Cour Pénale Internationale

International Criminal Court

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Date: **4 April 2008**

THE APPEALS CHAMBER

Before: **Judge Georghios M. Pikis, Presiding Judge**
Judge Philippe Kirsch, Judge
Judge Navi Pillay, Judge
Judge Sang-Hyun Song, Judge
Judge Erkki Kourula, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

Defence Appeal against the Decision of Pre-Trial Chamber I of 27 March 2008, entitled "Decision on the Application for Interim release of Mathieu Ngudjolo Chui"

Source: **Defence Team for Mathieu Ngudjolo composed of:**

Jean-Pierre Kilenda Kakengi Basila

Maryse Alié

Aurélie G. Roche

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

The Office of the Prosecutor
Luis Moreno-Ocampo
Fatou Bensouda

Counsel for the Defence
David Hooper
Goran Sluiter

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Paolina Massida

The Office of Public Counsel for the Defence
Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar
Bruno Cathala

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

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I. Procedural background

1. On 6 July 2007, Pre-Trial Chamber I of the International Criminal Court issued a warrant of arrest for Mr Mathieu Ngudjolo.[1]

2. On 7 February 2008, Pre-Trial Chamber I rendered a decision to seal the warrant of arrest issued for Mr Mathieu Ngudjolo Chui.[2]

3. On 7 February 2008, Pre-Trial Chamber I scheduled the first appearance of Mathieu Ngudjolo for 11 February 2008.[3]

4. On 12 February 2008, Mathieu Ngudjolo's Defence submitted an application for extension of time to file a complete case justifying the challenge to admissibility of the proceedings raised at the pre-trial hearing of 11 February 2008.[4]

5. On 18 February 2008, Mathieu Ngudjolo's Defence submitted its observations to Pre-Trial Chamber I on the joinder of the case against its client and that of Germain Katanga, pursuant to the oral request made by Pre-Trial Chamber I at the hearing of 12 February 2008.[5]

6. On 25 February 2008, the appointment of Mr. Kilenda Kakengi Basila Jean-Pierre as permanent counsel was registered.[6]

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[1] Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber I, 6 July 2007, ICC-01/04-02/07-1.
[2] *Decision to unseal the Warrant of Arrest Against Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-10.
[3] *Decision Scheduling the First Appearance of Mathieu Ngudjolo Chui and Authorizing Photographs at the Hearing of 11 February 2008*, Pre-Trial Chamber I, 7 February 2008, ICC-01/04-02/07-14.
[4] *Requête en vue d'obtenir la prorogation des délais permettant à la Défense de déposer l' ensemble du dossier pouvant justifier l'exception d'irrecevabilité de la procédure,* Pre-Trial Chamber I, 12 February 2002, ICC-01/04-02/07-20.
[5] Defence Observations on the Joinder of the Cases against Mathieu Ngudjolo and Germain Katanga, pursuant to the oral request of Pre-Trial Chamber I at the hearing of 12 February 2008, Pre-Trial Chamber I, 18 February 2008, ICC-01/04-02/07-29.
[6] *Enregistrement de la désignation de Maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme son conseil et de la déclaration d'acceptation du mandat par le conseil,* Pre-Trial Chamber I, 25 February 2008, ICC-01/04-02/07-42.

7. On 10 March 2008, the Pre-Trial Chamber issued a decision ordering the joinder of the cases against Katanga and Ngudjolo on the ground of their alleged joint criminal participation in the events described in their respective warrants of arrest.[7]

8. On the same day, the Pre-Trial Chamber issued a decision establishing a calendar for the new joint case. Mathieu Ngudjolo Chui's Defence was given until 28 March 2008 to file any requests for reconsideration or for leave to appeal against the decisions handed down in the case of *The Prosecutor v. Germain Katanga*.[8]

9. On 13 March 2008, Pre-Trial Chamber I revoked the order for segregation of the two suspects, Germain Katanga and Mathieu Ngudjolo, prohibiting all communication between them.[9]

10. On 12 February 2008, an Application for Interim Release was submitted to the Pre-Trial Chamber.[10]

11. On 25 February 2008, the Prosecution filed its observations, requesting denial of the Application for Interim Release.[11]

12. On 28 February 2008, the Registry report and the observations of Belgium, England, France and the Netherlands on the Application for Interim Release filed by Mathieu Ngudjolo, pursuant to the Pre-Trial Chamber's Decision of 14 February 2008,[12] were entered into the record.[13]

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[7] *Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-257.
[8] *Decision establishing a Calendar in the Case against Germain Katanga and Mathieu Ngudjolo Chui*, Pre-Trial Chamber I, 10 March 2008, ICC-01/04-01/07-259.
[9] ICC-01/04-01/07-322, 14-03-2008 1/14 CB PT.
[10] ICC-01/04-02/07-21.
[11] ICC-01/04-02/07-40.
[12] ICC-01/04-02/07-23
[13] ICC-01/04-02/07-47, and Annexes.

