

ANNEX 10

Confidential ex parte available to the Registry, Prosecutor and Defence of Mr Ngudjolo only

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

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

Date: **14 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 of Mathieu
Ngudjolo Chui and the Registry***

**Decision on the Appeals by the Prosecutor and
the Defence of Mathieu Ngudjolo Chui against Decision 1243 of 24 June 2009**

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 Eric 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 Victims

Legal Representatives of 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
Mr Anders Backman

Victims Participation and Reparations Section

Other
Presidency
Appeals Chamber

Trial Chamber II of the International Criminal Court ("the Chamber" and "the Court" respectively), acting pursuant to article 81(2)(d) of the *Rome Statute* ("the Statute") decides as follows:

1. On 8 June 2009, the Registrar submitted her first report on the monitoring of Mathieu Ngudjolo's non-privileged communications ("the Report")¹ to the Chamber. This document follows on from the Registry's decision filed on 12 February 2009 ordering the post factum monitoring of his telephone conversations since 1 October 2008 and the active surveillance of his future telephone communications, for a period of 14 days.²
2. In its oral decision of 9 June 2009, the Chamber gave leave for the Report to be disclosed to the Prosecutor.³ The Prosecutor submitted an urgent motion based on regulation 101(3) of the *Regulations of the Court* to the Chamber on 12 June 2009 to prohibit any contact between Mathieu Ngudjolo and the outside and to isolate him from the other detainees ("the Motion").⁴
3. Pursuant to the afore-mentioned regulation 101(3), the Chamber informed Mathieu Ngudjolo of the existence of the said Motion so that he could submit any observations. It also applied provisional measures prohibiting any contact with the

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. 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 11-15.

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 la séparation de Mathieu Ngudjolo d'avec les autres détenus", 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp. See also ICC-01/04-01/07-1233-Conf-Exp.

outside, be it incoming or outgoing mail, telephone calls or visits and any contact with his co-detainees.⁵

4. On 23 June 2009, Mathieu Ngudjolo's Defence team submitted observations pursuant to the afore-mentioned regulation 101(3)⁶ and the Chamber rendered its decision on 24 June.⁷ Pursuant thereto, the Chamber temporarily restricted Mathieu Ngudjolo's incoming and outgoing mail to his family only and ordered all his mail to be monitored; it prohibited all telephone communications and all visits and ordered that he be separated from his co-detainees. However, these measures did not apply to communications with his Defence team. Furthermore, the Chamber refused to authorise the disclosure to the Prosecutor of the recordings of the telephone conversations referred to in the Registrar's Report and the list of telephone contacts and the Annex to the said Report referring thereto.

5. This decision was the subject of two separate applications for leave to appeal submitted respectively by the Prosecutor⁸ ("Prosecutor's Application") and Mathieu Ngudjolo's Defence ("Mathieu Ngudjolo's Application").⁹ A response was filed for each of the applications.¹⁰

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.

⁶ 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.

⁷ 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-01/04-01/07-1238-Conf-Exp.

⁸ Office of the Prosecutor, "Prosecution's Application for Leave to Appeal the 'Décision sur la Requête 1200 du Procureur aux fins de mesures d'interdiction et de restriction de contacts avec l'extérieur comme au sein de l'établissement pénitentiaire contre Mathieu Ngudjolo'", 30 June 2009, ICC-01/04-01/07-1254-Conf-Exp.

⁹ Mathieu Ngudjolo's Defence Team, "Demande d'autorisation d'interjeter appel contre la décision de la Chambre de première instance II N°ICC-01/04-01/07-1243-Conf-Exp du 24 juin 2009", 30 June 2009, ICC-01/04-01/07-1255-Conf-Exp.

¹⁰ Mathieu Ngudjolo's Defence, "Réponse de la Défense de Mathieu Ngudjolo à la Demande d'Autorisation d'Interjeter Appel 1254-Conf-Exp du Procureur", 6 July 2009, 01/04-01/07-1268-Conf-Exp; Office of the

I. Examination criteria

6. In conducting its analysis of the two Applications, the Chamber intends to apply the criteria of article 82(1)(d) of the Statute, as clarified by the Appeals Chamber in its judgment of 13 June 2006.¹¹ It must therefore determine the following:

- 1) Whether the issue in question constitutes an appealable “issue”;¹²
- 2) If so, whether this issue is apt to “significantly affect”, i.e. in a material way;¹³ either the fair and expeditious conduct of the proceedings¹⁴ or the outcome of the trial;¹⁵ and
- 3) Whether the immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings.¹⁶

