’s case clearly demonstrates, is precarious owing to the absence of a legal framework for the *expressis verbis* regulation of their status in the Netherlands at the time of release following acquittal.

In Ngudjolo’s case, the host State relied on the lack of a residence permit to arrest and detain him. The Defence is of the opinion that the Registry was given no opportunity to execute the acquittal judgment under article 81(3)(c)¹³ and rule 185 of the RPE. As it has no power of compulsion over the host State, the Registry had no choice but to accept the situation.

In the Defence’s opinion, rule 185 alone and article 48(1) of the Headquarters Agreement were sufficient to resolve the issue. The Registry, with the assistance of States Parties, could have executed the judgment acquitting Ngudjolo. The credibility of the International Criminal Court was at stake. That is why, during the signing of the agreements on enforcement of sentences between the ICC and Belgium and Denmark, the President of the International Criminal Court, Judge Sang-Hyun Song, rightly stated that “[h]aving sufficient options in place to ensure

¹² For example: Agreement between the International Criminal Court and the Government of the Republic of Mali on enforcement of sentences by the Court ICC-PRES/11-01-12 which came into effect on 13 January 2012; Agreement between the Kingdom of Denmark and the International Criminal Court on enforcement of sentences made by the Court ICC-PRES/12-02-12, which came into effect on 5 July 2012; Agreement between the International Criminal Court and the Government of Finland on enforcement of sentences by the Court ICC-PRES/07-01-11 which came into effect on 24 April 2011; The ICC reached agreements with Belgium, Denmark and Finland ICC-CPI-20100601-PR 533; Agreement between the International Criminal Court and the Federal Government of Austria on enforcement of sentences by the Court ICC- PRES/00-01-05, The Hague, 27 October 2005; Agreement between the International Criminal Court and the United Kingdom and Northern Ireland on enforcement of sentences by the International Criminal Court ICC-PRES/04-01-07, London, 8 November 2007 and Agreement between the International Criminal Court and Colombia.

¹³ This article provides that in case of an acquittal the accused shall be released immediately.

enforcement of judicially ordered sentences is an important element in the overall credibility of the judicial process at the ICC”.

When a similar agreement was signed with Serbia, Judge Sang-Hyun Song repeated that “[h]aving sufficient options in place to ensure enforcement of judicially ordered sentences is an important element in the overall credibility of the judicial process at the ICC”.

There is no gainsaying the fact that enforcement of sentences must include acquittal judgments rendered by the Court. The credibility of this eminent criminal court will soon be undermined were States Parties to ignore the legal decisions made by its chambers. In our understanding, the administrative handling of Ngudjolo immediately after his release by the Registry is due to the host State’s misconstruction of the ambit both of rule 185 of the RPE and article 48(1) of the Headquarters Agreement.

The Defence accepts that responsibility for administrative handling of persons acquitted by the International Criminal Court should be shared among States Parties. As with the agreements on sentences of imprisonment, agreements should also be signed with respect to execution of acquittal judgments where, for sound reasons, acquitted persons cannot return to their native country.

For now, Mathieu Ngudjolo cannot return to his country of origin, where he will be in danger. He has chosen to apply for asylum to secure international protection. However, beyond the instant case, it is propitious for Part 10 of the Statute to be expanded to include clear provisions governing acquittal which unambiguously resolve the administrative situation of acquitted persons.

Conclusion

What Ngudjolo suffered following his acquittal is unfortunate. We appeal to the International Criminal Court, the host State and the States Parties to work together towards ending the legal uncertainty of acquitted persons after they are released. Now, as part of post-trial assistance, we should witness the advent of agreements on the hosting of persons acquitted by the International Criminal Court. At stake is the credibility of our Court, which a Japanese colleague described at the end of the Sixth Seminar of Counsel as the pinnacle of criminal justice. The right to execution of an acquittal judgment is an integral part of fair-trial rules

within the meaning of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴

Thank you for your kind attention.

¹⁴ Franklin Kutu, *Justice pénale et procès équitable*, Volume I, Larcier, Brussels, 2006 para. 103 including jurisprudential references:

[TRANSLATION] The right to execution of a decision to acquit. Execution of a judgment of acquittal handed down at first instance or on appeal, irrespective of the court which rendered it, must be considered an integral part of the trial within the meaning of article 6 of the Convention. Some 40 years ago, the Court of Cassation determined that articles 1 and 6 of the Convention have no bearing on the execution of the aforesaid judgments. The guarantees enshrined in article 6 would, however, be illusory if a Contracting State's administrative or ordinary courts allowed a final, binding judicial decision to acquit to remain inoperative to the detriment of a person acquitted of serious or ordinary offences. It would be inconceivable for paragraph 1 of article 6, taken together with paragraph 3, to mandate Contracting States to take positive measures with regard to the accused and expound on the procedural guarantees afforded to litigants – fairness, publicity and expeditiousness – without at the same time safeguarding implementation of a decision to acquit handed down at the end of such proceedings. Criminal proceedings form a whole and article 6 protection does not cease with pronouncement of a judgment of acquittal. If the State administrative authorities could refuse or omit to comply with a judgment acquitting a defendant, or even delay or fail to do so, the article 6 guarantees the acquitted person previously enjoyed during the judicial phase of the proceedings would become partly illusory.