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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 Document

Second Review of the *Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*

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

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Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court”, respectively) issues the following decision pursuant to articles 21(3), 58, 60, 61 and 64(6)(a) of the Rome Statute (“the Statute”).

I. Procedural Background

1. In the decision it issued on 30 October 2008, the Chamber recalled the need to review the detention of Mathieu Ngudjolo Chui pursuant to article 60(3) of the Statute and rule 118(2) of the *Rules of Procedure and Evidence* (“the Rules”).¹ In that same decision, it further stated that, in accordance with the Appeals Chamber Judgment of 13 February 2007,² it is appropriate to ensure that pre-trial detention does not last for an unreasonable period due to inexcusable delay by the Prosecutor.

2. The Chamber also requested that the Prosecutor and the Legal Representatives of anonymous and non-anonymous Victims file their observations on the detention of Mathieu Ngudjolo Chui at the Court’s Detention Centre no later than 6 November 2008 and that his Defence file its own observations and its response to observations no later than 12 November 2008.

3. In compliance with this decision, the Prosecutor filed his observations on 6 November 2008³ and the Legal Representatives of the Victims⁴ filed theirs on 3 and

¹ *Decision Inviting Observations from the Participants concerning the Detention of Mathieu Ngudjolo Chui (rule 118(2))*, 30 October 2008, ICC-01/04-01/07-732-tENG, p. 3.

² Appeals Chamber, *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo”*, 13 February 2007, ICC-01/04-01/06-824, para. 120.

³ Office of the Prosecutor, *Prosecution’s Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui*, 6 November 2008, ICC-01/04-01/07-742.

⁴ Legal Representative of Victims a/0036/08, a/0037/08, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0071/08, a/0073/08, a/0076/08, a/0077/08, a/0079/06, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08,

6 November 2008. The Defence for Mathieu Ngudjolo Chui filed its observations on 12 November 2008,⁵ stating that the submissions set out in the first application for interim release dated 13 February 2008 (“the First Application”),⁶ that is a few days after he was transferred to The Hague, “[TRANSLATION] must be considered to be replicated word for word and in their entirety in that they form part of [its observations]”.⁷ Accordingly, the Chamber also referred to the First Application. Moreover, the Defence for Mathieu Ngudjolo Chui concluded its observations by suggesting that he be granted conditional interim release in the Democratic Republic of the Congo (“the DRC”).

II. Decisions issued by Pre-Trial Chamber I on the release of Mathieu Ngudjolo Chui

4. The First Application was the subject of several decisions by Pre-Trial Chamber I which are summarised as follows.

a/0104/08, a/0108/08, a/0078/08, a/0109/08, “Observation des victimes sur la détention de Mathieu Ngudjolo Chui”, 6 November 2008, ICC-01/04-01/07-740 ; Legal Representative of Victims a/0333/07 and a/110/08, “Observations des victimes a/0333/07 et a/110/08 sur la détention de Mathieu Ngudjolo Chui (règle 118-2)”, 6 November 2008, ICC-01/04-01/07-741 ; Legal Representative of Victims a/0009/08 à a/0013/08, a/0015/08, a/0016/08, “Observations écrites du représentant légal des victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur l’examen du maintien en détention de M. Mathieu Ngudjolo Chui”, 3 November 2008, ICC-01/04-01/07-743.

⁵ Mathieu Ngudjolo Chui’s Defence Team, “Observations de la Défense par rapport à la détention de Mathieu Ngudjolo (Règle 118-2 du Règlement de Procédure et de Preuve)”, 12 November 2008, ICC-01/04-01/07-746.

⁶ Mathieu Ngudjolo Chui’s Defence Team, “Demande de mise en liberté provisoire”, 13 February 2008, ICC-01/04-01/07-280.

⁷ ICC-01/04-01/07-746, para. 12.

