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No.: ICC-01/04-01/07  
Date: 4 November 2009

**TRIAL CHAMBER II**

**Before:** Judge Bruno Cotte, Presiding Judge  
Judge Fatoumata Dembele Diarra  
Judge Christine Van den Wyngaert

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. GERMAIN KATANGA AND MATHIEU NGUDJOLO  
CHUI***

**Public Redacted Version**

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

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

**The Office of the Prosecutor**

Mr Luis Moreno-Ocampo, Prosecutor  
 Ms Fatou Bensouda, Deputy Prosecutor  
 Mr Éric MacDonald, Senior Trial Lawyer

**Counsel for Germain Katanga**

Mr David Hooper  
 Mr Andreas O'Shea

**Counsel for Mathieu Ngudjolo Chui**

Mr Jean-Pierre Kilenda Kakengi Basila  
 Mr Jean-Pierre Fofé Djofia Malewa

**Legal Representatives of the Victims**

Mr Jean-Louis Gilissen  
 Mr Fidel Nsita Luvengika

**Legal Representatives of the Applicants**

**The Office of Public Counsel for  
 Victims**

**The Office of Public Counsel for the  
 Defence**

**States' Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Mr Anders Backman

**Victims Participation and Reparations  
 Section**

**Other**

**Trial Chamber II** of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 21(3), 58, 60, 61 and 64(6)(a) of the Rome Statute (“the Statute”) and rule 118(2) of the Rules of Procedure and Evidence (“the Rules”), renders the following decision.

## **I. Background**

1. On 10 July 2009, acting pursuant to article 60(3) of the Statute and rule 118(2) of the Rules, the Chamber undertook a fourth review<sup>1</sup> of the decision rejecting the application for the interim release of Mathieu Ngudjolo, rendered on 27 March 2008 by the Single Judge (“the Decision of 27 March 2008”).<sup>2</sup>

2. The Decision of 27 March 2008, issued in the pre-trial stage, was supported at that time by the following facts: 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 had committed crimes within the jurisdiction of the Court; 2) in view of the gravity of the crimes cited in the warrant of arrest for Mathieu Ngudjolo<sup>3</sup> and the possibility of a long prison sentence, there was a risk that the accused might seek to abscond from the jurisdiction of the Court; 3) Mathieu Ngudjolo had escaped from Makala prison in the Democratic Republic of the Congo (“the DRC”) before a military tribunal in Kinshasa had reached a verdict on his indictment in the DRC for war crimes allegedly committed in the town of Tchomia in May 2003; 4) there were also reasonable grounds to believe that Mathieu Ngudjolo was the highest ranking commander of the *Front des nationalistes et intégrationnistes* in the Zumbe area during the relevant period; it further appeared that he still wielded influence as a powerful figure within the DRC and, in this capacity, had maintained numerous contacts nationally and internationally, which could provide him with the

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<sup>1</sup> *Fourth Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*, 10 July 2009, ICC-01/04-01/07-1287-Conf Exp-tENG.

<sup>2</sup> Pre-Trial Chamber I, *Decision on the Application for Interim Release of Mathieu Ngudjolo Chui*, 27 March 2008, ICC-01/04-01/07-345.

<sup>3</sup> Pre-Trial Chamber I, *Warrant of Arrest for Mathieu Ngudjolo Chui*, 6 July 2007, ICC-01/04-01/07-1-tENG.

connections and means to flee. In the Single Judge's view, the supporters of the accused had the means to interfere with ongoing or further Prosecution investigations and/or to put pressure on witnesses, victims and members of their families. Moreover, there were several precedents of interference with Prosecution witnesses.

