

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: 24 February 2009

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

***IN THE CASE OF  
THE PROSECUTOR  
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

**Public Redacted Version**

**Prosecution's Observations on the Review of the Pre-Trial Detention 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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## Background

1. On 6 July 2007, a warrant of arrest was issued against Mathieu NGUDJOLO CHUI ("Arrest Warrant"),<sup>1</sup> in which Pre-Trial Chamber I ("PTC I") found reasonable grounds to believe that NGUDJOLO had committed crimes within the jurisdiction of the International Criminal Court ("ICC" or "Court").<sup>2</sup>
2. On 7 February 2008, NGUDJOLO was arrested and transferred to the Detention Centre at the seat of the Court in The Hague.<sup>3</sup>
3. NGUDJOLO first appeared before the Court on 11 February 2008, during which Defence Duty Counsel orally requested NGUDJOLO's interim release and indicated that he would subsequently file a written request.<sup>4</sup>
4. On 13 February 2008, the Defence submitted a written application for interim release ("Application for Interim Release").<sup>5</sup>
5. On 22 February 2008, the Prosecution filed its "Observations on the Defence Application for Interim Release".<sup>6</sup>
6. On 27 March 2008, the Single Judge issued the "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui"<sup>7</sup> ("First Decision") whereby the Single Judge found that NGUDJOLO should remain in pre-trial

<sup>1</sup> ICC-01/04-02/07-1-US; reclassified as public, *see* ICC-01/04-02/07-1; reclassified as ICC-01/04-01/07-260.

<sup>2</sup> ICC-01/04-02/07-3-US; reclassified as public, *see* ICC-01/04-02/07-3; reclassified as ICC-01/04-01/07-262.

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

<sup>4</sup> ICC-01/04-02/07-T-3-ENG ET, p. 12, line 25-p. 13, lines 1-2; p. 17, lines 3-16; p. 22, lines 13-25; p. 23, lines 1-25; p. 24, lines 1-18.

<sup>5</sup> ICC-01/04-02/07-21; reclassified as ICC-01/04-01/07-280.

<sup>6</sup> ICC-01/04-02/07-38-Conf + Conf-Anx1; reclassified as ICC-01/04-01/07-297-Conf + Conf-Anx1; reclassified as public *see* ICC-01/04-02/07-40-Anx1 + Anx2; reclassified as ICC-01/04-01/07-299-Anx1 + Anx2.

<sup>7</sup> ICC-01/04-01/07-344-Conf.

detention because the conditions set forth in Article 58(l)(b)(i) and (ii) of the Statute continue to be satisfied.<sup>8</sup>

7. On 9 June 2008, the Appeals Chamber rendered its "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" in which the Appeals Chamber upheld the Decision.<sup>9</sup>
8. On 23 July 2008, PTC I rendered its "Review of the 'Decision on the Application for Interim Release of Mathieu Ngudjolo Chui'", in which PTC I rejected NGUDJOLO's application for interim release and decided to maintain the detention pursuant to Article 60(3) of the Statute.<sup>10</sup>

From 27 June to 16 July 2008, the Confirmation Hearing was held before PTC I. On 26 September 2008, PTC I issued its "Decision on the confirmation of charges" ("Confirmation Decision"), in which it confirmed the charges<sup>11</sup>.

9. On 30 October 2008, Trial Chamber II requested the Prosecution and the Defence to submit observations on the pre-trial detention of NGUDJOLO.<sup>12</sup>
10. On 6 November 2008, the Prosecution submitted its observations regarding the pre-trial detention of NGUDJOLO.<sup>13</sup>

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<sup>8</sup> ICC-01/04-01/07-602, p. 3.

<sup>9</sup> ICC-01/04-01/07-572 OA 4.

<sup>10</sup> ICC-01/04-01/07-694.

<sup>11</sup> ICC-01-04-01/07-717. The Decision confirmed that there was sufficient evidence to establish substantial grounds to believe that: a. NGUDJOLO was the *de jure* supreme commander of the *Front des nationalistes et intégrationnistes* ("FNI") and had *de facto* ultimate control over the FNI commanders during the relevant period (paras. 541 and 544), and b. NGUDJOLO ("the Accused") was responsible under Article 25(3)(a) for the following crimes: the crimes against humanity of murder, sexual slavery and rape; and the war crimes of wilful killing, sexual slavery and rape, using children to participate actively in hostilities, intentionally directing attacks against the civilian population of Bogoro village, pillaging and destruction of property (pp. 211-213).