7. The Chamber recalls the position adopted by several Chambers of the Court, whereby the mere fact that an issue is of general interest or that it can be raised in future pre-trial or trial proceedings is not sufficient to warrant the granting of leave to appeal.¹⁷ Leave to file interlocutory appeals against decisions should therefore be granted only in exceptional circumstances.¹⁸ The Chamber emphasises moreover that

Prosecutor, “Prosecution’s Response to Defence ‘Demande d’autorisation d’interjeter appel contre la décision de la Chambre de première instance II N°ICC-01/04-01/07-1243-Conf-Exp du 24 juin 2009’”, 6 July 2009, 01/04-01/07-1270-Conf-Exp.

¹¹ Appeals Chamber, *Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006, 01/04-168, paras. 9 to 20.

¹² 01/04-168, para. 9.

¹³ *Ibid.*, para. 10.

¹⁴ *Ibid.*, paras. 11 and 12.

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, paras 14-19.

¹⁷ See, for example, Trial Chamber I, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008*, 26 February 2008, ICC-01/04-01/06-1191, para. 11.

¹⁸ *Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009*, 6 March 2009, ICC-01/04-01/07-946, para. 11. See also, for example, Pre-Trial Chamber II, *Decision on Prosecutor’s Application for leave to appeal in part Pre-Trial Chamber II’s decision on the Prosecutor’s Application for warrants of arrest under article 58*, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 19 (this decision was made public pursuant to a decision rendered on 13 October 2005, ICC-02/04-01/05-52).

these criteria are cumulative and failure to meet one of them means that the application cannot be granted.

II. Prosecutor's Appeal

a. Does the issue raised constitute an "issue" within the meaning of article 82(1)(d) of the Statute?

8. The issue raised by the Prosecutor is as follows:

Whether the Chamber erred in denying to the Prosecution access to the Accused's contacts, the Annex to the Report identifying these contacts and pertinent recordings of his routinely monitored phone conversations, in which he threatened witnesses, urged others to threaten witnesses, or solicited false exculpatory evidence, where the list of contacts, the contacts' identities and recordings are necessary to investigate potential obstruction of justice under Article 70 and to impeach or cross-examine witnesses at the upcoming criminal trial.¹⁹

9. The Chamber recalls that an issue "is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one."²⁰

10. In its decision the Chamber stated the following:

The Chamber recalls that the requested recordings of the conversations obtained thanks to the passive monitoring measures were ordered by the Registry on the basis of regulations 174 and 175 of the *Regulations of the Registry* for the sole purpose of ensuring that the communication facilities provided to the accused were being used appropriately. Therefore, in no way did this interference with the confidentiality of Mathieu Ngudjolo's correspondence seek to facilitate the post factum gathering of new evidence in support of the prosecution. Nor was it ordered by a judicial authority which had expressly decided to retain control thereover. The Chamber considers, that at this stage in the proceedings, the Prosecutor cannot use the content of these conversations to make a determination of the truth. The monitoring measures ordered sought an entirely different aim and their use for the purposes of prosecution could be challenged on the basis of a possible abuse of process and on the ground that the information thus gathered was not equitably obtained.²¹

¹⁹ ICC-01/04-01/07-1254-Conf-Exp, para. 13 (emphasis added).

²⁰ 01/04-168, para. 9.

²¹ ECHR, *Huvig v. France* and *Kruslin v. France*, Judgments of 24 April 1990.

Furthermore, the Chamber specifically notes that none of the texts governing the Court explicitly provide for the possibility of using the recordings ordered on the basis of regulations 174 and 175 of the *Regulations of the Registry* for purposes other than those for which they were laid down. Accordingly, it considers that the recordings of the conversations need not be fully disclosed to the Office of the Prosecutor for their possible use as incriminating or exonerating evidence.²²

It thus held that the Prosecutor could not use the recordings of the conversations and the list of contacts which he was seeking for the purpose of any prosecution, whether in the present case or any prosecution based on article 70 of the Statute, since the surveillance measures ordered by the Registry – rather than a judicial authority – were dictated by an entirely different objective. It did, however, insist on the need to ensure [REDACTED]

[REDACTED] if appropriate.

11. It would appear that the solution to the problem raised in the present case, which is whether the Prosecutor may have access to the recordings of the conversations and to the list of contacts he is seeking, is a crucial pre-condition:

- To determine whether the possibility for the Prosecutor to investigate potential manoeuvres to hinder the administration of justice pursuant to article 70 of the Statute and rule 165 of the Rules depends on this information;
- To decide whether the Prosecutor, the Defence or indeed the Chamber may mention or use all the information contained in the afore-mentioned documents during the hearings on the merits.

