

Status Conference

(Open Session)

ICC-01/04-02/12

1 International Criminal Court

2 Trial Chamber II - Courtroom 1

3 Situation: Democratic Republic of the Congo

4 In the case of The Prosecutor v. Mathieu Ngudjolo Chui - ICC-01/04-02/12

5 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra

6 and Judge Christine Van den Wyngaert

7 Status Conference

8 Tuesday, 18 December 2012

9 (The hearing starts in open session at 1.32 p.m.)

10 THE COURT USHER: All rise.

11 The International Criminal Court is now in session.

12 PRESIDING JUDGE COTTE: (Interpretation) Please be seated.

13 Good afternoon and hello again to everybody. We meet again for a hearing of a

14 limited duration, which should not exceed 45 minutes in duration, in order to enable

15 first and foremost the public -- the Prosecutor or one of her colleagues to expose to us

16 the arguments that they would like to bring to the Court in favour of the referral on

17 the basis of Article 81(3)(c)(i) of the Statute. Maître Gilissen and Maître Luvengika

18 will then address the Court if they so wish briefly and then Maître Kilenda and

19 Maître Fofé will also address the Court.

20 Mr MacDonald, or Madam Bensouda, do you wish to address the Court?

21 MS BENSOU DA: Mr President, my colleague Eric MacDonald will address the

22 Court.

23 Thank you.

24 PRESIDING JUDGE COTTE: (Interpretation) Yes, thank you, Madam Prosecutor.

25 Mr MacDonald, please address the Court.

1 MR MACDONALD: (Interpretation) Yes, I thank you, Mr President, your
2 Honours.

3 You are referring indeed to Article 83(1)(c) and it places the Chamber I think in an
4 immediate situation in view of the acquittal of -- release of the individual. Of course
5 we do understand the situation that the Chamber is up against currently, but the Trial
6 Chamber should also note that my presentation is on the basis of a very rapid reading
7 of approximately 200 pages of the decision and it has a lot of information that I need
8 to assimilate. So I shall be brief in my exposé and in view of the time constraints and
9 the time that we have allocated for us this afternoon.

10 PRESIDING JUDGE COTTE: (Interpretation) Mr Prosecutor, of course we are
11 aware of the fact that the time that you have to familiarise yourself with the decision
12 in full was very brief and of course you are also mindful and alive to the fact that your
13 application for a possible -- for maintaining Mr Ngudjolo in custody should be in
14 keeping with what is outlined in Article 81(3)(c)(i).

15 MR MACDONALD: (Interpretation) Yes, I was going to refer to that article and I
16 will start by addressing the issue of the probability or the -- or the chance that the
17 appeal would be successful and then I shall move on to the other issues.

18 This also places us in a situation where immediately we have to say to you of course
19 that you were wrong, and the despite all the goodwill you have made errors or you
20 have erred in fact and in law, and I'm saying this to you just after the acquittal. Of
21 course you have to reassess the situation, work that you have conducted over a
22 period of a number of months that you need to reassess within a brief time frame.

23 We are of course all professionals. I am doing my job. I am presenting to you in a
24 succinct fashion according to the brief and rapid reading of the decision the subject
25 which is at the crux of your decision, notably the probative value of the testimony. I

1 shall concentrate notably on P-250 and P-317 and also some of the exhibits, notably
2 the infamous letter and the issue that we are both aware of.

3 Firstly, the Chamber, and I can't give you the details here because these are ex parte
4 submissions, I am here referring to your decision of 3120-Conf-Exp, there is a certain
5 amount of evidence that the Prosecution wanted to obtain a full copy of and they
6 were excluded from this.

7 The Chamber decided not to grant leave or to allow the admissibility of this evidence
8 and this evidence contained information that has immediate consequences with
9 regard to the possibility for the Prosecution to bring further evidence with a view to
10 possibly demonstrating guilty -- a guilty conscience and also very relevant evidence
11 in evaluating the credibility of the Prosecution witness, notably P-250.

12 Also, in assessing the credibility of the Defence witnesses for Mr Ngudjolo, those
13 individuals who came to testify, the Chamber in its decision, notably with regard to
14 the letter, this infamous letter, made mention of the fact that there seemed to have
15 been collusion despite the fact that all the evidence that we did not have access to
16 showed quite the opposite.

