

Annex 2

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **19 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

PUBLIC REDACTED DOCUMENT

**"Public redacted version of
"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 ",
ICC-01/04-02/12-95-Conf-Anx2-tENG, 19 June 2009**

Source: The Office of the Prosecutor

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

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Introduction

1. By its Decision of 9 June 2009, Trial Chamber II¹ granted the Prosecution access to the “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” (“the Report”).
2. It is clear from the Report that Mathieu Ngudjolo is breaching the non-disclosure obligations ordered by the Court, attempting to find, or put pressure on Prosecution witnesses, including the most crucial witnesses, and is also “coaching” his witnesses’ statements.
3. Such tactics compromise the present proceedings. They can harm the people concerned and represent a risk to the protection of their rights and liberty. Some constitute an offence against the administration of justice, within the meaning of article 70 of the *Rome Statute* (“the Statute”).
4. In accordance with articles 68(1) and 64(6)(c), (e) and (f) of the Statute, and regulations 101(2) and 101(3)² of the *Regulations of the Court* (“the Regulations”), the Prosecution requests specifically that the Chamber issue an urgent provisional decision prohibiting all contact between Mathieu Ngudjolo and anyone outside of the Detention Centre³ and order that Mathieu Ngudjolo be separated from the other detainees held in the Detention Centre.

¹ Henceforth “the Chamber”.

² See paragraph 20 below; if Mathieu Ngudjolo were to learn of the Prosecution’s requests before an order is issued, there is that risk of his trying to use the time remaining to him to continue his activities.

³ His wife included, but naturally not including the visits and calls from his Counsel: Maître Kilenda, Maître Fofé, Ms Maryse Alié and Ms Aurélie Roche

FACTS

5. In its application of 14 January 2009, the Office of the Prosecutor submitted a *“Requête urgente [...] aux fins de convocation d’une audience ex parte relative à la protection des témoins et des victimes”*.⁴ In this application, the Prosecution referred to information showing that Mathieu Ngudjolo had maintained contacts from the Detention Centre for the purpose of exerting pressure on Prosecution Witness [REDACTED]. The contacts in dispute are alleged to have taken place in [REDACTED], or in the period between [REDACTED].
6. The Chamber held an *ex parte* hearing on this issue on 28 January 2009. On that occasion, the Head of the Victims and Witnesses Unit (“the VWU”) indicated that the Registry was making plans [REDACTED]
[REDACTED]
[REDACTED].⁵
7. Subsequently, on 12 February 2009, the Registry considered in particular, *“that, as per regulation 175(1)(b) of the Regulations [of the Registry] the information in the possession of the Registrar gives reasonable grounds to believe that [...] Mathieu Ngudjolo Chui might [attempt] or might have attempted to ‘interfere or intimidate’ persons from the detention centre by [...] telephone conversations and/or visits”*.⁶ The Registrar, *proprio motu*, therefore ordered the retroactive monitoring of the recordings of the conversations⁷ that Mr Katanga and Mr Ngudjolo have had since 1 October 2008 and monitoring of all their telephone communications for 14 days.⁸

⁴ ICC-01/04-01/07-831-Conf-Exp.

⁵ ICC-01/04-01/07-T-54-CONF-EXP-ENG-ET, p. 31, lines 2-4.

⁶ ICC-01/04-01/07-894-Conf-Exp, p. 3 *in fine*.

⁷ Non-privileged conversations.

⁸ ICC-01/04-01/07-894-Conf-Exp, p. 5

8. By a second Decision dated 27 February 2009, the Registrar decided to continue to monitor the recordings of Mathieu Ngudjolo's telephone conversations between 1 October and 26 February 2009, while suspending, as of 26 February 2009, the active monitoring of Mathieu Ngudjolo's telephone conversations and the monitoring of his visits.⁹ The Registrar stated that she remains seized of the situation and is prepared to review the necessity for such monitoring.¹⁰

9. All these facts fall into a context of pressure exerted on the witnesses.¹¹

10. The Registry's Report of 8 June 2009 confirms the information put forward by the Prosecution and reveals that Mathieu Ngudjolo systematic practice of obstructing the course of justice.