13. On 27 March 2008, the Pre-Trial Chamber rejected the Application for Interim Release filed by Mathieu Ngudjolo.[14]

14. On 2 April 2008, Mathieu Ngudjolo lodged a Notice of Appeal against the Decision rejecting his Application for Interim Release.[15]

15. Today, pursuant to article 82(1)(b) of the *Rome Statute* ("the Statute"), Mathieu Ngudjolo lodges his Appeal against the Decision rejecting his Application for Interim Release.

II. Challenge to the impugned Decision

16. In support of its decision to deny Mathieu Ngudjolo interim release, the Pre-Trial Chamber stated that the conditions set forth in article 58(1) of the Statute were met, and that there had been no violation of article 67(1) of the Statute.

17. The Defence seeks formally to challenge the reasoning adopted by the Pre-Trial Chamber and, specifically, the violation of articles 58(1)(a)(b)(i),(ii) and (iii) and 67(1) of the *Rome Statute*.

18. Pursuant to article 82(1)(b) of the *Rome Statute*, Mathieu Ngudjolo appeals against the Decision rejecting his Application for Interim Release, on the ground that, in the impugned Decision, the Pre-Trial Chamber committed errors which affected the decision's reliability. In the view of the Defence, the Decision:

1) violated article 58(1)(a)(b)(i, ii and iii) of the Statute, because the Single Judge:
   i. erred in applying article 58(1)(b)(i) of the Statute;

[14] ICC-01/04-01/07-345, Public Redacted Version of ICC-01/04-01/07-344-Conf.
[15] ICC-01/04-01/07-29

ii. erred in failing to consider the possibility of issuing a summons to appear instead of a warrant of arrest which deprived the Appellant of his freedom;

2) violated the judge's duty to base his or her decision on reliable evidence previously disclosed to the Defence, in that the Single Judge:

i. erred in failing sufficiently to establish the existence of a risk that the Appellant would abscond;

ii. erred in failing to demonstrate the existence of a threat to witnesses and victims;

iii. erred in failing sufficiently to establish a causal link between the alleged risks of absconding or threats and the interim release of Mathieu Ngudjolo;

iv. erred in failing sufficiently to establish the necessity of detention.

3) violated articles 67(1)(i) and 66 of the Statute.

1. Submissions based on the violation of article 58(1)(a)(b)(i), (ii) and (iii) of the Statute

19. Article 58(1) of the Statute provides that a warrant of arrest shall be issued by the Pre-Trial Chamber (on the application of the Prosecutor and the evidence or other information submitted by him), if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and that the arrest of the person appears necessary to ensure the person's appearance at trial, that the person does not obstruct or endanger the investigation or the court proceedings or, where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances. The Defence maintains that the impugned Decision violates article 58(1) of the Statute.

20. The Pre-Trial Chamber considered that, because Mathieu Ngudjolo was served with a French version of his warrant of arrest both by the *Auditeur Général* of

the High Military Court on 6 February 2008 and by the Registry of this Court, and the Defence did not challenge his arrest, the application of article 58(1) was fully justified.

21. The Defence considers that the reasons relied on by the Pre-Trial Chamber in order to justify the application of this statutory provision are insufficient.

22. The fact that Mathieu Ngudjolo received a French version of his warrant of arrest, both in Kinshasa and at The Hague, cannot mean that he consented to his arrest and detention. Having been arrested in Kinshasa, he had no choice. Because he was in the hands of the Military Court, he was not in a position to make a legal challenge to his arrest. Nevertheless, he did at that time already protest against his arrest and detention on the ground that he had already been tried for the same acts in Bunia.[16] Likewise, he challenged the said warrant of arrest at his first appearance before the Pre-Trial Chamber.[17]

23. It is furthermore recalled that on 12 February 2008, through his Counsel, Mathieu Ngudjolo filed an Application for Interim Release, which was recently considered and dismissed by the impugned Decision.

A. Main submission: the Defence challenges the applicability of the condition set forth in article 58(1)(b)(i)

24. In the impugned Decision, the Pre-Trial Chamber applied the condition set forth in article 58(1)(b)(i) of the Statute, which provides: "*(b) [t]he arrest of the person appears necessary: (i) to ensure the person's appearance at trial*", as the basis for its decision to reject the Application for Release. The Defence submits that the Pre-Trial Chamber erred in law by applying this condition in order to deny Mr Ngudjolo's Application for Interim Release, at a time when Mr Ngudjolo has not yet had any of

[16] See Mathieu Ngudjolo's statement on the day of his arrest and surrender to the *Auditeur* of the High Military Court.
[17] See the transcripts of the first appearance before the Pre-Trial Chamber on 11 February 2008, p. 17 ff. The document is available at http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-T-3-ENG.pdf.

the charges against him confirmed. Accordingly, this Appeals Chamber has power to reverse the impugned Decision, as this error has led to an arbitrary result.

25. It is recalled that, in its initial Application, the Defence pointed out that, under articles 55(1)(d), 58, 59 and 60 of the *Rome Statute,* pre-trial release is manifestly an overriding principle in criminal proceedings.[18] This is consistent with the law applicable before the Court pursuant to article 21(2) of the Statute. And indeed the application and interpretation of the law must be consistent with internationally recognized human rights.

