

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No. ICC-01/04-02/12 OA
Date: 20 December 2012**

THE APPEALS CHAMBER

Before:
Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Cuno Tarfusser
Judge Erkki Kourula
Judge Ekaterina Trendafilova

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

Public document

**Decision on the request of the Prosecutor of 19 December 2012
for suspensive effect**

No: ICC-01/04-02/12 OA

1/11



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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for the Defence
Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims
Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

REGISTRY

Registrar
Ms Silvana Arbia

A handwritten signature in black ink, appearing to be the initials 'Ar' or similar, located in the bottom right corner of the page.

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the oral decision of Trial Chamber II pursuant to article 81 (3) (c) (i) of the Statute of 18 December 2012 (ICC-01/04-02/12-T-3-ENG),

Having before it the “Prosecution’s Appeal against Trial Chamber II’s oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect” of 19 December 2012 (ICC-01/04-02/12-5), in which a request for suspensive effect is made,

After deliberation,

Renders unanimously the following

DECISION

The request for suspensive effect is rejected.

REASONS

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

A. Proceedings before the Trial Chamber

1. On 18 December 2012 Trial Chamber II (hereinafter: “Trial Chamber”) rendered the “Jugement rendu en application de l’article 74 du Statut”¹ (hereinafter: “Decision of Acquittal”), in which it acquitted Mr Mathieu Ngudjolo Chui (hereinafter: “Mr Ngudjolo”) of all the charges that had been brought against him and ordered the Registrar to take all necessary measures to secure his immediate release.²

2. A summary of the Decision of Acquittal was delivered at a hearing scheduled for 9h00 on 18 December 2012.³ At the conclusion of that hearing, the Prosecutor

¹ ICC-01/04-02/12-3.

² Decision of Acquittal, p. 215.

³ ICC-01/04-02/12-T-1-ENG.

stated that she would be requesting the Trial Chamber to maintain the detention of Mr Ngudjolo pursuant to article 81 (3) (c) (i) of the Statute.⁴

3. The Trial Chamber therefore convened a further hearing at 13h30 on the same day, at which the arguments of the Prosecutor in relation to her request, as well as the observations of the legal representatives of the victims thereon and the response of Mr Ngudjolo thereto, were heard.⁵

4. At 17h30 on 18 December 2012, the Trial Chamber rendered its oral decision in relation to the continued detention of Mr Ngudjolo, in which it dismissed the request of the Prosecutor under article 81 (3) (c) (i) of the Statute⁶ (hereinafter: “Impugned Decision”).

B. Proceedings before the Appeals Chamber

5. On 19 December 2012, the Prosecutor filed the “Prosecution’s Appeal against Trial Chamber II’s oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect”,⁷ in which she requests that the Appeals Chamber order suspensive effect (hereinafter: “Request for Suspensive Effect”).

6. The Prosecutor applies for her appeal against the Impugned Decision to have suspensive effect “pursuant to articles 82(3), 81(4) and rule 156(5)”.⁸ She does so “on an expedited basis considering that Mr Ngudjolo is to be released between today and tomorrow”.⁹ She also states that she is separately appealing the Decision of Acquittal.¹⁰

7. The Prosecutor submits that, “[w]here the release of the accused has been ordered, suspensive effect is necessary in order to avoid pre-empting the subject of the appeal – i.e. the Decision whether to release Mr Ngudjolo – and rendering its outcome moot”.¹¹ Contending, by reference to previous decisions of first instance Chambers of this Court, that Mr Ngudjolo had escaped from prison in the Democratic Republic of

⁴ ICC-01/04-02/12-T-1-ENG, p. 19, lines 9-11.

⁵ ICC-01/04-02/12-T-2-ENG.

⁶ ICC-01/04-02/12-T-3-ENG.

⁷ ICC-01/04-02/12-5 (OA).

⁸ Request for Suspensive Effect, paras 8 and 17.

⁹ Request for Suspensive Effect, para. 17. *See also* Request for Suspensive Effect, para. 3.

¹⁰ Request for Suspensive Effect, para. 3.