17 So we contend that this in itself is a very important detail, because it really touches
18 upon the credibility of the witnesses who were both exculpatory and inculpatory,
19 incriminating and excriminating and also guilty conscience.

20 As regards P-250, I am here referring to your decision or assessment of the threats
21 against T -- D03-100. I am referring here to the light shed on the matter by 250 and
22 the manner in which he testified. We contend that in addition to this additional
23 information that we did not have access to there are -- mistakes have been made in
24 the weight to be given to the situation to -- of these witnesses, these witnesses who
25 have come from the Ituri region to come and testify before this very Court and all the

1 baggage that they carry with them.

2 So D03-100 clearly said that he had been threatened and we contend that this has a
3 very important impact on the testimony of P-250.

4 P-317, when the Chamber was assessing the alleged admissions that he made,
5 Mr Ngudjolo made, to P-317, or confessions that he might have done in a written
6 statement or in the report of an interview, or that Mr Katanga might have made with
7 regard to his own participation and that of Mr Ngudjolo with regard to P-12 and
8 P-260, the Chamber has drawn a certain number of conclusions and saying -- in
9 saying that it was too general.

10 Now, I'm going to limit my discussions to P-317 in order to demonstrate this general
11 or generality, or general character, of their testimony. I think I am not wrong when I
12 say that this was paragraph 434. Despite the fact that you say that this testimony
13 was entirely credible, what he said was quite general and the Chamber went on to
14 speculate on the fact that Mr Ngudjolo even confessed to 371 with a view to giving
15 himself further importance and a higher rank. Despite the fact that Mr Ngudjolo
16 came to testify and denied having met P-317 at all, the Chamber should not have
17 speculated on the subject and if the Appeals Chamber finds that this is a mistake then
18 it will go to the authority of Mr Ngudjolo himself who says that he did organise and
19 confesses to have organised in the attack on Bogoro.

20 So if this item of evidence was proven beyond any reasonable doubt, then and if other
21 things do not have the same burden of proof, then of course they will be analysed in
22 the new light. This is a question of interpretation of evidence of course and were the
23 Prosecution to be able to prove that the Chamber had erred, then the Appeals
24 Chamber would be in a position to reverse or overturn your verdict with regard to the
25 authority or the organisation in Zombe and concentrate on other factors of mode of

1 responsibility or mode of liability under Article 85(3) -- 25 (3)(a).

2 Now, of course there is a probability. The Prosecution has not demonstrated that
3 there will be any sure success in appeal, but there is a probability.

4 Now, as for the risk of flight of the acquitted, I am going to now concentrate on the
5 gravity of the offence. Of course I think there is no doubt about this.

6 There is one thing, the gravity of the crime. I think there is one thing, notably the
7 risk of flight. I would refer to your last decision which we think is still very relevant.

8 This is decision 1593 dated 4 November 2009, and at that moment in time you
9 retained what the Pre-Trial Chamber had already determined, notably that

10 Mr Ngudjolo had previously already escaped from Makala prison, and that in view of
11 his position in Zombe and subsequently as recognised in your decision from the
12 month of March in your decision of 2003, Mr Ngudjolo made a number of contacts on
13 an international and national level which would allow him to indeed escape.

14 I would like to say that since this decision, since November 2009, what is new with
15 regard to this ex parte evidence that the Defence has had access to and the Trial
16 Chamber has also had access to and which are relevant with a view -- with the
17 reference to the impediment that the -- that Ngudjolo might, and any contacts that he
18 might have and any threats that he might make to witnesses who might need to be
19 recalled to testify, and that also D03-100, who was -- and this was the only reason
20 why he admitted --

21 THE INTERPRETER: Message from the English interpreter: Can counsel please be
22 requested to slow down? They cannot keep up.

23 MR MACDONALD: (Interpretation) Now -- so, were you to release Mr Ngudjolo,
24 those risks are still very much flavour of the day.

25 Now, what would be the guarantees that would be offered for Mr Ngudjolo to

1 present himself before the Court again? What would be the conditions of his release
2 that would mean that these threats might not occur, even though those might occur,
3 were he not to be released?

