

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date of the original: 27 May 2013

Date of the redacted version: 12 June 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 redacted version

Decision on Mr Ngudjolo's request 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

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
Ms Andrea Valdivia

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

States' Representatives
The Kingdom of the Netherlands

REGISTRY

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 “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’” of 8 February 2013 (ICC-01/04-02/12-22-tENG),

Renders unanimously the following

DECISION

The Registrar is instructed to make such arrangements as he considers appropriate for the transfer of Mr Mathieu Ngudjolo Chui in accordance with rule 185 (1) of the Rules of Procedure and Evidence and article 48 of the Headquarters Agreement between the International Criminal Court and the Host State. The remainder of Mr Mathieu Ngudjolo Chui’s request 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”¹ (hereinafter: “Decision on Acquittal”), in which Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) was acquitted of all charges against him and the Registrar was ordered to take the measures necessary to ensure Mr Ngudjolo’s immediate release.

2. On 29 January 2013, Mr Ngudjolo filed the “Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et

¹ ICC-01/04-02/12-3.



aux témoins d'exécuter, et à l'Etat hôte de respecter le jugement d'acquiescement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale" together with four confidential Annexes,² followed by two addenda, which were filed on 30 January 2013³ and 8 February 2013⁴ with the latter being considered exclusively as Mr Ngudjolo's request (hereinafter: "Request"). Recalling that he has been in an asylum-seekers' detention centre since his asylum application on 21 December 2012,⁵ Mr Ngudjolo submits that he "continues to be deprived of his liberty"⁶ and that, furthermore, his arrest and detention by The Netherlands (hereinafter: the "Host State") are arbitrary and unlawful.⁷ Mr Ngudjolo contends that since his release by the Court, his presence in the country is not unlawful,⁸ as the Prosecutor's appeal requires him to be present on the territory of the Host State.⁹ Mr Ngudjolo submits that he is not in violation of the laws, public order or morality of the Host State since he came to this country pursuant to a warrant of arrest issued by the Court for the purposes of his trial and he must remain there until the end of his trial at the appeals stage.¹⁰ Accordingly, Mr Ngudjolo requests that the Appeals Chamber require "the host State to hand [him] over to the authorities of the International Criminal Court and to agree on the location where he will stay pending the outcome of his asylum proceedings and the appeal".¹¹

3. Mr Ngudjolo further submits that under article 2 of the Headquarters Agreement between the International Criminal Court and the Host State (hereinafter: "Headquarters Agreement"), the Host State has to facilitate the presence of all persons required by the Court at its seat¹² and that under article 29 (2) of the Headquarters Agreement, the Registry shall provide the Host State with a document certifying that

² ICC-01/04-02/12-20 (A).

³ "ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d'appel une injonction donnée à l'Unité d'aide aux victimes et aux témoins d'exécuter, et à l'Etat hôte de respecter le jugement d'acquiescement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »", ICC-01/04-02/12-21 (A).

⁴ "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'", ICC-01/04-02/12-22-tENG (A).

⁵ Request, paras 4-7.

⁶ Request, para. 14.

⁷ Request, paras 22 *et seq.*, 49.

⁸ Request, paras 24 and 25.

⁹ Request, para. 27.

¹⁰ Request, para. 23.

¹¹ Request, p. 15.

¹² Request, para. 31.



his presence is required at the seat of the Court to prepare for, and participate in, the proceedings before the Appeals Chamber.¹³ Mr Ngudjolo contends that it is not mandatory for the Registry to receive from the Appeals Chamber indications as to the holding of hearings in order to allow for his presence at the seat of the Court.¹⁴ Accordingly, Mr Ngudjolo requests the Appeals Chamber to 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 [his] presence is required at the seat of the Court so that he may prepare for and participate in the proceedings pertaining to him before the Appeals Chamber”.¹⁵

4. Finally, Mr Ngudjolo submits that if he were repatriated to the Democratic Republic of the Congo (hereinafter: “DRC”), his appearance at hearings before the Appeals Chamber could not be guaranteed.¹⁶ Mr Ngudjolo further recalls that the Host State has ratified all international legal instruments requiring respect for human rights and deploring *refoulement* to unsafe countries,¹⁷ which prevent it from repatriating him to the DRC, a country which, he submits, applies the death penalty and resorts to extra-judicial executions.¹⁸ Moreover, Mr Ngudjolo submits that since he has not been convicted, and pursuant to the Decision on Acquittal and the relevant provisions of the Statute, “the Victims and Witnesses Unit must ensure his liberty, safety and relocation”.¹⁹ Therefore, Mr Ngudjolo requests the Appeals Chamber to instruct “the Victims and Witnesses Unit to provide [him] with protection pursuant to article 68 of the Statute”,²⁰ rule that “such protection must be ensured by the Registry of the International Criminal Court, which must have [him] at its disposal in observance of said Judgment”²¹ and 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 [him]”.²²

¹³ Request, paras 32 and 33.

