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

Date: **30 June 2011**

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 Document

Order on the Application by the Defence for Mathieu Ngudjolo requesting the Chamber to obtain the recording of a statement made by Mr Ntumba Luaba to Radio France Internationale

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Mr Éric MacDonald

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Council 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
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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Victims and Witnesses Unit

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 57(3)(b), 61(11), 64(2), 64(6)(a) and 67(1) of the Rome Statute (“the Statute”) and rule 116 of the Rules of Procedure and Evidence, orders as follows.

I. BACKGROUND

1. Application of Mathieu Ngudjolo

1. On 25 May 2011, the Defence for Mathieu Ngudjolo (“the Defence”) prayed the Chamber to intervene for the purposes of obtaining an archival recording from Radio France Internationale (“RFI”). This was a recording of comments apparently made by Mr Ntumba Luaba, then human rights minister of the Democratic Republic of the Congo (“DRC”), about the Bogoro attack of 24 February 2003, in the days following the event.¹

2. The Chamber fixed a time limit of 10 June 2011 for the parties to submit their observations.² The Defence for Mathieu Ngudjolo set forth further arguments in a supplemental submission filed on 30 May 2011³ (hereinafter referred to jointly with the main submission as “the Application”).

¹ Defence for Mathieu Ngudjolo, “*Requête de la Défense de Mathieu Ngudjolo afin de solliciter de la Chambre de demander la bande d’enregistrement de la déclaration de Monsieur Ntumba Luaba à Radio-France Internationale en février 2003 sur l’attaque de Bogoro*”, 25 May 2011, ICC-01/04-01/07-2957.

² E-mail from the Chamber to the parties and the participants, 25 May 2011 at 18.59.

³ Defence for Mathieu Ngudjolo, “*Arguments complémentaires de la Défense de Mathieu Ngudjolo à sa requête numéro ICC-01/04-01/07-2957 du 25 mai 2011 intitulée ‘Requête de la Défense de Mathieu Ngudjolo afin de solliciter de la Chambre de demander la bande d’enregistrement de la déclaration de Monsieur Ntumba Luaba à Radio-France Internationale’*”, 30 May 2011, ICC-01/04-01/07-2969.

3. The Defence explained that the Application resulted from Witness Ndjabu Ngabu's reference during the 6 April 2011 hearing to the radio interview in question.⁴ In its view, the comments made by Congolese government spokesperson Minister Ntumba Luaba support the argument that the Accused were not responsible for planning the Bogoro attack.⁵

4. To obtain this recording, the Defence for Mathieu Ngudjolo approached the RFI archives department, which refused to provide it, stating that it now only considers requests made by judges.⁶

5. The Defence maintains that hearing this recording is useful for the ascertainment of the truth and will enable the Chamber to make an informed ruling.⁷ It based its request on articles 64(6)(b), 64(6)(d) and 69(3) of the Statute, which vest the Chamber with the power to order the production of evidence.⁸ It argued further that fairness of the proceedings and the proper administration of justice demand that the Chamber require RFI to produce the recording.⁹

2. Observations of the Office of the Prosecutor

6. The Prosecutor filed a submission in response on 10 June 2011.¹⁰ He takes the view that, in spite of the absence of an explicit reference to this effect, the Application constitutes a late request for an unjustified amendment to the list of evidence in light of regulation 35(2) of the Regulations of the Court and, accordingly,

⁴ ICC-01/04-01/07-2957, paras. 1 and 2.

⁵ *Ibid.*, para. 3; ICC-01/04-01/07-2969, para. 10.

⁶ ICC-01/04-01/07-2957, para. 4.

⁷ *Ibid.*, para. 7.

⁸ ICC-01/04-01/07-2969, paras. 5-7.

⁹ *Ibid.*, paras. 8-9 and 11-12.

¹⁰ Office of the Prosecutor, "*Observations de l'Accusation sur la Requête de la Défense de Mathieu Ngudjolo afin de solliciter de la Chambre de demander la bande d'enregistrement de la déclaration de Monsieur Ntumba Luaba à Radio-France Internationale en février 2003 sur l'attaque de Bogoro* (ICC-01/04/01/07-2957)", 10 June 2011, ICC-01/04-01/07-3009.

should be denied.¹¹ He recalled that the party must demonstrate the existence of *exceptional circumstances*, which the Defence is unable to do in this instance.¹²

7. The Prosecutor pointed out that Mr Ndjabu Ngabu is a witness for both the Accused, and that the Defence has had the opportunity to confer with him and, thereby, to be made aware of Mr Ntumba Luaba's comments.¹³ In any case, he considers that the Defence could have responded when Mr Ndjabu Ngabu's written statement was disclosed by the Defence for German Katanga on 21 March 2011 or during the 6 April 2011 hearing.¹⁴