¹¹ Request for Suspensive Effect, para. 11.

the Congo prior to a ruling from a domestic military tribunal on an indictment on war crimes against him, the Prosecutor submits that there is “a clear and present danger that if Mr Ngudjolo were released, but the Appeals Chamber subsequently overturned the [Impugned Decision], the Court would not be able to regain custody of him”.¹²

8. The Prosecutor argues that, throughout the proceedings against him at the Court, Mr Ngudjolo was detained “on the basis of repeated findings that his detention was necessary to ensure his appearance at trial”¹³ and that the Trial Chamber had “found that even strict conditions would not guarantee that Mr Ngudjolo would appear”, a factor that the Prosecutor contends remains the case.¹⁴ The Prosecutor further submits that a risk exists that Mr Ngudjolo would obstruct the conduct of the appeals proceedings, referring in this context to a witness having testified that he had been threatened by members of Mr Ngudjolo’s family and to the military group to which Mr Ngudjolo belonged having recently carried out attacks on civilians in Ituri.¹⁵

9. The Prosecutor submits that, if the Appeals Chamber were to overturn the Decision of Acquittal, which she is appealing, the basis for Mr Ngudjolo’s release would no longer be present.¹⁶ Furthermore, she submits that no State has provided guarantees to ensure Mr Ngudjolo’s return to the Court should the Appeals Chamber overturn the Decision of Acquittal.¹⁷ As such, she submits that suspensive effect is necessary to “prevent irreparable prejudice” in the present appeal and “to ensure that the Appeals Chamber is in a position to exercise its corrective authority in a comprehensive manner”.¹⁸ The Prosecutor contends that ordering suspensive effect in the current circumstances is consistent with the practice of the Court and “the *ad-hoc* Tribunals”.¹⁹

10. On 20 December 2012, further to an order of the Appeals Chamber of the previous day,²⁰ Mr Ngudjolo filed the “Réponse de la Défense de Mathieu Ngudjolo

¹² Request for Suspensive Effect, para. 12.

¹³ Request for Suspensive Effect, para. 13.

¹⁴ Request for Suspensive Effect, para. 14.

¹⁵ Request for Suspensive Effect, para. 14.

¹⁶ Request for Suspensive Effect, para. 15.

¹⁷ Request for Suspensive Effect, para. 15.

¹⁸ Request for Suspensive Effect, para. 15.

¹⁹ Request for Suspensive Effect, para. 16.

²⁰ “Order on the filing of a response to the request of the Prosecutor of 19 December 2012 for suspensive effect”, 19 December 2012, ICC-01/04-02/12-8 (OA).

au « Prosecution's Appeal against Trial Chamber II's oral decision to release Mathieu Ngudjolo and Urgent Application for Suspensive Effect » [ICC-01/04-02/12-5]"²¹ (hereinafter: "Response to the Request for Suspensive Effect"). Mr Ngudjolo requests the Appeals Chamber to reject the Request for Suspensive Effect.²² He submits that the Request for Suspensive Effect makes incorrect factual statements, notably with regard to the allegation that Mr Ngudjolo previously escaped from prison, that Mr Ngudjolo has national and international contacts, that a witness had been threatened by members of Mr Ngudjolo's family, and as to Mr Ngudjolo's membership in a group that, according to the Prosecutor, is currently committing attacks against civilians in Ituri.²³ He notes furthermore that the Prosecutor's submissions on appeal do not contain any new element, if compared to her oral submissions before the Trial Chamber on 18 December 2012.²⁴

11. Mr Ngudjolo submits that the Request for Suspensive Effect is without a legal basis. To the extent that the Prosecutor made reference to article 81 (4) of the Statute, Mr Ngudjolo argues that this provision is applicable only in the case of a conviction, but not in the case of an acquittal.²⁵ Mr Ngudjolo also avers that article 82 (3) of the Statute, read with rule 156 (5) of the Rules of Procedure and Evidence, does not provide a legal basis for ordering suspensive effect in the present case as, in his submission, the appeal in the present case, which is brought under article 81 (3) (c) (ii) of the Statute, is governed by rules 150 to 153 of the Rules of Procedure and Evidence.²⁶

12. Finally, Mr Ngudjolo makes submissions on the merits of the Impugned Decision itself, which, in his view, was correctly taken.²⁷

13. On 20 December 2012, the Prosecutor filed an appeal against the Decision of Acquittal.²⁸

²¹ ICC-01/04-02/12-9 (OA).

²² Response to the Request for Suspensive Effect, p. 10.

²³ Response to the Request for Suspensive Effect, paras 5-9.

²⁴ Response to the Request for Suspensive Effect, para. 10.

²⁵ Response to the Request for Suspensive Effect, paras 17-18.

²⁶ Response to the Request for Suspensive Effect, paras 19-20.

²⁷ Response to the Request for Suspensive Effect, paras 20-27.

²⁸ "Prosecution's Appeal against Trial Chamber II's 'Judgement rendu en application de l'article 74 du Statut'", ICC-01/04-02/12-10 (A).

II. MERITS

14. The appeal in the present case is brought by the Prosecutor pursuant to article 81 (3) (c) of the Statute, which provides:

In case of an acquittal, the accused shall be released immediately, subject to the following:

- (i) Under exceptional circumstances, and having regard, *inter alia*, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
- (ii) A decision by the Trial Chamber under subparagraph (c) (i) may be appealed in accordance with the Rules of Procedure and Evidence.