¹⁴ Request, para. 17.

¹⁵ Request, pp. 15 and 16.

¹⁶ Request, para. 20.

¹⁷ Request, para. 46.

¹⁸ Request, paras 45 *bis* and 48.

¹⁹ Request, para. 21.

²⁰ Request, p. 15.

²¹ Request, p. 15.

²² Request, p. 15.

5. On 22 February 2013, following an order of the Appeals Chamber,²³ the Registrar filed the “Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du ‘SECOND ADDENDUM’ à la ‘Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquiescement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale”²⁴ (hereinafter: “Observations”), with a confidential, *ex parte* annex only available to the Victims and Witnesses Unit (hereinafter: “VWU”) and the Defence for Mathieu Ngudjolo²⁵ (hereinafter: “Annex to the Observations”). The Registrar submits that the issues of the necessity and the lawfulness of Mr Ngudjolo’s presence on the territory of the Host State, his release from the asylum-seekers’ detention centre, and the applicability of rule 185 of the Rules of Procedure and Evidence exceed the VWU’s mandate,²⁶ and do not fall within the jurisdiction of the Court, but the sovereignty of the Host State.²⁷ The Registrar further considers that Mr Ngudjolo’s request to instruct the VWU to afford him with protection under article 68 of the Statute is redundant because Mr Ngudjolo has already filed a request for protection from the VWU, which is currently being processed.²⁸ Finally, the Registrar notes that since Mr Ngudjolo is in an asylum-seekers’ detention centre, he does not face any direct risk to his safety.²⁹

6. On 20 March 2013, the Appeals Chamber granted Mr Ngudjolo’s request³⁰ to reply to the Observations.³¹ On 25 March 2013, Mr Ngudjolo filed the “Réplique de la Défense de Mathieu Ngudjolo aux « Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du « SECOND ADDENDUM à la

²³ “Order on the filing of submissions by the Registrar on the Defence request of 8 February 2013”, 15 February 2013, ICC-01/04-02/12-24 (A).

²⁴ ICC-01/04-02/12-25 (A).

²⁵ “Conclusions de l’évaluation de la situation sécuritaire de M. Mathieu Ngudjolo conduite par l’Unité d’aide aux victimes et aux témoins”, ICC-01/04-02/12-25-Conf-Exp-Anx1.

²⁶ Observations, para. 3.

²⁷ Observations, para. 4, p. 6.

²⁸ Observations, para. 10.

²⁹ Observations, para. 11.

³⁰ “Application to reply to the ‘Observations du Greffe en application de la norme 24bis du Règlement de la Cour au sujet du ‘SECOND ADDENDUM à la « Requête de la Défense tendant à obtenir de la Chambre d’appel une injonction donnée à l’Unité d’aide aux victimes et aux témoins d’exécuter, et à l’Etat hôte de respecter le jugement d’acquiescement du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »” (Regulation 24 of the Regulations of the Court)”, ICC-01/04-02/12-26 (A).

³¹ “Decision on the defence request to reply to the Registrar’s observations pursuant to regulation 24 bis of the Regulations of the Court”, 20 March 2013, ICC-01/04-02/12-43 (A).



« Requête de la Défense tendant à obtenir de la Chambre d'appel une injonction donnée à l'Unité d'aide aux victimes et aux témoins d'exécuter, et à l'Etat hôte de respecter le jugement d'acquittal du 18 décembre 2012 rendu par la Chambre de première instance II de la Cour pénale internationale »³² (hereinafter: "Reply"). Mr Ngudjolo submits that the issue of the lawfulness of his presence on the territory of the Host State is a matter for the Court,³³ and that the Registry is duty-bound to issue him with a document certifying that his presence at the seat of the Court is required.³⁴ Moreover, Mr Ngudjolo avers that the Host State is under an obligation to admit onto its territory those persons whom the Court has called or summoned,³⁵ and that the warrant of arrest issued against him by the Court constitutes a valid travel document and residence permit.³⁶ Mr Ngudjolo also submits that his repatriation to the DRC would constitute a violation by the Host State of article 48 of the Headquarters Agreement.³⁷

7. On 15 May 2013, the Registry filed the "Registry's update on the situation in relation to Mathieu Ngudjolo Chui"³⁸ (hereinafter: "Registry's Update"), informing the Appeals Chamber, *inter alia*, that by a 3 May 2013 judgement of the "Rechtbank Den Haag" (as a Court of Appeal)³⁹, Mr Ngudjolo's release was ordered and that on 4 May 2013, Mr Ngudjolo left the asylum-seekers' detention centre.⁴⁰

