

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/07

Date: 23 July 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
*v. Germain Katanga and Mathieu Ngudjolo Chui***

Public Document

**Review of the “Decision on the Application for Interim Release of Mathieu
Ngudjolo Chui”**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

**Counsel for the Defence
of Germain Katanga**

Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyagandu
Mr Joseph Keta
Mr J.L. Gilissen
Mr Hervé Diakièse
Mr Jean-Chrisostome Mulamba
Nsokoloni

Unrepresented Victims

Legal Representatives of the Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I of the International Criminal Court (the “Chamber” and the “Court” respectively);

NOTING the Warrant of Arrest for Mathieu Ngudjolo Chui¹ issued by Pre-Trial Chamber I on 6 July 2007;

NOTING the “Decision on the evidence and information provided by the Prosecution for the issuance of an arrest warrant against Mathieu Ngudjolo Chui” (“the Decision on Evidence and Information”)² issued by the Chamber on 6 July 2007;

NOTING the arrest and surrender of Mathieu Ngudjolo Chui to the Court and transfer to the Detention Centre at the seat of the Court in The Hague on 7 February 2008;³

NOTING the “*Demande de mise en liberté provisoire*” (“the Application for Interim Release”)⁴ filed by the Defence for Mathieu Ngudjolo Chui on 13 February 2008;

NOTING the “Decision on the Application for Interim Release of Mathieu Ngudjolo Chui” (“the Decision on the Application for Interim Release”)⁵ issued by Judge Akua Kuenyehia, acting as Single Judge, on 27 March 2008, whereby the Single Judge found that the conditions set forth in article 58(l)(b)(i) and (ii) of the Statute continued to be fulfilled insofar as the detention of Mathieu Ngudjolo Chui remained necessary to ensure (i) his appearance at trial; and (ii) that he would not obstruct or endanger the investigation or the court proceedings;

¹ ICC-01/04-01/07-260.

² ICC-01/04-01/07-262.

³ ICC-01/04-01/07-276-Conf and its annexes (ICC-01/04-01/07-276-Conf-Anx1-13).

⁴ ICC-01/04-01/07-280.

⁵ ICC-01/04-01/07-344-Conf; ICC-01/04-01/07-345.

NOTING the “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”⁶ rendered by the Appeals Chamber on 9 June 2008, in which the Appeals Chamber upheld the decision of the Single Judge of 27 March 2008;

NOTING the “Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui”⁷ issued by Judge Sylvia Steiner, acting as Single Judge for this Chamber, on 17 June 2008, whereby the Single Judge decided to (i) give the Prosecution and the Legal Representatives of Anonymous and of Non-Anonymous Victims until 2 July 2008 at 16h00 to submit their observations on the pre-trial detention of Mathieu Ngudjolo Chui at the seat of the Court; and (ii) gave the Defence for Mathieu Ngudjolo Chui until 17 July 2008 at 16h00 to respond to the observations referred to in (i) above;

NOTING the “Prosecution’s Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui”⁸ filed by the Prosecution on 2 July 2008, whereby the Prosecution submitted that in order to ensure the suspect’s appearance at trial as well as the security of victims and witnesses, there were no grounds justifying Mathieu Ngudjolo Chui’s interim release;

NOTING the “*Observations de la Défense relatives à la détention préventive de Monsieur Ngudjolo en réponse aux observations émises par le Procureur*”⁹ filed by the Defence for Mathieu Ngudjolo Chui on 14 July 2008, whereby the Defence for Mathieu Ngudjolo Chui submitted that the Prosecution did not provide sufficient evidence to establish that Mathieu Ngudjolo Chui’s pre-trial detention was necessary; and therefore, the

⁶ ICC-01/04-01/07-572.

⁷ ICC-01/04-01/07-602.

⁸ ICC-01/04-01/07-658.

⁹ ICC-01/04-01/07-676.