15. The Appeals Chamber notes that, contrary to Mr Ngudjolo's submission,²⁹ it may order that an appeal under article 81 (3) (c) (ii) of the Statute have suspensive effect, upon request, pursuant to article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence. Rule 154 (1) of the Rules of Procedure and Evidence regulates appeals filed under article 81 (3) (c) (ii) of the Statute. Rule 156 of the Rules of Procedure and Evidence regulates the procedure to be followed in respect of an appeal filed under rule 154, including in relation to requests for suspensive effect under sub-paragraph 5.

16. In addition to those provisions, the Prosecutor refers to applying for suspensive effect pursuant to article 81 (4) of the Statute.³⁰ The Prosecutor does not elaborate why that provision is relevant to a request for suspensive effect in the present circumstances or make any other argument in respect thereof. The Appeals Chamber notes that the "decision" referred to in article 81 (4) of the Statute is the decision under article 74 of the Statute and not the decision that the Trial Chamber rendered in the present case under article 81 (3) (c) (i) of the Statute, which is a specific provision governing the release of an acquitted person. The Appeals Chamber shall therefore proceed to address the Request for Suspensive Effect on the basis of article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence.

²⁹ Response to the Request for Suspensive Effect, paras 19-20.

³⁰ Request for Suspensive Effect, paras 8, 17.

17. The Appeals Chamber recalls that it has previously stated that: “[s]uspension involves the non-enforcement of a decision, the subject of an appeal”.³¹ Suspensive effect thereby maintains the position as it was prior to the issuing of the Impugned Decision.³² In the present circumstances, ordering suspensive effect would therefore result in Mr Ngudjolo being kept in detention pending the outcome of the Prosecutor’s appeal pursuant to article 81 (3) (c) (ii) of the Statute. This is because the position would be as if the Trial Chamber had not yet ruled on the Prosecutor’s request for Mr Ngudjolo to be kept in detention. Until any such ruling, which in the present case was appropriately made as a matter of urgency, the acquitted person is to remain in detention, as is evident from the use of the words “the Trial Chamber [...] may *maintain* the detention of the person pending appeal” (emphasis added) within article 81 (3) (c) (i) of the Statute. Article 81 (3) (c) of the Statute would be rendered ineffective if a person were to be released prior to the ruling of the Trial Chamber pursuant to that provision.

18. In relation to when suspensive effect will be granted, the Appeals Chamber has previously explained:

Article 82 (3) of the Statute provides that an appeal shall not have suspensive effect “unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.” [...] The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.³³ [Footnote omitted.]

³¹ *Prosecutor v. Joseph Kony a.o.*, “Decision on the Prosecutor’s ‘Application for Appeals Chamber to Give Suspensive Effect to Prosecutor’s Application for Extraordinary Review’”, 13 July 2006, ICC-02/04-01/05-92 (OA), para. 3. Referred to most recently in *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (A A 2 A 3 OA 21), para. 81.

³² See, in this connection, Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the ‘Decision on the release of Thomas Lubanga Dyilo’”, Separate Opinion of Judge Georghios M. Pikis, 20 August 2008, ICC-01/04-01/06-1444-Anx (OA 12), para. 6: “Suspension [...] is designed to sustain the status quo ante, that is, the position obtaining prior to the issuance of the sub judice decision”.

³³ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of the Prosecutor for Suspensive Effect”, 3 September 2009, ICC-01/05-01/08-499 (OA 2), para. 11, citing *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008”, 22 April 2008, ICC-01/04-01/06-1290 (OA 11). Among other Appeals Chamber authorities, see, for the most recent example, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and

19. The Appeals Chamber has summarised the circumstances in which it has exercised its discretion to grant suspensive effect as follows:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant”, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the appeal”.³⁴ [Footnotes omitted.]

20. The Appeals Chamber recalls that it has previously, in the cases of *Prosecutor v. Thomas Lubanga Dyilo* and *Prosecutor v. Jean-Pierre Bemba Gombo*, granted requests for suspensive effect in cases concerning the release of an individual.³⁵ The Appeals Chamber emphasises that, notwithstanding those decisions, the decision as to whether or not to grant suspensive effect is always discretionary and depends upon the individual circumstances of the case. Suspensive effect is not automatic. Indeed, article 82 (3) of the Statute specifically provides that an appeal (including an appeal against a decision granting or denying release) “shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request [...]”.

