

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Date: 20 July 2009

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

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***

PUBLIC REDACTED DOCUMENT

Public redacted version of "Prosecution's Observation on Registry's Second and Third Reports on the Analysis of the Telephone Conversations of Mathieu Ngudjolo", ICC-01/04-01/07-1321-Conf-Exp, 20 July 2009

Source: Office of the Prosecutor

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

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**The Office of Public Counsel for the
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**Victims Participation and Reparations
Section**

Other

On 14 July 2009, the Registry filed its second report on the analysis of the telephone conversations of Mathieu Ngudjolo from the Detention Centre ("Second Report").¹ On 17 July 2009, the Registry filed its third report on the analysis of the telephone conversations of Mathieu Ngudjolo ("Third Report").² That same day, Trial Chamber II (the "Chamber") instructed the Prosecution and the Defence team of Mathieu Ngudjolo to submit combined observations on the Second and Third Report by 20 July 2009.³ The Prosecution hereby submits its observations ("Observations").

The Prosecution did not receive unredacted copies of the Second and Third Report, so its Observations respond only to the redacted Reports. Additionally, the Prosecution submits that the Second and Third Reports should not be read in isolation. These Reports are the continuity of the analysis of the telephones calls as submitted in the first report of the Registry.

Request for the Receipt of this Filing as Confidential *Ex Parte*

The Prosecution requests these Observations be received by the Chamber as Confidential, *ex parte*, only available to the Office of the Prosecutor, the VWU and Defence Team of Mathieu Ngudjolo since the Report as the same confidentiality level.

Prosecution's Observations

1. After receiving a Report from the Registry ("First Report") on Mathieu Ngudjolo's telephone conversations, on 12 June 2009 the Prosecution applied to the Chamber for an order directing the separation of Mathieu Ngudjolo

¹ ICC-01/04-01/07-1299-Conf-Exp.

² ICC-01/04-01/07-1312-Conf-Exp.

³ The instructions were received by way of an email from the Chamber.

from the other detainees at the Detention Centre and prohibiting contacts with persons living outside of the Detention Centre.⁴

2. On 24 June 2009, the Chamber decided, on a provisional basis, to separate Mathieu Ngudjolo from the other detainees and also prohibited all contacts with the outside, including two Congolese investigators working for his defence team in Ituri.⁵
3. The Second and Third Reports confirm the information analysed and provided by the Registry in its First Report.⁶ The Reports demonstrate serious interferences by Mathieu Ngudjolo with the course of justice. The Prosecution would also remind the Chamber that even though Mathieu Ngudjolo knew that his conversations were being recorded he continued via third parties to seek the location and names of witnesses interviewed by the Prosecution and/or to influence the possible testimony of witnesses to be interviewed by his own Defence team.
4. The Report appears to reveal, amongst others :
 - The violation of confidentiality orders of the Court;⁷
 - The possible attempt to identify witnesses;⁸
 - The possible attempt to interfere with the parents or family members of possible witnesses;⁹

⁴ ICC-01/04-01/07-1200-Conf-Exp, reclassified see ICC-01/04-01/07-1233-Conf-Exp.

⁵ ICC-01/04-01/07-1243-Conf-Exp.

⁶ ICC-01/04-01/07-1233-Conf-Exp-Anxl.

⁷ See Second Report, paras. 6 and 10. See also ICC-01/04-01/07-1196-Conf-Exp.

⁸ Second Report, footnote 24.

⁹ Second Report, para. 10 and footnote 21.

- The collusion of Mathieu Ngudjolo and Germain Katanga in relation to the *Front Congolais pour la Justice au Congo* ("FPJC").¹⁰ As the Chamber is aware, the FPJC is a militia group that has brought about important security and political instability in Ituri in the fall of 2008 and is still active in the Walendu Bindi area;¹¹
 - A conversation with the investigator (*personne resource*) of Thomas Lubanga and possible transmission of confidential information to him;¹²
5. The Second Report also reveals that the telephone numbers assigned to a given person (i.e. [REDACTED]) are in fact being used by other callers (i.e. [REDACTED]) thus circumventing the calling procedure put in place at the Detention Centre.¹³ This also demonstrates a willingness not to respect the rules of the Detention Centre.
6. The Third Report clearly demonstrates, amongst others:
- That Mathieu Ngudjolo via third parties "prepares" the testimony of witnesses to be interviewed by his own Defence Team;¹⁴
 - That Mathieu Ngudjolo knowingly changes languages when discussing witnesses to avoid detection;¹⁵
 - That Mathieu Ngudjolo seeks to covertly identify or obtain information on witnesses interviewed by the Prosecution or Prosecution trial witnesses;¹⁶

¹⁰ Second Report, para. 11.

¹¹ <http://www.alertnet.org/thenews/newsdesk/UNHCR/5d3a3690dc8fef505aa6633cd5226e9d.htm>; see also <http://aru-territoire.blogspot.com/2009/05/ituri-negociations-autorites-fpic.html>.

