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**International
Criminal
Court**

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Date: 14 April 2008

THE APPEALS CHAMBER

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

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

Public Document

**Prosecution Response to Defence Document in Support of Appeal against
"Decision on the Application for Interim Release of Mathieu Ngudjolo Chui"**

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. The Prosecution opposes this appeal by Mathieu NGUDJOLO (“the Appellant”) against the Decision of the Single Judge in Pre-Trial Chamber I denying his application for interim release. The Decision properly applied the criteria in Article 58(1)(b), after consideration of all of the factors in accordance with prior jurisprudence of the Appeals Chamber. The Appellant has demonstrated no error in the Decision, and the appeal must therefore be dismissed.

Procedural background

2. Pursuant to applications filed on 22 June and 25 June 2007,¹ Pre-Trial Chamber I issued a warrant of arrest against Mathieu NGUDJOLO on 6 July 2007,² in which it found reasonable grounds to believe that NGUDJOLO has committed crimes within the jurisdiction of the Court, and that his arrest appeared to be necessary “both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings”.³
3. NGUDJOLO received a copy of the Arrest Warrant upon his transfer to the Court on 7 February 2008, providing him with the necessary detail regarding the charges against him.⁴
4. During the first appearance of NGUDJOLO before the Court, on 11 February 2008, Defence Duty Counsel orally requested NGUDJOLO’s interim release and indicated

¹ ICC-01/04-348-US-Exp (reclassified as ICC-01/04-01/07-31-US-Exp), 22 June 2007; ICC-01/04-350-US-Exp (reclassified as ICC-01/04-01/07-33-US-Exp), 25 June 2007 (“Arrest Warrant Application”).

² ICC-01/04-02/07-1-US; reclassified as public, see ICC-01/04-02/07-1.

³ ICC-01/04-01/07-262, 6 July 2007, para. 68.

⁴ Decision, pp. 4-5.

he would subsequently file a written request.⁵ That written application for interim release was submitted on 13 February 2008.⁶

5. Pursuant to an invitation of the Single Judge dated 14 February 2008,⁷ on 22 February 2008 the Prosecution filed observations on the Application for Interim Release, in which the Prosecution submitted, in accordance with Article 60(2) of the Statute, that the conditions set forth in Article 58(1) of the Statute continue to be met and that, accordingly, NGUDJOLO must continue to be detained.⁸
6. On 10 March 2008, Pre-Trial Chamber I joined the case against NGUDJOLO with the case against Germain KATANGA.⁹
7. On 27 March 2008, the Single Judge issued the "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui", which held that the conditions for pre-trial detention set out in Article 58(1) continue to be met and therefore rejected the application for interim release.¹⁰
8. On 2 April, the Appellant lodged an appeal against the Decision under Article 82(1)(b) and Rule 154,¹¹ and filed a document in support of appeal on 4 April.¹²
9. The Prosecution hereby files its response to the Appeal Brief, pursuant to Regulation 64(5).

The Decision and the Nature of the Appeal

⁵ ICC-01/04-02/07-T-3-ENG RT, p. 11, lines 13-15; p. 15, lines 15-25 and p. 16, lines 1-2; p. 20, lines 18-25; p. 21, lines 1-25; p. 22, lines 1-14, lines 15-22.

⁶ ICC-01/04-02/07-21 ("Application for Interim Release").

⁷ ICC-01/04-02/07-23.

⁸ ICC-01/04-02/07-38-Conf ("Prosecutions Response to Application for Interim Release")

⁹ ICC-01/04-01/07-257. On the same date, the Pre-Trial Chamber ordered that the material disclosed to Germain KATANGA and a series of decision issued in that case must be disclosed and notified to NGUDJOLO, prescribed a time limit of 28 March 2008 for NGUDJOLO to file any applications for leave to appeal against those decisions – ICC-01/04-01/07-259.

¹⁰ ICC-01/04-01/07-344-Conf ("the Decision"). A public redacted version of the Decision was also issued: ICC-01/04-01/07-345.

¹¹ ICC-01/04-01/07-356 OA4.

¹² ICC-01/04-01/07-367 OA4 ("Appeal Brief").

10. The Appeals Chamber has ruled that a decision on interim release under Article 60(2) is not discretionary, in the sense that once a Chamber finds that the conditions under Article 58(1) are met, the person shall be detained.¹³ In making the determination whether those conditions are, or are not, met in any given case, the Pre-Trial or Trial Chamber must consider a range of factors and evidence placed before it by the parties. In this context, the Appeals Chamber has previously provided some guidance on certain factors which are relevant in assessing whether the conditions under Article 58(1) are met.¹⁴
11. Provided that the original Chamber correctly interpreted the law, then as previously held by the Appeals Chamber, the main basis for intervening in such a decision will be to review whether it was based on irrelevant factors.¹⁵ Alternatively, an appellant would need to show that the determination of the original Chamber was unreasonable.¹⁶
12. The Prosecution submits that an appellant is required to identify specific errors in the impugned decision.¹⁷

The Errors Alleged by the Appellant

13. The first error¹⁸ alleged by the Appellant is the Article 58(1)(b)(i) does not apply at the stage prior to the confirmation hearing.¹⁹ The Appellant argues that the Single

¹³ *Lubanga* Judgement on Interim Release Appeal, para. 134.