4 Finally, Mr President, your Honours, were the Chamber to decide to release
5 Mr Ngudjolo, we would request that you delay the execution of your decision, or stay
6 the execution of your decision, because tomorrow we will of course be filing a motion
7 for appeal to the Appeals Chamber in addition to the request to stay the effect or
8 execution of your decision to release Mr Ngudjolo.

9 We will also be appealing your decision, of course, but in view of the circumstances,
10 filing a motion of appeal and also requesting a stay of proceedings would be the way
11 forward.

12 Now, Mr President, I do know that there are certain administrative controls that need
13 to be conducted before Mr Ngudjolo be released. I also am mindful of the fact that,
14 were he to be released, he needs to remain in Holland because he cannot travel
15 according to a certain travel ban in place, put in place by the United Nations. I
16 believe that this travel ban is still in place. I do not believe that this request is
17 unreasonable.

18 Of course it goes without saying, lastly, in terms of the intimidation and threats, they
19 might also occur when one is outside of the detention facility, when one has access to
20 a telephone in The Hague. This goes without saying, of course.

21 I'd just like to turn to my colleagues before wrapping up, but you here have before
22 you the essential parts of our argument.

23 PRESIDING JUDGE COTTE: (Interpretation) Of course, the time given to you or
24 allocated to you was very brief, but if you have anything else you'd like to submit to
25 us, then please do, and take a minute or two to think about it.

1 MR MACDONALD: (Interpretation) Now, finally, Mr President, I have focused on
2 two issues. There are others, but essentially speaking we're talking about there
3 being a probable happy outcome at appeals, and were we to be able to demonstrate or
4 convince the Chamber of Appeal that you have indeed erred, then the Chamber of
5 Appeals would be in a position to reassess all of the evidence and either acquit or
6 overturn this acquittal and order a new trial.

7 So your decision would limit itself to the question of responsibility. Of course, he
8 was not the commander of all the forces present in Ezekere, saying that we did not
9 show this beyond all reasonable doubt, and that the structure, and I think this
10 structure was not a military structure; the other Chamber of Appeals might reach a
11 different decision.

12 So, in view of the urgency of the situation, we would request that you maintain
13 Mr Ngudjolo in detention and that, were you to release him, you stay the execution of
14 your decision until tomorrow, to enable the Prosecution to present before -- its
15 arguments before the Chamber of Appeal and continue with the rest of the procedure,
16 and I thank you.

17 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr Prosecutor.

18 JUDGE VAN DEN WYNGAERT: (Interpretation) Mr Prosecutor, is this better like
19 this? Is this better?

20 Could you please explain to us why your arguments are exceptional in nature,
21 because with view to the three points that you have raised in support of the
22 appeal - of course, these are arguments that you shall develop before the Appeals
23 Chamber - can you tell us precisely what is exceptional about these arguments?
24 You did not develop, notably, the gravity of the crime and, once again, what is special
25 about this? In view of the fact that, for each individual accused before our Court, the

1 facts or events mean that this -- that there is a serious offence at hand. So what
2 should motivate us to accept your request?

3 And lastly, the risk of flight, here you refer to a decision rendered by this Chamber in
4 2009, but we have now gone through the entire trial which reached -- and a verdict of
5 acquittal was reached unanimously. I do not see how the conditions of that decision
6 can be invoked again in support of your arguments. So I would request that once
7 again you tell us precisely what is exceptional about your explanation and tell us
8 precisely how this could motivate us in our decision.

9 MR MACDONALD: (Interpretation) So, in answer to the three questions raised,
10 with regard to the seriousness of the offence, in the decision, the last decision
11 rendered by this Chamber, this seriousness was noted, so the seriousness has not
12 changed today despite the acquittal. There was another attack in Bogoro where
13 more than 200 civilians, women, children and elderly, died, and there was another
14 situation where women were raped and children under the age of 15 were used to
15 commit these crimes, and this against their own will, and sometimes of course they
16 cannot consent and this is against their consent, so the seriousness is the same.
17 The Chamber has already taken note of that, firstly.