26. The Defence has recalled that this principle is consistent with various international instruments such as article 9(3) of the *International Covenant on Civil and Political Rights,* which provides that "[i]t shall not be the general rule that persons awaiting trial shall be detained in custody", as well as paragraph 6(1) of the *United Nations Standard Minimum Rules for Non-custodial Measure*s and paragraph 39 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, which states that pre-trial detention shall be used as a means of last resort.[19]

27. Moreover, this principle is recognized in European law in article 6 of the *Charter of Fundamental Rights of the European Union*, and also in articles 5(1) and 5(3) of the *European Convention on Human Rights,* which provide that any person detained during his or her trial "shall be entitled to trial within a reasonable time or to release pending trial".

28. This principle is particularly fundamental, when it applies to a suspect, in that the detention of a person who has the mere status of suspect should only be ordered

[18] The Pre-Trial Chamber was also able to confirm this in the impugned Decision, ICC-01/04-01/07-345, p.6 ; See also ICC01/04-01/07-330, pp. 6-7.

[19] *United Nations Standard Minimum Rules for Non-custodial Measure*s, Off. doc UN GA A/RES/45/110 (14 Dec. 1990) (Tokyo rules), annex, para. 6(1). *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Off. doc. UN GA A/RES/43/173 (9 Dec 1988) ("Principles pertaining to detention") Annex, principle 39.

in quite exceptional circumstances, for example when it is warranted by security reasons. Yet, if, on the pretext that the accused might not appear for trial, a suspect is kept in detention before any charges against him or her have been confirmed, this implies a failure to demonstrate the altogether exceptional nature of a deprivation of liberty, resulting in a violation of the principle of liberty.[20]

29. Article 63 of the Statute requires that the accused be present at his or her trial, which, in view of article 61(2) of the Statute and rules 124, 125 and 126 of the *Rules of Procedure and Evidence*, is not required of a suspect at the pre-trial phase. This phase may take place *in absentia*. The principle is thus that the suspect should be at liberty to appear if he or she wishes to participate in the proceedings prior to the confirmation hearing; the condition set forth in article 58(1)(b)(i) does not apply to this phase.

30. Furthermore, in its initial Application, the Defence noted that the English version of article 58(1)(b) expressly provides: "The arrest of the person appears necessary: (i) to ensure the person's appearance at trial." The use of the term "trial" must be given its true meaning, and hence does not include the phase prior to any subsequent confirmation of the charges.

31. The Single Judge likewise rejected the Defence submission that this condition did not apply to an application for release during the phase prior to any subsequent confirmation of the charges, stating that the condition had previously been accepted in the Decision on the Application for Interim Release, as well as in the Appeals Chamber's Judgment on that Decision, in the Thomas Lubanga Dyilo case.[21]

[20] Barayagwiza, ICTR-97-19-AR72, "Decision", 3 November 1999, para 62: The Appeals Chamber recognises that international standards view provisional (or pre-trial) detention as an exception, rather than the rule. … The issue, therefore, is whether the length of time the Appellant spent in provisional detention, prior to the confirmation of his indictment, violates established international legal norms for provisional detention of suspects.

[21] Page 6 of the impugned Decision.

32. The Defence submits, however, that this ground is being raised for the first time before the Appeals Chamber sitting in the current pre-confirmation phase, and that it requires immediate resolution.

33. The Defence would further point out that the procedural context is also different, since Thomas Lubanga's Defence appealed the Decision on the Application for Interim Release only two weeks prior to his confirmation hearing.[22]

34. The Appeals Chamber accordingly considered the issue and rendered its judgment after the charges had been confirmed, and it was thus in the context of the trial proceedings that it addressed the condition regarding the need to ensure the detainee's appearance.

B. In the alternative, the Defence submits that the Pre-Trial Chamber erred in failing to consider the possibility of issuing a summons to appear

35. The Pre-Trial Chamber, both in its Decision to issue a warrant of arrest for Mathieu Ngudjolo and in its Decision to deny interim release, did not take into account the possibility provided in the Statute for the issue of a summons to appear rather than a warrant of arrest, a measure involving deprivation of liberty. According to paragraph 6(1) of the *United Nations Standard Minimum Rules for Non-Custodial Measures* and paragraph 39 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, provisional detention is a means of last

[22] On 20 October 2006, the Appellant filed a notice of appeal entitled "Defence Appeal Against Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-594). On 26 October 2006, he filed his "Defence Appeal Against the 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo'" (ICC-01/04-01/06-618, "the Appeal Brief"). On 1 November 2006, the Prosecutor filed his response to this brief (ICC-01/04-01/06-637, "the Response to the Appeal Brief". The confirmation hearing started on 9 November 2006. The decision confirming the charges was rendered on 29 January 2007 (ICC-01/04-01/06-803-tENG). The Appeal Judgment on the application for release was rendered on 13 February 2007.

resort.[23] If a measure which is more flexible than arbitrary detention is sufficient then it must be applied.[24]

36. Yet in practice, in order to secure the presence of the person concerned before the Court, the Pre-Trial Chamber may apply article 60(5) of the Statute, which enables it to issue either a simple summons to appear or a warrant of arrest. It is apparent from article 60(2) of the *Rome Statute* that the International Criminal Court places the burden of proof on the Prosecutor to justify the need for detention. This is supported by the case law of the European Court of Human Rights,[25] and was recently confirmed by Pre-Trial Chamber I.[26] The Prosecutor must therefore provide reasons why he did not seek a summons to appear instead of a warrant of arrest. It is clear that neither the Prosecutor nor the Chamber discussed this possibility.

