

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: 20 January 2010

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Van den Wyngaert

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 for Mathieu
Ngudjolo and the Registry**

**Decision on the Registrar's Report on the Implementation of the Chamber's
Decision of 4 December 2009 concerning the Restrictions Imposed on Mathieu
Ngudjolo**

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 Éric 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 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

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), having regard to regulations 174 and 175 of the Regulations of the Registry and in accordance with articles 67 and 68 of the Rome Statute ("the Statute") and regulation 101 of the Regulations of the Court, decides as follows.

1. On 8 January 2010, at the Chamber's request, the Registrar provided it with a report¹ on the implementation of the fourth decision on the measures imposed on Mathieu Ngudjolo prohibiting and restricting his contact with the outside.²

2. In her report, the Registrar gives an account of the conditions under which Mr Ngudjolo conducts his contacts with his co-detainees within the Detention Centre, such contacts having been partially re-authorised. She also explains that the accused's contact with the outside has been limited to telephone calls.

3. The Registrar further indicates that Mathieu Ngudjolo received a visit from his wife and two of his children between 13 and 25 December 2009, and that he was able to have conjugal visits.

4. She also stresses that, since the Chamber's decision authorising the accused to talk on the telephone with members of his family and persons of special interest to him,³ none of his conversations have been monitored, and thus the content thereof remains unknown. Accordingly, the Registrar suggests that the Chamber authorise "[TRANSLATION] the non-selective, non-regular, non-systematic monitoring of some of Mr Ngudjolo's communications [...]"⁴ Lastly, she explains that, if any such new monitoring measures fail to disclose anything reprehensible, she could recommend

¹ Registry, "Rapport du Greffier sur la mise en oeuvre de la décision de la Chambre du 4 décembre 2009 concernant les restrictions imposées à Mathieu Ngudjolo", 8 January 2010, ICC-01/04-01/07-1753-Conf-Exp.

² Quatrième décision sur les mesures d'interdiction et de restrictions de contacts avec l'extérieur comme au sein de l'établissement pénitentiaire concernant Mathieu Ngudjolo, 4 December 2009, ICC-01/04-01/07-1709-Conf-Exp.

³ Third Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo, 25 September 2009, ICC-01/04-01/07-1498-Conf-Exp-tENG, para. 21.

⁴ ICC-01/04-01/07-1753-Conf-Exp, para. 8.

that the Chamber authorise the resumption of contact with his co-detainees during outdoor activities.

5. In his observations filed on 15 January 2010,⁵ and after recalling the conduct of Mathieu Ngudjolo which gave rise to the sanctions imposed on him, the Prosecutor requests that all his non-privileged telephone conversations continue to be monitored *post factum*. He also requests that, as matters stand at present, the measures preventing Mr Ngudjolo from having contact with his co-detainees during sports and outdoor activities be maintained until the Registrar has provided a comprehensive report on all the telephone conversations and the Chamber has been able to analyse them. In his view, both these sets of measures are indispensable in order to prevent any initiative by the accused that may affect the safety of the witnesses and interfere with the proper administration of justice.

6. In its observations filed on 18 January 2010,⁶ the Defence for Mathieu Ngudjolo firmly opposes the Prosecutor's analysis, which it considers to be "[TRANSLATION] false and without any legal basis".⁷ It notes that the accused has deliberately limited his telephone communications to his wife, children, sister-in-law and a close relative, and that, given the restricted and intimate nature of this circle of contacts, the monitoring of his conversations, were it resumed, would constitute a real violation of his and his family's privacy. Mr Ngudjolo's counsel, Mr Jean-Pierre Kilenda, states nevertheless that he leaves it to the Chamber, in its wisdom, to decide the matter.

7. Concerning the refusal to relax in any way the measures prohibiting all contact between Mr Ngudjolo and his co-accused during physical and outdoor

⁵ Office of the Prosecutor, "Prosecution's Observations on Registry's report titled « *Rapport du Greffier sur la mise en oeuvre de la décision de la Chambre du 4 décembre 2009 concernant les restrictions imposées à Mathieu Ngudjolo* »", 15 January 2010, ICC- 01/04-01/07-1768-Conf-Exp.

⁶ Defence for Mathieu Ngudjolo, "Observations de la Défense relatives au « *Rapport du Greffier sur la mise en oeuvre de la décision de la Chambre du 4 décembre 2009 concernant les restrictions imposées à Mathieu Ngudjolo* » (ICC-01/04-01/07-1753-Conf-Exp du 11 janvier 2010)", 18 January 2010, ICC-01/04-01/07-1771-Conf-Exp.

⁷ Ibid., para. 14.

activities, Mr Kilenda stresses that the Victims and Witnesses Unit has indicated that it did not have "[TRANSLATION] any particular information to disclose,"⁸ which, in Mr Kilenda's view, proved "[TRANSLATION] that no Prosecution witness ha[d] suffered in any way because of Mathieu Ngudjolo".⁹ He also recalls that the accused, though deprived of their freedom, are no less "[TRANSLATION] entitled to their right to life"¹⁰ and to physical and mental health.

8. At the conclusion of its observations and after recalling that Mathieu Ngudjolo has, for seven months, complied with all the measures ordered by the Chamber, his Defence requests the lifting of all measures of prohibition and restriction still affecting him.

9. Concerning the Registrar's request for the Chamber's leave to carry out random monitoring both of conversations taking place between 25 September 2009 and the date of the present decision, and of those taking place subsequently, the Chamber can only take formal note of that suggestion. It notes that, in accordance with regulations 174 and 175 of the Regulations of the Registry, it is for the Chief Custody Officer and the Registrar themselves to take the action which they deem appropriate in this regard.

10. Should such monitoring be resumed and prove negative, the Chamber will determine whether there is cause to reconsider the measures restricting Mr Ngudjolo's contact with his co-detainees during physical and outdoor activities. Pending any additional material from the Registry, the Chamber considers that, as matters stand, these measures should be maintained. It considers it necessary, however, to request the Registry to inform it by 29 January 2010 whether or not it intends to implement *post-factum* monitoring measures in the form of sampling. If

⁸ Ibid., para. 26

⁹ Idem.

¹⁰ Ibid., para. 27.

that is not the case, it will then make a ruling on whether to maintain or lift the above-mentioned prohibition on contact.

FOR THESE REASONS, the Chamber

- 1) **RECALLS** that it is for the Registrar to assess whether there is cause to carry out the random monitoring of telephone conversations conducted by Mathieu Ngudjolo between 25 September 2009 and the present decision and of those conducted subsequently, and requests that she inform the Chamber by 29 January 2010 whether she intends to take action to that effect; and
- 2) **MAINTAINS** until that date the measures prohibiting all communication between Mathieu Ngudjolo and his co-detainees during physical and outdoor activities and exercises.

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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Van den Wyngaert

Dated this 20 January 2010

At The Hague, The Netherlands