

1 International Criminal Court

2 Appeals Chamber

3 Situation Democratic Republic of the Congo - ICC-01/04-01/07

4 Judgement - Open Session

5 Monday, 9 June 2008

6 The hearing starts at 3.31 p.m.

7 COURT USHER: All rise. The International Criminal Court is now
8 in session. Please be seated.

9 PRESIDING JUDGE PIKIS: Can you please call the case in the
10 appeal of Mathieu Ngudjolo Chui, 27th March 2008, against the decision of
11 Pre-Trial Chamber I on the application of the appellant for interim
12 release.

13 COURT OFFICER: Situation in the Democratic Republic of the
14 Congo, case the Prosecutor against Germain Katanga and Mathieu Ngudjolo
15 Chui, number ICC-01/04-01/07.

16 PRESIDING JUDGE PIKIS: Can we have the appearances. Who appears
17 for the appellant?

18 MR. KILENDA (interpretation): Thank you, your Honour. On my
19 right is Anne-Marie Baldovin, who is an intern on our team. She is
20 replacing my legal assistant, Maryse Alie, who is on business in
21 Brussels. To my left you have already Aurelie Roche who is the case
22 manager of our team. I am Jean-Pierre Kilenda, barrister of the Brussels
23 Bar.

24 PRESIDING JUDGE PIKIS: The appearance for Mr. Katanga.

25 MS. BUISMAN: Good afternoon, your Honour. Caroline Buisman,

1 legal assistant on the Defence team of Mr. Katanga. Thank you.

2 PRESIDING JUDGE PIKIS: For the Prosecutor.

3 MR. GUARIGLIA: Good afternoon, your Honour, Fabricio Guariglia,
4 senior appeals counsel, appearing together with Mr. Ben Batros, associate
5 appeals counsel, and Mr. Reinhold Gallmetzer, appeals counsel.

6 PRESIDING JUDGE PIKIS: Thank you.

7 By a decision of the Appeals Division, the judgement of the
8 Appeals Chamber in this case will be delivered by the Presiding Judge.

9 I shall not go through the judgement. I shall recount its
10 salient aspects, synopsising its content as briefly as it is possible,
11 but the judgement of the Court constitutes the only authentic document as
12 to its judgement.

13 On the 6th of July, 2007, a warrant had been issued for the
14 arrest of Mr. Chui. The arrest warrant was executed long after.
15 Eventually after its execution, the appellant was brought before the
16 Pre-Trial Chamber on the 7th February 2008. He intimated to the Court
17 that he would be applying for his interim release, and so he did by an
18 application filed on the 13th of the same month.

19 Article 62 of the Statute does provide for such a process, that
20 is, it envisages an application for the interim release of a detainee, a
21 person under detention pursuant to a warrant of arrest.

22 The Pre-Trial Chamber, after hearing the parties, the appellant
23 applicant in those proceedings and the Prosecutor, concluded that the
24 continued detention of the appellant was necessary in order to ensure his
25 appearance at the trial. It was found to be justified pursuant to the

1 provisions of Article 58(1)(b)(i).

2 The Court found the second reason justifying detention, namely to
3 ensure that the person does not obstruct, the appellant, that is, the
4 investigations or court proceedings, a cause for which detention may also
5 be ordered pursuant to the provisions of Article 58(1)(b)(ii).

6 Thereafter the appellant took an appeal in exercise of the right
7 vested in him under the provisions of Article 82(1)(b).

8 Three are the grounds of appeal put forward, the following: In
9 the first place violation of Article 58(1)(a) and (b). Secondly,
10 violation of the Court's duties to base its decision on reliable
11 evidence, and thirdly, violation of the provisions of Article 67(1)(i)
12 envisaging the reversal of the burden of proof or any onus of rebuttal
13 and Article 66, casting the burden of proof on the Prosecutor.

14 Under this label a plea of bias is put forward to the effect that
15 inasmuch as the Pre-Trial Chamber addressed proceedings or the
16 application for the issuance of a warrant of arrest, the appearance of
17 bias did arise as the same Court did address his application for interim
18 release. As a matter of fact, the Pre-Trial Chamber I en bank addressed
19 the application for arrest of the appellant, whereas a Single Judge dealt
20 with his application for interim release.

21 The submission that Article 58(1)(a) and (b) are violated is
22 primarily based on the proposition that a warrant of arrest provides a
23 mandate for detention only up to the surrender or appearance of the
24 person before the Court.