<sup>12</sup> ICC-01/04-01/07-732.

<sup>13</sup> ICC-01/04-01/07-742.

11. On 12 November 2008, the Defence submitted its observations regarding the pre-trial detention of NGUDJOLO.<sup>14</sup>
12. On 19 November 2008, Trial Chamber II held that pursuant to Article 60(3) of the Rome Statute there had been no significant change of circumstances which would justify the release of NGUDJOLO<sup>15</sup> and that the general interest required that he be kept in detention "...in view of the absolute necessity to guarantee his appearance at trial and to ensure that the victims and witnesses are protected" ("The Decision").<sup>16</sup>
13. On 18 February 2009, Trial Chamber II requested the Prosecution to submit observations on the pre-trial detention of Mathieu NGUDJOLO CHUI ("NGUDJOLO").<sup>17</sup> The Prosecution makes the following observations on the matter.

### **Prosecution's Observations**

14. As the Appeals Chamber has reiterated, where the conditions under Article 58(1) of the Statute continue to be met, Article 60(2) requires that the person must continue to be detained.<sup>18</sup>
15. Pursuant to Article 58(1) of the Statute, a warrant of arrest shall be issued and detention ensue i) to ensure a person's appearance at trial; ii) to prevent the obstruction of court proceedings; or iii) to prevent continuing criminal conduct by the same person.

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<sup>14</sup> ICC-01/04-01/07-746.

<sup>15</sup> ICC-01/04-01/07-750-tENG, para. 12.

<sup>16</sup> ICC-01/04-01/07-750-tENG, para. 19.

<sup>17</sup> ICC-01/04-01/07-904.

<sup>18</sup> ICC-01/04-01/06-824, para. 134.

16. The Prosecution submits that there has been no substantial change of these conditions or any related factors since the Decision that warrants a variation or the interruption of the current detention regime.
17. The condition set forth in Article 58(1)(a) continues to be met.<sup>19</sup>
18. The continued detention of NGUDJOLO remains necessary to guarantee that he will appear in court. This will also ensure that he will not obstruct or endanger the investigation, the court proceedings or the witnesses or other persons at risk on account of their interaction with the Court.<sup>20</sup>
19. The Prosecution submits that the risk of absconding has increased as a result of the confirmation of the charges, consequently NGUDJOLO's continued detention is necessary to ensure his appearance.<sup>21</sup> The gravity of the charges that NGUDJOLO is facing might prompt him not to appear in court if he were to be released.
20. In addition, the Prosecution asserts that in light of the Accused's former positions in the FNI, *Mouvement Révolutionnaire Congolais* ("MRC") and *Forces Armées de la République Démocratique du Congo* ("FARDC") he benefits from the support of a number of influential networks in Ituri and in Kinshasa, and has numerous and powerful contacts both within and outside the Democratic Republic of the Congo, which could facilitate his flight from the Court's jurisdiction.<sup>22</sup>

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<sup>19</sup> ICC-01/04-01/07-750-tENG, para. 12.

<sup>20</sup> Article 58(1)(b).

<sup>21</sup> ICC-01/04-01/07-794, para. 10.

<sup>22</sup> The Prosecution submits that it is not necessary to show that the Accused has actually made use of any of those contacts to seek to abscond, but there is an element of predictability that he could use those contacts. *See* ICC-01/04-01/06-824, para. 137: The Appeals Chamber said it was not persuaded by the Appellant's argument that the PTC I should not have taken into account the international contacts of the Appellant because there had been no evidence before the Chamber that the Appellant actually would make use of those contacts to abscond. The Appeals Chamber noted that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction.

21. Taking into consideration the volatile situation in the DRC<sup>23</sup> and the disclosure of Prosecution witnesses' identity to the Defence, the Prosecution submits that the interim release of NGUDJOLO "would lead to the grave endangerment of the safety of the victims and witnesses and would obstruct the court proceedings".<sup>24</sup> This is further confirmed by the information contained [REDACTED]<sup>25</sup>.
22. The security problems in the DRC were demonstrated in September and October 2008, when members of the *Force de Résistance Patriotique en Ituri* ("FRPI") and other forces now in the *Front Populaire pour la Justice au Congo* ("FPJC"), tried to re-take Bogoro and neighbouring villages, leading to mass displacement of civilians.<sup>26</sup>
23. It must also be noted that supporters of the Accused have the capability to interfere with Prosecution witnesses and their families.<sup>27</sup> There are precedents of interference with Prosecution witnesses by FNI and/or FRPI members, some of them allegedly acting directly under the Accused's instructions.<sup>28</sup> Accordingly, if the Accused were to be released, he would be

<sup>23</sup> ICC-01/04-01/07-794-tENG, para. 13. See also ICC-01/04-01/07-889-Conf, par. 9.