18 Now, secondly, the Chamber will note or will have noted that the FRPI was called the
19 FRPJ, is still active in Ituri, and in the month of August this summer was still
20 committing crimes and it was still active as such. Mr Ngudjolo has links with the
21 actors of this group.

22 Lastly, with regard to the exceptional nature, or the exceptional circumstance, we are
23 here talking about an acquittal by this Trial Chamber, and of course this is an
24 exceptional matter previously, but even more so exceptionally in view of the fact that
25 there has been an acquittal, but as it has been noted on a number of occasions, either

1 orally or in writing, an alleged fact that has not been proven beyond reasonable doubt
2 is not an indication that this fact or event does not occur, meaning that the
3 Prosecution has not met its burden of proof, but if it is in a position or able to prove to
4 the Appeals Chamber that you did in fact err and that with regard to significant
5 alleged facts the Prosecution showed beyond all reasonable doubt, then this can have
6 an impact on other alleged facts which have not been proven, according to the
7 Chamber, and can lead to a conviction, and were Mr Ngudjolo to be released, the risk
8 that he would not appear again, in view of the difficulties that this institution is up
9 against with -- in regards to co-operation, it might mean that we would never see him
10 again.

11 And, secondly, that since 2009, since your last decision that I referred to, and I would
12 repeat once again, decision 3120-Conf-Exp, which refers to evidence that prove
13 collusion, intimidation and threats, and you have a witness, D03-100, who came here
14 to testify under oath, having been threatened when he was due to testify, and not by
15 all and sundry, but by the family of the accused.

16 Now, these are new circumstances and I would submit to you that they are
17 exceptional in nature.

18 JUDGE VAN DEN WYNGAERT: (Interpretation) Thank you.

19 PRESIDING JUDGE COTTE: (Interpretation) I thank you, Mr Prosecutor.

20 Mr Gilissen, you have a few minutes to develop your observations and we are all
21 ears.

22 MR GILISSEN: (Interpretation) Thank you, your Honour.

23 Your Honours, we respectfully submit to the Chamber that according to us there are
24 exceptional circumstances which would exceptionally require that the principle of
25 release be revisited.

1 The first exceptional circumstance which we want to mention for your attention
2 pertains to the criteria of the -- to the criterion of the seriousness of the offence. I do
3 not want to talk about the importance or the number of charges. This material is
4 already available to the Chamber and need not be revisited as such at this stage.
5 What I would like to underscore is that the new fact today arising from your decision
6 is that these serious offences of an extreme nature were indeed committed and that
7 they existed. I am not going to insist before this Court because I am certain, and if
8 need be I can guarantee this, that the Judges of this Court are people of a high level of
9 conscience. You have recognised that these crimes did take place, but beyond the
10 crimes, they are people, they are men, they are women and they are children and this,
11 to our mind, amounts to an exceptional circumstance. You have yourself
12 acknowledged the real existence of these crimes, and I want to thank the Chamber for
13 having carefully pointed this out.
14 In any event, this would be an item which victims and people with whom we have
15 contact will be happy and satisfied that you did recognise this.
16 Secondly, in your decision, you stated that Mr Mathieu Ngudjolo at this stage of the
17 proceedings has been found innocent, and at this juncture it would be inappropriate
18 for me to question that. However, you pointed out also that Mr Ngudjolo clearly
19 had some military responsibility and that it cannot be excluded that he also had
20 responsibility that may have been implemented during the attacks in Bogoro, but
21 within the context of a different mode of liability, different from that for which he was
22 charged.
23 Your Honour, I think I am going to slow down, because I can tell that I am speeding
24 up already.
25 Now, the -- those are the comments we want to make in relation to the seriousness of

1 the offence.

2 Secondly, Mr President, your Honours, I want to address the issue of the probability
3 of success on appeal. It would appear to us that the release of the accused should
4 not be such as to jeopardise the possibility of success on appeal, and I want to really
5 just point this out to the Chamber. You see, we must agree that we all need
6 guarantees, both as an institution and as a justice system; guarantees as the
7 Prosecutor has mentioned, guarantees for witness safety and security, as well as
8 safety and security for our victims.