11. This Report:

- demonstrates that Mathieu Ngudjolo is indeed communicating names of Prosecution witnesses to third parties by telephone, for example, the name of P-28;¹²
- would indicate that Mathieu Ngudjolo disclosed Witness P-250's statement to third parties;¹³
- corroborates the information available to the Prosecution showing that Mathieu Ngudjolo is initiating tactics regarding Witness [REDACTED] by telephone shows that Mathieu Ngudjolo is allegedly seeking to speak with the

⁹ ICC-01/04-01-07-932-Conf-Exp, p. 4.

¹⁰ ICC-01/04-01-07-932-Conf-Exp, p. 4.

¹¹ Cf. ICC-01/04-01/07-1061, para. 23.

¹² During a conversation on 13 January 2009, Mathieu Ngudjolo states the following to the person he was talking to: *"And then there's a boy called, yes, [REDACTED]. That boy, he's the one who caused problems [...]"* (footnote 35 of the Report). In all likelihood he is referring to Witness P-28. See also paras. 10, 12 and 19 of the Report and footnote 18.

¹³ See para. 10 and foot notes 18 and 22 of the Report. Mathieu Ngudjolo's wife informed him of the following by telephone on 29 December 2008: *"There was somebody from [REDACTED] family there [...] When we began the meeting, immediately you called. When I began to explain, to read out [REDACTED] statements, someone called from outside to say that I should not go into detail because he was there. We broke off"*.

members of [REDACTED] family,¹⁴ in particular, and to gain a more precise identification about [REDACTED],¹⁵ which, in the current context, can only be interpreted as an attempt to circumvent these witnesses;

- sheds light on the pivotal role of Mathieu Ngudjolo's wife in these tactics and that she transmits information following her visits and telephone calls;¹⁶
- reveals that Mathieu Ngudjolo is coaching his witnesses, as revealed in the conversation of 3 October 2008, during which Jean Ngabu says to Ngudjolo that he *"did get the message"* and asks *"In fact, what should [they] say so that [their] statement is not dissimilar to"* his;¹⁷ ¹⁸ and
- exposes the active role of various other local protagonists.

12. Furthermore, the Report demonstrates that Mathieu Ngudjolo is exchanging information with the accused Lubanga. Proof of this is found in footnote 37 of the Registry's initial report, which quotes what Mathieu Ngudjolo said on the telephone about a witness in the Lubanga case. Mathieu Ngudjolo mentions a precise detail during this conversation that he had no reason to know (*cf.* para. 25 below for further details).

13. Lastly, the Report reveals that Germain Katanga *"seems to be in direct contact with groups to whom he is issuing instructions from the Detention Centre"*.¹⁹

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ See paras. 7 and 21 and footnote 13 of the Report. In particular, Mathieu Ngudjolo asks his wife to talk to "people" and gives her an instruction *"to make sure [...] they are informed about all the things [he has] told [her] about"*: footnote 38 of the Report.

¹⁷ See para. 3 and footnote 8 of the Report. See also para. 7 and **footnote 13 of the same Report** in relation to this.

¹⁸ This coaching seems to have been brought up during the questioning of [REDACTED] by the Prosecution when the Office of the Prosecutor met with him last [REDACTED]. The transcripts of this interview are still being produced, and will be finalized as soon as possible.

¹⁹ See para. 14 and footnote 21 of the Report.

PROSECUTION REQUESTS

A The Prosecution requests the temporary prohibition of all contact between Mathieu Ngudjolo and the outside.

