

Hearing to deliver the decision

(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 Hearing to deliver the decision

8 Tuesday, 18 December 2012

9 (The hearing starts in open session at 5.30 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 I see that Mr Ngudjolo is with us.

14 Good afternoon, everyone. We shall resume the proceedings. This is the third

15 hearing today.

16 Oral decision regarding the continued detention of Mathieu Ngudjolo. This decision

17 stands on its own and in a way we need to go back, but this decision stands on its

18 own.

19 By way of a decision on 26 September 2008, the Pre-Trial Chamber I confirmed the

20 charges against Mathieu Ngudjolo and found that there was sufficient evidence to

21 establish substantial grounds to believe that he committed the following crimes

22 during the attack on Bogoro on 24 February 2003: Jointly with Germain Katanga and

23 through other people, in the meaning of Article 25(3)(a) of the Statute, the crimes of

24 murder, wilful killing, attacks on a civilian population, destruction of property,

25 pillaging a town or place, rape and sexual slavery; and jointly with Germain Katanga

1 in the meaning of Article 25(3)(a) of the Statute the war crime of using children under
2 the age of 15 and having them playing an active role in hostilities.

3 On 21 November 2012, the Chamber - this Chamber, Trial Chamber II - issued a
4 decision and had recourse to Regulation 55 of the Court regarding the accused,
5 Germain Katanga, and severed the charges against Mr Ngudjolo and on 18 December
6 2012 issued a further ruling and concluded that the evidence in the Chamber's
7 possession was not sufficient to establish beyond all reasonable doubt that Mathieu
8 Ngudjolo had, on the basis of Article 25(3)(a), committed the alleged crimes that I've
9 just set out. The Chamber found that the accused was not guilty of all the charges
10 that had been confirmed by Pre-Trial Chamber I and thus this Chamber acquitted him.
11 In turn, consequently, the Chamber asked the Registrar to take all necessary measures
12 for the immediate release of Mathieu Ngudjolo.

13 After reading out a summary of the decision in open court this morning, the Chamber
14 then asked the Prosecutor if he was considering an application for continued
15 detention, as is provided for in Article 81(23)(c) of the Statute. The Prosecutor said
16 that that was the case, and during a separate hearing held this same day at 1.30 in the
17 afternoon today the Prosecutor advanced the following arguments to support his
18 application for continued detention.

19 He said that in this particular case there were exceptional circumstances. He argued
20 that there was the probability of a successful appeal, and consequently he stressed
21 that the Chamber had made a number of errors when assessing testimony and in
22 particular the Chamber allegedly refused access to certain elements of evidence that
23 he believes would have allowed him to challenge the credibility of certain Defence
24 witnesses, or would have allowed him to better explain the behaviour of some of his
25 witnesses.

1 The Prosecutor stressed the seriousness of the events. He was of the opinion that
2 there was the risk of flight, and he made reference to decisions taken by the Chamber
3 when the Chamber issued rulings during the period leading up to the proceedings
4 regarding continued detention of the person. In particular the Prosecutor made
5 reference to Ruling 1593, dated 4 November 2009.

6 The Prosecutor argued that the assurances from Mr Ngudjolo were insufficient and
7 that there was the possibility that, once Mr Ngudjolo was released, he might threaten
8 witnesses and he made mention of threats received by Witness D03-100.

9 The Prosecutor asked the Chamber to grant a stay of execution of the decision to
10 acquit and tomorrow, 19 December, the Prosecution would be in a position to file an
11 appeal.

12 The legal representatives of victims also made a number of observations. The legal
13 representative of the main group of victims also spoke to exceptional circumstances.

14 He argued that Mathieu Ngudjolo was not in a position to provide sufficient
15 assurances if he were called to appear before the Appeals Chamber. Since there was
16 no information regarding his place of residence, or his current residence, the legal
17 representative asked the Chamber to set a number of conditions for the release, and
18 these conditions are provided for in Rule 119 of the Rules of Procedure and Evidence
19 and this should be taken or looked at within the ambit of Article 61.

