

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 January 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR *v.* GERMAIN KATANGA *and* MATHIEU NGUDJOLO CHUI**

**URGENT
Confidential**

Ex parte available only to the Registry
With Annex *Ex parte* available to the Registry

Report of the Registrar pursuant to the Chamber's Order of 18 December 2008

Source: The Registrar

Document to be notified in accordance with regulation 31 of the RoC to:

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Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

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States Representatives

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REGISTRY

Registrar
Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section
Anders Backman

**Victims Participation and Reparations
Section**

Other

The Registrar of the International Criminal Court ("the Court");

NOTING the "*Ordonnance enjoignant au Greffe de déposer des documents sur l'influence que les accusés auraient pu conserver en RDC et sur les pressions qu'ils seraient susceptibles d'exercer actuellement sur les victimes et les témoins*", (the « Order ») issued by Trial Chamber II (the « Chamber ») on 18 December 2008;¹

NOTING article 58 of the Rome Statute, regulations 23 *bis*, 24 *bis* (2), 92, 99, 100 and 101 of the Regulations of the Court ("RoC"), and regulations 167 to 189 of the Regulations of the Registry ("RoR");

CONSIDERING that in its Order, the Chamber instructed the Registrar to file in the record of the case a general report labelled "Confidential, *ex parte*, available only to the Registry" setting out precisely the modalities and criteria under which are implemented the controls and monitoring pursuant to the RoR in order to determine whether there are reasonable grounds to believe that a detained person is attempting to interfere with or intimidate a witness, jeopardise public safety or the rights or freedoms of any person, or to violate a non-disclosure order made by a chamber;

CONSIDERING that the Chamber instructed the Registrar to also "indicate the criteria used to ascertain the existence of such grounds and explain to what extent the detention officer authorised to conduct such a study is familiar with the case file";²

RESPECTFULLY SUBMITS the report as follow:

¹ ICC-01/04-01/07-800-Conf

² ICC-01/04-01/07-800-Conf-tENG, p. 9.

I- General remarks

1. The Registrar wishes first to indicate the different areas where monitoring and standard measures may be decided. These areas encompass all non-privileged communications by means of telephone, incoming and outgoing mail, conversations during visits, or any other relevant means of communication between the detained person and other persons including co-detained persons.
2. According to regulations 175 and 184 of the RoR, the main criteria necessary for the Registrar to order active monitoring of non-privileged communications and visits of a detained person are related to the existence of reasonable grounds to believe that the detained person may be attempting to:
 - arrange an escape; interfere with or intimidate a witness;
 - interfere with the administration of justice;
 - otherwise disturb the maintenance of the security and good order of the detention centre;
 - jeopardise public safety or the rights or freedom of any person; or
 - breach an order for non-disclosure made by a Chamber.
3. The same criteria set out under regulation 169 of the RoR are applicable to items such as incoming and outgoing mail which, furthermore, shall not contravene to the RoC, the RoR, any other regulation relating to detention matters or an order issued by a Chamber. However, and contrary to the monitoring regime of telephone communications or visits, offending incoming and outgoing mail are returned to the sender or confiscated by the Chief Custody Officer (the "CCO").

II- Criteria applicable under regulation 169 of the RoR to incoming and outgoing mail

4. Pursuant to regulation 169 of the RoR, the CCO always ensures that the log of incoming and outgoing mail is maintained and updated.
5. In practice, as a matter of policy, all items received at the detention centre are screened by the Host prison. The administrative assistant of the detention centre opens, reviews and reads the content of the mail and records the details in the log together with the name of the sender, if known, and the recipient. Privileged correspondence is not reviewed according to regulation 169(1).
6. After a thorough review, all written materials are scanned – copied- and recorded in the log: letters in their entirety, books or newspapers by their cover and few of their pages. It is a standard procedure which does not fall under any specific monitoring regime. In general, a suspicious mail³ would be automatically brought to the attention of the CCO. Should the latter consider in his sole determination that the item shall not be delivered to the detained person, the item/package, especially if brought during a visit, will be returned to the sender in accordance with regulation 169(4) of the RoR.⁴ Regulation 169(6)-(9) of the RoR foresees the type of procedure to follow when the CCO is in possession of an offending item.
7. As to the case file of the detained persons, the administrative assistant and the custody officers are not generally aware of its content. However, it may happen that the administrative assistant is made aware of some filings during the Detention Section meetings or when the filings are not of such

³ Due to its cover, content, size or any other reason.