Defence requested the Chamber to order the interim (provisional) release of Mathieu Ngudjolo Chui;

NOTING articles 21(3), 58, 60, 61 and 67 of the *Rome Statute* ("the Statute") and rule 118 of the *Rules of Procedure and Evidence* ("the Rules");

CONSIDERING that article 60(3) of the Statute provides that "[t]he Pre-trial Chamber shall periodically review its ruling on the release or detention of the person [...]"; and that rule 118 of the Rules provides that "[t]he Pre Trial Chamber shall review its ruling on the release or detention of a person in accordance with article 60 (3) at least every 120 days [...]";

CONSIDERING that the last time the Chamber ruled on the "release or detention" of Mathieu Ngudjolo Chui was on 27 March 2008 in the Decision on the Application for Interim Release, whereby the Chamber rejected the Defence request for interim release;

CONSIDERING that in accordance with article 60 (2) of the Statute, the Chamber's denial of the Defence request for interim release was, *inter alia*, based on the grounds that the conditions set forth in article 58(1) of the Statute at the time continued to be fulfilled in so far as there were still reasonable grounds to believe that Mathieu Ngudjolo Chui had committed crimes within the jurisdiction of the Court; and that his detention remained necessary to ensure his appearance at trial and that he would not obstruct or endanger the investigation or the court proceedings;

CONSIDERING that in reaching its decision, the Single Judge was further guided by the gravity of the crimes Mathieu Ngudjolo Chui had allegedly committed, the possibility of facing a long prison sentence, the risk that he may abscond from the

jurisdiction of the Court if granted provisional release; and the consequent risk on the safety of victims and witnesses of the Court;¹⁰

CONSIDERING further that, in its Judgment of 9 June 2008, the Appeals Chamber found that:

[t]he decision of the Pre-Trial Chamber that the continued detention of the appellant is justified, pursuant to the provisions of article 58(l)(b)(i), is confirmed.¹¹

CONSIDERING that the Appeals Chamber, in its Judgment of 9 June 2008, stated that:

In this case the Single Judge adopted the findings made by another Single Judge in other proceedings; this is impermissible. A judge, the Single Judge in this case, is duty bound to appraise facts bearing on sub judice matters, determine their cogency and weight and come to his/her findings.¹²

CONSIDERING that pursuant to article 60(3) of the Statute, upon review of a decision on interim release, the Chamber may modify its ruling if it is satisfied that changed circumstances so require;

CONSIDERING that the Prosecution submitted that there has been no substantial change in the conditions or any related factors since the issuance of the Warrant of Arrest by the Chamber that would warrant a variation or the interruption of the current detention regime; and that therefore, the statutory grounds for interim release, pursuant to article 60(3) of the Statute, are not satisfied;¹³

CONSIDERING that the Prosecution further submitted that, pursuant to its disclosure obligations, it has disclosed the identities of Prosecution witnesses to Mathieu Ngudjolo Chui; and that if Mathieu Ngudjolo Chui were to be released, he

¹⁰ ICC-01/04-01/07-344-Conf, pp. 7-9.

¹¹ ICC-01/04-01/07-572, para. 28.

¹² ICC-01/04-01/07-572, para. 26.

¹³ ICC-01/04-01/07-658, para. 8.

would be in a position to exert pressure on these witnesses and thereby obstruct the Court's proceedings;¹⁴

CONSIDERING that, as submitted by the Prosecution, the circumstances have not changed for the Chamber to modify the ruling of the Single Judge pursuant to article 60(3) of the Statute; and that therefore, in accordance with the Appeals Chamber Judgment of 9 June 2008, the Chamber must appraise the submissions made by the parties in February 2008;¹⁵

CONSIDERING that the Defence for Mathieu Ngudjolo Chui submitted in the Application for Interim Release¹⁶ that:

- (i) the warrant of arrest which was issued for the Applicant on 6 July 2007 is legally unwarranted;
- (ii) the Mathieu Ngudjolo Chui never absconded, and he voluntarily underwent a training in Kinshasa;
- (iii) the conditions warranting continued detention under article 58(1) of the Statute are not met:
 - (a) by reason of the lack of a need justifying the detention, which must remain an exceptional measure dictated by the principles of necessity and proportionality; and
 - (b) because the condition under article 58(1)(b)(i) concerning the need for detention to ensure the person's appearance is not applicable at this stage of the proceedings;
- (iv) there is no relevant information to suggest that the charged person might, were his interim release to be ordered, obstruct or endanger the proceedings;

¹⁴ ICC-01/04-01/07-658, para. 10.

