Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-01/04-02/12**
Date: 20 December 2012

APPEALS CHAMBER

Before: **Judge Sang-Hyun Song, Presiding Judge**
Judge Sanji Mmasenono Monageng
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

Response of the Defence for Mathieu Ngudjolo to the "Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect" [ICC-01/04-02/12-5]

Source: Defence team for Mr Mathieu Ngudjolo

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

Office of the Prosecutor
Fatou Bensouda
Eric MacDonald

Counsel for the Defence of Mr Ngudjolo
Mr Jean Pierre Kilenda Kakengi Basila
Prof Jean-Pierre Fofé Djofia Malewa

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

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparations

Office of Public Counsel for Victims
Ms Paolina Massida

Office of Public Counsel for the Defence
Mr Keita

States' Representatives

Amicus curiae

REGISTRY

Registrar and Deputy Registrar
Ms Silvana Arbia and Mr Didier Preira

Defence Support Section
Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. BRIEF PROCEDURAL HISTORY

1. On 18 December 2012, Trial Chamber II ("the Chamber") handed down its judgment pursuant to article 74 of the Statute, by which it acquitted Mathieu Ngudjolo of all charges against him and ordered the Registry to take all the requisite measures for his release.[1]

2. In its oral application of the same date, the Office of the Prosecutor ("the Prosecution") requested the Chamber to continue Mathieu Ngudjolo's detention until the judgment on appeal. It relied on article 83(3)(c)(i) of the Statute for legal grounds, and argued exceptional circumstances as factual grounds. The Chamber dismissed the Prosecution's application and ordered Mr Mathieu Ngudjolo's immediate release.[2]

3. By application ICC-01/04-02/12 of 19 December 2012, the Prosecution challenged the Decision on Mr Ngudjolo's immediate release before the Appeals Chamber pursuant to article 83(3)(c)(ii), rule 154(1) of the Rules of Procedure and Evidence ("RPE") and regulation 64(1) of the Regulations of the Court ("RoC") and requested it to suspend Mr Ngudjolo's release, relying on articles 82(3) and 81(4) of the Statute and rule 156(5) of the RPE.[3]

4. The Defence team for Mr Mathieu Ngudjolo ("the Defence") hereby responds to the Prosecution's application in relation to the facts (I) and the law (II).

I. THE FACTS

5. In the facts presented by the Prosecution, the Defence notes some untruths and misrepresentations designed to mislead the Appeals Chamber. At paragraph 13 of its application, the Prosecution alleges that Mr Mathieu Ngudjolo escaped from Makala prison. This issue was discussed in court before the Chamber, and the Prosecution was unable to provide any supporting evidence whatsoever – not one document from the Congolese judicial authority attesting such an escape. Mr Ngudjolo, who stood accused at

[1] ICC-01/04-02/12-3, 18 December 2012, *Jugement rendu en application de l'article 74 du Statut*; ICC-01/04-02/12-T-1-FRA ET, 18 December 2012, p. 17, lines 13-19.
[2] ICC-01/04-02/12-T-3-FRA ET, 18 December 2012, p. 5, lines 24-28.
[3] ICC-01/04-02/12-5, "Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo und Urgent Application for Suspensive Effect".

the time, defended himself against the allegation. For the benefit of the Appeals Chamber, the Defence quotes its client's statement on the matter:

> [TRANSLATION] Mr President, your Honours, I was arrested on 23 October 2003, in Bunia, in connection with the *Lokana* case. I was tried on 3 June 2004. The judges handed down their decision; I was acquitted, but I was not released. I remained in detention. On 14 September 2004, I was transferred to the Makala prison in Kinshasa. I was not released until 24 December 2004. [...] I was released on 24 December 2004 in Kinshasa, contrary to reports from several NGOs claiming that I had escaped from detention in Kinshasa.[4]

6. In support of his testimony, Mr Mathieu Ngudjolo tendered exhibits EVD-D03-00134 and EVD-D03-00135 establishing that he had indeed been acquitted.[5]

7. Still at paragraph 13 of its application, the Prosecution states at point (ii) that Mr Ngudjolo "has a number of national and international contacts, giving him the means to seek to escape". Without wishing to dwell on the purely divinatory and speculative nature of this allegation, the Defence draws the Appeals Chamber's attention to the fact that, in almost five years of detention, its client, Mr Mathieu Ngudjolo, is the only detainee of the International Criminal Court not to have received any outside visitors – with the exception of his family from Kinshasa, which was duly authorised and arranged by the Registry, and a priest who also comes to provide religious services for all of the international detainees. Accordingly, this allegation by the Prosecution is wholly false.