3. Mathieu Ngudjolo's Defence lodged an appeal<sup>4</sup> against the Decision of 27 March 2008, and the said Decision was upheld by the Appeals Chamber on 9 June 2008.<sup>5</sup>

4. The Chamber reviewed the Pre-Trial Chamber's decision to maintain Mathieu Ngudjolo in detention,<sup>6</sup> and on 3 March 2009, in accordance with rule 118(3) of the Rules, it held a public hearing for that purpose. On 5 October 2009, for purposes of the fifth review of that Decision, the Chamber requested observations from the participants.<sup>7</sup> The Prosecutor submitted his observations on 12 October 2009<sup>8</sup> and Mathieu Ngudjolo's Defence filed its response on 19 October 2009 ("the Application"),<sup>9</sup> in which it requested the release of Mathieu Ngudjolo in The Hague, and that the release be subject to conditions, including the obligation to appear at the

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<sup>4</sup> Defence for Mathieu Ngudjolo, "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.

<sup>5</sup> Appeals Chamber, *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*, 9 June 2008, ICC-01/04-01/07 OA 4.

<sup>6</sup> *Second Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*, 19 November 2008, ICC-01/04-01/07-750-tENG; *Third review of the decision on the application for interim release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*, 17 March 2009, ICC-01/04-01/07-964-Conf-Exp-tENG; *Fourth Review of the Decision on the Application for Interim Release of Mathieu Ngudjolo (rule 118(2) of the Rules of Procedure and Evidence)*, 10 July 2009, ICC-01/04-01/07-1287-Conf-Exp-tENG.

<sup>7</sup> *Décision aux fins de recueillir les observations des participants sur la détention de Mathieu Ngudjolo (règle 118-2)*, 5 October 2009, ICC-01/04-01/07-1507.

<sup>8</sup> Office of the Prosecutor, "Prosecution's Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui", 12 October 2009, ICC-01/04-01/07-1523-Conf-Exp.

<sup>9</sup> Defence for Mathieu Ngudjolo, "*Observations de la Défense en réponse à celles de l'Accusation relativement à la détention préventive de Monsieur Mathieu Ngudjolo Chui (Règle 118-2 du Règlement de procédure et de preuve)*", 19 October 2009, ICC-01/04-01/07-1538-Conf-Exp.

Office of the Prosecutor three or four times a week.<sup>10</sup> The Legal Representatives of the Victims did not submit a filing.

## II. The Chamber's fifth review of the Decision of 27 March 2008

5. Pursuant to the Appeals Chamber Judgment of 13 February 2007,<sup>11</sup> the Chamber conducted the review provided for under article 60(3) of the Statute and rule 118(2) of the Rules, as well as that provided for under article 60(4) of the Statute.

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

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

7. The Prosecutor argues in his observations that the conditions required by article 58(1) of the Statute are still satisfied in the instant case, and refers the Chamber to the previous submissions filed by him to that effect.<sup>12</sup> He lays particular emphasis on the risks to witnesses, the identities of most of whom have now been disclosed to the Defence,<sup>13</sup> in the event of the accused's release. The Prosecutor stresses in this regard that the conduct of the accused has been subject to sanction by the Chamber, following the pressure he is alleged to have exerted on Prosecution witnesses, and thereby interfered with the conduct of the proceedings.<sup>14</sup>

8. Mathieu Ngudjolo's Defence contends that the arguments relied upon by the Prosecutor in support of maintaining Mathieu Ngudjolo in detention remain

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<sup>10</sup> *Ibid.*, para. 13.

<sup>11</sup> 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.

<sup>12</sup> ICC-01/04-01/07-1523-Conf-Exp, paras. 5, 8.

<sup>13</sup> *Ibid.*, para. 7.

<sup>14</sup> *Ibid.*, para. 6.

unchanged,<sup>15</sup> and makes express reference to its replies at the time of the previous reviews of Mathieu Ngudjolo's detention, which, in its view, remain entirely relevant.<sup>16</sup> Once again, it opposes the assertion that the accused, from his place of detention, exerts pressure or any form of influence on victims or witnesses in the DRC.<sup>17</sup> It stresses that the Prosecutor has never considered that Mathieu Ngudjolo might appear voluntarily before the Court simply on the basis of a summons to appear,<sup>18</sup> and considers, moreover, that the gravity of the crimes of which he is accused cannot be a sufficient condition for systematically refusing him interim release in any form.<sup>19</sup> Lastly, it opposes the argument that the imminence of the commencement of the trial could in any way affect a decision to grant interim release.<sup>20</sup>

9. The Chamber considers that the circumstances which served as grounds for placing, then maintaining, Mathieu Ngudjolo in detention, with the aim of ensuring that he appear before the Court for the opening of the trial scheduled for 24 November 2009, have not changed to any appreciable extent.

