



Original: English

No.: ICC-01/04-02/12  
Date: 19 December 2012

**THE APPEALS CHAMBER**

**Before:** Judge Erkki Kourula  
Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Anita Ušacka  
Judge Sanji Mmasenono Monageng

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
THE PROSECUTOR  
*v. MATHIEU NGUDJOLO***

**Public**

**Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu  
Ngudjolo and Urgent Application for Suspensive Effect**

**Source:** Office of the Prosecutor

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

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## Introduction

1. On 18 December 2012, Trial Chamber II delivered its “Jugement rendu en application de l’article 74 du Statut” (“Article 74 Judgment”) whereby Mathieu Ngudjolo was acquitted of all charges and the Registrar was ordered to take all necessary measures to effect the immediate release of Mr Ngudjolo.<sup>1</sup>
2. On the same day, the Prosecution orally requested that the Trial Chamber order the continued detention of Mr Ngudjolo pending appeal pursuant to article 81(3)(c)(i) due to the existence of exceptional circumstances. The Trial Chamber rejected the Prosecution’s application and ordered the immediate release of Mr Ngudjolo (“Decision on Release”). Mr Ngudjolo will be released from the detention facilities between today and tomorrow (19 or 20 December 2012).
3. The Prosecution is separately appealing the Article 74 Judgment. Through this filing it files its appeal against the Decision on Release and requests that the Appeals Chamber suspend the release of Mr Ngudjolo pending the resolution of this appeal.<sup>2</sup> It further requests that the Appeals Chamber decide on the suspensive effect of this appeal on an expedited basis and prior to any consideration of the appeal proper.<sup>3</sup>

## Background

4. On 18 December 2012, Trial Chamber II delivered its “Jugement rendu en application de l’article 74 du Statut” (“Article 74 Judgment”) whereby Mathieu Ngudjolo was acquitted of all charges and the Registrar was

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

<sup>2</sup> A document in support of the appeal will be filed shortly.

<sup>3</sup> See e.g. ICC-01/04-01/06-2536 OA17, 23 July 2010; ICC-01/04-01/06-1423 OA12, 7 July 2008; ICC-01/04-01/06-1347 OA9 OA10, 22 May 2008.

ordered to take all necessary measures to effect the immediate release of Mr Ngudjolo.<sup>4</sup>

5. In an oral hearing at 13.30h on the same day, the Prosecution requested that the Trial Chamber maintain the detention of Mr Ngudjolo pursuant to article 81(3)(c)(i) due to the existence of exceptional circumstances.<sup>5</sup> The Prosecution further requested that if the Trial Chamber were to reject its request and release Mr Ngudjolo, the Chamber should stay the execution of its decision until the following day, to enable the Prosecution to appeal this ruling.<sup>6</sup>
6. At 17.30h on the same day, the Trial Chamber orally found that there were no exceptional circumstances and ordered the immediate release of Mr Ngudjolo.<sup>7</sup> Further, the Chamber stated that it was not in a position to rule on a stay of the execution of the judgment as requested by the Prosecution, as it did not have a legal foundation.<sup>8</sup>
7. Mr Ngudjolo is to be released from the detention facilities between 19 and 20 December 2012.
8. The Prosecution hereby:
  - files its appeal against the Decision on Release, pursuant to article 81(3)(c)(ii), rule 154(1) and regulation 64(1); and
  - applies for suspensive effect of that appeal, pursuant to articles 82(3), 81(4) and rule 156(5).

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<sup>4</sup> ICC-01/04-02/12-3.

<sup>5</sup> ICC-01/04-02/12-T-2-ENG ET, pp.2-7; pp.8-9.

<sup>6</sup> ICC-01/04-02/12-T-2-ENG ET, p.7, lns.12-16.

<sup>7</sup> ICC-01/04-02/12-T-3-ENG ET, p.6, lns.15-18.

<sup>8</sup> ICC-01/04-02/12-T-3-ENG ET, p.6, lns.19-23.

### Appeal pursuant to Article 81(3)(c)(ii)

9. The Prosecution is appealing Trial Chamber II's decision to order the release of Mr Ngudjolo, delivered orally on 18 December 2012 (transcript ICC-01/04-02/12-T-3-ENG, pages 1-6) in the case of *The Prosecutor v Mathieu Ngudjolo*, pursuant to article 81(3)(c)(ii),<sup>9</sup> rule 154(1) and regulation 64(1).<sup>10</sup>
10. The Prosecution will request that the Appeals Chamber reverse the decision to release Mr Ngudjolo, and order his continued detention.

### Request for Suspensive Effect

11. The Appeals Chamber has previously recognised that releasing an accused pending an appeal against the decision on release could defeat the very purpose of the appeal, as well as the appeals against other related decisions (in this case, the Article 74 Judgment).<sup>11</sup> Where the release of the accused has been ordered, suspensive effect is necessary in order to avoid pre-empting the subject of the appeal – i.e. the Decision whether to release Mr Ngudjolo – and rendering its outcome moot.<sup>12</sup>
12. Mr Ngudjolo escaped from a DRC prison before a ruling from a domestic military tribunal on an indictment on war crimes against him was issued.<sup>13</sup>

<sup>9</sup> “A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.”

<sup>10</sup> “An appeal filed under rule 154 shall state: (a) The name and number of the case or situation; (b) The title and date of the decision being appealed; (c) The specific provision of the Statute pursuant to which the appeal is filed; (d) The relief sought.”

<sup>11</sup> ICC-01/05-01/08-817OA3, para. 11; ICC-01/04-01/06- 2536OA17, para. 11; ICC-01/04-01/06-1444 OA12, para. 9.

