

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/07

Date: 27 March 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Single judge

Registrar: Mr Bruno Cathala

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

Public Redacted Version

Decision on the Application for Interim Release of Mathieu Ngudjolo Chui

The Office of the Prosecutor

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I, Akua Kuenyehia, judge at the International Criminal Court (“the Court”);

NOTING the warrant of arrest for Mathieu Ngudjolo Chui, issued by Pre-Trial Chamber I (“the Chamber”) on 6 July 2007;¹

NOTING the “Decision on the evidence and information provided by the Prosecution for the issuance of an arrest warrant against Mathieu Ngudjolo Chui”² (“the Decision on Evidence and Information”), issued on 6 July 2007, in which the Chamber set out the analysis of the evidence and information provided by the Prosecution in connection with its application for a warrant of arrest for Mathieu Ngudjolo Chui;

NOTING the report entitled “*Rapport du Greffe à la Chambre relativement à l’exécution de la demande d’arrestation et de remise de Mathieu Ngudjolo Chui*”³ (“the Registry’s Report”), filed by the Registrar on 11 February 2008;

NOTING the application entitled “*Demande de mise en liberté provisoire*”⁴ (“the Application for Interim Release”), filed by the Defence for Mathieu Ngudjolo Chui on 13 February 2008, in which the Defence (i) requested the immediate release of Mathieu Ngudjolo Chui because of the alleged violation of his right under article 67(1)(a) of the Statute (“the First Request of the Defence”); and, (ii) in the alternative, his interim release with or without condition because the conditions set forth in article 58(1) of the Rome Statute for the pre-trial detention of Mathieu Ngudjolo Chui are not met (“the Second Request of the Defence”);

¹ ICC-01/04-02/07-1.

² ICC-01/04-02/07-3

³ ICC-01/04-02-07-17-Conf, ICC-01/04-02-07-17-Anx1; ICC-01/04-02-07-17-Conf-Anx2; ICC-01/04-02-07-17-Conf-Anx3; ICC-01/04-02-07-17-Conf-Anx4; ICC-01/04-02-07-17-Conf-Anx5; ICC-01/04-02-07-17-Conf-Anx6; ICC-01/04-02-07-17-Anx7; ICC-01/04-02-07-17-Conf-Anx8, ICC-01/04-02-07-17-Anx9, ICC-01/04-02-07-17-Conf-Anx10; ICC-01/04-02-07-17-Anx11; ICC-01/04-02-07-17-Anx12 and ICC-01/04-02-07-17-Anx13.

⁴ ICC-01/04-02/07-21.

NOTING the “Decision inviting observations on the Defence’s Application for Interim Release”,⁵ issued by the Chamber on 14 February 2008, by which the Chamber invited observations from the Prosecution and ordered the Registrar to notify the relevant authorities of Belgium, France, the United Kingdom and the Netherlands of Mathieu Ngudjolo Chui’s application for interim release;

NOTING the “Prosecution’s Observations on the Defence’s Application for Interim Release”⁶ (“The Prosecution Observations”), filed by the Prosecution on 22 February 2008, by which the Prosecution requested that the application for interim release be denied;

NOTING the “Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence’s Application for Interim release”,⁷ filed by the Registry on 29 February 2008, which included the observations of Belgium, France, the Netherlands and the United Kingdom;

NOTING the “Decision on the Designation of a Single Judge”,⁸ issued by the Chamber on 11 March 2008, in which the Chamber “decide[d] to temporarily appoint Judge Akua Kuenyehia as single judge of Pre-Trial Chamber I responsible for the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* from 14 March 2008 to 28 March 2008”;

NOTING the “Decision concerning the Notification of a decision to Mathieu Ngudjolo Chui”,⁹ issued by the Single Judge on 18 March 2008;

⁵ ICC-01/04-02/07-23.

⁶ ICC-01/04-02/07-38-Conf.

⁷ ICC-01/04-02/07-42, ICC-01/04-02/07-42-Anx1 to Anx4 and ICC-01/04-02/07-42-Conf-Anx5

⁸ ICC-01/04-01/07-309.