¹⁴ See *Lubanga* Judgement on Interim Release Appeal, paras. 136-140. The Prosecution notes that the Appellant refers to the failure of the Single Judge to comply with criteria set out in jurisprudence of the ICTY, sometimes from a different context – Appeal Brief, paras. 56, 60-61, 65; see also paras. 35, 51, 63. The Prosecution submits that while the jurisprudence of other tribunals may be of use in certain circumstances, the failure to follow the criteria prescribed by another tribunal does not in itself demonstrate any error on the part of the Single Judge.

¹⁵ See *Lubanga* Judgement on Interim Release Appeal, paras. 136-140. A demonstrated failure to consider relevant factors would have similar results.

¹⁶ A similar standard of review is applied to appeals against decisions on interim release in the other international criminal courts and tribunals, see e.g. *Prosecutor v Gotovina*, IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal against Denial of Provisional Release, 17 January 2008, paras. 5-6; *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005, para. 20.

¹⁷ *Prosecutor v Lubanga*, ICC-01/04-01/06-568 OA3, 13 October 2006, para. 19.

Judge erred in law by relying upon this provision to maintain his detention prior to any confirmation of the charges. The Prosecution opposes this ground of appeal, and submits that nothing in the Statute or the Rules indicates that the Single Judge committed any error by considering and applying Article 58(1)(b)(i) at this stage.

14. The second error alleged by the Appellant is that the Single Judge failed to consider issuing a summons to appear.²⁰ The Single Judge made no error in this regard, and the Prosecution opposes this ground of appeal. The Appellant appears to have misconstrued the system. Firstly, this appeal is not a review of the original decision to issue an arrest warrant; and secondly, Article 60(5) only empowers the Chamber to issue a further warrant of arrest after the release of a person if they have failed to attend, and in order to secure their presence.
15. The third, fourth and fifth errors allege that the Single Judge erred in finding that the conditions in Article 58(1)(b)(i) and (ii),²¹ which underpinned the Decision, were satisfied. The Appellant challenges the findings by the Single Judge that detention appeared necessary to ensure the person's appearance at trial;²² that continued detention appeared necessary to avoid interference with the investigation or with witnesses;²³ and that there was a sufficient link between the risks and the release of the Appellant.²⁴ As set out above, the relevant findings were made after

¹⁸ The Prosecution notes that the Appellant makes certain arguments regarding his notification of the arrest warrant, and whether this constitutes acceptance his arrest or detention, in the DRC (Appeal Brief, paras. 19-22). The Prosecution submits that these arguments are not clearly linked with any alleged error, and should be disregarded. The Decision under appeal is the Decision on the Application for Interim Release of Mathieu Ngudjolo Chui, under Article 60(2); not the prior decision issuing the warrant of arrest under Article 58. The Prosecution further notes that in the Decision, the Single Judge made a clear finding regarding the notification of the arrest warrant to the Appellant in the Decision, but that this was dealt with as a threshold issues relating to whether the Appellant's rights under Article 67(1)(a) had been violated (pp. 4-5), and was not taken into consideration in the findings under Article 60(2) which are the subject of this appeal.

¹⁹ Appeal Brief, paras. 24-34.

²⁰ Appeal Brief, paras. 35-40.

²¹ The Prosecution notes that the Appellant does not challenge the findings under Article 58(1)(a).

²² Appeal Brief, paras. 42-52.

²³ Appeal Brief, paras. 53-58.

²⁴ Appeal Brief, paras. 59-63.

consideration of all of the relevant factors. In order to demonstrate an error in such a determination, the Appellant must show that the Decision was unreasonable or was based on irrelevant considerations. The Appellant has failed to make such a showing, and consequently all three grounds of appeal are opposed.

16. The final error²⁵ alleges that the Decision raises an appearance of bias, based on the alleged contamination of the Single Judge caused by the purportedly *ex parte* nature of the proceedings, and on allegations that the Single Judge has accepted and considered facts that were not adequately proven.²⁶ The Prosecution opposes this ground of appeal. Nothing in the Appeal Brief, or in the proceedings leading up to the Decision, indicates bias or lack of impartiality on the part of the Single Judge. The submissions of the Appellant disclose no error on the part of the Single Judge, and must be dismissed.
17. Finally, the Prosecution recalls that the various limbs of Article 58(1)(b) are in the alternative, and that the Decision found that the detention of the Appellant was justified under both paragraphs (i) and (ii) of that provision. Thus, even if the Appellant was to succeed in relation to a ground which affected one of those two paragraphs, this would not in itself warrant the reversal of the Decision as the detention of the Appellant would still be warranted based on the other. The Prosecution will respond to each of the alleged errors separately below.