12. In the view of the Chamber, this is not simply a [TRANSLATION] “disputed interpretation”²³ or a simple difference of opinion on the applicable law, but an issue within the meaning given to it by the Appeals Chamber.

²² ICC-01/04-01/07-1243-Conf-Exp-tENG, para. 40.

²³ ICC-01/04-01/07-1268-Conf-Exp, para. 13.

b. Does this issue significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial?

13. For the Prosecutor, the issue at stake primarily has an impact on the fairness of the proceedings. His view is that when the trial commences, the witnesses may give false testimony and the judges will be unable to determine the truth if they do not have all the relevant information available.²⁴ The Prosecutor then states that he will not be able to fulfil his role in terms of witness protection if he does not have access to the contacts drawn up by the accused and that he will be unable to effectively present his case.²⁵ Finally, he maintains that the Chamber's decision not to provide him with the information sought "diminishes [his] ability to investigate witness tampering"²⁶ and to use the provisions of article 70(1) of the Statute to bring charges against the accused.

14. Mathieu Ngudjolo's Defence maintains that the Prosecutor's allegations regarding false testimony and the possible infringements of article 70 of the Statute are unfounded and unfair.²⁷ It recalls that the purpose of the decision of the Chamber is to prevent any possible offences by the accused and is in no way based on [TRANSLATION] "confirmed facts".²⁸

15. The Chamber acknowledges that the issue raised by the Prosecutor with regard to whether the information contained in the recordings of telephone conversations and in the list of contacts can be used during the hearings on the merits is likely to have an impact on the outcome of the trial. Whether or not he can use this information, as evidence if appropriate, has a direct impact on determining the truth. The Chamber is of the view that the error it may have made with regard to this issue could have a concrete influence on the outcome of the trial because the use

²⁴ ICC-01/04-01/07-1254-Conf-Exp, para. 20.

²⁵ *Ibid.*, para. 21.

²⁶ *Ibid.*, para. 22.

²⁷ ICC-01/04-01/07-1268-Conf-Exp, paras. 35 to 48.

²⁸ *Ibid.*, para. 39.

of the information in question might mean that the evidence which is currently in the case file is interpreted differently.

16. However, the Chamber considers that the issue raised by the Prosecutor regarding the application of article 70 affects neither the fair and expeditious conduct of the proceedings nor the outcome of the trial. It notes that these are separate proceedings to those which are currently underway involving Germain Katanga and Mathieu Ngudjolo. Moreover, if the Prosecutor did gain access to the relevant documents, there is nothing to indicate at the present time that he would actually initiate a prosecution on the basis of article 70 of the Statute and, even assuming that he were to do so, a decision might be rendered prior to the conclusion of the hearings on the merits given the relative complexity of the proceedings defined by rule 162 *et seq.* of the Rules. The Prosecutor in fact ought to decide to open an investigation on the basis of article 70 of the Statute and call on the Pre-Trial Chamber to confirm all the charges before arguing his case before a trial chamber.

17. The Chamber does not concur with the Prosecutor when he maintains that the concept of the proceedings set out in article 82(1)(d) of the Statute applies to “any subsequent proceedings in this or any other case” and that leave to appeal the decision should be granted automatically given “the potentially detrimental impact of the Decision on the expeditious conduct of an Article 70”.²⁹ When the Appeals Chamber indicates that the term “proceedings” as encountered in the first part of article 82(1)(d) is not confined to the proceedings in hand but also extends to proceedings prior and subsequent thereto.³⁰ This does not mean that interlocutory appeals may consequently be extended to hypothetical proceedings which are, moreover, totally separate from one another. The Chamber understands the argument of the Appeals Chamber to imply only that the term “proceedings” should not be interpreted too narrowly and that it covers all the phases of the proceedings in a same case.

²⁹ ICC-01/04-01/07-1254-Conf-Exp, para. 26.

³⁰ 01/04-168, para. 12.

c. Is the immediate resolution of the issue likely to materially advance the proceedings ?

