

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **20 July 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

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

Confidential

Ex parte, only available to the Office of the Prosecutor, the Defence for Mathieu
Ngudjolo and the Registry

**Decision on the Defence Request relating to the Registrar's Third Report
on the Monitoring of Mathieu Ngudjolo's Communications**

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 the Defence of Germain
Katanga**

**Counsel for the Defence of Mathieu
Ngudjolo Chui**

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

Legal Representatives of the Victims

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

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber II of the International Criminal Court ("the Chamber" and "the Court" respectively), acting pursuant to articles 67 and 68 of the Rome Statute ("the Statute"), rule 81 of the Rules of Procedure and Evidence ("the Rules") and regulations 23 and 35 of the Regulations of the Court, decides as follows:

1. On 8 June 2009, the Registrar submitted to the Chamber her initial report on the monitoring of Mathieu Ngudjolo's non-privileged communications.¹ This document was submitted further to the Registry's decision filed on 12 February 2009 ordering the *post factum* monitoring of the accused's telephone conversations since 1 October 2008 and the active monitoring of his future telephone communications for a period of 14 days.²
2. By oral decision of 9 June 2009, the Chamber gave leave for the Report to be disclosed to the Prosecutor.³ On 12 June 2009, the Prosecutor submitted to the Chamber an urgent request under regulation 101(3) of the Regulations of the Court *inter alia* to prohibit any contact between Mathieu Ngudjolo and the outside and to separate him from the other detainees.⁴
3. Acting pursuant to the aforementioned regulation 101(3), the Chamber informed Mathieu Ngudjolo of that request so that he could submit any observations. It also adopted provisional measures prohibiting any contact with the outside,

¹ Registry, "Registrar's initial report on the monitoring of Mathieu Ngudjolo Chui's non-privileged communications further to the Registrar's decision of 12 February 2009", 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp-tENG. See also: Registry, "Enregistrement au dossier des versions expurgées du Rapport du Greffier du 8 juin 2009 (ICC-01/04-01/07-1195-Conf-Exp) et du Mémoire de l'Accusation du 11 juin 2009 (ICC-01/04-01/07-1200-Conf-Exp)", 19 June 2009, ICC-01/04-01/07-1233-Conf-Exp Annexes 1 and 2.

² Registry, "Registrar's Decision on the Monitoring of Non-privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui", 12 February 2009, ICC-01/04-01/07-894-Conf-Exp.

³ ICC-01/04-01/07-T-66-CONF-EXP-ENG ET 09-06-2009, p. 39, lines 11 to 15.

⁴ Office of the Prosecutor, "Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the Regulations of the Court to Prohibit Mathieu Ngudjolo's Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees", 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp-tENG. See also ICC-01/04-01/07-1233-Conf-Exp.

including incoming and outgoing mail, telephone calls and visits, as well as any contact with his co-detainees.⁵

4. By decision of 24 June 2009, the Chamber took various measures to suspend Mr Ngudjolo's telephone conversations with the contacts registered by the Registry, to regulate the conditions for sending and receiving mail, to prohibit all visits and to separate the accused from persons detained in the same detention centre.⁶ The Chamber emphasised that each of these measures was ordered on a provisional basis and that it would review the need to maintain them once the Registry had filed a supplementary report on its analysis of the content of the accused's conversations between 31 January and 12 March 2009.⁷ The Chamber furthermore recalled that these various measures did not apply to the accused's Defence team, with the exception, however, of two resource persons, Mr Rock Banga Mateso and Mr Christophe Koli Lopa.⁸

5. The supplementary report on the analysis of telephone conversations during the month of February 2009 was filed on 10 July, in accordance with the Chamber's instructions.⁹ On 16 July 2009, the Chamber also received a third report from the Registrar on the analysis of telephone conversations¹⁰ between 1 and 10 March 2009

⁵ Order Inviting Observations from Mathieu Ngudjolo on Request 1200 of the Prosecutor (Regulation 101(3) of the Regulations of the Court) and Provisionally Prohibiting any Contact between Mathieu Ngudjolo and any other Person with the Exception of his Defence Team, 18 June 2009, ICC-01/04-01/07-1215-Conf-Exp-tENG. On 19 June 2009, this document was reclassified as confidential *ex parte*, only available to the Office of the Prosecutor, Mathieu Ngudjolo's Defence and the Registry. On 23 June 2009, Mathieu Ngudjolo's Defence submitted its observations in accordance with regulation 101(3) of the Regulations of the Court. See Mathieu Ngudjolo's Defence, "Observations sur le Rapport du Greffe et la Requête du Procureur ayant motivé l'ordonnance ICC-01/04-01/07-1215-Conf-Exp du 18 juin 2009 de la Chambre de première instance", 23 June 2009, ICC-01/04-01/07-1238-Conf-Exp.

⁶ Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre, 24 June 2009, ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 33.

⁷ *Ibid.*, paras. 35 and 36.

⁸ *Ibid.*, para. 34.

⁹ *Ibid.*, paras. 33 and 36.