8. He recalled that, despite its lateness, the new evidence introduced could be adduced if it were shown to be useful for the ascertainment of the truth, providing it is demonstrated that it is more convincing than the evidence already disclosed or that it reveals an important and hitherto unknown fact pertaining to the case.¹⁵ However, this is not the case, in his view, since not only did Mr Ndjabu Ngabu mention these comments in his preliminary statement, but Witness Pitchou Iribi also referred to them.¹⁶

9. Moreover, the Prosecutor noted that the submission of the Defence for Mathieu Ngudjolo in respect of Ugandan and Congolese government involvement is not touched upon in Mr Ntumba Luaba's radio interview.¹⁷ Lastly, he submitted that the Chamber could order the presentation of the recording if, once the Defence teams have finished presenting their evidence, it considers such presentation necessary for the ascertainment of the truth.¹⁸

¹¹ ICC-01/04-01/07-3009, paras. 5 and 8.

¹² *Ibid.*, paras. 12 and 13.

¹³ *Ibid.*, paras. 14 and 15.

¹⁴ *Ibid.*, para. 16.

¹⁵ *Ibid.*, paras. 18 and 19.

¹⁶ *Ibid.*, para. 22.

¹⁷ *Ibid.*, paras. 20 and 21.

¹⁸ *Ibid.*, paras. 5 and 24-25.

3. Observations of the Legal Representative of the victims

10. On 10 June 2011, the Chamber received the observations of the common Legal Representative of the main group of victims (“the Legal Representative”).¹⁹ The Legal Representative sees no impediment to the Chamber’s assisting the Defence for the purposes of obtaining the audio recording from RFI.²⁰ However, he notes that, in spite of its ambiguity, the Application amounts to a request for the admission of this recording as evidence; the recording would, in this case, constitute testimony given in audio form.²¹

11. The Legal Representative pointed out that such a procedure would be a departure from the principle of *viva voce* hearings enshrined in article 69(2) of the Statute and in a recent decision of the Appeals Chamber.²² He recalled that prudence must be exercised in granting exceptions, which must take into account the rights of the Accused and the fairness of the trial, as provided for in article 69(4) of the Statute,²³ and he noted that, in the present instance, the Defence has been unable to provide justification for its application.²⁴ Consequently, in his view, if the intention of the Application is to have the recording admitted, *ipso facto*, as evidentiary material, then it must be denied.²⁵

II. DISCUSSION

12. The scope of the Application does not appear to be clearly defined, inasmuch as, on the one hand, the Chamber’s assistance is sought for the purposes of obtaining an archival recording from RFI and, on the other, it is based on the Chamber’s vested powers to order the presentation of evidence, implying that the Defence is intending,

¹⁹ Common Legal Representative of the main group of victims, “*Observation sur la requête de la Défense de Mathieu Ngudjolo visant à obtenir la bande d’enregistrement de la déclaration de Monsieur Ntumba Luaba à Radio-France Internationale en février 2003 sur l’attaque de Bogoro*”, 10 June 2011, ICC-01/04-01/07-3010.

²⁰ *Ibid.*, para. 7.

²¹ *Ibid.*, paras. 8-11 and 14.

²² *Ibid.*, para. 12.

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, para. 15.

²⁵ *Ibid.*, p. 6.

beyond the prescribed time limit, to add the audio recording to the list of material it plans to present.

13. The Chamber notes that this recording was not submitted to it and that the Defence is itself not fully aware of its contents. Accordingly, it considers that it is not appropriate, in the circumstances, to authorise an addition to the Defence's list on the basis of regulation 35(2) of the Regulations of the Court. It notes, moreover, that such a request has been neither specifically made nor justified.

14. Accordingly, in accordance with article 57(3)(b) of the Statute, the Chamber will only act on the request for assistance submitted by the Defence for Mathieu Ngudjolo for the purposes of obtaining a document that it would otherwise be unable to procure.

15. In this connection, the Chamber notes that the Defence is of the opinion that Mr Ntumba Luaba's comments will serve to support the case that it intends to make regarding the events before the Chamber. It notes that these appear indeed to be comments made publicly by a representative of the Government of the DRC in regard to the Bogoro attack of 24 February 2003 immediately following this event. Therefore, the Chamber considers that this evidence could be necessary for the preparation of Mathieu Ngudjolo's defence.

16. The Defence has sought to obtain the relevant audio excerpt via the normal channels, but it was refused by the legal department of the radio station in question. Thus, desirous of enabling the Defence to prepare itself in all fairness and with the necessary means at its disposal, the Chamber will assist it in its efforts. Therefore, it requests RFI to assist the Court by acceding to the request made by the Defence for Mathieu Ngudjolo.

FOR THESE REASONS, the Chamber,

REQUESTS Radio France Internationale to accede to the Application of the Defence for Mathieu Mgudjolo; and

ORDERS the Registry to provide the Defence for Mathieu Ngudjolo with a certified true copy of this decision.

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 30 June 2011

At The Hague, The Netherlands