First Alleged Error – Article 58(1)(b)(i) does apply at this stage of proceedings

²⁵ The Prosecution notes that the Appellant has raised an additional argument relating the alleged absence of the need to detain (Appeal Brief, para. 64). The Prosecution does not consider that this paragraph substantially adds to the other arguments raised by the Appellant or independently demonstrates any error in the Decision. The Prosecution recalls that the Appeals Chamber has previously ruled that in the absence of any showing of error, the Pre-Trial Chamber is not required to independently address necessity and proportionality - see *Lubanga* Judgement on Interim Release Appeal, para. 140. The Prosecution therefore will not deal with this point further.

²⁶ Appeal Brief, paras. 65-71.

18. The Decision does not conflict with the human rights principles stated by the Appellant. Firstly, Article 60(2) embodies the relevant human rights principles.²⁷ Secondly, the Single Judge expressly recognised that pre-trial detention is an exception under the Statute, in that it must be justified by the conditions set out in Article 58(1).²⁸
19. In this case, the Single Judge found that those conditions were indeed met. As a result, and as confirmed by the Appeals Chamber,²⁹ the Statute requires that the person shall continue to be detained. In this regard, the Statute and the Rules do not differentiate between the position of a suspect and an accused; the same assessments must be made under Article 60(2) for each.³⁰
20. As recognised by both the Decision and the Appellant,³¹ the jurisprudence of this Court has already considered Article 58(1)(b)(i) as a basis on which the continued detention of a suspect can be ordered under Article 60(2) prior to the confirmation hearing.³² An appeal against that decision in the *Lubanga* case was lodged prior to the confirmation hearing and, while the Appeals Chamber did not render its judgement in that case until after charges had been confirmed, nothing in the Appeals Chamber's judgement indicates that the application of Article 58(1)(b)(i) prior to the confirmation of charges was in any way erroneous.³³
21. The Prosecution thus submits that the Decision was correct to consider Article 58(1)(b)(i) as one of the available bases to support continued detention at this stage,

²⁷ *Lubanga* Judgement on Interim Release Appeal, Separate Opinion of Judge Pikis, para. 2, 8-12, 16, 23. Further, Article 60 entrenches the general human right to have judicial review of decisions affecting liberty - *Prosecutor v Lubanga*, ICC-01/04-01/06-926 OA8, 13 June 2007, para. 13.

²⁸ Decision, p. 6.

²⁹ *Lubanga* Judgement on Interim Release Appeal, para. 134.

³⁰ This has been confirmed in *Lubanga* Judgement on Interim Release Appeal, Separate Opinion of Judge Pikis, para. 2, 7.

³¹ Decision, p. 6; Appeal Brief, paras. 31-34.

³² *Lubanga* Judgement on Interim Release Appeal, paras. 134-139.

³³ See specifically *Lubanga* Judgement on Interim Release Appeal, Separate Opinion of Judge Pikis, paras. 2, 7.

and that the Appellant has not demonstrated any error. The Prosecution, therefore, opposes the First Alleged Error.

Second Alleged Error – the Single Judge had no obligation to consider the issue of a summons to appear for the purposes of the Decision under Article 60(2)

22. The Prosecution notes that the Appellant makes certain arguments purporting to address the original decision issuing the arrest warrant.³⁴ The Prosecution recalls that this appeal is not against that decision of July 2007, but against the Decision of the Single Judge under Article 60(2).³⁵
23. The Prosecution accordingly submits that the Appellant has failed to demonstrate any error on the part of Decision warranting appellate intervention and therefore opposes the Second Alleged Error.³⁶

Third Alleged Error – the Single Judge made no error in finding that detention appeared necessary to ensure appearance at trial

24. As outlined above, the third, fourth and fifth errors appear to be largely based on allegations that the Decision erred in making the findings that the conditions in Article 58(1)(b)(i) and (ii) were satisfied. In reviewing such findings, the Prosecution submits that the Appeals Chamber should only intervene where the finding was

³⁴ Appeal Brief, para. 35; see also paras. 19-22.

³⁵ See para. 2, above.

³⁶ The Prosecution notes that the Appellant makes a series of arguments relating to the technical and procedural nature of pre-trial proceedings, the possibility of attending certain pre-trial proceedings by video link, the ability to hold the confirmation hearing in absentia, and the option for the Pre-Trial Chamber to issue a summons immediately before the confirmation hearing (Appeal Brief, paras. 37-39). The Prosecution submits that these arguments, some of which relate to the decision issuing the arrest warrant instead of the impugned Decision in this appeal, are irrelevant to the present appeal. As the Prosecution has argued above, Article 58(1)(b)(i) does apply at this stage of the proceedings. Further, the Prosecution notes that the Appellant has not waived his right to participate in the confirmation hearing pursuant to Article 61(2)(a).

wholly unreasonable or, consistent with the prior approach of this Chamber, where it was based on irrelevant factors.³⁷