¹⁵ ICC-01/04-02/07-21, now ICC-01/04-01/07-280; ICC-01/04-02/07-38-Conf, now ICC-01/04-01/07-297-Conf; and ICC-01/04-02/07-44, ICC-01/04-02/07-44-Anx1 and ICC-01/04-02/07-44-Conf-Anx2 to Anx5, now ICC-01/04-01/07-303, ICC-01/04-01/07-303-Anx1 and ICC-01/04-01/07-303-Conf-Anx2 to Anx5.

¹⁶ ICC-01/04-01/07-280, paras. 6, 8, 9, 12, 20 and 27.

- (v) pre-trial detention cannot be predicated on unsubstantiated fears, a specific danger must be identified by the Prosecutor; and
- (vi) the gravity of the crimes charged, the existence of contacts at the national or international level, or the fact that confidential information has been disclosed to the charged person cannot, on their own, justify the detention;

CONSIDERING that the Prosecution has submitted¹⁷ that Mathieu Ngudjolo Chui must continue to be detained because (i) the conditions of Article 58(1)(a) of the Statute continue to be met in that there are reasonable grounds to believe that Mathieu Ngudjolo Chui committed crimes within the jurisdiction of the Court; (ii) since the issuance of the Arrest Warrant the situation has not changed; (iii) the conditions under Article 58(1)(b) of the Statute continue to be met because Mathieu Ngudjolo Chui's detention continues to be necessary to ensure:

(a) his appearance at trial, as:

- i. the gravity of the crimes levelled against him in the Arrest Warrant and Arrest Warrant Application, and the possibility that he faces a long prison sentence, support the existence of a substantial risk of flight of the suspect from the Court's jurisdiction if he were to be released; and
- ii. due to his former senior positions and his status in the DRC, he has established numerous contacts nationally and internationally, which provide him with the connections and means to flee;

(b) that he does not obstruct or endanger the investigation or the court proceedings, as:

- i. he still wields influence as a powerful figure within the DRC, and if released, his contacts and access to resources within the DRC, as described above, would enable him to pressure, threaten, or harm witnesses, thereby obstructing or endangering court proceedings;
- ii. people under his control have already threatened witnesses in the past; and,

¹⁷ ICC-01/04-01/07-297-Conf, pp. 4-13.

CONSIDERING that, as stated by the Single Judge, in the Decision on the Application for Interim Release:

[...] because of the gravity of the crimes contained in the warrant of arrest for Mathieu Ngudjolo Chui, and the possibility of a long prison sentence, there is a risk that he may wish to abscond from the jurisdiction of the Court;¹⁸

[...] there are also reasonable grounds to believe that Mathieu Ngudjolo Chui was the highest ranking commander of the FNI in the Zombe area during the relevant period; and that it appears that Mathieu Ngudjolo Chui (i) still wields influence as a powerful figure within the DRC; and, (ii) in this capacity, has established numerous contacts nationally and internationally, which can provide him with the connections and means to flee;¹⁹

[...] (i) the supporters of Mathieu Ngudjolo Chui have the capability to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families; and (ii) that there are several precedents of interference with Prosecution witnesses by FNI and/or FRPI members, some of them allegedly acting directly under the instructions of Mathieu Ngudjolo Chui;²⁰