9 We know what is happening in the Ituri. We know what is happening in Kivu. We
10 know what the risks are, and the facts are that even today there is still a pending trial
11 regarding a former co-accused, with evidence with joined witnesses and with
12 common evidence, so you see that this points to the exceptional character of this
13 situation which needs then to be taken into consideration when assessing the
14 exceptional circumstances under Article 81(3)(c)(i).

15 Your Honours, Mr President, I would stop by saying that by your decision of
16 21 November 2012, you determined that there will be a possibility for new hearings
17 regarding new evidence, or that there would be hearings regarding any new facts and
18 evidence. This we believe is material that needs to be considered, mindful of the
19 witnesses involved and of the exceptional nature of these circumstances. You also
20 understand that this is a matter that speaks to the very substance of the evidence.

21 Now, what we want to say is that the evidence in itself will determine the outcome of
22 the appeal. It is not for me to say to the Chamber or to the Judges that they erred or
23 not. I would be very uncomfortable making such an assertion. I don't think that it
24 is for the legal representative of victims to make any such assertion. In any event, a
25 diligent and serene judicial process is one that calls for us to work together, to ensure

1 that the Appeals Chamber has the full evidence in its fullness.

2 Now, Mr President, maybe just one last comment, one last comment relating to
3 Article 81(3)(c)(i), which includes the word "particularly" and that calls us to talk a
4 little bit about reasonable time frames.

5 If you were to look at this criterion, you would note that the Chamber did not allow
6 room for delays or unjustified delays in a trial which has been quite complex and
7 which we all recall has covered a lot of ground. You see, the trial involved two
8 co-accused and we must acknowledge that the Chamber worked diligently to meet all
9 its duties regarding the accused persons.

10 Now, Maître Luvengika will be talking about the risk of flight and any other
11 guarantees that surround this point, because we need those guarantees, Mr President,
12 your Honours, so that those with whom we are working and with whom we are
13 communicating on these issues can follow these proceedings in a congenial manner.

14 Thank you, your Honour.

15 PRESIDING JUDGE COTTE: (Interpretation) Thank you.

16 Maître Luvengika, you have the floor.

17 MR NSITA: (Interpretation) Mr President, your Honours, thank you for giving me
18 the floor.

19 Maître Gilissen has talked about the need to protect victims and witnesses in the
20 course of these proceedings against Germain Katanga. The procedure in itself is one
21 that has been of concern to us mindful of the nature of the prosecuting circumstances
22 and that is why we must note that the possible release of Mr Mathieu Ngudjolo is an
23 exceptional circumstance.

24 Let me add that there is fear - there is fear - and the Chamber must be aware of this,
25 particularly in relation to the prevailing situation in the Eastern DRC.

1 I have just returned from the Ituri. I was there in the month of November. The
2 victims in Bogoro and surrounding areas are not reassured with the resurgence of
3 new rebel movements and the proliferation of new rebel movements in the region.
4 Now, speaking to the issue of the risk of flight and the attendant guarantees which
5 Maître Gilissen addressed a short while ago, let me submit, your Honours, that the
6 Prosecutor has indicated that he will be lodging an appeal. As at now, we do not
7 have any guarantees from the accused that he will voluntarily appear either before
8 the Appeals Chamber or, as the case may be, when proceedings start at that level.
9 We further do not have any information as to where he will be resident, his home
10 address and his country of residence.
11 In those circumstances, therefore, we can only but assert that there is a possibility of a
12 risk of flight by Mr Ngudjolo in the absence of guarantees from the accused.
13 For that reason, and alternatively, we believe that if the Chamber were to decide to
14 immediately release Mr Ngudjolo, then we would request that the Chamber apply
15 Rule 119, because we believe that the rule spells out a number of conditions which the
16 Trial Chamber can resort to along -- along with Article 61 of the Statute.
17 Regarding the seriousness of the offence, the Prosecutor a short while ago mentioned,
18 and my learned colleague Maître Gilissen echoed the point, that the fact that the Trial
19 Chamber came to an acquittal judgment does not in any way diminish the seriousness
20 of the crimes for which the Court was initially seized -- the crimes of which the Court
21 was initially seized, particularly as these matters will again be considered on appeal,
22 as the Prosecutor has pointed out.
23 Otherwise, your Honours, I agree with what the Prosecutor and my learned colleague,
24 Maître Gilissen, have already stated.
25 I thank you.