25. The Prosecution submits that the Decision sets out in substantial detail the findings leading to the conclusion that the ongoing detention of the Appellant appeared necessary to ensure his appearance at trial. These factors include the gravity of the crimes charged and the possibility of a long sentence, which create a risk that the Appellant may wish to abscond; an apparent prior escape from judicial custody in relation to war crimes charges in the DRC; and personal influence and established contacts which could provide him with the means to evade the jurisdiction of the Court.³⁸ The Prosecution thus submits that the Appellant's references to comments by the Appeals Chamber regarding the level of detail provided in a different case are irrelevant.³⁹
26. The Appellant also challenges the sufficiency of one aspect of the Decision, namely the seriousness of the charges and possibility of lengthy sentence, to justify his detention.⁴⁰ However these factors were not considered in isolation. Rather, they were considered in the context of the risk that the Appellant may wish to abscond, and in connection with a series of other factors to arrive at the determination that his detention appeared necessary to ensure his appearance at trial. The Appeals Chamber has previously confirmed that these, along with other factors considered in this Decision,⁴¹ are all relevant to a decision on interim release, which necessarily

³⁷ Or if the Chamber failed to consider relevant factors - see paras. 11-12, 15, above.

³⁸ Decision, pp. 7-8.

³⁹ Appeal Brief, para. 44, referring to *Lubanga* Judgement on Interim Release Appeal, paras. 136 and 137. The Prosecution notes that the impugned Decision in this case sets out the factors in support of the conclusion that detention appeared necessary to ensure the appearance of the Appellant at trial in more detail, compared with the relevant decision in the *Lubanga* case (contrast *Prosecutor v Lubanga*, ICC-01/04-01/06-586-tEN, 18 October 2006, p. 6, first para.); and that even in that case, while the Appeals Chamber noted that it would have been preferable for the Pre-Trial Chamber to explain its reasoning in more detail, this did not constitute an error.

⁴⁰ Appeal Brief, para. 43.

⁴¹ For example, the international contacts of the individual, which provide the means to abscond – Decision, p. 8.

involves an element of prediction.⁴² The consideration of the seriousness of the crimes charged and the possible sentence, in context, does not violate the presumption of innocence⁴³ or demonstrate any error, but is consistent with the jurisprudence of the Court.

27. In relation to the concerns raised by the Appellant regarding the IWPR report,⁴⁴ the Prosecution notes that this was only one factor used by the Single Judge in concluding that the continued detention of the Appellant appeared necessary. The report was clearly identified and relied upon in the Prosecution's Response to the Application for Interim Release.⁴⁵ The Prosecution further notes that this report is a public document, readily accessible to the Appellant.⁴⁶
28. The Single Judge had the authority to freely assess the evidence before her.⁴⁷ The fact that a party in another case has argued that other NGO reports ought to be accorded limited probative value, citing the practice of a different court for different purposes,⁴⁸ does not make it unreasonable to have considered the report in question,

⁴² *Lubanga* Judgement on Interim Release Appeal, paras. 136-137. The seriousness of the crimes charged and the possibility of a lengthy sentence are also regularly considered as relevant in determinations on interim release in the ICTY: see e.g. *Prosecutor v Sainovic and Ojdanic*, IT-99-36-AR65, Decision on Provisional Release, 30 October 2002, para. 6; *Prosecutor v Dragomir Milosevic*, IT-98-29/1-PT, Decision on Defence Motion for Provisional Release, 13 July 2005, para. 8; *Prosecutor v Mico*, IT-04-79-PT, Decision on Mico Stanisic's Motion for Provisional Release, 19 July 2005, para. 9.

⁴³ The Appeals Chamber of the SCSL has confirmed that the conditions for release are unrelated to, and have no impact upon, the presumption of innocence – *Prosecutor v. Norman et al.*, SCSL-04-14-AR65, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005, para. 37. This is underscored by the fact that a number of decision of the ICTY have expressly confirmed that the presumption of innocence applies, and have gone on to consider the seriousness of the charges and the potentially lengthy sentence - see e.g. *Prosecutor v Martić*, IT-95-11-PT, Decision on Second Motion for Provisional Release, 12 September 2005, paras. 7, 12; *Prosecutor v Ljubicic*, IT-00-41-PT, Decision on Second Application for Provisional Release, 26 July 2005, paras. 17, 30.

⁴⁴ Appeal Brief, paras. 45-50.

⁴⁵ Prosecutions Response to Application for Interim Release, para. 18 and footnote 27.

⁴⁶ In this regard, and contrary to the implication in para. 45 of the Appeal Brief, the Prosecution submits that it has no independent obligation to disclose to the Appellant publicly available reports in this context.

⁴⁷ Rule 63(1) and (2).