8. Furthermore, the Prosecution adds at paragraph 14 of its application that "defence witness D03-100 testified in September 2011 that if he was before the Trial Chamber providing evidence it was because he had been threatened by family members of Ngudjolo". Once again, the Defence notes the inaccuracy of this allegation. In actual fact, Witness D03-100 testified about a conflict between his family and Mr Ngudjolo's family after his son had lied about Mr Ngudjolo *before the world's highest court*[6] *at the instigation of the "white people"*[7];[8] the conflict was resolved by an emissary who intervened. It was the emissary

[4] ICC-01/04-01/07-T-329-Red-FRA CT WT, 31 October 2011, p. 29, line 15, to p. 30, line 9.
[5] See Annex 1.
[6] See ICC-01/04-01/07-T-310-Red-FRA CT WT, 13 September 2011, p. 5, lines 23-26; p. 46, lines 12-14.
[7] To be understood as investigators from the Office of the Prosecutor.
See ICC-01/04-01/07-T-310-Red-FRA CT WT, *Idem*, p. 43, lines 9-15; p. 54, lines 13-20; p. 55, lines 19-21.
[8] See *Idem*, p. 47, line 13, to p. 48, line 8:
"[TRANSLATION] Q. Now, Mr. Witness, you explained, when you were talking about the conflict between the members of your family and the members of Ngudjolo's family, and I'm going to quote you now from page 8 of today's transcript, lines 6 to 12:
'In fact, there was a conflict between the members of my family and the members of Ngudjolo's family. A lot of discussion took place and I told myself that…that I needed to do something to resolve the situation because the relationship between our families had become wholly untenable. The emissary who came to see us helped us a

who proposed that the witness should come to testify to set the record straight. Furthermore, the crux of the matter is that in response to the Chamber's only question, as to whether he had told the truth, Witness D03-100 stated: "[TRANSLATION] Everything I have stated before you is the truth."[9] The Prosecution should have been embarrassed to produce and raise before the Appeals Chamber such a factual ground revealing the questionable methods used by its staff.

9. Finally, the Prosecution alleges that the FRPI movement to which Mathieu Ngudjolo belonged instigated military operations against civilians in Ituri. The Defence finds this ground to be grossly dishonest and designed to mislead the Appeals Chamber. In actual fact, not only was Mr Ngudjolo never a member of the FRPI, instead belonging to the FNI-FRPI alliance which disbanded shortly afterwards, but he also subsequently had no connection to either movement. This is evidenced by the fact that he did not join the national army and acquire his rank either through the FNI or the FRPI. Moreover, as an officer of the national army, Mathieu Ngudjolo fought against the FRPI within the regular army unit to which he had been posted. Furthermore, Mathieu Ngudjolo has been in detention in The Hague for five years. Must he be held accountable for everything which is happening now in the Democratic Republic of the Congo? Does this ground not show animus against Mathieu Ngudjolo?

10. In fact, the Prosecution does not provide any fresh evidence not contained in its oral application of 18 December 2012, which the Chamber dismissed. Accordingly, the Defence repeats the broad lines of the legal arguments it made on that date.

II. THE LAW

11. As legal grounds for its appeal, the Prosecution relies on article 81(3)(c)(ii), rule 154(1) and regulation 64(1) of the Regulations of the Court. It seeks suspensive effect for the appeal pursuant to articles 82(3) and 81(4) and rule 156(5).

---

lot. He told the other family that they needed to wait because something was going to happen to improve the situation. And, in fact, the situation did indeed improve.' End of quotation.
Now, Mr Witness, that solution to that very difficult situation you were in when your families were in conflict, indeed that solution was to come to testify in favour of Mathieu Ngudjolo, isn't that right?
A. Yes, that is correct. My solution was that I should come here to testify and explain the situation of my child and explain that he had not worked with Ngudjolo. I made up my mind to come here. I told myself that even if I had to die, then I would die, on condition that I came to testify here. I also thanked all those who assisted us to come right here and testify. I cannot travel here to the ends of the world, and I told myself that even if I died beforehand, my spirit would come here. I came here because of what the Court did to my child. It was for that reason that I am not afraid to come and tell the truth here. I already volunteered."

[9] *Idem*, p. 56, lines 7-12.

12. The Defence need not address the provisions of article 81(3)(c)(ii), rule 154(1) and regulation 64(1) of the Regulations of the Court; however, it will examine articles 82(3), 81(4) and rule 156(5) in order to challenge the legal grounds on which the Prosecution relies.

13. Article 82(3) provides:

> An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

14. Article 81(4) states:

> Subject to the provisions of paragraph 3 (a) and (b), execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

15. Rule 156(5) stipulates:

> When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3.

16. It follows from these provisions that only article 82(3) and rule 156(5) may be relied on to request the Appeals Chamber to grant suspensive effect, and such a request applies only to appeals against decisions other than a decision of acquittal or conviction or a decision on a sentence.

17. However, the decision which the Prosecution is appealing is neither a decision of acquittal or conviction nor a decision on a sentence; it is a decision on release following an acquittal on all charges. Furthermore, as proven by the referral to "the provisions of paragraph 3 (a) and (b)", article 81(4) is applicable only where the accused has been found guilty, not when he has been acquitted. In fact, the provisions of paragraph 3(a) and (b) relate solely to "a convicted person". Article 81(4) cannot, therefore, be applied to an acquitted person.