18. As the Chamber addressed only the issue regarding the use of information contained in the recordings of conversations during the hearings on the merits, it must now endeavour to determine, in this regard only, whether the immediate resolution thereof is likely to materially advance the proceedings. The Prosecutor does not develop any specific arguments in this regard. In fact he focuses his argument on the issue of whether the possibility for him to investigate potential manoeuvres to hinder the administration of justice within the meaning of article 70 of the Statute and rule 165 of the Rules is dependent on the information he seeks.³¹

19. The Appeals Chamber stated that: “[t]he issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.”³²

20. The Chamber concedes that an immediate examination of the issue by the Appeals Chamber will help quickly to resolve issues which have a genuine influence on the smooth running of the trial. A subsequent resolution by the Appeals Chamber, if it were to consider that the Chamber had erred, would only serve to hinder the proper administration of justice given that the use of information likely to help in adducing evidence during hearings on the merits is involved. Independently of any decision which might be taken regarding any possible suspensive effect of the appeal, it is indeed vital for the Appeals Chamber to deliver its judgment “the earliest possible”³³, as required by rule 156(4) of the Rules. It is important to emphasise that in the present case the introduction of both incriminating and

³¹ ICC-01/04-01/07-1254-Conf-Exp, paras. 32, 33 and 34.

³² 01/04-168, para. 14.

³³ *Ibid.*, para. 18.

exculpatory evidence³⁴ is at stake, which must be analysed by the parties and put into perspective in relation to all the information they currently hold, all of which has an obvious impact on the organisation and conduct of the hearings on the merits.

21. For all these reasons, the Prosecutor's Application should be granted.

III. Mathieu Ngudjolo's Appeal

a. Is the issue raised really an "issue" within the meaning of article 82(1)(d) of the Statute?

22. Mathieu Ngudjolo's Defence Team raises two issues:

-[TRANSLATION] The first involves the erroneous legal basis which the Chamber relied on to take the restrictive measures as set out in Decision 1243 against Mathieu Ngudjolo

-The second involves the infringement by the Chamber of the principles of necessity and proportionality of the measures affecting the basic rights of Mathieu Ngudjolo and which jeopardise the proceedings which are in progress.³⁵

23. The Prosecutor is not disputing the fact that the first afore-mentioned issue might constitute an issue within the meaning of article 82(1)(d) of the Statute.³⁶ However, he does feel that in raising the second issue the Defence has misinterpreted the decision rendered by the Chamber and thereby finds itself quite simply at variance with the Chamber's findings.³⁷

24. On the first point, the Chamber emphasises that regulations 201 and 212 of the *Regulations of the Registry* provide for very specific situations, both linked to the need to isolate a detainee for internal disciplinary reasons or on medical grounds. In no way should they be confused with the authority expressly granted to the Chamber by regulation 101 of the *Regulations of the Court* to prohibit or regulate, at the Prosecutor's request, any contact between a detained person and any other person,

³⁴ ICC-01/04-01/07-1200-Conf-Exp, para. 33.

³⁵ ICC-01/04-01/07-1255-Conf-Exp, para. 25.

³⁶ ICC-01/04-01/07-1270-Conf-Exp, para. 13.

³⁷ *Ibid.*, paras. 25 and 28.

on any of the six grounds specifically stated in said regulation. In light of texts which are sufficiently clear and given the Defence's failure to demonstrate the existence of any text which might constitute a better basis, the allegation whereby the Chamber might have rendered a decision on an erroneous legal basis does not constitute an issue within the meaning of article 82(1)(d) of the Statute. It has merely highlighted divergent views regarding the applicable law, as the Appeals Chamber understands it in the afore-mentioned decision of 13 July 2006. Furthermore, the Chamber notes the mere fact that the Defence has challenged the text on which the Chamber based its decision does not constitute an issue on which the Appeals Chamber should be required to rule.

25. On this second point, the Chamber notes that the Defence fails to take into consideration the temporary nature of the measures it has decided upon and recalls that the said measures are likely to be re-assessed. It notes that the Defence limits itself to challenging the findings reached by the Chamber, without however establishing that intervention by the Appeals Chamber is crucial.

b. Conclusion

26. In light of the foregoing, there is no need for the Chamber to examine the other criteria set out in article 82(1)(d) of the Statute.

FOR THESE REASONS, THE CHAMBER

- 1) **DISMISSES** the Prosecutor's Application on the issue of whether the possibility of investigating potential manoeuvres to hinder the administration of justice pursuant to article 70 of the Statute and rule 165 of the Rules is dependent on the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in the list of his contacts;

- 2) **GRANTS** the Prosecutor's Application on the issue of ascertaining whether the parties or the Chamber can refer to or use all the information contained in the recordings of telephone conversations made by Mathieu Ngudjolo and in his list of contacts during the hearings on the merits; and
- 3) **DISMISSES** the Application by Mathieu Ngudjolo.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 14 July 2009

At The Hague, The Netherlands