25 Secondly, a plea was made or a submission raised that his human

1 rights were violated, contending that pre-trial detention can only arise
2 or come into play after the person is charged, after he becomes the
3 accused person as provided in the Statute. Another contention is that he
4 had not been properly apprised with the material upon which the warrant
5 of arrest had been founded. Further more, he disputed the reliability of
6 the material upon which the Single Judge had relied upon to the effect
7 that he was the highest ranking officer or official of FNI in the Zombe
8 area. Especially he contested information from an NGO that he had in the
9 past, in the Republic of Congo, escaped from lawful custody whereby he
10 was detained in proceedings before a criminal tribunal. He escaped be
11 pending the verdict of the tribunal. Also, he doubted the validity of
12 the proposition that his supporters have the capacity to interfere with
13 either investigations or court proceedings.

14 The Prosecutor informed the Court in his response that the other
15 person with whom the appellant is facing charges in the document
16 containing the charges does not oppose joinder. Furthermore, he
17 submitted that contentions raised and acted upon in support of the appeal
18 are based on a misapprehension of the law.

19 The decision of the trial court is valid in every sense.
20 Applying ourselves to an appraisal to the merits of the case, the first
21 question that we do address is that of bias, the aphorism "Justice must
22 not only be done but must appear to be done" is a fundamental norm of the
23 administration of justice.

24 In this case the provisions of Article 62 are designed in support
25 of the rights of the appellant to afford him an opportunity to contest

1 detention. The Court that dealt with the case is the one ordained by law
2 to do so. In such circumstances, no reasonable onlooker apprised with
3 these facts could either discern or perceive the appearance of bias. The
4 Court is required to address the issue of detention anew in the light of
5 the facts before it, facts including those that may be placed before the
6 Pre-Trial Chamber by the appellant himself.

7 Now, with regard to the legal framework, Article 58 does
8 specifically identify that any decision as to the prolongation of
9 detention must be determined by reference to Article 58. This is
10 specifically provided by the Statute.

11 The suggestion that authority for detention under Article
12 58(1)(b)(i) is authority for the detention of a person up to his or her
13 surrender before the court is ill-founded. In fact, in relation to (i)
14 the object of detention is to assure appearance at the trial. It is of
15 course the right of the accused to contest detention under Article 62,
16 and there are other safeguards envisaged by the provisions of Article 63
17 for a periodic review of any ruling on release or detention, and Article
18 64, to ward off prolongation of detention on account of unjustified
19 delay, inexcusable delay on the part of the Prosecutor.

20 In order for an arrest to be ordered or the prolongation of the
21 detention to be approved, the detention under 58(1)(b)(i) must appear to
22 be, and the other provisions of 58(1)(b), the detention must appear to be
23 necessary for any one of the three reasons enumerated under 58(1)(b).

24 Now, "appear" does introduce a possibility, not inevitability. A
25 distinction consideration in making the prognosis of this possibility is

1 the gravity of the offence or gravity of the offences. In this case
2 there is no dispute or, rather, better still it's not disputed that the
3 offences are grave, the offences attributed to the appellant are great,
4 including the murder, inter alia, of 200 people, persons, and the
5 enslavement for sexual purposes of woman and girls.

6 The material before the Pre-Trial Chamber was evaluated by the
7 Single Judge, and evaluation of the material is, in the first place, the
8 province of the Single Judge. We shall interfere, that is the Appeals
9 Chamber, if the decision is fraught with the misdirection as to the law.
10 Secondly, if there has been a misappreciation of the facts founding the
11 decision of the first instance Court. Thirdly, if there has been a
12 disregard of relevant facts, that is, facts that should come into play in
13 making the decision but were either ignored or disregarded. And
14 fourthly, if extraneous facts were taken into consideration by the Court
15 in coming to its decision.

16 Having due -- given due consideration to the matter and as
17 explained in great detail in our decision, we are of the view and so
18 conclude that there is no ground for interfering with the decision of the
19 Pre-Trial Chamber that the prolongation or continuation of detention -
20 "continued detention" is the term used by the Statute - is warranted, and
21 for that reason we shall confirm the decision of the Pre-Trial Chamber on
22 that score, but insofar as the decision of the Pre-Trial Chamber
23 effecting Article 58(1)(b)(ii), that is not the case. We cannot confirm
24 it, because as it emerges from the decision, the Pre-Trial Chamber, the
25 Single Judge, in coming to her decision relied on the findings and the

1 evaluation of facts, of relevant facts, made by another member of the
2 Pre-Trial Chamber acting as a Single Judge in different proceedings. A
3 Judge is duty-bound, and so was the Single Judge in this case, to make
4 her own appreciation of the facts and come to a conclusion as to its
5 findings. Sequentially, we cannot confirm the justification of detention
6 for the additional reason set out in 58(1)(b)(ii).