37. If the aim is simply to secure the presence of the suspect during the pre-trial phase, it would appear that a summons is not necessary in any case, firstly because the pre-trial phase is more of a technical than a procedural phase, which does not require the presence of the suspect, and, even if the suspect is not physically present, the status conferences could equally be conducted by video-link if the suspect wishes to be involved, thus respecting the principle of liberty until any future conviction.

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[23] *United Nations Standard Minimum Rules for Non-Custodial Measures*, Official Document UN GA A/RES/45/110 (14 December 1990) (Tokyo Rules), Annex, para. 6(1). *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Official Document UN GA A/RES/43/173 (09 December 1988) ("Principles relating to detention"), Annex, principle 39.

[24] *Prosecutor v. Prlić et al*, Order on Provisional Release of Berislav Pušic, Case No. IT-04-740PT, T. Ch. I, 30 July 2004, para. 15; *Prosecutor v. Limaj et al*., Decision on Fatmir Limaj's Request for Provisional Release, Case No. IT-03-66-AR65, Bench of the Appeals Chamber, 31 October 2003, para. 13; *Prosecutor v. Brdjanin and Talić*, Decision on the Motion for Provisional Release of the Accused Momir Talić, Case No. IT-99-36-T, T. Ch. II, 20 September 2002, para. 23; *Prosecutor v. Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, Case No. IT-02-59-PT, T. Ch. II, 15 April 2002, para. 31; *Prosecutor v. Blagojevic et al*, Decision on Request for Provisional Release of Accused Jokic, Case No. IT-02-60-PT, T. Ch. II, 28 March 2002, para. 18; *Prosecutor v. Hadžihasanović et al.*, Decision Granting Provisional Release to Enver Hadžihasanović, Case No. IT-01-47-PT, T. Ch. II, 19 December 2001, para. 8.

[25] See for example *Hutchinson Reid v. UK*, ECHR, 20 February 2003

[26] ICC-01/04-01/07-330, *Decision on the powers of the Pre-Trial Chamber to review* proprio motu *the pre-trial detention of Germain Katanga*, p. 5, 18 March 2008.

38. Furthermore, the Pre-Trial Chamber may in practice apply article 60(5) of the Statute in order to secure the presence of the person concerned, which allows it to issue a simple summons to appear, supported if necessary by guarantees to secure the person's presence. A summons to appear should be preferred during the pre-trial phase, rather than a measure involving deprivation of liberty such as a warrant of arrest, thus, in particular, ensuring that the status as suspect of the person concerned continues to be respected.

39. Finally, pursuant to article 61(1), the Pre-Trial Chamber holds a hearing to confirm the charges within a reasonable time after the person's surrender or voluntary appearance before the Court. Therefore, if the aim is to ensure the presence of the suspect, the Pre-Trial Chamber has the option of issuing a summons to appear shortly before the confirmation hearing and, if the summons remains without effect, a warrant of arrest, rather than issuing a warrant of arrest several months prior to the hearing, which involves an unnecessary deprivation of liberty.

40. Consequently, the Defence maintains that there is no necessity for the arrest and detention of the suspect at the pre-trial stage of the proceedings in order to secure his or her presence at a possible future trial. In any event, the considerations regarding the risk of Mr Mathieu Ngudjolo absconding are purely arbitrary. Thus the Pre-Trial Chamber committed a serious error of judgement in failing to consider the objective evidence in Mathieu Ngudjolo's case file. Particular reference may be made to the fact that, having learnt of the arrest of Germain Katanga, Mathieu Ngudjolo never attempted to flee the DRC, but quite the opposite; he continued with his daily life as usual. This suggests that it would have been sufficient to issue a summons to appear rather than a warrant of arrest.

2. Submissions regarding the violation of the judge's obligation to base his or her decision on reliable evidence previously disclosed to the Defence

41. The analysis undertaken by the judge in reaching a decision must be characterised by a constant process of calling into question all of the arguments

presented by all of the parties in support of their respective cases, in order both to crystallise the correct account of the facts and to determine the legal rules applicable thereto. It follows that the impugned Decision may be criticised on a number of counts.

A. Risk of absconding

42. Even if it were considered that the condition set forth in article 58(1)(b)(i) is applicable, the argument developed in the impugned Decision contains errors such as to violate articles 66 and 67(1)(i) of the Statute. Specifically, the Defence submits that, in its Decision of 27 March 2008, the Pre-Trial Chamber fails to explain the reasons behind its fears that Mr Mathieu Ngudjolo might seek to abscond from the jurisdiction.