14. The Prosecution would underscore that Mathieu Ngudjolo's actions clearly fall within the scope of regulation 101(2) of the Regulations. Combined analysis of both the information from the Prosecution and the Report of the Registrar (*cf.* para. 11 above) does indeed reveal that there are reasonable grounds to believe that Mathieu Ngudjolo is using his contacts with the outside and his visits:

- to "prejudice or otherwise affect the outcome of the proceedings" against him (regulation 101(2)(b) of the Regulations);
- to, in all likelihood, attempt to "harm" persons (regulation 102(2) of the Regulations);
- to "breach" "non-disclosure" obligations ordered by the Court (regulation 101(2)(d) of the Regulations);
- in such a way that these contacts and visits constitute "a threat to the protection of the rights and freedom" of various witnesses and individuals (regulation 101(2)(f) of the Regulations).

15. Such a situation requires that immediate steps be taken:

- as indicated above, some of Mathieu Ngudjolo's actions now seem to fall under article 70(1)(c) of the Statute: all possible offences against the administration of justice which might continue to occur should be stopped as soon as possible;
- at the very least, any further attempt to commit such offences should be made impossible, in view of the fact that the trial is due to commence shortly and that the list of witnesses has recently been disclosed;

- the witnesses have an immutable right to be protected:²⁰ only swift measures will make it possible to prevent Mathieu Ngudjolo from pursuing these practices;
- the system of witness protection is directly affected:²¹ this is an issue of particular concern requiring the VWU's consideration as soon as possible and requiring also that measures to be taken shortly to prevent additional harm;
- finally, among others, at issue are the Prosecution's [REDACTED] witnesses (P-28 and P-250) who are concerned here; any communication by Mathieu Ngudjolo in the coming days carries the risk of prejudicing the trial.²²

16. Such a situation warrants an immediate interim decision seeking to (a) prohibit all written and telephone contact between Mathieu Ngudjolo and persons outside the Detention Centre, as well as (b) prohibit all visits, except those of his Counsel Maître Kilenda, Maître Fofé, Ms Maryse Alié and Ms Aurélie Roche. There is no other way to prevent the situation from continuing. Active, real-time monitoring of the telephone contacts appears insufficient:

- Mathieu Ngudjolo has not hesitated to use the telephone for the tactics reported by the Registry, despite the fact that he knows perfectly well²³ that all the detainees' non-privileged conversations are recorded, in accordance with regulation 174(2) of the *Regulations of the Registry*. There is therefore no reason to believe that his behaviour might cease;
- the Report shows that the same telephone can be used by several persons, which prevents any real monitoring of the identity of the contacts;

²⁰ See to this effect ICC-01/04-01/06-1311-Anx2, para. 94.

²¹ Mathieu Ngudjolo's wife indicated on 28 January 2009: "*the others who are taken care of in [REDACTED] will be put off*" (footnote 37 of the Report). This is a fairly clear reference to the relocated witnesses.

²² There were prosecutions at the ICTY that could be considered lost because, amongst other things, there was a climate of intimidation where the victims were concerned: *cf.* the case of *Prosecutor v. Haradinaj* (IT-04-84-PT); while another case had to be suspended: the *Šešelj* case (IT-03-67).

²³ *Cf.* regulation 174(3).

- Mathieu Ngudjolo often uses a language [OTHER THAN LINGALA];²⁴
- there is a perfectly good chance he could use a coded language, decided on in advance.

17. The danger is the same in the case of visits from his wife and his children.²⁵

18. Admittedly, Mathieu Ngudjolo has, amongst others, the rights provided for in regulations 99 and 100 of the Regulations. However, precisely these same rights are subject to restrictions under regulations 101(1), 99(2) and 90 of the Regulations. In this context, it should be noted that, pursuant to article 8 of the European Convention on Human Rights, the right to a private and family life may be subject to interference if it is “in accordance with the law and is necessary in a democratic society [...] for the prevention of disorder or crime [...] or for the protection of the rights and freedoms of others”. This is exactly the case. It is specified that the Prosecution’s request is temporary (*cf.* below, para. 21).

