

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

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

**Date: 24 April 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**

**Decision on “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)”**



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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**  
Mr Jean Pierre Kilenda

**Legal Representatives of Victims**  
Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber II entitled “Jugement rendu en application de l’article 74 du Statut” of 18 December 2012 (ICC-01/04-02/12-3),

Having before it the “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)” of 20 March 2013 (ICC-01/04-02/12-40-tENG),

*Renders* unanimously the following

## DECISION

The “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)” is rejected.

## REASONS

### I. PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II delivered the “Jugement rendu en application de l’article 74 du Statut”<sup>1</sup> (hereinafter: “Decision on Acquittal”) in which Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) was acquitted of all charges against him.

2. On 21 December 2012, Mr Ngudjolo filed the “Urgent Defence Application for the international relocation of Mathieu Ngudjolo outwith the African continent

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<sup>1</sup> ICC-01/04-02/12-3.



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”.<sup>2</sup>

3. On 19 March 2013, the Prosecutor filed the “Prosecution’s Document in Support of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’”<sup>3</sup> (hereinafter: “Document in Support of the Appeal”).

4. On 20 March 2013, Mr Ngudjolo filed the “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)”<sup>4</sup> (hereinafter: “Request”). He recalls that he applied for asylum in The Netherlands “to forestall [his] expulsion [to the Democratic Republic of the Congo] which would be extremely detrimental to him”.<sup>5</sup> Submitting that he is “currently in administrative detention at the detention centre at Schiphol; 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”,<sup>6</sup> Mr Ngudjolo seeks “the Appeals Chamber’s instructions on the manner in which [...] [the Defence] should proceed with the appeal within the time limit and conditions which are consistent with the rights of the Defence”.<sup>7</sup>

5. Mr Ngudjolo submits that the Request is based on article 67 (1) (b) of the Statute and on factual grounds relating to his current “prison conditions”.<sup>8</sup> Mr Ngudjolo contends, *inter alia*, that article 67 (1) (b) of the Statute and article 6 (3) (b) of the European Convention on Human Rights “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”.<sup>9</sup> Furthermore, Mr Ngudjolo avers that the practical modalities and effective mechanisms set out under regulations 174 to

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<sup>2</sup> ICC-01/04-02/12-15-tENG.

<sup>3</sup> ICC-01/04-02/12-39-Conf-Exp.

<sup>4</sup> ICC-01/04-02/12-40-tENG.

<sup>5</sup> Request, para. 3.

<sup>6</sup> Request, para. 16.

<sup>7</sup> Request, para. 16.

<sup>8</sup> Request, para. 17.

<sup>9</sup> Request, paras 18-19.

180 of the Regulations of the Registry and regulation 98 of the Regulations of the Court either do not exist or have not been implemented in the Dutch system of administrative detention at Schipol.<sup>10</sup>

6. Regarding the factual grounds of this Request, Mr Ngudjolo submits that, as of 21 December 2012, he has been held in a detention centre at Schipol, which is “not designated to hold detainees facing criminal proceedings”,<sup>11</sup> and where the conditions “are not conducive to the calm and acceptable preparation of his defence”.<sup>12</sup> Mr Ngudjolo avers that he is not “currently able to communicate freely and in confidence with his counsel and thereby adequately prepare his defence”,<sup>13</sup> that his Counsel does not have easy access to him,<sup>14</sup> and that he does not have access to his entire case file, which was previously accessible to him through a computer connected to the Defence’s team network at the Court’s detention centre.<sup>15</sup> Furthermore, Mr Ngudjolo submits that his Counsel cannot communicate directly with him, in that only he can “telephone his Defence team, and not without incurring considerable costs”.<sup>16</sup> Mr Ngudjolo also submits that he must now share his cell with another detainee from the Democratic Republic of the Congo who speaks Lingala and French, thus making it “impossible for [him] 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”.<sup>17</sup> Finally, Mr Ngudjolo submits that his co-detainee disturbs him during the night, compromising his health and psychological well-being.<sup>18</sup> Accordingly, Mr Ngudjolo requests that the Appeals Chamber 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” and that it issue “any orders which it considers necessary to protect [his] rights [...]”.<sup>19</sup>

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<sup>10</sup> Request, para. 24.

<sup>11</sup> Request, para. 25.

<sup>12</sup> Request, para. 25.

<sup>13</sup> Request, para. 26.

<sup>14</sup> Request, paras 27 and 28.

<sup>15</sup> Request, para. 29.

<sup>16</sup> Request, para. 32.

<sup>17</sup> Request, para. 30.

<sup>18</sup> Request, para. 31.

<sup>19</sup> Request, p. 11.

## II. MERITS

7. The Appeals Chamber notes that Mr Ngudjolo contends that his right to a fair trial, in particular his right to have adequate time and facilities for the preparation of his defence, is impaired for several reasons. Accordingly, Mr Ngudjolo seeks instructions from the Appeals Chamber “on the manner in which [...] [the Defence] should proceed with the appeal”.<sup>20</sup> The Appeals Chamber will address Mr Ngudjolo’s submissions in turn.