⁴⁸ Appeal Brief, paras. 46-47, which sets out an extensive quote from the Defence written submissions filed after the confirmation hearing in *Prosecutor v Lubanga*. The Prosecution notes that there is no indication that the Pre-Trial Chamber in that case afforded any weight to these submissions; and that to the contrary the Pre-Trial Chamber made extensive use of reports by the United Nations (MONUC) and Human Rights Watch (HRW) in the Decision on the Confirmation of Charges - ICC-01/04-01/06-803-tEN, 29 January 2007, *inter alia* paras. 183, 191, 196-97, 215, 235-37, 250-53, 265, 291.

together with other material, in this instance. Beyond unsubstantiated allegations, the Appellant has offered no arguments establishing the unreliability of the document in question.⁴⁹

29. Further the Appellant failed to raise these concerns before the Single Judge for the purposes of his application for release. As has been stated earlier, a party has an obligation to place its case fully before the first instance Chamber, and should generally be precluded from raising new arguments on appeal.⁵⁰
30. None of the arguments raised by the Appellant demonstrate that any of the factors considered in the Decision were irrelevant, nor that there were additional relevant factors to consider. For these reasons, the Prosecution opposes the Third Alleged Error.

Fourth Alleged Error - the Single Judge also made no error in finding that detention appeared necessary to ensure that the Appellant does not obstruct or endanger the investigation

31. The Prosecution submits that, as with the third alleged error, in relation to the finding under Article 58(1)(b)(ii) the Decision took into consideration all of the relevant factors and based on these reasonably concluded that the continued detention of the Appellant was necessary. The Appellant has not demonstrated any error which would warrant intervention of the Appeals Chamber.

Even the Judgement of the International Court of Justice (ICJ) referred to in the Appeal Brief does not provide a basis to conclude that NGO reports, as a category, have minimal probative value or are highly biased. While the ICJ did not rely on NGO reports where those reports were regarded as too general to support the relevant claim or were clearly partisan (e.g. paras. 159, 298); in the same judgement the ICJ relied on other reports from MONUC and HRW (e.g. paras. 209-211).

⁴⁹ The Appellant has not provided any substantiation to his allegation that the IWPR report in question is biased (“sa fiabilité est critiquable dès lors que les conclusions sont partisans”) – Appeal Brief, para. 45. Further, the Prosecution notes that the Decision only found that “it appears that Mathieu Ngudjolo Chui escaped from the Makala prison in the DRC before a verdict was reached by a military tribunal in Kinshasa on the war crimes” (Decision, p. 8). This is not a conclusive factual finding, but rather recognition that there is evidence indicating this, which was not challenged by the Defence. This was a reasonable and relevant factor to take into consideration in the Decision.

⁵⁰ See para. 12, above.

32. The arguments of the Appellant to the effect that the Decision considered “hearsay” statements⁵¹ do not demonstrate any error: as noted above, the Chamber may freely consider the evidence before it.⁵²
33. As to the Appellant’s allegations pertaining to the allegedly speculative nature of the Decision, the Prosecution firstly submits that the Decision did not purport to hold, nor was required to conclusively find, that the Appellant had interfered with witnesses or that he would if released.⁵³ As the Appeals Chamber has previously recognised, decisions on interim release necessarily involve “an element of prediction”.⁵⁴
34. In this context, there is no “paradox” in the Decision not to order that the Appellant’s communications from within detention be actively monitored.⁵⁵ This decision and the determination that the conditions in Article 58(1)(b)(ii) were met required two different determinations, governed by different standards, and for different purposes. The relevant regulations require a different evidentiary showing for additional impositions on a person’s rights once in detention⁵⁶ than they do to maintain a person in detention *per se*.⁵⁷ It was thus consistent for the Single Judge to find that releasing the Appellant from custody risked endangering the investigation, without finding concrete evidence related to a different standard of past threats to

⁵¹ Appeal Brief, paras. 55-56.

⁵² See para. 28, above.

⁵³ The Prosecution notes that the Single Judges have found that, in addition to the general security context in the DRC (and in particular in Ituri and Kinshasa), supporters of the Appellant appear to have the capability to interfere with investigations, witnesses, victims and/or their family members; and that there have been several precedents of such interference by FNI and/or FRPI members, some allegedly acting under instructions from the Appellant (Decision, p. 9). The Prosecution notes that recent filings confirm that these concerns still apply – see *Prosecutor v Katanga and Ngudjolo*, ICC-01/04-01/07-383, 9 April 2008.

⁵⁴ *Lubanga* Judgement on Interim Release Appeal, para. 137.

⁵⁵ Appeal Brief, paras. 56-58 and 62-63.

⁵⁶ As noted by the Appellant, active monitoring of communications from within detention requires “reasonable grounds to believe” - Appeal Brief, para. 62, citing Regulation 175 of the Registry. See also Regulation 101(2) of the Court.

⁵⁷ That the detention “appears necessary”, Article 58(1)(b), which as noted above inherently involves an element of prediction.

witnesses from within detention.⁵⁸ The denial of the additional measures shows that the Decision scrutinised the basis for any restrictions on the rights of the Appellant, rather than demonstrating any error .

35. Accordingly, the Prosecution opposes the Fourth Alleged Error.

Fifth Alleged Error – the findings pertaining to the causal link between the alleged risks and the interim release of the Appellant are not unreasonable

36. The Fifth Alleged Error relates to the allegedly erroneous finding that the evidence established a causal link between the risks included in Articles 58(1)(b)(i) and (ii) and the interim release of the Appellant.⁵⁹

37. The Prosecution contends that the Appellant's submissions pertaining to the applicable standard of proof in relation to the requirements under Article 58(1)(b) are flawed and fail to make a showing that the findings were unreasonable.