CONSIDERING therefore that the Single Judge decided that the condition set forth in article 58(1)(a) of the Statute continues to be fulfilled insofar as there are still reasonable grounds to believe that Mathieu Ngudjolo Chui has committed crimes within the jurisdiction of the Court; and that the conditions set forth in article 58(1)(b)(ii) and (ii) continue to be fulfilled insofar as the detention of Mathieu Ngudjolo Chui remains necessary to ensure his appearance at trial and that he will not obstruct or endanger the investigation or Court proceedings;²¹

CONSIDERING that, in the view of the Chamber, there has not been any material change of circumstance to justify the release of Mathieu Ngudjolo Chui since the Decision on the Application for Interim Release and since the Single Judge decided that:

[...] there are also reasonable grounds to believe that already before the attack on Bogoro on or about the 24 February 2003, Mathieu Ngudjolo Chui was the highest ranking commander of the FNI in the Zombe area;²²

¹⁸ ICC-01.04-01.07-344-Conf, p. 7.

¹⁹ ICC-01.04-01.07-344-Conf, p. 8.

²⁰ ICC-01.04-01.07-344-Conf, p. 9.

²¹ ICC-01.04-01.07-344-Conf, pp. 6-8

²² ICC-01/04-01/07-262, para. 56; and ICC-01/04-01/07-344-Conf, p. 8.

[m]oreover, the Chamber finds that there are reasonable grounds to believe that after the UPC was chased out of Bunia on or about 6 March 2003, Mathieu Ngudjolo Chui became one of the three most senior commanders of the allied forces of the FNI and the FRPI;²³

[...] there are reasonable grounds to believe that by virtue of his current position as a Colonel of the Forces Armées de la République Démocratique du Congo ("FARDC") in Bunia and as the advisor to the Operational Zone Commander in the Ituri district, Mathieu Ngudjolo is able to make use of "the services" of former FNI and FRPI members who have integrated into the ranks of FARDC, and that he might use his connections and the means at his disposal in order to flee as soon as he would become aware of the warrant of arrest issued against him.²⁴ Therefore, the Chamber is satisfied that the arrest of Mathieu Ngudjolo appears necessary at this stage to ensure his appearance at trial pursuant to article 58(l)(b)(i) of the Statute.²⁵

[...] according to the Prosecution Application, Mathieu Ngudjolo also has the means to obstruct or endanger the investigation pursuant to article 58(l)(b)(ii) of the Statute.²⁶

[...] the Prosecution indicates that the men under Mathieu Ngudjolo Chui's control have threatened witnesses in the past, [...] with regard to the ongoing investigation by the Prosecutor of the Court [...];²⁷

[...] on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to subsequent determination under article 60 of the Statute and rule 119 of the Rules, the arrest of Mathieu Ngudjolo appears necessary pursuant to article 58(l)(b)(i) and (ii) of the Statute, both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.²⁸

CONSIDERING further that, for the purpose of the confirmation hearing, the identities of many witnesses have been disclosed to the suspect; that the situation in the DRC continues to appear volatile;²⁹ and that therefore his release increases the risk of endangerment to the security of victims and witnesses;

CONSIDERING furthermore that the Chamber reached its decision in compliance with internationally recognized human rights and especially with due regard to the right of any person arrested or detained to trial within a reasonable time or to release pending trial;³⁰

²³ ICC-01/04-01/07-262, para. 56.

²⁴ ICC-01/04-01/07-262, para. 64.

²⁵ ICC-01/04-01/07-262, para. 65.

²⁶ ICC-01/04-01/07-262, para. 66.

²⁷ ICC-01/04-01/07-262, para. 67.

²⁸ ICC-01/04-01/07-262, para. 68.