1) Decision on the Application for Interim Release of Mathieu Ngudjolo Chui (“the Decision on the First Application”)

5. On 27 March 2008, ruling on the First Application, Single Judge Akua Kuenyehia held that the following factors justified the continued pre-trial detention of Mathieu Ngudjolo Chui:⁸ 1) the condition set forth in article 58(1)(a) of the Statute continued to be fulfilled since there were still reasonable grounds to believe that Mathieu Ngudjolo Chui has committed crimes within the jurisdiction of the Court; 2) the gravity of the crimes contained in the warrant of arrest for Mathieu Ngudjolo Chui⁹ and the possibility of a long prison sentence, created a risk that he may wish to abscond from the jurisdiction of the Court; 3) Mathieu Ngudjolo Chui escaped from Makala prison in the DRC before a verdict was reached by a military tribunal in Kinshasa on the war crimes allegedly committed in the town of Tchomia in May 2003 for which he was charged in the DRC; 4) there were also reasonable grounds to believe that Mathieu Ngudjolo Chui was the highest ranking commander of the *Front des nationalistes et intégrationnistes* [National Integrationist Front] (FNI) in the Zumbe area during the relevant period; and that it appears that Mathieu Ngudjolo Chui still wields influence as a powerful figure within the DRC; and, in this capacity, has established numerous contacts nationally and internationally, which can provide him with the connections and means to flee.

6. According to the Single Judge, Mathieu Ngudjolo Chui’s supporters have the capability to interfere with ongoing and further Prosecution investigations and/or to interfere with Prosecution witnesses, victims and members of their families. Furthermore there have already been several precedents of interference with Prosecution witnesses.

⁸ Pre-Trial Chamber I, *Decision on the Application for Interim Release of Mathieu Ngudjolo Chui*, 27 March 2008, ICC-01/04-01/07-345.

⁹ Pre-Trial Chamber I, *Warrant of Arrest for Mathieu Ngudjolo Chui*, 6 July 2007, ICC-01/04-01/07-1-tENG.

7. On 2 April 2008, the Defence of Mathieu Ngudjolo Chui appealed the Single Judge's decision.¹⁰ On 9 June 2008, the Appeals Chamber upheld the said decision.

2) First review of the Decision on the First Application

8. On 17 June 2008, Pre-Trial Chamber I recalled the need to review pre-trial detention in accordance with rule 118(2) of the Rules.¹¹ Having requested observations from the participants and obtained those of the Prosecutor and the Defence, Pre-Trial Chamber I issued its Decision on the review of the Decision on the First Application¹² in the absence of observations from the Legal representatives of Victims who abstained from submitting any.¹³

9. Pre-Trial Chamber I considered that circumstances had not changed since the time it issued the Decision on the First Application. It further recalled that the identities of many witnesses had been disclosed to the Defence for the purpose of the confirmation hearing, that the situation in the DRC was still volatile and that the release of the accused would therefore increase the risk to the victims and witnesses in the case.

¹⁰ Mathieu Ngudjolo Chui's Defence Team, Notice of Defence Appeal against the Decision on the Application for Interim Release of Mr Ngudjolo, 2 April 2008, ICC-01/04-01/07-356-tENG.

¹¹ Pre-Trial Chamber I, *Decision concerning observations on the review of the pre-trial detention of Mathieu Ngudjolo Chui*, 17 June 2008, ICC-01/04-01/07-602.

¹² Pre-Trial Chamber I, *Review of the "Decision on the Application for Interim Release of Mathieu Ngudjolo Chui"*, 23 July 2008, ICC-01/04-01/07-694.

¹³ Office of the Prosecutor, "Prosecution's Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui", 2 July 2008, ICC-01/04-01/07-658 ; and Mathieu Ngudjolo Chui's defence Team, "Observations de la Défense relatives à la détention préventive de Monsieur Ngudjolo en réponse aux observations émises par le Procureur", 14 July 2008, ICC-01/04-01/07-676.

III. Second review by the Chamber of the Decision on the First Application

10. In accordance with the abovementioned Appeals Chamber judgment,¹⁴ the Chamber undertook the review provided for in article 60(3) of the Statute and rule 118(2) of the Rules as well as article 60(4) of the Statute.

1) Review under article 60(3) of the Statute and rule 118(2) of the Rules

11. Under article 60(3) of the Statute, when the Chamber reviews a decision on interim release, it may modify its decision if it is satisfied that changed circumstances so require.

