

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No. ICC-01/04-01/07 OA 9

Date: 16 December 2009

**THE APPEALS CHAMBER**

**Before:**  
Judge Erkki Kourula, Presiding Judge  
Judge Sang-Hyun Song  
Judge Ekaterina Trendafilova  
Judge Daniel David Ntanda Nsereko  
Judge Joyce Aluoch

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO**

**IN THE CASE OF**

**THE PROSECUTOR**

**v. Germain KATANGA and Mathieu NGUDJOLO CHUI**

**Confidential – *Ex Parte* – Available only to the Prosecutor  
and to Mr Ngudjolo Chui**

**Judgment**

**on the Appeal of the Prosecutor against the “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”**

**Dissenting Opinion of Judge Sang-Hyun Song**

*shs*

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

**The Office of the Prosecutor**

Ms Fatou Bensouda, Deputy Prosecutor  
Mr Fabricio Guariglia

**Counsel for the Defence**

Mr Jean-Pierre Kilenda Kakengi Basila  
Mr Jean-Pierre Fofe Djofia Malewa

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

*Shs*

## Dissenting Opinion of Judge Sang-Hyun Song

1. With the judgment on the present appeal,<sup>1</sup> the majority of the Appeals Chamber reverses the Trial Chamber's "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"<sup>2</sup> (hereinafter: "Impugned Decision"). The majority is of the view that the Trial Chamber rejected the Prosecutor's request for full access to information obtained through the monitoring of Mr Ngudjolo Chui's telephone conversations at the Court's detention centre because none of this information would be admissible as evidence at the trial. In the majority's opinion, this finding on the inadmissibility of the monitored information was both premature and erroneously categorical. I respectfully dissent from this judgment for the reasons summarised below.

2. I agree with the majority of the Appeals Chamber that the Trial Chamber's decision under regulation 92 (3) of the Regulations of the Court was of discretionary nature. Thus, appellate intervention is only warranted if the exercise of discretion was erroneous. I cannot identify such an error in the Impugned Decision. In my view, the Trial Chamber did not rule on the admissibility as evidence of the information that the Prosecutor requested. Rather, the Trial Chamber denied the Prosecutor's request for full access to the monitored information.<sup>3</sup> To support its decision to deny this request, the Trial Chamber reasoned that the information (or part of it) *could* be inadmissible at trial.<sup>4</sup> Therefore, the Impugned Decision did not generally preclude monitored information from being admitted at trial into evidence, should this be necessary. It merely noted that there could be concerns regarding the admissibility of the information. I note in this context that the Prosecutor's request for access was very general – he did not specify for what exact type of information he was looking or why

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<sup>1</sup> "Judgment on the Appeal of the Prosecutor against the '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'", ICC-01/04-01/07-1718-Conf-Exp, 9 December 2009.

<sup>2</sup> ICC-01/04-01/07-1243-Conf-Exp-tENG, 24 June 2009.

<sup>3</sup> See "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-01/04-01/07-1200-Conf-Exp-tENG, 11 June 2009, paras 32 et seq.

<sup>4</sup> See Impugned Decision, para. 40. In the French original version of the Impugned Decision, the Trial Chamber stated that "[l]es mesures de surveillance ordonnées poursuivaient un tout autre objectif et leur utilisation aux fins de la poursuite *pourrait* être contestée sur le fondement d'un éventuel détournement de procédure et au motif que les informations ainsi recueillies *n'auraient pas été* loyalement obtenues" (emphasis added).



he required access to the full, un-redacted information.<sup>5</sup> To this general request, the Trial Chamber answered in general terms.

3. In addition, I am of the opinion that the Trial Chamber correctly reasoned that the purpose of this monitoring was not to “facilitate the post-factum gathering of new evidence in support of the prosecution”, but rather for “ensuring that the communication facilities provided to the accused were being used appropriately.”<sup>6</sup> The Trial Chamber noted that the monitoring was not ordered by a judicial authority, but by the Registrar on the basis of regulations 174 and 175 of the Regulations of the Registry.<sup>7</sup> I also observe that the Prosecutor could have sought to gather the same information by asking the relevant Chamber to issue a judicial order for the monitoring of the accused’s telephone conversation for the purposes of his investigation. Had he made such a request, the relevant Chamber could have considered whether there was a sufficient factual and legal basis to monitor Mr Ngudjolo Chui’s telephone conversations with a view to using the monitored information at the trial. The Prosecutor chose not to do so; instead, he sought access to information obtained through monitoring that was ordered for another purpose, and without prior judicial authorisation.

4. In sum, it is my view that the Trial Chamber’s balancing of, on the one hand, the Prosecutor’s interest in being granted full access to the monitored information and, on the other hand, the purpose of the monitoring as well as Mr Ngudjolo Chui’s right to privacy did not amount to an erroneous exercise of discretion that would justify appellate intervention. I therefore would have confirmed the Impugned Decision.

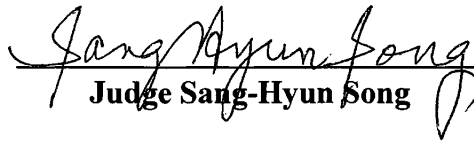
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<sup>5</sup> See “Urgent Brief of the Prosecution Pursuant to Regulation 101(3) of the *Regulations of the Court to Prohibit Mathieu Ngudjolo’s Contact with the Outside and to Separate Mathieu Ngudjolo from the Other Detainees*”, ICC-01/04-01/07-1200-Conf-Exp-tENG, para. 33.

<sup>6</sup> Impugned Decision, para. 40.

<sup>7</sup> Impugned Decision, para. 40.

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

  
**Judge Sang-Hyun Song**

Dated this 16<sup>th</sup> day of December 2009

At The Hague, The Netherlands