38. The applicable test is whether the continued detention of the Appellant based on either of the grounds under Article 58(1)(b)(i) or (ii)⁶⁰ "appears necessary".⁶¹ As stated in the Decision, "the Defence for Mathieu Ngudjolo Chui has not put forward any argument that would justify departing from the existing case law of [...] the Appeals Chamber".⁶² Due to the specific reference in Article 58(1)(b) to the applicable standard of proof, the arguments advanced by the Appellant pertaining to other tests

⁵⁸ The finding referred to by the Appellant was limited to finding that the Prosecution had not provided concrete evidence that the Appellant might be threatening witnesses from within detention, and did not address whether the Appellant had been involved in threatening witnesses prior to his detention, nor whether he may engage in such threats if released.

⁵⁹ Appeal Brief, paras. 59-63 («*L'insuffisance des preuves concernant le lien de causalité entre les risques allégués et une mise en liberté provisoire des Mathieu Ngudjolo*»). See also para. 24 above.

⁶⁰ As stated by the Appeals Chamber, the various limbs of Article 58(1)(b) are in the alternative (*Lubanga* Judgement on Interim Release Appeal, para. 139). The Prosecution recalls that the Single Judge found that the detention of the Appellant was justified under both paragraphs (i) and (ii) of that provision (Decision, p. 9).

⁶¹ Article 58(1)(b). See also *Lubanga* Judgement on Interim Release Appeal, para. 139. Necessity is a component of the principle of proportionality, which in general terms requires that there be a reasonable relationship between the particular objective to be achieved and the means used to achieve that objective (see Clayton, R. and Tomlinson, H., *The Law of Human Rights* (2000), p. 278).

⁶² Decision, p. 6.

to be found in the Statute or the Regulations of the Registry are not relevant, as they relate to different measures to be adopted by the respective decision making bodies.⁶³

39. The Appellant does not demonstrate that the factual findings are unreasonable. Contrary to the contention of the Appellant,⁶⁴ the Decision did not make findings on the requirements under Articles 58(1)(b)(i) and (ii) in the abstract. The reasoning of the Decision demonstrates that these requirements were assessed in light of the personal circumstances of the Appellant.⁶⁵ Having analysed the evidence the Decision found that the detention of the Appellant remains necessary both to ensure the Appellant's appearance at trial,⁶⁶ and to ensure that the Appellant will not obstruct or endanger the investigation or the court proceedings.⁶⁷

40. For these reasons, the Prosecution opposes the Fifth Alleged Error.

Sixth Alleged Error – the Decision discloses no appearance of bias by the Single Judge

41. The Appellant contends that the Decision raises the issue of an appearance of bias of the Single Judge, which results in violations of Articles 58(1), 66 and 67(1)(i) of the

⁶³ See Appeal Brief, paras. 62-63, which refer to the "reasonable grounds to believe test" to be found in Article 58(1)(a) and Regulation 175 of the Regulations of the Registry. In this particular context, reference to the jurisprudence of the ICTY is not helpful. The jurisprudence of the ICTY sets out a different standard of proof for interim release to the one found in Article 58(1)(b), and is therefore not an applicable source to assist in the interpretation of the standard of proof under Article 58(1)(b). The following are the main differences of the applicable standard before the ICTY: First, the equivalent provision, Rule 65 of the ICTY Rules, preserves the discretionary nature of the Tribunal's decision, whereas Article 58(1) of the Rome Statute, through the use of the term "shall", mandates the issue a warrant of arrest if the conditions in that Article are satisfied (see *Prosecutor v. Popovic et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovcanin Provisional Release, 1 March 2007, para. 5; *Prosecutor v. Milutinovic et al.*, Decision on Milutinovic Motion for Provisional Release, 22 May 2007, para. 6). Second, at the ICTY the burden of proof regarding the conditions in Rule 65 rests with the accused, while under Article 58, it is the Prosecution who must satisfy the continued existence of the requirements of the Article (*Prosecutor v. Limaj et al.*, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 40; *Prosecutor v. Haradinaj et al.*, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005, para. 21).

⁶⁴ Appeal Brief, para. 61.

⁶⁵ For the requirements under Article 58(1)(b)(i), see in particular, Appeals Brief pp. 7-8. For the requirements under Article 58(1)(b)(ii), see in particular, Appeals Brief p. 9.

⁶⁶ Decision, pp. 7-9.

⁶⁷ Decision, pp. 9-10.

Statute.⁶⁸ The Appellant bases this argument on the alleged contamination of the Single Judge caused by the purportedly *ex parte* nature of the proceedings,⁶⁹ and on allegations that the Single Judge accepted and considered facts that were not adequately proven.⁷⁰

42. The Prosecution contends these arguments by the Appellant are baseless⁷¹ and inconsistent with prior jurisprudence.⁷² In particular, nothing in these arguments shows that Articles 58(1), 66 or 67(1)(i) have been violated.