19. Mr Ngudjolo might be permitted to continue to send and receive post from his family if, in addition to the usual application of regulation 169 of the *Regulations of the Registry*, the Chamber, further to regulation 101 of the Regulations, instructs the Registry always to keep a photocopy of the incoming and outgoing post and to report back to it on a regular basis about the correspondence of the accused.²⁶

20. The conditions for application of regulation 101(3) of the Regulations are met. Mathieu Ngudjolo’s actions are extremely serious. Above all, if Mathieu Ngudjolo were to learn of the Prosecution’s applications before an order is

²⁴ Possibly [REDACTED].

²⁵ See above, footnote 17.

²⁶ As far as the Prosecution understands, Mathieu Ngudjolo can communicate by email only with his Defence team. However, verification of exactly who is in his Defence team is needed.

issued, there is the risk of his attempting to use his remaining time to continue his activities.

21. Finally, the Prosecution notes that it envisages the total prohibition of visits and contact with the outside as temporary, on the basis of the Registry's Report and until such time as there is more information on the extent of Mathieu Ngudjolo's activities. The issue therefore calls for re-examination. As indicated below in paragraph 36, it might be for a period of 4 to 5 weeks.

B. The Chamber should order the urgent separation of Mathieu Ngudjolo from the other accused.

22. The Prosecution also considers that separating Mathieu Ngudjolo from the other detained persons is necessary, despite the practical difficulties that this may engender.²⁷

23. At issue is consistency: prohibiting contact between Mathieu Ngudjolo and the outside would become pointless if he can still pass on messages via co-detainees.

24. There is a risk of this happening if Mathieu Ngudjolo and Germain Katanga maintain contact:

- both are alleged co-perpetrators;
- they have common interests, as underscored during a conversation between Mathieu Ngudjolo and "Manu"²⁸ during which the latter stated:
"Lobo came to see me at home and told me that he was Germain's lawyer and that

²⁷ ICC-01/04-01/07-200-Conf, paras 2, 3 and 10.

²⁸ Probably "Chef Manu" from Zumbe.

*you have the same case file, we need to go to Zombe together. I told him I was available any time”;*²⁹

- the telephone contacts by Mathieu Ngudjolo and Germain Katanga which have been recorded show that they have at least one contact in common (see the Registry’s report);
- Mathieu Ngudjolo’s conduct provides reasonable grounds to believe that he will be tempted to use his contacts with Germain Katanga to communicate with the outside and to continue his activities;
- this constitutes that much more of a risk since, as mentioned above, Germain Katanga also maintains disputed contacts with the outside,³⁰ and he is not always receptive to instructions given to him in the Detention Centre.³¹

25. Continued contact between Mathieu Ngudjolo and Thomas Lubanga Dyilo should also be prohibited:

- as indicated above, footnote 37 of the Registry’s Report demonstrates that Mathieu Ngudjolo knows precise details concerning the witness in the Lubanga case who came to testify accompanied by his father [REDACTED];
- the conversation referred to in footnote 37 of the Report took place on 28 January 2009, [REDACTED] in The Hague with his father: Mathieu Ngudjolo can have learned this only from a source other than Lubanga himself;
- this attests to the ease with which collusion can be established in the Detention Centre and to the risk that information can be communicated via the intermediary of Thomas Lubanga, who has a well-developed network in Ituri.

²⁹ See footnote 14 in the Registrar’s initial report.

³⁰ [REDACTED]

³¹ ICC-01/04-01/07-200-Conf, para. 13 and ICC-01/04-01/07-192-Conf-Anx.

26. It should be pointed out that Mathieu Ngudjolo spends eight hours per day with all the other detained persons and that the *Regulations of the Registry* do not prohibit the same telephone number from appearing on the contact lists of different co-detainees.³² It follows that the risk of information being divulged is ongoing, not only via the accused Katanga and Lubanga, but also via any other co-detainee. In this respect, it should be noted that the Minister of Decentralisation and Regional Planning of the government of the DRC, Antipas Nyamwisi (*cf.* para. 24 above) is a close acquaintance of Bemba.