II. MERITS

8. The Appeals Chamber notes that Mr Ngudjolo contends that the Host State, as well as the Registry, did not comply with the Decision on Acquittal. Accordingly, Mr Ngudjolo requests that the Appeals Chamber (i) in respect of his challenge to the legality of his current detention, request the Host State to hand him over to the Court, (ii) order the Registry to issue a document certifying that his presence is required at the seat of the Court for the purposes of preparation for and participation in the appellate proceedings concerning him, and (iii) instruct the VWU to provide him with

³² ICC-01/04-02/12-48-Conf.

³³ Reply, para. 23.

³⁴ Reply, para. 27.

³⁵ Reply, para. 23.

³⁶ Reply, para. 30.

³⁷ Reply, para. 28.

³⁸ ICC-01/04-02/12-69-Conf-Exp.

³⁹ Registry's Update, para. 1.

⁴⁰ Registry's Update, para. 2.

protection pursuant to article 68 of the Statute and the Registry to ensure such protection.⁴¹ The Appeals Chamber will address Mr Ngudjolo's requests in turn.

A. Request to be handed over to the authorities of the Court

9. Mr Ngudjolo submits that his arrest and detention by the Host State are arbitrary and unlawful and that the Host State must hand him over to the authorities of the Court so that they may reach an agreement on the location where he will stay pending the outcome of his asylum proceedings and the appeal.

10. In this regard, the Appeals Chamber notes that since Mr Ngudjolo has been released from the asylum-seekers' detention centre, his request to be handed over to the authorities of the Court is now moot. In any event, as an asylum-seeker in The Netherlands, Mr Ngudjolo is under the authority of the Host State and as a result, the Appeals Chamber is not the competent judicial body to review the lawfulness of his detention or to order his release from the asylum-seekers' detention centre.⁴²

B. Document certifying that Mr Ngudjolo's presence at the seat of the Court is required

11. Mr Ngudjolo submits that the Registry failed to issue a document to the Host State certifying that his presence is required at the seat of the Court to prepare for and participate in the proceedings pertaining to him before the Appeals Chamber. In this regard, the Appeals Chamber notes that while Mr Ngudjolo's presence at the seat of the Court may be necessary at a later stage of the appeals proceedings, his presence is not currently required since, to date, the Appeals Chamber has not scheduled hearings in relation to the appeal. Therefore, the Appeals Chamber considers that no document is required from the Registry.

C. Request for protection pursuant to article 68 of the Statute

12. Mr Ngudjolo submits that the VWU and the Registry must comply with the operative provisions of the Decision on Acquittal, by which the VWU and the Registry are ordered to provide him, as per his status as a witness in the case, with

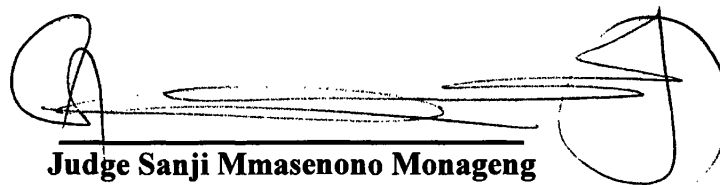
⁴¹ Request, pp. 15 and 16.

⁴² See also "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)", 24 April 2013, ICC-01/04-02/12-67 (A), paras 7 *et seq.*

protection pursuant to article 68 of the Statute. The Appeals Chamber notes the submission of the Registrar that [REDACTED].⁴³

13. Notwithstanding the aforementioned, the Appeals Chamber notes that Mr Ngudjolo's current stay in The Netherlands is potentially temporary and dependent upon the outcome of his asylum application. The Appeals Chamber further notes that, according to Mr Ngudjolo, he applied for asylum in order not to be returned to the DRC and because no other provision in respect of relocation had been provided by the Court at the time of his release from the Court. The Appeals Chamber considers that the pending asylum application does not negate the Registrar's obligation to give effect to Mr Ngudjolo's acquittal pursuant to rule 185 (1) of the Rules of Procedure and Evidence. Accordingly, the Registrar is instructed to make such arrangements as he considers appropriate for the transfer of Mr Ngudjolo in accordance with rule 185 (1) of the Rules of Procedure and Evidence and article 48 of the Headquarters Agreement, and taking into account Mr Ngudjolo's views, including as regards his security situation.

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



Judge Sanji Mmasenono Monageng
Presiding Judge

Dated this 12th day of June 2013

At The Hague, The Netherlands

⁴³ See Annex to the Observations. See also Registry's update, para. 6.