43. Furthermore, the Pre-Trial Chamber could have alleviated these fears by attaching certain conditions to Mr Ngudjolo's interim release. Thus the serious nature of the charges and the possibility of a long prison sentence cannot suffice to justify in law the ongoing detention of Mr Ngudjolo. Moreover, it is curious that the Pre-Trial Chamber cites the possible long prison sentence if Mr. Ngudjolo were convicted, when he is still presumed innocent and when, in any event, international human rights instruments, firstly, advocate pre-trial detention only as an exceptional measure and, secondly, call for a trial to be held within a reasonable timeframe.

44. In addition, regarding the risk of absconding, the Appeals Chamber in the Lubanga case has already deemed such an approach to be "regrettable", as it implies a lack of explanation regarding the risk of absconding. Thus the Appeals Chamber stated: "[…] *the Pre-Trial Chamber based its finding on the consideration that the Prosecutor intended to charge the Appellant with serious crimes, that his main ties remained in the Democratic Republic of the Congo, and that because of his international contacts he is readily able to abscond from the jurisdiction of the Court, if released. The Appeals Chamber notes that it would have been preferable for the Pre-Trial Chamber to explain in more detail*

why it reached its conclusion that the Appellant may abscond."[27] The Appeals Chamber further stated: "*Although it would have been preferable for the Pre-Trial Chamber to explain in more detail in the Impugned Decision itself why it came to the conclusion that the Appellant might abscond, it is clear that there was sufficient information before the Pre-Trial Chamber that enabled the Pre-Trial Chamber to make an assessment that such a risk indeed existed."*[28]

45. The Pre-Trial Chamber bases its arguments in support of its fears that Mathieu Ngudjolo might abscond on an article by the Institute for War and Peace Reporting (IWPR). Not only has this document not been disclosed to the Defence, but it is of questionable reliability, since its conclusions are biased.

46. With regard to the issue of reliance on documents of this kind, Thomas Lubanga's Defence was quite explicit in the context of the confirmation hearing: "*Furthermore, similar NGO reports were also rejected by the International Court of Justice in the Case of Armed Activities on the Territory of the Congo. "The Court has for such reasons set aside the ICG report of 17 November, the HRW report of March 2001, passages from the Secretary-General's report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged); articles in the IRIN bulletin and Jeune Afrique; and the statement of a deserter who was co-operating with the Congolese military commission in preparing a statement for purposes of the present proceedings. "Yet, an HRW report and another ICG report appear on the Prosecutor's list of evidence.*"

47. *The Decision of the Pre-Trial Chamber of 17 November and the Decision of the International Court of Justice show that these reports are of minimal probative value. NGOs are often highly biased and their point of view is far from being independent because it stems from the need to sensationalise a given situation in order to attract interest from governments or international organisations. It has also become clear that Security Council resolutions and*

[27] *Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled* "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo", No ICC-01/04-01/06OA7, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-824_English.pdf, paragraph 136, p. 44
[28] *Ibidem* paragraph 137, p. 44

reports are often based on NGO reports. Therefore, an error which creeps into the first report is then repeated."[29]

48. In the present case, the documents to which the impugned Decision refers are unreliable. It is thus incorrect to state that Mr Mathieu Ngudjolo escaped from Makala prison in the Democratic Republic of the Congo before a verdict was reached by the Kinshasa military tribunal on the war crimes committed in the town of Tchomia in May 2003, and that he is considered to be the highest-ranking FNI Commander in the Zumbe area, and still wields influence as a powerful figure who has established numerous national and international contacts which could help him to flee the country.

49. It is of prime importance to make it clear that, following his acquittal by the *Tribunal de grande instance de Bunia* [Bunia High Court], Mathieu Ngudjolo was not released immediately. As is expressly stated in the warrant issued for his arrest on 6 July 2007, he was detained, transferred to Kinshasa in September 2003 and arbitrarily detained at the *Centre pénitentiaire et de rééducation de Kinshasa* (CPRK) [Kinshasa Penitentiary and Rehabilitation Centre], from which he was not released until December 2003 as a result of the steps taken by his Counsel, Mr Banga, to secure his release.

50. Furthermore, the Kinshasa military tribunal which reportedly investigated the crimes with which Mathieu Ngudjolo has been charged has yet to be identified, given that the Congolese capital has several military tribunals. In this regard, the Appeals Chamber's attention is drawn to the fact that, procedurally and from a jurisdictional point of view, under Congolese law governing the judicial system and matters of jurisdiction, a tribunal in Kinshasa does not have the necessary jurisdiction

[29] Defence Brief on Matters the Defence Raised During the Confirmation Hearing, No ICC-01/04-01/06-763 of 7 December 2006, paragraphs 58-59, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-763_tEnglish.pdf

ratione loci to hear a case dealing with events which occurred in the interior of the country - in Orientale Province in this case, which has its own military tribunals.