27. Here again, the Prosecution considers that the situation warrants the implementation of regulation 101(3) of the Regulations. On this point, the Prosecution would refer to the points made in paragraph 20 above.

C. The Prosecution requests the disclosure of the recordings of the conversations referenced in the Report and in the annex of that Report as well as Mathieu Ngudjolo's contact list.

i. Disclosure of the recordings and the interpreters' summaries

28. In accordance with articles 68 [REDACTED] and regulation 101 of the Regulations, the Prosecution requests that the Chamber order the disclosure to the Prosecution of the recordings of the conversations referenced in the Report³³ - including the recordings of the conversations in a language which the interpreters did not understand – with the summaries or transcriptions (even those which are incomplete) prepared by the interpreters who listened to them.

³² See, *mutatis mutandis*, the submissions in the role of third parties as a liaison in the Registrar's submission ICC-01/04-01/07-200-Conf, para 6.

³³ With a precise indication of the date and time of the call, the number of the caller or person being called, and the supposed identity of the contact.

29. The Prosecution must have this material in order to conduct a more thorough assessment of which individual measures it has to take under article 68 of the Statute to protect its various witnesses, to support an additional application in accordance with regulation 101 of the Regulations [REDACTED].

30. It is also possible that some relevant information escaped the Registry's interpreters, whose knowledge is less detailed than Prosecution's in respect of (a) the names of all the witnesses approached by the Prosecution and who are not in the ICC Protection Programme (henceforth "ICCPP"), (b) the individual circumstances of each of the ICCPP witnesses, (c) all the protagonists and local nicknames, and finally (d) the relationships between these different persons.

31. Finally, the Prosecution must be able to apply itself to transcribing the conversations [IN A LANGUAGE OTHER THAN LINGALA] and which probably contain crucial information, as shown by the care Mathieu Ngudjolo took to switch language when discussing the "coaching" of his witnesses.³⁴

32. In addition to articles 68 [REDACTED] and regulation 101 of the Regulations, the Prosecution needs access to these conversations in order to fulfil its obligations as provided for by other provisions of the Statute and the *Rules of Procedure and Evidence*.

33. Some of the conversations constitute incriminating evidence³⁵ and therefore form part of determining the truth in this case. Some other conversations may be used by the Prosecution and also by Germain Katanga during the Defence for Mathieu Ngudjolo's cross-examination of witnesses: these conversations may therefore fall under article 67(2) of the Statute and rule 77 of the *Rules of Procedure and Evidence*.

³⁴ See footnote 8 of the Report.

³⁵ See footnote 13 of the Report.

ii. Disclosure of Mathieu Ngudjolo's contact list and of the annex to the Report

34. On the basis of the same rules, the Prosecution also requests the list of Mathieu Ngudjolo's telephone contacts and the disclosure of the annex of the Registry's Report, or, at the very least, the disclosure of a re-worked version of that annex. It is possible that this annex contains information which the Prosecution does not have.

35. After analysing this information, and, if necessary, the information deriving from the monitoring which the Registry has just reactivated,³⁶ the Prosecution hopes to be able to return to the Chamber within 4 to 5 weeks in order to submit a consolidated application on the issue.

³⁶ ICC-01/04-01/07-1196-Conf-Exp.

CONCLUSION

36. The Prosecution therefore respectfully requests that the requested prohibitions and separations be ordered along with the disclosure of the aforementioned information.

37. The Prosecution remains at the disposal of the Chamber should the Chamber wish to organise an *ex parte* hearing on this matter on Friday 12 June 2009.

_____[Signed]_____

Luis Moreno-Ocampo, Prosecutor

Dated this 19 June 2009,

At The Hague, The Netherlands