⁹ ICC-01/04-01/07-329

NOTING the “Information to the Chamber Concerning the Notification of the Decision on Evidence and Information dated 6 July 2007”¹⁰ (the Registry’s Observations on the Notification”), filed by the Registry on 19 March 2008;

NOTING articles 21, 58, 60 and 61 of the *Rome Statute* (“the Statute”), rules 118 and 122 of the *Rules of Procedure and Evidence* (“the Rules”), regulations 99 and 101 of the *Regulations of the Court* (“the Regulations”) and regulations 173 to 175 of the *Regulations of the Registry* (“the RoR”);

CONSIDERING that the First Request of the Defence seeks the immediate release of Mathieu Ngudjolo Chui because of the alleged violation of his right, pursuant to article 67(1)(a) of the Statute, “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”; and that the Prosecution does not address this First Request of the Defence in the Prosecution Observations;

CONSIDERING that, according to the Registry’s Report, Mathieu Ngudjolo Chui, as part of the arrest and surrender proceedings in the custodial State (the Democratic Republic of the Congo – “the DRC”), was served on 6 February 2008 by REDACTED – *Avocat Général près la Haute Cour Militaire* – with a French version of the warrant of arrest issued by Pre-Trial Chamber I on 6 July 2007; and that the Defence for Mathieu Ngudjolo Chui, who is currently a colonel in the *Forces Armées de la République Démocratique du Congo* (Armed Forces of the Democratic Republic of the Congo) (“the FARDC”), has not alleged that REDACTED was not the competent national authority to conduct such arrest and surrender proceedings;

CONSIDERING that, on 7 February 2008, the day of his transfer to the Court’s Detention Centre at the seat of the Court in The Hague, Mathieu Ngudjolo Chui was

¹⁰ ICC-01/04-01/07-331 and ICC-01/04-01/07-331-Anx1 and Anx2.

served by an officer of the Registry with a French version of the warrant of arrest issued by Pre-Trial Chamber I on 6 July 2007;

CONSIDERING that the Decision on Evidence and Information issued by Pre-Trial Chamber I on 6 July 2007 – in which the Chamber specified in great detail the reasons justifying the issuance of the warrant arrest for Mathieu Ngudjolo Chui – in spite of having an “under seal” level of confidentiality was never classified as “*ex parte*”; and that, accordingly, a French version of the decision was notified by the Registry to Mathieu Ngudjolo Chui on 9 February 2007,¹¹ two days following his transfer to the Court’s Detention;

CONSIDERING that, under these circumstances, the Single Judge considers that there has been no violation of Mathieu Ngudjolo Chui’s right, pursuant to article 67(1) of the Statute, “to be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks”; and that, therefore, the First Request of the Defence must be rejected;

CONSIDERING that, in the alternative, the Defence for Mathieu Ngudjolo Chui requests his *interim* release because detention is an exceptional measure subject to the principles of necessity and proportionality and that the conditions set forth in article 58(1)(b) of the Statute are not met insofar as:

- (i) article 58(1)(b)(i) does not apply to the pre-trial phase;
- (ii) the condition set forth in article 58(1)(b)(ii) has not been met as pre-trial detention cannot be predicated on unsubstantiated fears of obstruction or endangerment of the investigation or the court proceedings;
- (iii) the condition set forth in article 58(1)(b)(iii) has not been met as the existence of fears regarding the continued commission of crimes within the jurisdiction of the Court has not been established;

¹¹ ICC-01/04-01/07-331 and ICC-01/04-01/07-331-Anx1 and Anx2.

CONSIDERING that, as the Single Judge has already stated, “pre-trial detention is not the general rule, but it is the exception, and shall only be resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in article 58(1) of the Statute are met”;¹²

CONSIDERING, therefore, that, in the view of the Single Judge, the condition set forth in article 58(1)(a) of the Statute continues to be fulfilled insofar as there are still reasonable grounds to believe that Mathieu Ngudjolo Chui has committed crimes within the jurisdiction of the Court;

CONSIDERING that, in relation to the condition set forth in article 58 (1)(b)(i) of the Statute, Judge Claude Jorda, acting as Single Judge for this Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, held that this condition applies to this stage of the proceedings,¹³ and that the Appeals Chamber upheld his finding in its “Judgement 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*’” where it stated that:

However, as the reasons for detention pursuant to article 58(1)(b)(i) and (ii) of the Statute are in the alternative, the question of whether or not the continued detention of the Appellant appears necessary under article 58(1)(b)(ii) is ultimately not decisive for the present appeal because in any event and for the reasons explained above the Pre-Trial Chamber’s finding as to the necessity of continued detention to ensure the presence of the appellant at trial justified the decision to deny release under article 60(2) of the Statute. For that reason, the Appeals Chamber will not consider any further the arguments of the Appellant in relation to article 58(1)(b)(ii) of the Statute.¹⁴