1 PRESIDING JUDGE COTTE: (Interpretation) We thank you too, Maître
2 Luvengika.
3 Maître Kilenda, you have the floor to respond to the points that have been raised by
4 the Prosecutor, Maître Gilissen and Maître Luvengika.
5 MR KILENDA: (Interpretation) Thank you, Mr President. Thank you, your
6 Honours.
7 I have listened attentively to the Prosecutor and to the legal representatives of victims.
8 I am clearly under the impression that the two groups have forgotten our track record.
9 They have forgotten where we are coming from.
10 Mr President, the Prosecutor told you that Mathieu Ngudjolo and Germain Katanga
11 had agreed in a criminal pact to wipe out Bogoro village. Now, your acquittal of this
12 morning is not the first decision that challenges that theory. The Prosecutor was
13 unable to establish beyond a reasonable doubt that Mathieu Ngudjolo and
14 Germain Katanga had designed a common plan to wipe out Bogoro village.
15 On 21 November 2012, your Chamber, by decision 3219, decided to sever the charges
16 and in that connection this was the first judicial act that seriously challenged the
17 theory of a common plan hitherto upheld by the Prosecutor and the legal
18 representatives of victims.
19 This severance decision was not appealed, neither by the Prosecutor, nor the legal
20 representative of victims. This amounts to acquiescence in law and this means that
21 they agreed with the decision to sever the trial.
22 Now we have listened to them, and we do not see any serious reason for which they
23 would believe that there is a possibility of success for them on appeal. The
24 Prosecutor, in any event, is free to appeal, but if he were to lodge such an appeal, in
25 Belgian law this will amount to what is referred to as a crazy appeal, "fol appel" so to

1 speak, because there is no ground on which the Prosecution can today uphold the
2 theory of a common plan.

3 The Prosecutor has alleged that there are some elements that your Chamber did not
4 take into consideration, the testimony of Witness D03-100, who allegedly was
5 threatened by Ngudjolo's family. He also talks about P-250 and P-317.

6 Mr President, your Honours, why did the Prosecutor not talk about EVD-203136, the
7 Samba letter which the accused person, Mathieu Ngudjolo, talked about here in this
8 Court, pointing out the involvement of the Congolese government in the Bogoro
9 attacks? The Prosecution never challenged the authenticity, nor the validity of that
10 document.

11 I also hear the legal representatives of victims say that there are exceptional
12 circumstances and the seriousness of offences -- of the offence which should not allow
13 Mathieu Ngudjolo to be released, but they don't mention the common plan, not at all,
14 and for that reason, Mr President, we believe that they will not succeed on appeal.

15 The exceptional circumstances that they referred to, your Honour, have not been
16 developed to meet the standard of the facts. I hear Maître Luvengika talk about the
17 mushrooming of rebel movements in the Ituri. How is Mathieu Ngudjolo involved
18 in that? He has been here for more than five -- for five years. What does he know
19 about what's happening in the DRC? He is not connected to those events.

20 Mr President, the Prosecutor and the legal representatives agreed with your decision
21 3319, which put an end to the theory of the common plan and are therefore in a very
22 bad position today to attempt to appeal for Mr Mathieu Ngudjolo to continue to be
23 held in detention. He should be released immediately, and on that score I would
24 like to ask Professor Fofé to make submissions as to why this position should not be
25 upheld.

1 Thank you, your Honour.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Maître Kilenda.

3 Professor Fofé, you have the floor.

4 MR FOFÉ: (Interpretation) Thank you, Mr President. Good afternoon, your
5 Honours.

6 Before addressing the Prosecutor, I would like quite quickly to say a word or two on
7 the arguments put forth by our learned colleague, Maître -- our learned colleagues,
8 Maître Gilissen and Maître Luvengika.

9 I will be brief and then move on subsequently to deal with what our main
10 contradictor has asserted.

11 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofé, we intend to adjourn
12 at 4.30, so you have -- at 2.30, rather, and you have 15 minutes to do what you intend
13 to do. I think it is possible, so please proceed.