21. The Appeals Chamber further notes that the context of the present request for suspensive effect is very different from the other requests upon which it has ruled in the cases of *Prosecutor v. Thomas Lubanga Dyilo* and *Prosecutor v. Jean-Pierre Bemba Gombo*, referred to above. In those cases, requests for suspensive effect were made, and granted, in respect of decisions to release a suspect following a stay of the proceedings or in relation to interim release pending trial. Thus, in those cases, no decision of acquittal or conviction under article 74 of the Statute had been rendered.

directions on the further conduct of proceedings”, 14 December 2012, ICC-01/04-01/06-2953 (A A 2 A 3 OA 21), para. 81.

³⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, 9 July 2010, ICC-01/05-01/08-817 (OA 3), para. 11.

³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, “Reasons for the decision on the request of the Prosecutor for suspensive effect of his appeal against the ‘Decision on the release of Thomas Lubanga Dyilo’”, 22 July 2008, ICC-01/04-01/06-1444 (OA 12); *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Request of the Prosecutor for Suspensive Effect”, 3 September 2009, ICC-01/05-01/08-499 (OA 2); *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo”, 23 July 2010, ICC-01/04-01/06-2536 (OA 17).

In contrast, in the present case, the Trial Chamber acquitted Mr Ngudjolo, finding that his guilt had not been established beyond reasonable doubt.

22. The fundamental difference of this case from those other cases in which the Appeals Chamber has ordered suspensive effect is that it is plain from the wording of article 81 (3) (c) of the Statute that the rule, in the case of an acquittal, is that the acquitted person “shall be released immediately”. Continued detention may be ordered only “[u]nder exceptional circumstances”. Thus, in the ordinary course of events, the acquitted person is to be released immediately, thereby respecting the fundamental right to liberty of the person.³⁶

23. In exercising its discretion whether to order suspensive effect in the present case, the Appeals Chamber has to bear in mind the exceptional nature of the continued detention of the acquitted person pending appeal. In other words, for the Appeals Chamber to order suspensive effect, which would result in Mr Ngudjolo remaining in custody until the Prosecutor’s appeal against the Impugned Decision has been decided upon, particularly strong reasons for doing so must exist, which clearly outweigh Mr Ngudjolo’s statutory right to be released immediately following his acquittal.

24. In the view of the Appeals Chamber, the Prosecutor has put forward no such reasons. The principal reason in support of her request is that not ordering suspensive effect could render her appeal against the Impugned Decision as well as the appeal she intends to file against the Decision of Acquittal moot because Mr Ngudjolo might abscond.³⁷ In the present case, and having considered the Prosecutor’s submissions, this alone does not persuade the Appeals Chamber to exercise its discretion and order suspensive effect, given the importance of Mr Ngudjolo’s statutory right to be released immediately after acquittal. As the present decision is limited to the issue of suspensive effect, the Appeals Chamber will not further address the Prosecutor’s

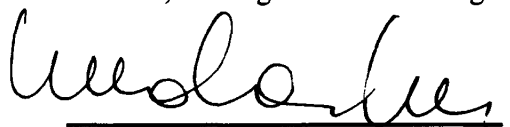
³⁶ See article 9 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 United Nations Treaty Series 14668; article 5 of the *[European] Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, as amended by Protocols No. 11 and No. 14, 213 United Nations Treaty Series 2889; article 7 of the *American Convention on Human Rights “Pact of San Jose, Costa Rica”*, 22 November 1969, 1144 United Nations Treaty Series 17955; article 6 of the *African Charter on Human and Peoples’ Rights*, 27 June 1981, 1520 United Nations Treaty Series 26363.

³⁷ Request for Suspensive Effect, paras 11, 15.

arguments as to the risk of flight and the potential for obstruction of the proceedings,³⁸ because those arguments have to be considered in relation to the merits of the appeal against the Impugned Decision. Further, the Prosecutor's argument that the Appeals Chamber may reverse the Decision of Acquittal, in which case "the very foundations of the release would have disappeared",³⁹ is unpersuasive. The Statute provides for the right of the Prosecutor to appeal an acquittal – notwithstanding this, the Statute also provides that unless exceptional circumstances exist, the acquitted person has to be released immediately.

25. In sum, in the absence of strong reasons in support of the ordering of suspensive effect, the Appeals Chamber finds that the interest of Mr Ngudjolo to be released immediately prevails. Accordingly, and without prejudice to the Appeals Chamber's eventual decision on the merits of the Prosecutor's appeal against the Impugned Decision, the Request for Suspensive Effect is rejected.

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



Judge Cuno Tarfusser
On behalf of the Presiding Judge

Dated this 20th day of December 2012

At The Hague, The Netherlands

³⁸ Request for Suspensive Effect, paras 12-14.

³⁹ Request for Suspensive Effect, para. 15.