CONSIDERING that, in the view of the Single Judge, the Defence for Mathieu Ngudjolo Chui has not put forward any argument that would justify departing from the existing case law of this Chamber and the Appeals Chamber;

¹² ICC-01/04-01/07-330, pp. 6-7

¹³ ICC-01/04-01/06-586

¹⁴ ICC-01/04-01/06-824, para. 139

CONSIDERING, further, that, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Judge Claude Jorda, acting as Single Judge for this Chamber, along with the Appeals Chamber addressed the issue of whether the following factors should be taken into account for the purpose of article 58(1)(b)(i) of the Statute: (i) the gravity of the crimes; (ii) the international contacts of the person, and (iii) his or her hypothetical voluntary surrender to the Court; and that, in upholding the findings of the Single Judge, the Appeals Chamber stated that:

The Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the gravity of the crimes allegedly committed by the Appellant. As the Prosecutor correctly notes, the Pre-Trial Chamber did not take into account the gravity of the crimes in isolation but as part of its consideration that the Appellant might abscond. If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond.¹⁵

Furthermore, the Appeals Chamber is not persuaded by the argument of the Appellant that the Pre-Trial Chamber should not have taken into account the international contacts of the Appellant because there had been no evidence before that Chamber that the Appellant actually would make use of these contacts to abscond. The Appeals Chamber notes that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction.¹⁶

Finally, the Appeals Chamber sees no merit in the argument of the Appellant that the Pre-Trial Chamber should have taken into account that the Appellant would have surrendered voluntarily to the Court, if only he had had an opportunity to do so. The Appeals Chamber agrees with the Prosecutor that there was no reason for the Pre-Trial Chamber to do so because his voluntary surrender is merely hypothetical. The Appeals Chamber notes in this context the in the *Stanišić* decision to which the Appellant refers, the ICTY Trial Chamber took into account the hypothetical voluntary surrender of the detainee on the basis of concrete evidence of an intention to surrender voluntarily.¹⁷

CONSIDERING that, in the view of the Single Judge, because of the gravity of the crimes contained in the warrant of arrest for Mathieu Ngudjolo Chui, and the

¹⁵ ICC-01/04-01/06-824, para 136.

¹⁶ ICC-01/04-01/06-824, para 137.

¹⁷ ICC-01/04-01/06-824, para 138.

possibility of a long prison sentence, there is a risk that he may wish to abscond from the jurisdiction of the Court;¹⁸

CONSIDERING that it appears that Mathieu Ngudjolo Chui escaped from the 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;¹⁹

CONSIDERING that there are also reasonable grounds to believe that Mathieu Ngudjolo Chui was the highest ranking commander of the FNI in the Zombe area during the relevant period;²⁰ and that it appears that Mathieu Ngudjolo Chui (i) still wields influence as a powerful figure within the DRC;²¹ and, (ii) in this capacity, has established numerous contacts nationally and internationally, which can provide him with the connections and means to flee;²²

CONSIDERING, further, that the Defence has not provided any concrete evidence of Mathieu Ngudjolo Chui's intention to surrender voluntarily to the Court and that, therefore, in the view of the Single Judge, the Defence claim that he would have voluntarily surrendered is speculative;

¹⁸ See for example: European Court of Human Rights, *Case of Tomasi v France*, Judgment of 27 August 1992, Application No. 12850/87, para. 89; European Court of Human Rights, *Case of Mansur v Turkey*, Judgment of 8 June 1995, Application No. 16026/90, para. 52.

¹⁹ http://www.iwpr.net/?p=acr&s=f&o=342800&apc_state=henh.

²⁰ ICC-01/04-02/07-3, para. 56.

²¹ ICC-01/04-01/07-224-Anx, paras. 15 and 22. See also

<http://www.reuters.com/article/featuredCrisis/idUSL06582640>;

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/312/21/PDF/N0531221.pdf?OpenElement>

<http://www.monuc.org/News.aspx?newsId=15959>, http://www.un.org/sc/committees/1533/pdf/1533_list.pdf,

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:152:0022:0024:EN:PDF>; and

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:057:0037:0037:EN:PDF>.