14 MR FOFÉ: (Interpretation) Thank you, Mr President. I will attempt to do so.

15 Maître Gilissen established a link between Mathieu Ngudjolo's current situation and
16 the situation of Germain Katanga. Mr President, your Honours, to proceed rapidly,
17 Mathieu Ngudjolo should not suffer because Katanga's trial will still continue.

18 Maître Gilissen would not, I believe, want to keep Mathieu Ngudjolo in detention
19 until the Katanga judgment is handed down, because that would amount to
20 subverting decision 3319 of 21 November 2012, which was neither challenged by the
21 Prosecution nor the legal representatives of victims. They did not appeal against
22 that decision.

23 Our learned colleague, Maître Luvengika, talking about the exceptional circumstances,
24 alluded to the rebel movements that are ongoing in their activities in the DRC, in the
25 east of the DRC. Maître Luvengika, I believe would not want to see

1 Mathieu Ngudjolo remain in detention until the cycles of rebellions in the DRC come
2 to an end, would he? These rebellions have nothing to do with Mathieu Ngudjolo
3 and, by the way, this cycle of rebellions started in 1996, 16 years ago. This argument,
4 therefore, does not hold sway.

5 Turning to our colleague opposite, the Prosecutor, let me say, Mr President, your
6 Honours, that in his submissions the Prosecutor revisited the assessment of his own
7 evidence, rather than provide the evidence to the Court, the evidence that points to
8 the existence of all the criteria in Article 81(3)(c)(i) of the Statute. That is what the
9 Prosecutor should have done. Rather than do so, he decided to revisit your
10 assessment of his evidence, but this is what was already done during the submissions.

11 Mr President, your Honours, Article 81(3)(c)(i) of the Statute provides as follows, "In
12 the case of acquittal, the accused shall be released immediately, subject to the
13 following: (i) Under exceptional circumstances and having regard, inter alia, to the
14 concrete risk of flight, the seriousness of the offence charged and the probability of
15 success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain
16 the detention of the person pending appeal."

17 If one were to analyse this provision of this Statute, it would emerge that the onus is
18 on the Prosecution to demonstrate in support of his motion that exceptional
19 circumstances do exist. What exceptional circumstances has the Prosecution now
20 put forth in support of his motion? None.

21 Second, and cumulatively because the drafters of Article 81(3)(c)(i) have used the
22 conjunction "and" to mean therefore that these criteria must be met cumulatively; that
23 is in addition to the exceptional circumstances, the Prosecutor must establish that
24 there is a risk of flight as well as the seriousness of the offence charged and the
25 probability of success on appeal.

1 Let us take the risk of flight. Mr President, your Honours, you have been witnesses
2 to Mr Mathieu Ngudjolo's conduct in this Court for more than four years.
3 Mathieu Ngudjolo is not one who would extricate himself from justice. There is no
4 risk of flight, and it is with the Court which has the power to determine the conditions
5 and apply them to Mathieu Ngudjolo, and he will respect those conditions.
6 If the Prosecutor intends to appeal, Mathieu Ngudjolo will stay maybe in The Hague,
7 or in any event within the Schengen area, and would therefore be in a position to
8 quickly appear before this Court.
9 I want to point out, your Honours, that at the ICC there are suspects who appear
10 freely before the Court.
11 Mathieu Ngudjolo has been available to this Court since the month of February 2008.
12 He has never attempted to flee. He has never attempted to flee or to escape, and this
13 can be confirmed by reports from the Registry.
14 He has never organised any demonstration seeking his release. What he simply did
15 was to defend himself against the charges brought against him. His team on several
16 occasions asked for provisional release and that was it.
17 The Prosecution has no evidence to substantiate the fear of a risk of flight. The
18 threats that the Prosecution have referred to are not established. Throughout these
19 proceedings, the Prosecutor often talked about threats against witnesses, but never
20 adduced any evidence as to the existence of such threats.
21 Mathieu Ngudjolo has no links with the rebel movements currently operating in the
22 Ituri.
23 Let us now look at the two other criteria mentioned in this article: Seriousness of the
24 offence and the probability of success on appeal.
25 Mathieu Ngudjolo has been charged by the Prosecutor with serious crimes, and we all

1 agree on that point. The crucial problem, however, is that the Prosecutor failed to
2 prove beyond a reasonable doubt that those crimes were committed by
3 Mathieu Ngudjolo according to the mode of liability under 25(3)(a) of the Statute.
4 The Prosecutor is at liberty to appeal the acquittal judgment, which also ordered an
5 immediate release of the accused person today by your Chamber.