²⁹ Twenty-fifth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2008/218, 2 April 2008, paras 27 and 29

³⁰ ICC-01/04-01/06-586-tEN, pp. 6-7. The Chamber thus restates its position that since pre-trial detention cannot be extended to an unreasonable degree that reasonableness cannot be assessed *in abstracto* but depends on the

CONSIDERING that pursuant to article 60(4) of the Statute, the Chamber “shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor” and that the Appeals Chamber in its Judgment has confirmed that “unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case”;³¹

CONSIDERING therefore that in assessing whether the period of pre-trial detention of Mathieu Ngudjolo Chui is reasonable, the Chamber shall take into account all the circumstances in the present case;

CONSIDERING further that in assessing the reasonableness of the period of the pre-trial detention the Chamber shall weigh the genuine requirement of public interest against the principle of respect for individual liberty;³² and that the circumstances outlined above fulfil the requirement of public interest, in particular in relation to the need to ensure the appearance of the accused at trial and the security and protection of victims and witnesses;

CONSIDERING that the Prosecution submitted that Mathieu Ngudjolo Chui’s detention at the seat of the Court has not been unreasonable as the period for his detention from his arrest and transfer to the commencement of the confirmation hearing proceedings is less than five months;³³

particular features of each case and that to assess the reasonableness of the detention, it is particularly important to assess the complexity of the case.

³¹ ICC-01/04-01/06-824, para. 122.

³² See European Court of Human Rights, *W v Switzerland*, Judgment of 27 June 1993, Application No. 14379/88, para. 30; and *Ihjkov v Bulgaria*, Judgment 26 July 2001, Application no 33977/96, para. 84.

³³ ICC-01/04-01/07-658, para. 11.

CONSIDERING that the Defence for Mathieu Ngudjolo Chui disputed the Prosecution's submission in relation to the unreasonable duration of the pre-trial detention of Mathieu Ngudjolo Chui;³⁴

CONSIDERING that, in the view of the Chamber (i) Mathieu Ngudjolo Chui has been detained at the seat of the Court since 7 February 2008; and (ii) the confirmation hearing of Mathieu Ngudjolo Chui has taken place in an expeditious manner and in accordance with the time regime set out in the Statute, the Rules and the Regulations of the Court; and that therefore, the length of Mathieu Ngudjolo Chui's detention of five and a half months cannot be considered unreasonable;

CONSIDERING further that in light of the Judgement of the Appeals Chamber,³⁵ the Chamber, having determined that the period of detention is not unreasonable, the question of inexcusable delay of the Prosecution need not be addressed by the Chamber in reviewing the Defence request for interim release;

CONSIDERING therefore that, having determined that there has not been any material change of circumstances to justify the release of Mathieu Ngudjolo Chui at this stage of the proceedings and that the period of detention is not unreasonable, the requests by the Defence for Mathieu Ngudjolo Chui for (i) the release of Mathieu Ngudjolo Chui is rejected; and (ii) to reside in the DRC pending trial is moot;

FOR THESE REASONS

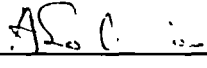
REJECTS the Defence for Mathieu Ngudjolo Chui's request for the release of Mathieu Ngudjolo Chui;

³⁴ ICC-01/04-01/07-676, paras. 24-26.

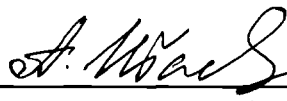
³⁵ See the Appeal Chamber's ruling in ICC-01/04-01/06-824 to the effect that "having determined that the period of detention was not unreasonable, the question of the inexcusable delay has become moot."

DECIDES that Mathieu Ngudjolo Chui shall continue to be detained pursuant to article 60(3) of the Statute.

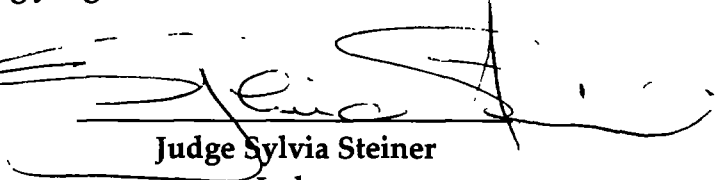
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka
Judge



Judge Sylvia Steiner
Judge

Dated this Wednesday 23 July 2008

At The Hague, The Netherlands