7 In the result, we dismiss the appeal and we confirm the decision
8 as stated in our judgement for the continued detention of the appellant
9 under Article 58(1)(b)(i). And with this we conclude the summary
10 narrative of the appeal. Later today copies of the judgement will be
11 made available to the parties. Thank you.

12 Now may we call the next appeal, please.

13 COURT OFFICER: Situation in the Democratic Republic of the
14 Congo, case the Prosecution against Germain Katanga and Mathieu Ngudjolo
15 Chui, number ICC-01/04-01/07.

16 PRESIDING JUDGE PIKIS: In this case, too, by a decision of the
17 Appeals Division, the judgement of the Appeals Chamber will be delivered
18 by the Presiding Judge. Again I shall summarise, emphasising that the
19 authentic -- the text is the judgement of the court and nothing else.

20 The background to this appeal is that the Prosecutor, in the
21 first place, applied jointly -- made a joint application for the arrest
22 of Mr. Katanga and Mr. Chui. Sequentially he moved the Pre-Trial Chamber
23 to join them in the same document containing the charges. The Pre-Trial
24 Chamber, the single -- the jurisdiction being exercised in the matter by
25 a Single Judge, did hold that this was justified and duly warranted by

1 the provisions of Article 64(5) and of those of Rule 136.

2 The following neat question was set down for determination by the
3 Appeals Chamber: Whether the Single Judge violated the principle of
4 legality in its interpretation of Article 64(5) and Rule 136.

5 Principle of legality as can be depicted from the way advanced in
6 the document in support of the appeal is to the following effect: That
7 law is known in advance, there is no specific provision for joinder in
8 proceedings before the trial. The appellant disputed in this context
9 applicability of the Vienna convention of the law of treaties as setting
10 out the rule governing the interpretation of the Statute.

11 The Prosecutor in his response submitted that by any rule of
12 interpretation the inevitable inference is that joinder is permissible in
13 confirmation proceedings.

14 Now, with regard to the rule governing the application of the
15 Statute, we have it on previous authority, and here we are referring to
16 the decision of the Appeals Chamber of 13th July 2003, that this is the
17 rule applicable to the interpretation of the Statute. It lays down that
18 the treaty shall be interpreted in good faith in accordance with the
19 meaning to be given to the terms of the treaty in their context and in
20 the light of its object and purpose.

21 Now, Article 64(5) reads as follows: "Upon notice to the parties
22 the Trial Chamber may as appropriate direct that there may be joinder or
23 severance of charges against more than one accused."

24 The document containing the charges is subject to the approval of
25 the Pre-Trial Chamber. We must further notice that nowhere in the

1 Statute is the person named as the accused before the approval of the
2 charges. Sequentially, and inevitably, the term "severance" presupposes
3 joinder. This interpretation not only is -- accords with the natural
4 meaning of the words used in 64(5), but moreover it serves the efficacy
5 of the judicial process and promotes its purpose, that proceedings should
6 be conducted and held expeditiously.

7 The decision of the Pre-Trial Chamber gives expression to this
8 principle of legality. In parallel, we may refer, and the same is
9 warranted by Rule 136, envisaging that persons jointly accused shall be
10 tried together.

11 In this case we had an application together with the appeal for
12 the suspension of the proceedings pursuant to the provisions of Article
13 82(3) of the Statute. As we address both issues together, that is
14 suspension and the merits of the appeal, and concluded that the appeal is
15 liable to dismissal, we considered suspension as superfluous measure and
16 on that account we made no order about it.

17 In the result, the appeal is dismissed. The decision of
18 Pre-Trial Chamber I of 10th March 2008 entitled "Decision on the Joinder
19 of the Cases Against Germain Katanga and Mathieu Ngudjolo Chui" is
20 confirmed, and with this we conclude the announcement of our judgements.

21 COURT USHER: All rise.

22 The hearing ends at 3.59 p.m.

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