6 What are the probabilities of success on appeal? I believe that you have heard the
7 Prosecutor and he has talked about the possibility or probability of success. It is the
8 position of the Defence that while waiting for that probability, Mathieu Ngudjolo
9 should be released. Our analysis is that the -- there is no probability of success on
10 appeal for the Prosecutor.

11 Your Honours, the absence of evidence beyond a reasonable doubt as to the
12 involvement of Mathieu Ngudjolo in the crimes committed in Bogoro on
13 24 February 2003 is an established fact, because the Prosecutor himself during the oral
14 submissions stated that evidence was difficult to establish in this matter. The
15 Prosecution had difficulties answering the very specific questions that were put to the
16 Prosecution by the Bench, pointing thereto to its failure to establish evidence beyond
17 a reasonable doubt.

18 In his own words the Prosecution said that the events on the ground were blurry, and
19 I refer to transcript 337, pages 31 -- page 31, page 18, line 23. In his own words, the
20 Prosecution confessed that it was difficult to establish evidence. It was difficult to
21 come up with evidence. The same transcript, 337, page 32, lines 13 to 15, and on the
22 same page 32, lines 16 to 21, he confessed to these difficulties and talked about these
23 possibilities and difficulties, and yet we all know that someone cannot be convicted
24 simply because of possibilities and probabilities.

25 Mr President, your Honours, as you know, evidence is only valid to the extent that it

1 excludes any other options or possibilities. I refer to the Delalic judgment of
2 20 February 20 -- or 2001, at paragraph 458, which states, "Such findings of conviction
3 must be established beyond a reasonable doubt. It does not suffice that evidence
4 would lead reasonably to such a conclusion. The conclusion must be the one and
5 only possible reasonable conclusion to which to come. If it is possible to reach
6 another reasonable conclusion from the available evidence and that such a conclusion
7 does not exclude the innocence of the accused person, then the accused person must
8 be acquitted," end of quote.

9 Mr President, your Honours, justice, equity and legality guided your august Chamber
10 in acquitting Mathieu Ngudjolo of all charges against him. Prior to your decision of
11 today, you had decided in 3319 to trigger Rule 55 and sever the trial involving
12 Mathieu Ngudjolo. This was indeed a challenge to the Prosecutor's case, but the
13 Prosecutor failed to challenge that decision legally.

14 The Chamber provided figures as to the unfolding of these proceedings, 265 days of
15 hearing, 25 status conferences, 201 written and oral decisions, 54 witnesses, 271 -- and
16 61 pieces of evidence, and in all that the Prosecution failed to establish between a
17 reasonable doubt that Mathieu Ngudjolo was guilty.

18 A decision to maintain an acquitted accused person in detention is one that is as
19 serious as the decision to refer an accused person to the Court. It therefore cannot be
20 a simple formality, but must be one that is grounded on evidence; cumulative
21 evidence of exceptional circumstances, of the risk of flight and of the probability of
22 success on appeal. The Prosecutor has not provided that evidence.

23 For that reason, Mr President, your Honours, your judgment of this day must
24 therefore be given its full implementation by ordering the immediate release of
25 Mathieu Ngudjolo, most respectfully submitted.

- 1 I thank you, Mr President.
- 2 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Professor Fofé.
- 3 The Defence was allowed to speak last. Mr Prosecutor, you did recall during your
- 4 submissions that the decision as to maintaining the -- Mr Ngudjolo in custody was
- 5 also to be appealed on the basis of the decision rendered this morning.
- 6 So the Chamber will withdraw in order to deliberate. We requested this morning
- 7 that you remain in the area and we will certainly give this decision this afternoon,
- 8 probably after 1700 hours. The Registry, Madam Toumaj, will contact you to tell you
- 9 precisely when we should meet again in the courtroom.
- 10 Court is adjourned.
- 11 (The hearing ends in open session at 2.35 p.m.)