¹⁰ Registry, "Troisième rapport du Greffier sur l'écoute des communications non couvertes par le secret professionnel de Mathieu Ngudjolo Chui suite à la décision du Greffier du 12 février 2009", 16 July 2009, ICC-01/04-01/07-1308-Conf-Exp. See the public redacted version, ICC-01/04-01/07-1312-Conf-Exp, filed on 17 July 2009.

and between 17 and 31 May 2009; the period between 17 March and 17 May 2009 was to be dealt with in subsequent filings.¹¹ The parties were invited to submit their observations on that report by 20 July 2009, the latter having been disclosed to them in redacted form on 17 July 2009 ("the Redacted Third Report").

6. The present Decision will respond to a request which Mathieu Ngudjolo's Defence wished to file prior to submitting its observations ("the Request") and which seeks:

- a finding that the Registry, in making the redactions, failed in its obligation to remain neutral;
- to prohibit the Prosecutor from submitting observations on the redacted version of the document, which it considers to be available to the Defence only and of an internal nature within the meaning of rule 81 of the Rules; and
- additional time for submitting its observations on the Redacted Third Report.¹²

7. Regarding the first argument, concerning the Registry's lack of neutrality, the Chamber notes that the Defence has failed to specify which passages in the Redacted Third Report relate to the preparation of Mr Ngudjolo's Defence and, accordingly, should never have been disclosed to the Office of the Prosecutor. In the absence of information enabling it to give a ruling specifically on this point, the Chamber is therefore unable to conclude that the Registry failed in its obligation to remain neutral. In this regard, the Chamber feels bound to recall that regulation 23 of the Regulations of the Court requires that any document filed with the Court must be sufficiently detailed to enable it to give a ruling in full knowledge of the matters in issue.

8. The Chamber remains unconvinced that the information contained in the Redacted Third Report can be included in the category of documents prepared by

¹¹ ICC-01/04-01/07-1308-Conf-Exp, paras. 1 and 2.

¹² Mathieu Ngudjolo's Defence, "*Demande de la Défense relative au troisième rapport du Greffier sur l'écoute des communications de Mathieu Ngudjolo non couvertes par le secret professionnel (ICC-01/04-01/07-1312-Conf-Exp du 17 juillet 2009)*", 17 July 2009, ICC-01/04-01/07-1316-Conf-Exp.

the Defence in connection with its investigations, in the sense of rule 81(1) of the Rules. On the contrary, it is bound to note that the items of information contained in the Redacted Third Report, and therefore disclosed to the Prosecutor, are not relevant to the accused's defence strategy, as he claims, but rather reflect the methods he uses, the lawfulness of which the Registry is questioning. In this regard, the Registrar limits herself to highlighting the efforts made by Mathieu Ngudjolo to attempt either to identify the Prosecutor's witnesses or to "coach" witnesses shortly before they meet with members of his Defence team. To this end, the Registrar has endeavoured to extract only the passages of conversation deemed most relevant and which, it should be emphasised, are reported mainly in an impersonal style using indirect speech, without reference to names or information allowing identification of the individuals whom the Defence team is seeking to contact or has already met.

9. The Chamber would point out that the Registrar, in her implementation of the redaction procedure, has once again, as the Defence has also emphasised,¹³ adhered strictly to her obligation to remain neutral and made efforts to strike a fair balance between the necessary protection of the victims and witnesses vis-à-vis the Defence on the one hand, and the lawful preservation, vis-à-vis the Prosecutor, of the rights of the Defence to conduct its investigations in complete discretion. The Chamber emphasises in this regard that the redactions proposed were moreover reviewed by it beforehand.

10. In light of these considerations, the Chamber does not wish to call into question either the disputed transmission to the Prosecutor of the redacted report on 17 July 2009 or its request to him to submit observations.

11. Nor does the Chamber consider it necessary to extend the time limit for responding to the Redacted Third Report, which is set at 4 p.m. on 20 July 2009, since

¹³ Mathieu Ngudjolo's Defence, "*Observations de la Défense relatives au Deuxième Rapport du Greffier sur l'écoute des communications de Mathieu Ngudjolo non couvertes par le secret professionnel (ICC-01/04-01/07-1299-Conf-Exp du 14 juillet 2009)*", 17 July 2009, ICC-01/04-01/07-1313- Conf-Exp, para. 14.

the Defence has not provided it with any material enabling it to assess whether in this case there are any valid grounds for an extension of the time limit under regulation 35 of the Regulations of the Court.

12. The Chamber takes note, however, of the wishes expressed by Mathieu Ngudjolo's Defence concerning subsequent reports on the analysis of his telephone conversations. Mr. Ngudjolo's Defence considers that these reports "[TRANSLATION] should not be disclosed to the Office of the Prosecutor without prior consultation with the Defence"¹⁴ in order to avoid any "[TRANSLATION] intrusion" by the Office of the Prosecutor "[TRANSLATION] in the preparation of its case". The Chamber deems such a concern to be legitimate and considers that in future the Registry must, when in doubt and where it considers it essential to do so, consult with the Defence before proposing any redactions, in order to invite any observations or proposals that the Defence may wish to make.

¹⁴ ICC-01/04-01/07-1316-Conf-Exp, para. 19.

FOR THESE REASONS, THE CHAMBER

DISMISSES the Request; and

INVITES the Registrar to consult with Mathieu Ngudjolo's Defence in the event of any redaction procedures which she considers it necessary to implement when filing her future reports.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed 20/7/09]

Judge Hans-Peter Kaul

Dated this 20 July 2009

At The Hague, The Netherlands