51. It follows that this Court cannot simply rely on speculative material and must apply a proper standard of proof. Unreliable evidence must therefore be rejected, along with any undisclosed evidence. In the *Haradinaj* case, the OTP sought to rely on press articles to prove that the accused had infringed detention rules and to establish that he could intimidate witnesses as a result. The Chamber attached little weight to this submission.[30]

52. In the impugned Decision, the Pre-Trial Chamber should have applied the criteria used in *Haradinaj* and deemed the evidence submitted by the Prosecution on the risk of Mathieu Ngudjolo absconding to be insufficiently substantiated.[31]

B. Endangerment of victims and witnesses

53. With regard to the endangerment of witnesses, the Pre-Trial Chamber considered that, if Mathieu Ngudjolo were released, there was a potential risk of various forms of interference with the investigations, with victims and witnesses, or even with their family members. According to the impugned Decision, Mathieu Ngudjolo must remain in detention in order to ensure that he does not obstruct or endanger the investigation or the proceedings.

54. This argument is tantamount to speculation, insofar as the behaviour of our client in no way justifies this assessment. The endangerment of witnesses is in reality pure supposition.

55. Here too, the reasoning of the Pre-Trial Chamber concerning the endangerment of witnesses is factually weak. In the first place, the arguments

[30] P*rosecutor v. Haradinaj*, Decision on Ramush Haradinaj's request for Provisional Release, 6 June 2005, para. 7, footnotes 11 and 78. http://www.un.org/icty/haradinaj/trialc/decision-e/050606.htm#11
[31] Ibidem, para. 45

developed above regarding the reliability of the source cited (in this instance a Reuters press release) are equally valid: how does this document seriously demonstrate that Mr Mathieu Ngudjolo is an important figure in the DRC and has a network with the capacity to help him abscond? Secondly, the article has no probative value, being based solely on hearsay.

56. Mathieu Ngudjolo has threatened nobody. This is anonymous hearsay, which cannot be deemed admissible by the Chamber in light of existing case law.[32] [33] He has no supporters either acting or ready to act in this way. The impugned Decision itself states: "*CONSIDERING that the Prosecution has not provided any concrete evidence showing that Mathieu Ngudjolo Chui might be using the communication facilities at the Detention Centre or might have breached the detention regime for the purpose of threatening or harming witnesses on whom the Prosecution intends to rely at the Confirmation hearing*".[34] The Chamber notes that the Prosecution has not provided any evidence that Mathieu Ngudjolo has used facilities to threaten or harm the witnesses on whom it intends to rely at the confirmation hearing. On that basis, the Pre-Trial Chamber therefore decided that there was no need for active monitoring of Mathieu Ngudjolo's communications.

57. In other words, in specific and reasonable terms, Mathieu Ngudjolo poses no threat to the security of the victims and witnesses, and is not hindering the ongoing investigations in any way. Hence he cannot obstruct the ongoing proceedings. The monitoring sought by the Prosecution in its submissions as a result of the alleged threats by our client against Prosecution witnesses was denied by the Pre-Trial

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[32] *Prosecutor v. Kordic et al*. (IT-95-14/2), Decision on Prosecutor's Submissions Concerning "Zaghreb Exhibits" and Presidential Transcripts, 1 December 2000 at paragraph 39: '*The Trial Chamber has examined the documents sought to be admitted. The Trial Chamber finds that many documents are to be excluded for one or more of the following reasons: […] (e) the material is based on anonymous sources or hearsay statements that are incapable of now being tested by cross-examination*.'
Decision confirmed by the Appeals Chamber Judgment of 17 December 2004, paragraph 190.

[33] In *Al-Najjar v. Reno*, 97F. Supp. 2d 1329, 1352-61 (S.D. Fla. 2000) (Dismissal of the INS detention order against a person suspected of having connections with a terrorist group, order based on ex parte hearsay), vac. as moot, 273 F.3d 1330 (11th Cir. 2001).

[34] ICC-01/04-01/07-345, 27 March 2008, p. 10

Chamber, which held that such a measure was a restriction on the rights of the suspect which could only be imposed if the requirements of necessity and proportionality were met.

58. It can thus be readily understood, in light of the foregoing, that the attitude of the Pre-Trial Judge is paradoxical: confirming the continued detention of Mathieu Ngudjolo, even while acknowledging that the Prosecution has not supplied any tangible evidence of threats by the suspect against witnesses. Similarly, the Prosecution has failed to identify, and provided no tangible evidence, regarding the alleged supporters of Mathieu Ngudjolo who might obstruct the investigations and harm witnesses, victims or their families.

C. Weakness of evidence regarding the causal link between the alleged risks and the interim release of Mathieu Ngudjolo

59. The reasons justifying detention must be exhaustive and strictly interpreted. In order to meet the legal requirements of article 58(1)(b)(i) and (ii), the Prosecution must provide tangible evidence that the person being prosecuted might abscond, obstruct the proceedings or compromise their conduct, in particular in relation to fears of witness intimidation if the person were to be released.[35]

60. The Defence, as was implicitly held in *Simatovic*,[36] maintains that there is a high threshold for such evidence. In *Brdjanin*, the Chamber required additional evidence from the Prosecution to establish a sufficient basis for a causal link between the release of the person concerned and the possibility that witnesses might be intimidated as a result of such release.[37] The Chamber in *Haradinaj* was also explicit

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[35] ICC-01/04-01/07-330, *Decision on the powers of the Pre-Trial Chamber to review* proprio motu *the pre-trial detention of Germain Katanga*, 18 March 2008, p. 5.