18. This reasoning is confirmed in C. Staker's commentary on article 81(4),[10] which *de facto* rules out the possibility of the provision being applicable in the case of an acquittal; the author only states the following:

> Apart from the fact that a convicted person will thus normally remain in custody pending an appeal, under paragraph 4, the effects of the conviction or sentence are suspended during the period allowed for appeal and for the duration of any appeal proceedings. The consequences are, for instance, that during this period the convicted person will not be transferred to the State

[10] Starker, C. in *Commentary on the Rome Statute of the International Criminal Court*, Triffterer, O. (ed.), 2nd edition, 2008, p. 1455, para. 17.

> of enforcement designated under article 103, and that no order can be made against the convicted person under article 75 para. 2. There will also be a suspension of any fine imposed under article 77 para. 2 (a) and of any order for forfeiture of assets under article 77 para. 2 (b).

19. The Chamber's decision to release Mathieu Ngudjolo follows from the application of article 81(3)(c) since, as the Chamber clearly established, it was responding to a request founded on that provision. Accordingly, the provisions which apply to an appeal against the decision of 18 December 2012 are all those provisions of the Statute, the RPE (150 to 153) and the Regulations of the Court (57 to 63) governing an appeal against a decision of acquittal or conviction.

20. Since article 82(3) is also inapplicable in the current matter, the Prosecution has no legal basis for its application for suspensive effect.

21. As for the appeal *per se*, the Defence demonstrated at the hearing of 18 December 2012 that the Prosecution had not provided any evidence of the elements required by article 81(3)(c)(i) of the Statute, which states:

> In case of an acquittal, the accused shall be released immediately, subject to the following: (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal.

22. It can be seen from an analysis of this provision of the Statute that the Prosecution must support its application by demonstrating, **firstly**, the existence of exceptional circumstances. It is apparent that the Prosecution has failed to do so. It did not present any exceptional circumstances as a basis for its application. **Secondly**, there is a cumulative requirement – since the drafters of the Statute use the "and" conjunction twice in article 81(3)(c)(i) – for the Prosecution to establish, *inter alia*, the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal.

23. Yet, in its application, the Prosecution did not present any material evidence establishing that Mathieu Ngudjolo is a flight risk. The judges of Trial Chamber II and the Detention Centre authorities alike have had occasion to observe Mr Ngudjolo's conduct over more than four years of detention. He has given no indication of a wish to abscond. He has never attempted escape and he has never organised or had anyone else organise a demonstration calling for his release.

24. The Defence therefore emphasises that Mr Mathieu Ngudjolo will not evade justice. The judges of the Court have the authority to set conditions for his liberty and he will comply with such conditions. If the Prosecution is determined to appeal against the decision to acquit and immediately release Mr Mathieu Ngudjolo, the appeal must not infringe his fundamental right to regain his liberty. If resident in The Hague, or the Schengen area at least, Mathieu Ngudjolo will appear in court while remaining at liberty. In this respect, the Defence recalls that there are other suspects before the International Criminal Court who appear in court while remaining at liberty. The seriousness of the crimes with which they are charged is no impediment to their appearing while at liberty. The Defence guarantees that Mathieu Ngudjolo will comply with any conditions imposed on his release.

25. During his oral submissions on 18 December 2012, concerning the **chances of his appeal against the decision to acquit Mathieu Ngudjolo**, the Prosecutor spoke of the probability of success.[11] The Defence emphasises that Mathieu Ngudjolo must be released in the meantime. In actual fact, the Defence is of the view that the Prosecution's appeal has no chance of succeeding, since the finding that there is no evidence beyond reasonable doubt of Mathieu Ngudjolo's involvement in the crimes perpetrated in Bogoro on 24 February 2003 is an objective one. The Prosecutor himself publicly admitted in his closing oral submissions that providing evidence was difficult; he encountered difficulties in responding to the Chamber's precise questions to him, publicly demonstrating his failure to administer evidence beyond reasonable doubt. He spoke, *inter alia*, of – to use his own words – the "[TRANSLATION] evolving" situation on the ground.[12] He admitted that evidence is not easy, and that evidence is difficult.[13] He provided his view of the possibilities, whereas it is well established that a person cannot be convicted on the basis of possibilities or probabilities.[14] Evidence is effective only if it excludes any other possibilities.

26. On this matter, the Defence recalls the *Delalić* judgment of 20 February 2001, which states at paragraph 458:

> Such a conclusion [of guilt] must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.

[11] See Annexes 2 and 3.
[12] Transcript 337, French version, p. 31, lines 18-23.
[13] Transcript 337, p. 18, lines 24-25, and page 32, lines 13-15.
[14] *Idem*, page 32, lines 16-21.

27. Accordingly, Trial Chamber II's decision to acquit Mr Mathieu Ngudjolo and order his immediate release was wholly just and fair and perfectly lawful.

FOR THESE REASONS

MAY IT PLEASE the Appeals Chamber to find the Prosecution application ICC-01/04-02/12 of 19 December 2012 unfounded both in fact and in law; and

TO DISMISS it quite simply in its entirety.

AND JUSTICE WILL BE DONE.

[signed]

Jean-Pierre Kilenda Kakengi Basila
Lead Counsel

Dated this 20 December 2012, at The Hague