43. Although the Single Judge based her conclusions in part on findings that were originally included in an *ex parte* decision in the proceedings against Germain KATANGA,⁷³ the Appellant did have access to a redacted confidential version of this decision,⁷⁴ and the Prosecution informed the Appellant of the relevant findings in its response to the Appellant's application for interim release.⁷⁵ The Appellant, thus, did have access to the relevant findings and did not seek additional disclosure of any underlying material on which these findings were based. Moreover, the Defence also had a chance to challenge the relevant findings, but did not seek leave to reply

⁶⁸ Appeal Brief, paras. 65-71. No suggestion of actual bias has been made in the present Appeal.

⁶⁹ Appeal Brief, paras. 65-66.

⁷⁰ Appeal Brief, paras. 66-70.

⁷¹ The Appellant supports his submissions with a decision from a Trial Chamber of ICTY in the *Krnjelac* case (see Appeal Brief, footnote 44). The Prosecution contends that this decision does not support the allegations of the Defence, as no analogy may be drawn between the subject matter decided in that decision in the *Krnjelac* case and this issue before the Appeal Chamber. The question as to whether a judge or a chamber confirming the charges is eligible to sit as a member of the Trial Chamber for the trial of that accused is irrelevant to the issue before the Appeals Chamber.

⁷² *Prosecutor v. Furundzija*, IT-95-17/1-A, Appeals Judgement, 21 July 2000, para. 189; *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, paras. 683 and 697; *Prosecutor v. Galic*, IT-98-29-A, Judgement, 30 November 2006, para. 44; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Grounds for the Appeals Judgement, 3 July 2002, para. 100.

⁷³ Decision, p. 9. See especially the findings with regards to the interference with witnesses. While the Decision refers to the public version of the decision in question issued on 22 February 2008 (*Prosecutor v. Katanga*, ICC-01/04-01/07-224 and *Prosecutor v. Katanga*, ICC-01/04-01/07-224-Anx), the original confidential *ex-parte* version was issued on 2 December 2007 (*Prosecutor v. Katanga*, ICC-01/04-01/07-84-Conf-Exp and *Prosecutor v. Katanga*, ICC-01/04-01/07-84-Anx-Conf-Exp).

⁷⁴ *Prosecutor v. Katanga*, ICC-01/04-01/07-223-Anx-Conf, *ex parte*, only available to the Office of the Prosecution and the Defence, 22 February 2008. In this version of the decision all redactions other than those related to the protection of witnesses have been lifted pursuant to an order of the Single Judge (see *Prosecutor v. Katanga*, ICC-01/04-01/07-223, 22 February 2008, p. 3).

⁷⁵ Prosecutions Response to Application for Interim Release. See in particular paras. 22-27.

to the Prosecution's response, or leave to appeal the relevant decisions, which it was expressly empowered to do.⁷⁶

44. The Defence did therefore not show any error on the side of the Single Judge.

45. The same applies in relation to the Appellant's allegations that the Single Judge accepted and considered facts that have not been adequately proven.⁷⁷ The circumstance that the Defence disagrees with the evaluation by the Single Judge of an item of evidence or any of her factual conclusions does not demonstrate an appearance of bias of the Single Judge.⁷⁸

46. For these reasons, the Prosecution opposes the Sixth Alleged Error.

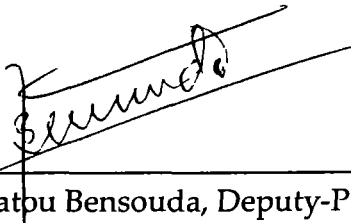
Relief Sought

47. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber denies the appeal in its entirety.

⁷⁶ After the cases of *Prosecutor v. Katanga* and *Prosecutor v. Ngudjolo* had been joined (*Prosecutor v. Katanga*, ICC-01/04-01/07-257, 10 March 2008), another Single Judge of Pre-Trial Chamber I issued a decision in which she ruled that "in relation to those decisions issued by the Chamber in the case of *The Prosecutor v. Germain Katanga* that may have an impact on the Defence of Mathieu Ngudjolo Chui, in particular the First, Second and Third Decisions on Redactions, the Defence of Mathieu Ngudjolo Chui will have until 28 March 2008 at 16h00 to file any requests for reconsideration or, alternatively, for leave to appeal" (*Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-259, 10 March 2008, pp. 9-10).

⁷⁷ Appeal Brief, paras. 66-70.

⁷⁸ Arguments or evidence disputing or contradicting a piece of evidence submitted by the other party should have been brought before the Single Judge. In addition, the Appellant may not introduce new facts simply by asserting those facts or referring to statements in submissions (see e.g. Appeal Brief, para. 68). Further, in appeal proceedings an Appellant may not introduce new evidence without making a proper application to do so, pursuant to Regulation 62. See para. 12, above.