12. In this case, the Chamber is of the opinion that there has been no significant change of circumstances which would justify the release of Mathieu Ngudjolo Chui. Moreover, the Chamber observes that the charges against him were confirmed by Pre-Trial Chamber I, which also rejected the applications for leave to appeal the *Decision on the confirmation of charges*.¹⁵ The Chamber therefore concurs with the Prosecutor¹⁶ and the Legal Representatives of the Victims¹⁷, that the criterion set out in article 58(1)(a) of the Statute, that there must be “reasonable grounds to believe that the person [concerned] has committed a crime within the jurisdiction of the Court”, has been met.

13. Furthermore, as regards the criterion set out in article 58(1)(b)(i) of the Statute, the Chamber considers that the risk of absconding has increased as a result of the

¹⁴ ICC-01/04-01/06-824, para. 120.

¹⁵ Pre-Trial Chamber I, *Decision on the Applications for leave to Appeal the Decision on the Admission of the evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges*, 24 October 2008, ICC-01/04-01/07-727.

¹⁶ ICC-01/04-01/07-742, para. 14.

¹⁷ ICC-01/04-01/07-741, p. 4.

confirmation of the charges against Mathieu Ngudjolo Chui and that his continued detention is even more necessary to guarantee his appearance. It recalls that serious charges brought against the accused who, if released, would return to the DRC, whereas everything must be done to ensure his actual presence at the trial. The Chamber does concede to the Defence of Mathieu Ngudjolo Chui¹⁸ that the gravity of the crimes alone cannot justify his being denied release. However, it considers that this criterion cannot be underestimated here since the penalty for the charges confirmed by Pre-Trial Chamber I might be such as to encourage the accused not to appear.

14. The Defence for Mathieu Ngudjolo Chui challenges the Prosecutor's¹⁹ and the Legal Representatives'²⁰ submissions that the continued detention of the accused is further justified by his status of former FNI leader which allegedly contributes to his playing a role in the *Front populaire pour la Justice au Congo*, a newly formed movement conducting armed operations in Ituri.²¹ It further disputes the allegation that Mathieu Ngudjolo Chui has an extensive network of contacts both in the Congo and overseas which could help him to arrange his escape. The Defence requests that the accused be released with the obligation to remain in the DRC but subject to the stringent obligations specifically intended to guarantee his appearance.²²

15. Although the conditions set out in article 58(1)(b) (i) to (iii) of the Statute are in the alternative,²³ the Chamber considers it necessary to determine whether Mathieu Ngudjolo Chui's release might obstruct or endanger the court proceedings. In this respect, the Chamber notes that the information it has received does not make it possible to establish Mathieu Ngudjolo Chui's involvement in the events currently

¹⁸ ICC-01/04-01/07-746, para. 26 et seq.

¹⁹ ICC-01/04-01/07-742, para. 15.

²⁰ ICC-01/04-01/07-741, p. 4 ; ICC-01/04-01/07-740, para. 2 et seq. ; ICC-01/04-01/07-743, para. 12.

²¹ ICC-01/04-01/07-746, para. 13 et seq.

²² ICC-01/04-01/07-746, para. 39 et seq.

²³ ICC-01/04-01/06-824, para. 139.

taking place in Ituri. Even supposing that his involvement were to be established, the possible role of the accused in those events has been neither specified nor established. Nevertheless, in the current situation, it does not appear possible for the Chamber to envisage his release onto Congolese territory.²⁴ As recalled by the Prosecutor and the Legal Representatives of the Victims,²⁵ the identities of many witnesses were disclosed to the accused during the confirmation hearing, and the situation in the DRC remains volatile. The Chamber holds that in such conditions, Mathieu Ngudjolo Chui's release would seriously jeopardize the safety of the victims and witnesses and might obstruct the proceedings. Admittedly, the submissions of the Legal Representatives of the Victims ought to be based on more specific information. However, in view of the feeling of insecurity voiced by the victims, the use of general terms, equally striking in the Prosecutor's submissions, does not reasonably eliminate the risk of real interference should Mathieu Ngudjolo Chui be released and return to the DRC.