10. The Chamber stresses that it must ensure the safety of the victims and witnesses, whose identities – with the exception of one Prosecution witness - have now been disclosed to the Defence. It must also ensure that there will be no obstacles to the proper conduct of the proceedings; both of those objectives could be impeded by the release of Mathieu Ngudjolo.

11. [REDACTED].<sup>21</sup>

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<sup>15</sup> ICC-01/04-01/07-1538-Conf-Exp, para. 5.

<sup>16</sup> *Ibid.*, para. 6.

<sup>17</sup> *Ibid.*, paras. 15,23,25.

<sup>18</sup> *Ibid.*, paras. 13,14,16,17,18.

<sup>19</sup> *Ibid.*, paras. 16,18.

<sup>20</sup> *Ibid.*, paras. 11-12.

<sup>21</sup> [REDACTED]

12. The Chamber also stresses once again that, while the gravity of the crimes cannot alone justify the refusal of an application for release, it is nevertheless a factor in its determination which it should not underestimate, especially a few weeks before commencement of the trial. In this regard, the Chamber considers that release, even to The Hague and subject to strict conditions, could not guarantee that the accused would re-appear for trial.

## 2) Review pursuant to article 60(4) of the Statute

13. Article 60(4) of the Statute provides that the Chamber “shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”. The Appeals Chamber confirmed 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.”<sup>22</sup> In order to determine whether the period of detention of Mathieu Ngudjolo prior to the trial is unreasonable or not, the Chamber must take into account all the circumstances of the instant case.

14. As Pre-Trial Chamber I recalled in *The Prosecutor v. Thomas Lubanga Dyilo*, in order to assess the unreasonableness of detention, it must be determined whether the requirement of public interest takes precedence over the principle of respect for individual liberty.<sup>23</sup> In the instant case, the Chamber considers that the public interest requires that Mathieu Ngudjolo be kept in detention, given the absolute necessity of guaranteeing his appearance at trial and of ensuring the protection of victims and witnesses.

<sup>22</sup> ICC-01/04-01/06-824, para. 122.

<sup>23</sup> 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, *W v. Switzerland*, Judgment of 27 June 1993, Application No. 14379/88, para 30; European Court of Human Rights, *Ilijkov v. Bulgaria*, Judgment of 26 July 2001, Application No. 33977/96, para. 84.

15. Between the first status conference, held on 27 and 28 November 2008,<sup>24</sup> and the present Decision, the Chamber has actively prepared this case for trial. The date for the commencement of the trial, initially set for 24 September 2009, has been postponed to 24 November 2009; the Chamber has held public and *ex parte* hearings, and rendered numerous decisions relating in particular to the disclosure of incriminating and exonerating evidence to the Defence, as well as to the admissibility and submission of incriminating evidence.

16. Furthermore, the Defence does not attribute any blame to the Prosecutor for the delays in the proceedings. Mathieu Ngudjolo's detention cannot therefore be considered as having been prolonged unreasonably, and the Prosecutor cannot be accused, in present circumstances, of causing an inexcusable delay within the meaning of article 60(4) of the Statute.

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<sup>24</sup> *Order Fixing the Date of a Status Conference (rule 132 of the Rules of Procedure and Evidence)*, 6 November 2008, ICC-01/04-01/07-739-tENG.

**FOR THESE REASONS,**

The Chamber **DISMISSES** the Application and **DECIDES** to maintain Mathieu Ngudjolo in detention.

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

**[signed]**

**Judge Bruno Cotte**  
**Presiding Judge**

**[signed]**

**Judge Fatoumata Dembele Diarra**

**[signed]**

**Judge Christine Van den Wyngaert**

Dated this 4 November 2009,

At The Hague, The Netherlands