⁴ This has been, for instance, the case of CD-ROMs brought to detained persons but returned to the sender as a matter of respect to “property rights”; or other items that are prohibited within the detention centre, such as certain liquids or electronic materials that may be used to communicate with outside world

confidentiality that the administrative assistant should be kept unaware of their content.

III- Criteria and modalities relating to the implementation of the monitoring under regulations 175, 180 and 184 of the RoR

8. In general terms, and as per the letter of the RoR the term 'monitoring' delineates the following:

- a) Passive monitoring of telephone calls;
- b) Active monitoring of telephone calls;
- c) Active monitoring of visits;

Additionally, as highlighted in the Order, restrictions to access to contacts and news may be imposed by the Chamber under the RoC.⁵

A- Monitoring of telephone communications under the RoR

Passive monitoring of telephone calls

9. The Registrar wishes to indicate that the standard regime of monitoring which normally applies within the detention centre encompasses what the RoR refer to as *passive monitoring of non-privileged telephone calls*. This form of monitoring, as stipulated under Regulation 174(1) and (2), entails the recording of telephone calls but without simultaneous listening. The Registrar deems essential to emphasize that unless an active monitoring is ordered, the designated staff of detention centre never listens to the recorded telephone conversations. Therefore, the allegation of the defence teams that the telephone conversations of the detained persons are listened to by the Registry is groundless.

⁵ ICC-01/04-01/07-800-Conf, para. 11

Active monitoring of telephone communications

10. *Active monitoring of telephone calls*, according to regulations 174(2) and 175 of the RoR, involves two distinctive processes. The first one being the implementation of regulation 174(2), entails a *post factum* listening of the recorded non-privileged communications ("*Post factum* listening regime"). The second one being active monitoring within the meaning of regulation 175 implies a simultaneous listening (real-time) of the conversation between the detained person and his interlocutor ("*Simultaneous* listening regime").
11. As to the criteria underlying a decision to conduct an active monitoring of non-privileged telephone communications, and in accordance with regulation 175(1), the CCO can only proceed further if he has reasonable grounds to believe that such monitoring is necessary for the reasons enumerated under the said regulation. In practice, and in all cases before the Court, the CCO has never decided so far to conduct an active monitoring.
12. Should "suspicious" information be received by the CCO, he would, after thorough examination decide to request the permission of the Registrar to conduct an active monitoring of the non-privileged telephone communications of the relevant detained person. Such a decision may result from a particular behaviour of a detained person reported to the CCO by the detention staff or any other source⁶ regarding the attempt of the detained person to commit one of the breaches under regulation 175(1) of the RoR.⁷ The criteria that would assist the CCO in his assessment of the attempt of the detained person to engage in the abovementioned activities derive of

⁶ It may be information provided by the Host Prison

⁷ A conflict of interests may arise, should such information come from another organ or section within the Court. For instance, would the Victims and Witnesses Unit or the Victims Participation and Reparation Section be entitled to directly inform the CCO about information gathered or received in the course of their operations or activities, or would such information have to be communicated first to the Registrar directly as part of her prerogatives under regulation 90 of the RoC, or submitted first to the Chamber, notwithstanding the urgency of the matter?

particular circumstances, changing behaviour of the detained person or other combined factors such as the stage of the proceedings. It is worthwhile mentioning that there is no exhaustive list of behaviours or actions that would trigger the mechanism supporting an active monitoring of non-privileged telephone communications.

13. Thus far, the monitoring system conducted at the detention centre vis-à-vis the non-privileged telephone communications of a detained person has been the "*Post factum* listening regime" pursuant to an order of a Chamber.⁸ Taking into account the outcome⁹ of the "*post factum* listening", the Registrar decided to order an active monitoring of the non-privileged visits received by the same detained person, i.e. the presence of a representative of the CCO during the visit to audio-record the conversation within sight and hearing was required. The decisions to authorise both active monitoring – telephone and visits - were justified by the existence of reasonable grounds to believe that the detained person may be interfering with witnesses and/or with the administration of justice, or may jeopardise public safety or the rights or freedom of any person.

14. The Registrar respectfully submits that any order imposing the active monitoring of non-privileged telephone communications would imply an active monitoring of non-privileged visits and the suspension of private visits which are not of a privileged nature.