<sup>24</sup> Although these comments were made in the decision concerning the interim release of Germain Katanga they equally apply to the situation of Mathieu Ngudjolo, see ICC-01/04-01/07-794-tENG, para. 13.

<sup>25</sup> ICC-01/04-01/07-894-Conf-Exp.

<sup>26</sup> See "Ituri: reprise des combats entre FARDC et la milice FRPI à Bogoro", *Radio Okapi*, 30 September 2008 (available at <http://www.radiookapi.net/index.php?i=53&a=20494> (last accessed 24 February 2009)).

<sup>27</sup> ICC-01/04-01/07-196-Conf-AnxA, para. 224. See also ICC-01/04-02/07-3, p. 64. PTC I found that there were reasonable grounds to believe that by virtue of his then position as Colonel with the FARDC in Bunia and as advisor to the Operational Zone Commander in Ituri, NGUDJOLO was 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." See ICC-01/04-01/07-224-Anx, para. 16: A number of former FNI and FRPI commanders have joined the FARDC and are currently in Kinshasa, Kisangani or Bunia, or their whereabouts remain unknown.

<sup>28</sup> ICC-01/04-02/07-3, para. 67 ICC-01/04-01/07-224-Anx, para. 17. See also "Ngudjolo Trial Faces Double Jeopardy Claim", *IWPR*, 19 February 2008 (available at <http://www.iwpr.net/?p=acr&s=f&o=342800&apc=stac:hcniaacr2008> (last accessed 24 February 2009)), in which human rights groups say NGUDJOLO was acquitted in one of his domestic cases because the witnesses were too scared to testify. See ICC-01/04-01/07-420-Conf-AnxA, para. 224: Witnesses interviewed by the OTP have uniformly expressed fear about actions that NGUDJOLO might take or order if their contact with the OTP becomes known to him. ICC-01/04-01/07-224-Anx, para. 17: An OTP witness has explained that individuals were trying to identify persons close to the FNI and/or FRPI, who may have cooperated or might cooperate with the OTP in relation to investigation of crimes allegedly committed by members of FNI and/or FRPI.

in a position to exert pressure on these witnesses and thereby obstruct the Court's proceedings.

24. The above-mentioned considerations were deemed relevant by PTC I prior to the confirmation of the charges against the Accused.<sup>29</sup> Now that the charges against the Accused have been confirmed, there exists a firmer evidential basis for arguing that these same considerations necessitate his continued detention.

25. [REDACTED].<sup>30</sup>

26. [REDACTED]<sup>31</sup>, [REDACTED]<sup>32</sup>

27. The Prosecution further asserts that NGUDJOLO's period of detention is not unreasonable. As confirmed by the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, "the 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."<sup>33</sup>

28. The Accused has been in detention at the seat of the Court for just over one year. The period of the Accused's detention from his arrest and transfer to the commencement of the Confirmation Hearing was less than five months.

29. The Confirmation Hearing took place in an expeditious manner, and a trial date is soon to be set.

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<sup>29</sup> See ICC-01/04-01/07-345; ICC-01/04-01/07-602; and ICC-01/04-01/07-694.

<sup>30</sup> ICC-01/04-01/07-889-Conf, para. 9 (Prosecution's translation).

<sup>31</sup> ICC-01/04-01/07-894-Conf-Exp.

<sup>32</sup> ICC-01/04-01/07-894-Conf-Exp, p. 3.

<sup>33</sup> ICC-01/04-01/06-824, para. 122.



30. Pursuant to Articles 60(3) or 60(4) of the Statute, there are no grounds for granting interim release.

### Conclusion

Considering the foregoing reasons and taking into account the need to ensure the appearance of the Accused at trial and the security of victims and witnesses, the Prosecution submits that there are no grounds justifying NGUDJOLO's interim release.



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Luis Moreno-Ocampo, Prosecutor

Dated this 24<sup>th</sup> day of February 2009

At The Hague, The Netherlands