



Original: **French**

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

Date: **18 June 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 Registry and the Office of the Prosecutor

**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**

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, 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**

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

Mr Simo Vaatainen

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

The Presidency

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”) and regulations 23*bis* and 101 of the *Regulations of the Court* orders as follows:

1. On 8 June 2009, the Registrar submitted her first report on the listening to Mathieu Ngudjolo’s non-privileged telephone communications (“the Report”) to the Chamber.¹ This document follows the Registry’s decision dated 12 February 2009, ordering the post-factum listening to his telephone conversations since 1 October 2008 as well as the active monitoring, for a period of 14 days, of any telephone conversations that he might have.²

2. By oral decision of 9 June 2009, the Chamber authorized the disclosure of the Report to the Prosecutor.³ On 12 June 2009, the latter submitted an urgent brief based on regulation 101(3) of the *Regulations of the Court* to the Chamber for the purpose of, *inter alia*, prohibiting all contact between Mathieu Ngudjolo and the outside and separating him from the other detained persons (“the Request”).⁴

3. Pursuant to the above-mentioned regulation 101(3), the Chamber must inform Mathieu Ngudjolo of the existence of this Request so as to enable him to provide observations, if any.

4. To enable the Report and the Request to be disclosed as expeditiously as possible to the accused, the authors thereof must first urgently undertake those

¹ Registry, “*Premier 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*”, 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp.

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, line 11 to 15.

⁴ Office of the Prosecutor, “*Mémoire urgent de l’Accusation, en application de la norme 101-3 du Règlement de la Cour, aux fins d’interdiction des contacts de Mathieu Ngudjolo avec l’extérieur et de séparation de Mathieu Ngudjolo d’avec les autres détenus*”, 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp.

redactions considered necessary for the protection of the victims and witnesses' safety within the meaning of article 68 of the Statute under the Chamber's scrutiny.

5. Nevertheless, it is appropriate to emphasise that the extent of the interference with the rights of the accused require such redactions to be as limited as possible so as to allow him and his Counsel to provide meaningful observations and thereby fully exercise the rights of the Defence. In this respect, it is clear to the Chamber that essentially, the redactions envisaged must pertain solely to the names of protected witnesses and of intermediaries mentioned in the Report and the Request and that the content of the conversations at issue must, in principle, be preserved.

6. Also, there is the issue as to whether the Chamber may transmit this Report and Request without immediately taking provisional restrictive or even prohibition measures, within the meaning of regulation 101 of the *Regulations of the Court*. In fact, paragraph 3 allows the Chamber to issue an order prior to the detained person being informed of the Prosecutor's request "[i]n exceptional circumstances such as in an emergency".

7. If, in the instant case, it became apparent that the accused person was exerting pressure on certain witnesses – which cannot be conclusively ascertained by the Chamber at this stage – Mathieu Ngudjolo, with information about the Chamber's probable intervention, could be tempted to actively continue or even increase his contact with the outside and the other detained persons upon receipt of the documents in question. However, under article 68(1) of the Statute, the Chamber is under the obligation to take all necessary measures to protect the safety of the witnesses and to prevent any interference with them, if foreseeable, which is clearly the case here. In view of this, it reviewed objective pieces of information of concern, obtained from the Registry's Report and based on the report on the post-factum listening to telephone conversations between 1 October 2008 and 31 January 2009 between the accused person and persons residing in the Democratic Republic of the Congo.

8. It is clear to the Chamber that, despite being aware, since 12 February 2009, that his conversations other than those with his Defence team could be listened to, the accused person is likely to have used, in communicating both with the outside and within the Detention Centre, [REDACTED], all the means of communication available to him in order to potentially exert influence over testimony. In light of such a finding and the conclusions the Registry has drawn from its own observations, the Chamber considers that in the instant case, the “exceptional circumstances”, requiring provisional restrictive or prohibition measures to be promptly taken, have been met.

9. Nevertheless, it considers that these measures can only be of short duration and cannot continue beyond the time given to Mathieu Ngudjolo’s Defence to present its observations and which is necessary for the Chamber to issue a reasoned decision on the merits, particularly in consideration of the said observations.

10. As matters now stand, pending the further and imminent consideration of the absolute need for such an interference with the rights of the accused, the requisite provisional measures can therefore only consist of prohibiting any external contact, be it incoming or outgoing mail, telephone calls, visits or contact with his fellow detained persons.

11. With respect to the last point, the Chamber invites the Chief Custody Officer, whilst ensuring that Mathieu Ngudjolo does not meet with his fellow detained persons, to take any measure, specifically to keep him in the cell he currently occupies, facilitate his access to communal and exercise areas and enable him to access the record of the case via Ringtail. The Chamber further notes that these provisional prohibition measures must not affect Mathieu Ngudjolo’s Defence Team which consists of Mr Jean-Pierre Kilenda Kakengi Basila, Mr Jean-Pierre Fofé Djofia Malewa, Ms Maryse Alié and Ms Aurélie-Gaëlle Roche, to the exclusion, however, of the two resource persons: Mr Rock Banga Mateso and Mr Christophe Koli Lopa.

FOR THESE REASONS, THE CHAMBER

- 1) **DIRECTS** the Registrar, before 4 p.m. on 19 June 2009, to reclassify this order as a confidential *ex parte* document, only available to the Office of the Prosecutor, Mathieu Ngudjolo's Defence and the Registry;
- 2) **DIRECTS** the Registrar to notify this order to Mathieu Ngudjolo before 4 p.m. on 19 June 2009;
- 3) **DIRECTS** the Registrar to implement, before 4 p.m. on 19 June 2009, at the time of the notification of this order, the prohibition measures mentioned at paragraphs 10 and 11 of this order until further order of the Chamber;
- 4) **ORDERS** the Prosecutor and the Registry, after having consulted with one another, to suggest to the Chamber any redactions to the Report and the Request that they consider fit by no later than 4 p.m. today, 18 June 2009;
- 5) **GIVES NOTICE** that before 4 p.m. on 19 June 2009, the Chamber itself will file with the Registry the confidential *ex parte* versions of these two documents which will only be available to the Office of the Prosecutor, Mathieu Ngudjolo's Defence (excluding Germain Katanga's Defence) and the Registry; and
- 6) **DIRECTS** Mathieu Ngudjolo's Defence to file its observations on the Report and the Request by no later than 4 p.m. on 23 June 2009, as of which date the Chamber will be in a position to rule on the merits of the Request.

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

[signed]

Judge Bruno Cotte

Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 18 June 2009

At The Hague, The Netherlands