16. Lastly, the Defence asserts that Mathieu Ngudjolo Chui's continued pre-trial detention is a serious infringement of his right to maintain his family ties and is contrary to the best interests of his children. The Chamber emphasizes that as important as preserving family ties may be²⁶, it cannot be a consideration in assessing the necessity of keeping the accused in detention. In this regard, it recalls that the Defence is aware that the Court has taken steps to allow the accused to receive visits from members of his family and that on 3 November 2008 the Registry reported to the Chamber thereon.²⁷

²⁴ ICC-01/04-01/07-742, para. 16

²⁵ ICC-01/04-01/07-741, p. 4.

²⁶ Regulation 179(1) of the *Regulations of the Registry*: "All visitors, other than counsel, diplomatic or consular representatives, representatives of the independent inspecting authority, or officers of the Court, shall first apply to the Registrar for permission to visit a detained person. The Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links."

²⁷ The Registrar, "Troisième rapport du Greffe sur l'état d'avancement des demandes de visas pour les familles des personnes détenues dans le cadre des visites familiales", 3 November 2008, ICC-01-04/01-07/733, par. 11 et seq.

17. For all these reasons, the Chamber finds that, with respect to articles 60(2) and (3) of the Statute, the circumstances have not changed.

2) Review under 60(4) of the Statute

18. Under 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.” In its judgment, the Appeals Chamber reaffirmed that “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.”²⁸ To determine whether Mathieu Ngudjolo Chui’s pre-trial detention period is or is not unreasonable, the Chamber must therefore take into account all the circumstances in the case.

19. As recalled by Pre-Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, when assessing the reasonableness of detention, it is appropriate to determine whether the requirement of public interest outweighs the rule of respect for individual liberty.²⁹ In this case, as it explained above, the Chamber holds that the general interest requires that Mathieu Ngudjolo Chui 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.

²⁸ ICC-01/04-01/06-824, para. 122.

²⁹ Pre-Trial Chamber I, *Second Review of the “Decision on the Application for Interim Release of Thomas Lubanga Dyilo”*, 11 June 2007, ICC-01/04-01/06-924; European Court of Human Rights (ECHR), *W. v. Switzerland*, Judgment of 27 June 1993, Application No. 14379/88, para. 30; ECHR, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application No. 33977/96, para. 84.

20. In this case, the proceedings for confirming the charges against Mathieu Ngudjolo Chui were conducted in a particularly expeditious manner within the time limits required by the Statute, the Rules and the *Regulations of the Court*. The Chamber agrees with the Representatives of the Victims³⁰ that no delay has occurred since 26 September 2008, the date of the confirmation of charges.³¹ The Presidency constituted the Trial Chamber on 24 October 2008,³² promptly after Pre-Trial Chamber I had informed it that it had rejected the requests for leave to appeal,³³ and after having elected its Presiding Judge,³⁴ the Chamber scheduled the initial status conference which is to be held on 27 November.³⁵

21. In the view of the Chamber, it cannot be said that Mathieu Ngudjolo Chui has been in detention for an unreasonable period and no inexcusable delay can be ascribed to the Prosecutor, as required by article 60(4) of the Statute.

FOR THESE REASONS,

The Chamber **REJECTS** the application for release submitted by the Defence in its observations **and DECIDES** that Mathieu Ngudjolo Chui shall remain in detention.

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

³⁰ ICC-01/04-01/07-740, para. 7.

³¹ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf; and Pre-Trial Chamber I, *Decision on the confirmation of charges*, 26 September 2008, ICC-01/04-01/07-716-Conf.

³² The Presidency, *Decision constituting Trial Chamber II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 24 October 2008, ICC-01/04-01/07-729.

³³ ICC-01/04-01/07-727.

³⁴ Trial Chamber II, *Décision notifiant l'élection du juge président dans l'affaire Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, 29 October 2008, ICC-01/04-01/07-731.

³⁵ Trial Chamber II, *Ordonnance fixant la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 19 November 2008

At The Hague, the Netherlands