20 The legal representative of another group of victims, the child soldiers, also spoke to
21 exceptional circumstances, the seriousness of the offences, the possibility of a
22 successful appeal and the possibility of proceedings continuing after severing of the
23 charges.

24 Mr Ngudjolo's Defence team countered the various arguments advanced by the
25 various parties and participants and was opposed to any continued detention.

1 In light of the various observations, the Chamber has reviewed the matter to
2 determine whether the conditions provided for in Article 81(3)(c) of the Statute are
3 here and whether detention should continue.

4 Regarding the possibility of a successful appeal of the ruling of 18 December 2012, the
5 Chamber notes that the Prosecutor restricted his remarks to challenging the
6 assessment of the credibility and the probative value of certain testimony given by a
7 number of witnesses and, really, this is looking at the very heart of the matter. This
8 would mean the Appeals Chamber would have to look at the actual heart of the
9 matter.

10 The Chamber also wishes to point out that this ruling was issued unanimously and
11 the probability of a successful appeal might be different if there had been a dissenting
12 opinion, or separate opinions, but that was not the case.

13 A few words regarding the seriousness of the offences. The Chamber does not
14 downplay the seriousness of the offences that have been attributed to Mr Mathieu
15 Ngudjolo.

16 With regard to the issue of continued detention, this is a criteria that does deserve to
17 be taken into account. In this particular case, the condition is certainly met, but the
18 Chamber cannot base itself on the single criterion to maintain the accused person in
19 detention after a unanimous acquittal.

20 At this particular stage in the proceedings, release should be more than ever the rule
21 and continued detention should be the exception.

22 Regarding the lack of assurances and the risks of intimidation that were mentioned by
23 the Prosecution, undoubtedly, at this particular juncture, the Chamber does not know
24 where the accused person plans to travel once the various formalities are over and he
25 is released, but the Chamber can only note that the Prosecution based themselves

1 only on a ruling that goes all the way back to November of 2009.

2 At this time the Chamber does not have any new item of information that would cast
3 doubt on Mr Ngudjolo's assurances, if an appeal were to be filed and if the Appeals
4 Chamber were to call him to appear once again in court.

5 Furthermore, the Chamber wishes to point out that Mr Ngudjolo's Defence team
6 clearly indicated that Mr Ngudjolo would comply with his obligations. In particular,
7 the Chamber particularly noted that particular remark that you made, sir.

8 Irregardless of whether such a likelihood is open from a legal point of view at this
9 particular stage, that is to say at the time of an acquittal, the Chamber further finds
10 that, in the lack of any specific request regarding conditions that might be set when

11 Mr Ngudjolo is released, the Chamber is not in a position to rule on the matter
12 whether -- there is the point of whether this is legally possible at this particular stage;
13 namely at the time of an acquittal.

14 Regarding intimidation, the Chamber cannot base itself on events that date back
15 many years and cannot rely on theoretical speculations about what may happen if
16 Mr Ngudjolo is released.

17 Thus, the Chamber finds that there are no exceptional circumstances in this particular
18 case and can only observe that the Office of the Prosecution has been unable to justify
19 the existence of such circumstances.

20 On these grounds the Chamber dismisses the application for continued detention and
21 declares that, as the Chamber does not have a legal foundation, it is not in a position
22 to rule on a stay of execution of the judgment as requested by the Prosecution.

23 Furthermore this can only be analysed or seen as an application for continued
24 detention, and indeed a ruling has just been issued in this regard.

25 The Chamber thanks you, parties and participants, for attending, and once again, as I

Hearing to deliver the decision

(Open Session)

ICC-01/04-02/12

- 1 did this morning, I wish to thank our court reporters and interpreters.
- 2 The hearing is now adjourned.
- 3 (The hearing ends in open session at 5.45 p.m.)