[36] In the *Simatovic* case, provisional release was granted in the absence of any credible evidence of intimidation of Prosecution witnesses by the Accused: http://www.un.org/icty/simatovic/trialc/decision-e/040728-2.htm

[37] Decision on Motion by Radoslav Brdjanin for provisional release, 25 July 2000, para. 19: "*It cannot just be assumed that everyone charged with a crime under the Tribunal's Statute will, if released, pose a danger to victims or witnesses or others*", para. 20, "*The Trial Chamber does not accept that this mere possibility – that the willingness of witnesses to testify would be affected by an accused's provisional release – would be a*

on the need for an adequate basis: "*The Prosecution has not identified or alleged that the Accused can be linked to any of the incidents of witness interference that were mentioned*." […].[38] Consequently, the decision maintaining detention must be based on facts concerning the person concerned and his or her specific circumstances.

61. Thus the issue of establishing whether there is a risk that a person applying for interim release might abscond or poses a threat to the conduct of the proceedings cannot be assessed simply *in abstracto*; a specific danger must be identified,[39] and must originate from the person concerned.[40] The Pre-Trial Chamber should therefore not have failed to mention whether the risk of witness intimidation originated specifically from Mathieu Ngudjolo rather than Germain Katanga or other unidentified persons.

62. Moreover, the fact that the Chamber has refused to have Mathieu Ngudjolo actively monitored in detention, whilst also refusing his release, is somewhat contradictory. The standard to be applied is the same in both cases. Regulation 175 refers to "*reasonable grounds to believe that the detained person may be attempting to […] (b) Interfere with or intimidate a witness*". Paragraphs (a) and (b) of article 58(1) also use the standard of "reasonable grounds to believe"[41] … in particular that the person will not intimidate witnesses.

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sufficient basis for refusing that provisional release were it otherwise satisfied that such accused will not pose a danger to the witnesses." http://www.un.org/icty/brdjanin/trialc/decision-e/00725PR213239.htm

[38] Prosecutor v. Haradinaj, Decision on Ramush Haradinaj's request for Provisional release, 6 June 2005, http://www.un.org/icty/haradinaj/trialc/decision-e/050606.htm, para. 46 "*The Prosecution has not identified or alleged that the Accused can be linked to any of the incidents of witness interference that were mentioned*." […]; para. 47 "*The Trial Chamber is not persuaded that the Prosecution's first argument shows that the Accused's presence in Kosovo would have a negative impact on the security situation of witnesses, or induce the perpetrators from previous incidents to take steps against these witnesses*."

[39] Prosecutor v. Talic, Decision on the motion for provisional release, 20 September 2002. http://www.un.org/icty/brdjanin/trialc/decision-e/20155759.htm

[40] "*The circumstances of each accused who applies for provisional release must be evaluated individually as they weigh upon the likelihood that he will appear for trial*". *Prosecutor v. Sainovic and Ojdanic*, Decision on Provisional Release, 30 October 2002, para. 7, http://www.un.org/icty/milutinovic/appeal/decision-e/sai-021030.htm

[41] Early drafts apply the standard of "reasonable grounds to believe" to Articles 58(1)(a) and (b) together, i.e. at A/CONF.183/2/Add.1

63. Finally the Defence notes the absence of any causal link between the risk of witness intimidation and release, since the Appellant is not subject to active monitoring in detention, and, if he were to be released, he would likewise not be monitored. Why recognise a risk in one situation and not in the other? In any event, it should be noted that, if Mathieu Ngudjolo were released, there would anyway be no risk, given that witnesses may be placed under a protection programme (relocation, redaction of information about their identity and so on).[42]

D. There is no necessity for Mathieu Ngudjolo to be kept in detention

64. In his analysis of article 60 of the Statute, Khan states that "[*t]he deprivation or limitations on liberty should only be imposed if really required in the interests of justice and the Prosecution should be put to proof why either pre-trial detention or release with conditions are, in fact, required*".[43] It follows, in light of the arguments advanced above, that the criterion of necessity as required by article 58(1)(b) of the ICC Statute is not satisfied. There is no reason to believe that Mathieu Ngudjolo will breach the conditions set out in points (i) to (iii) of the said provision.