¹² See Second Report, footnote 18.

¹³ Second Report par. 8.

¹⁴ Third Report, par. 3, 9, 10 and 11; see also footnote 44.

¹⁵ Third Report, par. 4.

¹⁶ Third Report, par. 5; see also footnotes 24 and 25.

- That Mathieu Ngudjolo selected his second investigator (*personne ressource*) because of his capacity to covertly access and “prepare” or influence witnesses;¹⁷
 - That this investigator is being tasked to locate and/or identify witnesses interviewed by the Prosecution;¹⁸
 - That information is being exchanged among Mathieu Ngudjolo and Thomas Lubanga and Lubanga’s registered investigator.¹⁹
7. As a result, the Prosecution respectfully requests that the Chamber permanently order the separation of Mathieu Ngudjolo and prohibit all contacts (in any form) with the outside except for family members, as set out below.
8. The Prosecution agrees with the Registry’s proposal in relation to the telephone conversation between Mathieu Ngudjolo and his wife and/or children, but would request the additional conditions:
- The active or live monitoring of the telephone conversations with family members. That the conversation be in Lingala/Swahili to enable a qualified interpreter to follow the conversation;
 - A prohibition against the parties’ discussion of any facts of the case; and
 - The immediate termination of the call if a coded language or language other than Lingala or Swahili is used or if the parties discuss any facts of the case.

¹⁷ Third Report, footnotes 17 and 18.

¹⁸ Third Report, par. 7 and corresponding footnotes. The person identified as [REDACTED] is witness 314. P-314 was interviewed by the Office of the Prosecutor in November 2008 and his interview disclosed in PEXO package 26 on 14 May 2009 (see disclosure report ICC-01/04-01/07-1137).

¹⁹ Third Report, par. 17 and 18.

9. The Prosecution believes that these measures are warranted because of the role played by the wife of Mathieu Ngudjolo in the efforts to, inter alia, intimidate witnesses, a role already recognised by the Chamber.²⁰
10. The Prosecution submits that the permanent separation from the other detainees and permanent prohibition of contacts are necessary measures to ensure:

*[L]'absolue nécessité d'éviter que le déroulement de la procédure soit entravé et de protéger les témoins et leurs proches de toute éventuelle pression ou mesure d'intimidation. Toutes ces mesures sont absolument nécessaires pour mettre un terme aux agissements constatés, et selon la Chambre, proportionnées à l'objectif légitime poursuivi.*²¹

11. The Prosecution also requests that Mathieu Ngudjolo and his Defence team be prohibited from communicating with Rock Banga Mateso and Christophe Koli Lopa, the two *personnes ressources* currently associated with his Defence team. These measures are necessary because of the central role these two individuals played or are playing in identifying Prosecution witnesses for the purpose of intimidating them; influencing them to not cooperate or testify or to change their statements.
12. The Prosecution submits that the same prohibition should also apply to the investigator of Thomas Lubanga. Mathieu Ngudjolo and his Defence Team should be prohibited from communicating with [REDACTED] for the reasons outlined above.

²⁰ ICC-01/04-01/07- 1243-Conf-Exp, par. 27.

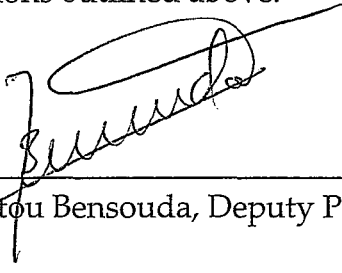
²¹ ICC-01/04-01/07- 1243-Conf-Exp, par. 35.

13. The Prosecution also requests that the three reports of the Registry be reclassified as Confidential, *ex parte* also available to the Defence team of Germain Katanga. The Reports reveals relevant information that may be material to the preparation of the defence of Germain Katanga, which the Prosecution is obliged to disclose pursuant to Rule 77.
14. The Prosecution also requests the Chamber to instruct the Registry to monitor, post-factum, the previously-recorded and non-privileged telephone conversations of Germain Katanga from 1 December 2008 to 28 February 2009 pursuant to Regulation 175(1) of the Regulation of the Registry.
15. Finally, the Prosecution would need to inform Trial Chamber 1 of the three reports of the Registry since they suggest, amongst other violations, the exchange of confidential information between Mathieu Ngudjolo and Thomas Lubanga that may affect the Lubanga proceedings.²² For that purpose, the Prosecution requests the issuance of an order that both reports be filed before Trial Chamber I as Confidential, *ex parte* only, available to the Office of the Prosecutor and the VWU.

²² Second Report footnotes 12 and 14, see additionally footnote 25. Third Report, par. 17 and 18.

Conclusion

16. The Prosecution requests the Chamber to make permanent the separation of Mathieu Ngudjolo from the other accuseds and the prohibition of all contacts with the outside, with the exception of conversations with family members subject to the conditions outlined above.



Eatou Bensouda, Deputy Prosecutor

Dated this 20th day of July 2009

At The Hague, The Netherlands