Fatpu Bensouda, Deputy-Prosecutor
on behalf of
Luis Moreno-Ocampo, Prosecutor

Dated this 14th day of April, 2008
At The Hague, The Netherlands

ANNEX¹
LIST OF AUTHORITIES

A. JURISPRUDENCE

(a) ICTY

Prosecutor v. Blagojević, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace his Defence Team, 7 November 2003

<http://www.un.org/icty/blagojevic/appeal/decision-e/031107.pdf>

Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgment, 29 July 2004

<http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf>

Prosecutor v. Delalić et al., IT-96-21-A, Appeal Judgment, 20 February 2001

<http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf>

Prosecutor v. Furundžija, IT-95-17/1-A, Appeals Judgment, 21 July 2000

<http://www.un.org/icty/furundzija/appeal/judgement/fur-aj000721e.pdf>

Prosecutor v. Galić, IT-98-29-A, Judgment, 30 November 2006

<http://www.un.org/icty/galic/judgment/gal-acj061130e.pdf>

Prosecutor v. Gotovina, IT-06-90-AR65.1, Decision on Ante Gotovina's Appeal against Denial of Provisional Release, 17 January 2008

<http://www.un.org/icty/gotovina90/appeal/decision-e/080117.pdf>

Prosecutor v. Haradinaj et al., Decision on Ramush Haradinaj's Motion for Provisional Release, Trial Chamber, 6 June 2005

<http://www.un.org/icty/haradinaj/trialc/decision-e/050606.htm>

Prosecutor v. Kupreškić, IT-95-16-A, Appeal Judgment, 23 October 2001

<http://www.un.org/icty/kupreskic/appeal/judgement/kup-aj011023e.pdf>

Prosecutor v. Limaj et al., Decision on Fatmir Limaj's Request for Provisional Release, Appeals Chamber, 31 October 2003

<http://www.un.org/icty/limaj/appeal/decision-e/031031-3.htm>

Prosecutor v. Ljubičić, IT-00-41-PT, Decision on Second Application for Provisional Release, 26 July 2005

<http://www.un.org/icty/ljubicic/trialc1/decision-e/050726.htm>

Prosecutor v. Martić, IT-95-11-PT, Decision on Second Motion for Provisional Release, 12 September 2005

<http://www.un.org/icty/martic/trialc/decision-e/050912.pdf>

¹ Links provided last visited on 14 April 2008.

Prosecutor v. Dragomir Milošević, IT-98-29/1-PT, Decision on Defence Motion for Provisional Release, 13 July 2005

<http://www.un.org/icty/milosevic-d/trialc/decision-e/050713.htm>

Prosecutor v. Milutinović et al., Decision on Milutinovic Motion for Provisional Release, Trial Chamber, 22 May 2007

<http://www.un.org/icty/milutino87/trialc/decision-e/070607.pdf>

Prosecutor v. Popović et al., Decision on Interlocutory Appeal of Trial Chamber Decision Denying Ljubomir Borovcanin Provisional Release, Appeals Chamber, 1 March 2007

<http://www.un.org/icty/popovic88/appeal/decision-e/070301.pdf>

Prosecutor v. Sainović and Ojdanić, IT-99-36-AR65, Decision on Provisional Release, 30 October 2002

<http://www.un.org/icty/milutinovic/appeal/decision-e/sai-021030.htm>

Prosecutor v. Mićo Stanišić, IT-04-79-PT, Decision on Mico Stanisic's Motion for Provisional Release, 19 July 2005

<http://www.un.org/icty/stanisic/trialc/decision-e/050719-2.htm>

(b) ICTR

The Prosecutor v. Akayesu, ICTR-96-4-A, Appeal Judgement, 1 June 2001

<http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/Arret/index.htm>

The Prosecutor v. Bagilishema, ICTR-95-1A-A, Appeals Judgement, 3 July 2002

<http://69.94.11.53/ENGLISH/cases/Bagilishema/decisions/030702.htm>

The Prosecutor v. Kambanda, ICTR 97-23-A, Appeal Judgement, 19 October 2000

<http://69.94.11.53/ENGLISH/cases/Kambanda/judgement/191000.htm>

(c) SCSL

Prosecutor v. Norman et al., SCSL-04-14-AR65, "Fofana – Appeal against Decision Refusing Bail", 11 March 2005

<http://www.sc-sl.org/Documents/CDF/SCSL-04-14-T-371.pdf>

(d) ICJ

Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4, 9 April 1949

http://www.icjciij.org/icjwww/icasces/icc/icc_ijudgment/iCC_ijudgment_19490409.pdf

B. LEGISLATION

Vienna Convention on the Law of Treaties, 23 May 1969

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

Rules of Procedure and Evidence (ICTY), rev. 40, 12 July 2007
<http://www.un.org/icty/legaldoc-e/index.htm>

C. SECONDARY MATERIALS

Clayton and Tomlinson, *The Law of Human Rights* (Oxford, Oxford University Press: 2000)

Jennings and Watts (ed), *Oppenheim's International Law (9th ed)* (1992), Vol I

Khan, "Article 60" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Nomos Verlagsgesellschaft: 1999)

Schlunck, "Article 58", in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Nomos Verlagsgesellschaft: 1999)