### A. Preliminary observation

8. At the outset, the Appeals Chamber recalls that Mr Ngudjolo is currently detained at an administrative detention centre at Schipol airport, in connection with his request for asylum in The Netherlands.<sup>21</sup> His detention is governed by the “Internal Rules and Regulations for Aliens Detention Centre”<sup>22</sup> (hereinafter: “Internal Rules and Regulations”). As such, Mr Ngudjolo is under the jurisdiction of the Dutch authorities and the Appeals Chamber is not the competent judicial body to review the detention conditions pursuant to the Internal Rules and Regulations. Rather, the Appeals Chamber’s jurisdiction is limited to an assessment of whether the conditions of his detention infringe upon Mr Ngudjolo’s fair trial rights in relation to the proceedings before this Court.

### B. Free and confidential communication with his Counsel

9. Mr Ngudjolo submits that he does not have free and confidential access to his Counsel and that his Defence cannot communicate directly and confidentially with him.<sup>23</sup> The Appeals Chamber notes that, pursuant to article 3.7.2. of the Internal Rules and Regulations, a detainee may be visited by his or her legal assistant on every working day during working hours, as well as outside these hours if the interests of justice so require.<sup>24</sup> As regards the confidentiality of these communications, the Appeals Chamber notes that privileged visits take place in a visiting room in the

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<sup>20</sup> Request, para. 16.

<sup>21</sup> ICC-01/04-02/12-15-tENG.

<sup>22</sup> ICC-01/04-02/12-40-Anx1.

<sup>23</sup> Request, paras 26-28.

<sup>24</sup> Internal Rules and Regulations, article 3.7.2.

absence of any staff member of the detention centre, and that only indirect surveillance is conducted by a staff member outside the visiting room.<sup>25</sup>

### **C. Access to his case file**

10. In relation to Mr Ngudjolo's submission that he does not have electronic access to his case file because he has no access to a computer connected to his Defence team's network,<sup>26</sup> the Appeals Chamber notes that Mr Ngudjolo's Counsel is providing him with hard copies of the documents which are necessary for the preparation of his defence.<sup>27</sup> As such, Mr Ngudjolo does have access to his case file, albeit not electronically. The Appeals Chamber considers that the lack of electronic access to his case file does not prejudice Mr Ngudjolo's ability to prepare his defence.

### **D. Telephone calls to his Defence team**

11. Mr Ngudjolo submits that his Counsel cannot communicate directly with him, and his telephone calls to his Defence team incur considerable costs.<sup>28</sup> In this regard, the Appeals Chamber notes that while the Internal Rules and Regulations are silent on whether Mr Ndugjolo may receive calls, a telephone is located in Mr Ngudjolo's cell for him to make calls and he is given ten euros in telephone credit per week by the Dutch authorities to do so.<sup>29</sup> Furthermore, the Appeals Chamber notes that, according to article 3.8.2. of the Internal Rules and Regulations, telephone calls to privileged contacts are not monitored.

### **E. Presence of co-detainee**

12. Finally, Mr Ngudjolo submits that the presence of his co-detainee prevents him from communicating confidentially with his Counsel via phone from his cell and that this co-detainee disturbs him during the night.<sup>30</sup> As regards the first part of his submission on this point, the Appeals Chamber considers that it is up to Mr Ngudjolo to make the necessary practical arrangements *vis à vis* his co-detainee to be able to talk confidentially with his Counsel. As regards the second part, the Appeals Chamber notes that according to articles 8.1. and 8.2. of the Internal Rules and Regulations,

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<sup>25</sup> Internal Rules and Regulations, article 3.7.2.

<sup>26</sup> Request, para. 29.

<sup>27</sup> Request, para. 29.

<sup>28</sup> Request, para. 32.

<sup>29</sup> Request, para. 32; Internal Rules and Regulations, articles 3.8. and 4.5.2.

<sup>30</sup> Request, para. 31.

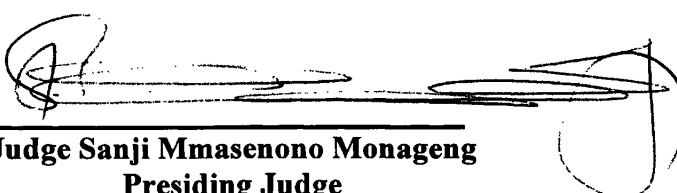
detainees' complaints are dealt with either by a Supervisory Commission or a Monthly Commissioner. Given the circumstances in the instant case, the Appeals Chamber considers it appropriate to direct Mr Ngudjolo to forward these complaints to the relevant bodies of the administrative detention centre.

## **F. Conclusion**

13. The Appeals Chamber finds that the conditions in the administrative detention centre, as laid out by the Internal Rules and Regulations and as described by Mr Ngudjolo, do not infringe upon his fair trial rights in relation to the proceedings before this Court. Furthermore, the Appeals Chamber recalls its decision of 11 April 2013, in which it ordered the Registry to provide Mr Ngudjolo with a draft translation of the Prosecution's Document in Support of the Appeal into French and granted Mr Ngudjolo a 30 day-extension of the time limit "to provide [him] and his counsel with sufficient time to adequately respond" thereto.<sup>31</sup>

14. In light of the foregoing, the Appeals Chamber does not consider it necessary to issue instructions on the modalities of preparation for the appeals procedure. Therefore, the Request must be rejected.

Done in both English and French, the English version being authoritative.



**Judge Sanji Mmasenono Monageng**  
**Presiding Judge**

Dated this 24th day of April 2013

At The Hague, The Netherlands

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<sup>31</sup> "Decision on Mr Ngudjolo's request for translation and suspension of the time-limit", ICC-01/04-02/12-60 (A), para. 13.