²² <http://www.reuters.com/article/featuredCrisis/idUSL06582640>;

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/312/21/PDF/N0531221.pdf?OpenElement>,

<http://www.monuc.org/News.aspx?newsId=15959>;

http://www.un.org/sc/committees/1533/pdf/1533_list.pdf;

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:152:0022:0024:EN:PDF>; and

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:057:0037:0037:EN:PDF>.

CONSIDERING, therefore, that, in the view of the Single Judge, the condition set forth in article 58(1)(b)(i) of the Statute continues to be fulfilled insofar as the detention of Mathieu Ngudjolo Chui remains necessary to ensure his appearance at trial;

CONSIDERING further that, in relation to the condition set forth in article 58(1)(b)(ii) of the Statute, Judge Sylvia Steiner, acting as Single Judge for this Chamber, in analysing the security situation and context in the DRC (and, in particular, in the Ituri and Kinshasa areas) in the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”,²³ found that it appears that (i) the supporters of Mathieu Ngudjolo Chui have the capability to interfere with ongoing and further Prosecution investigations and/or Prosecution witnesses, victims and members of their families;²⁴ and (ii) that there are several precedents of interference with Prosecution witnesses by REDACTED;²⁵

CONSIDERING that, Judge Sylvia Steiner, acting as Single Judge for this Chamber, recently found in the “Third Decision on the Prosecution Request for Authorisation to Redact materials related to the statements of Witnesses 7, 8, 9, 12 and 14” that the security situation and context remained the same as the ones mentioned in the “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”,²⁶

CONSIDERING, therefore, that, in the view of the Single Judge, the condition set forth in article 58(1)(b)(ii) of the Statute continues to be fulfilled insofar as the detention of Mathieu Ngudjolo Chui remains necessary to ensure that he will not obstruct or endanger the investigation or the court proceedings;

²³ ICC-01/04-01/07-224.

²⁴ ICC-01/04-01/07-224-Anx, paras. 15 and 22. In addition, according to certain reports, Mathieu Ngudjolo Chui was acquitted for the murder of a Hema businessman due to an apparent lack of evidence because witnesses were too scared to testify. See http://www.iwpr.net/?p=acr&s=f&o=342800&apc_state=henh.)

²⁵ ICC-01/04-01/07-224-Anx, paras. 17-22.

²⁶ ICC-01/04-01/07-247-Conf-Exp-Corr, para 9, ICC-01/04-01/07-248-Conf-Corr, para 9 and ICC-01/04-01/07-249, para. 9.

CONSIDERING that, having found that the conditions for the pre-trial detention of Mathieu Ngudjolo Chui set forth in article 58 (1) of the Statute continue to be met, it is the view of the Single Judge that it is not necessary to address the issues raised by Belgium, France, the Netherlands and the United Kingdom in relation to the Application for Interim Release;

CONSIDERING, furthermore, that, in the Prosecution Observations, the Prosecution requests that Mathieu Ngudjolo Chui's communications be actively monitored because of the "ongoing threat NGUDJOLO poses to Prosecution witnesses";²⁷

CONSIDERING that the measure requested by the Prosecution constitutes a restriction of Mathieu Ngudjolo Chui's rights under the detention regime established by the Regulations and the RoR and that, therefore, such a measure can only be imposed if the requirements of necessity and proportionality are met;²⁸

CONSIDERING that the Prosecution has not provided any concrete evidence showing that Mathieu Ngudjolo Chui might be using the communication facilities at the Detention Centre or might have breached the detention regime for the purpose of threatening or harming witnesses on whom the Prosecution intends to rely at the confirmation hearing;

CONSIDERING, therefore, that the Single Judge is of the view that there is no need to actively monitor the communications of Mathieu Ngudjolo Chui and that therefore there is no need to address the proportionality requirement;

FOR THESE REASONS,

²⁷ ICC-01/04-01/07-38-Conf, paras. 26 and 28

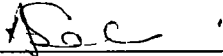
²⁸ ICC-01/04-01/07-322, p 9

REJECT the First and Second Requests of the Defence;

DECIDE that Mathieu Ngudjolo Chui shall remain in pre-trial detention;

REJECT the request of the Prosecution that the communications of Mathieu Ngudjolo Chui be actively monitored.

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



Judge Akua Kuenyehia
Single judge

Dated this Thursday 27 March 2008

At The Hague, The Netherlands