<sup>12</sup> Decisions on suspensive effect are left to the discretion of the Chamber, which should “consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances.” (ICC-01/04-01/06-1290 OA11, para. 7; ICC-01/05-01/08-817OA3, para. 6). In determining whether to exercise such discretion, it has been stated that the “guiding principle in the exercise of the discretion of the Court lies in the evaluation of the consequences that enforcement of an erroneous decision, if that is found to be the case by the decision of the Appeals Chamber, could have on the proceedings before the first instance court.” (ICC-01/04-01/06-1290-Anx OA11, 13 May 2008, Dissenting Opinion of Judge Pikis, para. 9).

<sup>13</sup> ICC-01/04-01/07-1593-Red, para.2, citing ICC-01/04-01/07-345.

There is thus a clear and present danger that if Mr Ngudjolo were released, but the Appeals Chamber subsequently overturned the Decision on Release, the Court would not be able to regain custody of him.

13. In addition, and throughout these proceedings, Mr Ngudjolo has been kept in detention on the basis of repeated findings that his detention was necessary to ensure his appearance at trial.<sup>14</sup> For example, when rejecting his request for provisional release, the Trial Chamber acknowledged that Mr Ngudjolo constituted a flight risk<sup>15</sup> noting the following facts as found by Pre-Trial Chamber I:<sup>16</sup>

- (i) Mr Ngudjolo had previously escaped from Makala prison in the Democratic Republic of the Congo (DRC) before a Kinshasa military tribunal ruled on an indictment for war crimes allegedly committed in Tchomia in May 2003; and
- (ii) By virtue of his previous senior military positions in armed groups in the DRC (including within the FNI-FRPI),<sup>17</sup> Mr Ngudjolo has a number of national and international contacts, giving him the means to seek to escape.

14. The Trial Chamber found that even strict conditions would not guarantee that Mr Ngudjolo would appear in Court<sup>18</sup> and that the circumstances warranting maintaining Mr Ngudjolo in detention for the start of trial had not significantly changed.<sup>19</sup> The Prosecution submits<sup>20</sup> – and will develop in its document in support of appeal – that this remains the case. In addition, there is a risk that Mr Ngudjolo would obstruct the conduct of the proceedings on appeal: as an example, defence witness D03-100 testified in September 2011 that if he was before the Trial Chamber providing evidence

<sup>14</sup> ICC-01/04-01/07-1593-Red, 4 November 2009; ICC-01/04-01/07-345, 27 March 2008.

<sup>15</sup> ICC-01/04-01/07-1593-Red.

<sup>16</sup> ICC-01/04-01/07-345.

<sup>17</sup> Article 74 Judgment, paras. 464, 467, 471, 475, 476, 484, 491, 493, 494, 498, 500-501.

<sup>18</sup> ICC-01/04-01/07-1593-Red, para.12.

<sup>19</sup> ICC-01/04-01/07-1593-Red, para.9.

<sup>20</sup> See ICC-01/04-02/12-T-2-ENG ET, pp.2-7; pp.8-9.

it was because he had been threatened by family members of Mr. Ngudjolo to do so and feared for the well-being of his family.<sup>21</sup> Further, the FRPI, the military group to which Mr Ngudjolo belonged, is still active and has carried out attacks on civilians in Ituri as recently as August 2012.<sup>22</sup>

15. Further, the release of Mr Ngudjolo is founded on the Article 74 Judgment.

The Prosecution is appealing this Judgment in a separate appeal. If Mr Ngudjolo were released and the Appeals Chamber ultimately overturned the Judgment, then the very foundations of the release would have disappeared. In addition, neither the DRC authorities nor those from any other state to which Mr Ngudjolo may travel have provided guarantees to ensure his return to the Court should the Appeals Chamber overturn the Judgment. Suspensive effect is thus needed both to prevent irreparable prejudice in this appeal, but also to ensure that the Appeals Chamber is in a position to exercise its corrective authority in a comprehensive manner, addressing all impugned aspects of the decisions under appeal and their relevant consequences.

16. The Prosecution therefore submits that for the reasons set out above, suspension of the implementation of release is necessary pending the Prosecution's appeal of the Decision on Release. Suspension pending appeal of a release decision is consistent with the practice of this Court<sup>23</sup> as well as the *ad-hoc* Tribunals.<sup>24</sup>

<sup>21</sup> See ICC-01/04-02/12-T-2-ENG ET, p.5, lns.14-20; p.9 (citing e.g. D03-100, lns.11-15). See also ICC-01/04-01/07-3120-Conf-Exp; ICC-01/0402/12-3, para.151.

<sup>22</sup> See ICC-01/04-02/12-T-2-ENG ET, p.8, l.18-21. See also <http://www.irinnews.org/Report/96144/DRC-Violence-hampers-aid-work-in-Ituri>.

<sup>23</sup> ICC-01/04-01/06-2536 OA17, para.12; ICC-01/04-01/06-1423 OA12, p.3.

<sup>24</sup> See ICC-01/04-01/06-1419 OA12, para. 12 and authorities cited therein.

### Relief Sought

17. Accordingly, the Prosecution requests that the Appeals Chamber:

- (1) Accept this appeal against the decision on the release of Mr Ngudjolo pursuant to articles 81(3)(c)(ii), rule 154(1) and regulation 64(1); and
- (2) Grant suspensive effect to the appeal, pursuant to articles 82(3), 81(4) and rule 156(5), on an expedited basis considering that Mr Ngudjolo is to be released between today and tomorrow.



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Fatou Bensouda  
Prosecutor

Dated this 19<sup>th</sup> day of December 2012  
At The Hague, The Netherlands