3. Submission based on the violation of articles 67(1)(i) and 66 of the Statute

65. Since the evidence cited in the impugned Decision regarding the risk of absconding or security risks for victims and witnesses is erroneous, it follows that the reasoning must be regarded as defective and the decision reversed. The Defence further raises the issue of the appearance of bias, as a result of the possible prejudicial effect that *ex parte* proceedings may, by their nature, have on the judge; this is

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[42] *Prosecutor v. Haradinaj*, Decision on Ramush Haradinaj's request for Provisional release, 6 June 2005, para. 48: "*Furthermore, the Trial Chamber recently issued a series of protective measures for witnesses during the pre-trial stage. Twenty-seven (27) potential witnesses were granted the use of pseudonyms and the Prosecution was allowed to refrain from disclosing the identities of these individuals to the Defence until 30 days before the commencement of trial. The Trial Chamber considers these measures to be a contribution to witness security and an additional safeguard for the protection of potential witnesses concerned with the Accused's provisional release*". http://www.un.org/icty/haradinaj/trialc/decision-e/050606.htm

[43] 'Article 60' in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999) at 777.

particularly to be feared, given that the Defence has not been allowed access to, or the opportunity to challenge, that evidence.[44]

66. Article 67(1) of the Statute requires the Court to hear the accused in public, fairly and impartially. He or she is entitled to an impartial judge when his or her case is heard. However, the factual bases of the impugned Decision are erroneous, as Mathieu Ngudjolo never escaped from Makala prison and has never established any contacts, either inside or outside the country, in order to evade international criminal justice.

67. Moreover, the possibility of him spending any time abroad is difficult to envisage, given that none of the countries which have ratified the *Rome Statute of the International Criminal Court* could allow him to enter its territory. The number of countries which facilitated Mathieu Ngudjolo's transit through their territory in order for him to be brought to the Court following his arrest in Kinshasa is evidence of this, and it is worth repeating here that England, Belgium and France, all countries designated by Mathieu Ngudjolo for residence in the event of his interim release, have refused to accept him.

68. As to such purported evasion, the Pre-Trial Chamber relied on a report produced by IWPR, which contains the allegation that he might abscond. It is, however, clear that that report is not based on any probative evidence. Furthermore, the Congolese military judge, John Penza Ishay, who was contacted in this connection in the DRC, has confirmed that Mathieu Ngudjolo was neither interrogated nor arrested for the crimes committed in Tchomia.

69. Consequently, we are entitled to ask ourselves whether the Pre-Trial Chamber took all the necessary precautions to guarantee, at the very least, an appearance of impartiality. The Chamber must examine the Application for Interim Release in

[44] In this regard, see *Prosecutor v. Krnojelac*, 20 May 1999, Decision on prosecutor's response to Decision of 24 February 1999, paras. 11 and 12. http://www.un.org/icty/krnojelac/trialc2/decision-e/90520FI27429.htm

order to address the various circumstances for or against detention.[45] The fact that the Chamber has essentially relied on evidence which, in the view of the Defence, is of insufficient probative value may have led to biased findings, compromising the obligation on the judge to consider the Application for Interim Release objectively. Doctrine holds that [TRANSLATION:] "impartiality is a state of mind of a person guided by a concern for justice on the basis of law; it requires the judge to have no preconceived opinions, no bias and no prejudice". As Françoise Tulkens, Henri Bosly and Koering-Joulin correctly point out, citing the case law of the European Court of Human Rights, subjective impartiality is what a given judge believed at a specific point in time in regard to a given party, in other words the sanction against any preconceived opinion or prejudice.[46]

70. The Defence submits that the Chamber has held as established and proven facts which have been insufficiently proved, and has relied on these in order to deny the release of Mathieu Ngudjolo. The Pre-Trial Chamber has endorsed the submissions of the Prosecutor, without subjecting them to the test of verification.

71. Consequently, the reasoning underlying the decision to deny release must be held to be inadequate and erroneous. Accordingly, the impugned Decision violates articles 58(1)(a)(b)(i,ii and iii), 66 and 67(1) of the *Rome Statute*.

FOR THESE REASONS,

[45] 29 April 1999, in the case of *Aquilina v. Malta*, the European Court of Human Rights held unanimously that there had been a violation of Article 5 §3 of the European Convention on Human Rights. The automatic review required by Article 5 § 3 extends beyond the one ground of lawfulness cited by the Government. The Court held that such review must be sufficiently wide to encompass the various circumstances militating for or against detention.

[46] TULKENS, F. and BOSLY, H. D.: "La notion européenne de tribunal indépendant et impartial. La situation en Belgique" [TRANSLATION: The European concept of an independent and impartial court. The situation in Belgium], in *Revue de science criminelle*, 4, 1990, pp. 682-690 ; KOERING-JOULIN, R.: "La notion européenne de tribunal indépendant et impartial au sens l'article 6 par. 1 de la Convention européenne de sauvegarde des droits de l'homme" [TRANSLATION: The European concept of an independent and impartial court within the meaning of article 6, para. 1 of the European Convention on Human Rights], in *Revue de science criminelle*, 4, 1990, pp. 765-774.

72. The Defence respectfully requests the Appeals Chamber to reverse the impugned Decision and to order the interim release of Mr Ngudjolo, subject to such conditions as the Chamber may deem necessary.

And justice shall be done.

[signed]

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Mr Jean-Pierre Kilenda Kakengi Basila

Permanent Counsel for the Defence for Mr Mathieu Ngudjolo Chui

Done this Fourth day of April 2008

At Brussels, Belgium