⁸ ICC-01/05-01/08-118-Conf

⁹ The Registrar – and not the CCO - had reasonable reasons on the basis of the outcome of the monitoring ordered by the Chamber to believe that the detained person would interfere with the administration of justice or jeopardise the rights or freedom of a person

B- Monitoring of visits under the RoR

Permission for visits

15. In view of the conditions set out under regulation 180 of the RoR to authorise visits to detained persons, all non-privileged visits require permission of the Registrar. Where a visit is denied, both the detained person and the visitor are notified of the decision of the Registrar and the reasons for such refusal in accordance with paragraph 3 of the abovementioned regulation.¹⁰ If permitted, any non-privileged visit is supervised within sight and hearing according to regulation 183 of the RoR but not monitored. The supervision is performed by the custody officers - who are not aware of the case file of the detained person.
16. Pursuant to regulation 185(2) of the RoR, the detained person may be granted private visits - i.e. conjugal visits - with his spouse or partner. Such visits are held behind closed doors and, therefore, are never supervised or monitored.

Active monitoring of visits

17. With respect to 'monitoring of visits', regulation 184 of the RoR stipulates that this type of monitoring measure entails the audio-recording of the conversation held during a non-privileged visit. The audio-recording is conducted in the presence of a delegate of the CCO, an officer, or a representative of the Court who is generally empowered to interrupt the conversation and to terminate the visit where it appears that such conversation is in any way in breach of the RoC, the RoR, any regulation regarding detention matters, and or any order of the Chamber - or the Registrar.

¹⁰ A refusal of a visit has already been made in respect of a request of a journalist to visit one detained person at the detention centre.

18. As to the prerogatives of the CCO with respect to 'monitoring of visits' he can only request permission of the Registrar to actively monitor the visit where the conditions under regulation 184 (1) are met. In such situations, the active monitoring of the conversation held during the visit is implemented for a period of 14 calendar days and may, if deemed necessary, be renewed several times for the same period.¹¹ In practice, the CCO will provide the Registrar with a copy of all actively monitored calls for review, as well as a report.

19. To date, the CCO has not sought permission of the Registrar for the implementation of such monitoring, as he has not been in possession of information which may lead him to conclude that there are reasonable grounds to believe that a detained person may be engaged in activities that will result in the conduct listed under regulation 184(1).

C- Restrictions that may be imposed by the Chamber under regulation 101 of the RoC

20. In addition to the above, and besides the mechanisms established by the RoR, the Registrar wishes to add that the Chamber may decide to impose such restrictions it deems necessary to the contacts or visits received by a detained person and his access to news pursuant to regulation 101 of the RoC. It is the sole decision of the Chamber to decide how such restrictions should be implemented. For example, and as far as non-privileged visits are concerned, the Chamber may decide that the detained person should not receive any visit at all or that only few categories of visitors or specific visitors (close relatives or spouse and children only) may visit the detained person.

¹¹ The same duration applies under the RoR to the active monitoring of non-privileged telephone communications

21. Restrictions to news imposed by the Chamber may comprise the prohibition of access to newspapers or audiovisual information. In practice, no newspaper would be delivered to the detained person and all audio-visual equipments in his/her cell would be removed.

IV- Implications of the active monitoring of non-privileged communications and visits

22. An active monitoring of non-privileged telephone communications ("Simultaneous monitoring regime") and visits entails numerous implications regarding the daily management of the detention centre involving availability of staff and the language(s) used by the detained person and his interlocutors.

A- The daily management of the detention centre and the rights of the detained person under monitoring

23. The normal regime set up at the detention centre is adapted to the needs of a small number of detained persons and therefore provides a great degree of flexibility. However, any alterations to this regime deriving from the implementation of an active monitoring measure will imply a considerable change in the routine of the detained person subject to it. With regard to the above, the Registry is in a position to implement a simultaneous listening regime as provided for by regulation 175 of the RoR as follows:

- a) The detained person would be allowed to make non-privileged calls between 1:30 p.m. and 3:30 p.m.;
- b) The detained person would be asked to inform the CCO or his delegate before 1:00 p.m. of the day prior to the day of the call in

weekdays and 48 hours in advance for weekends, of the identity of the person he would wish to contact via telephone and of the language to be used during the call. This would ensure that the person monitoring the call would be able to understand what is being said;

c) If the conversation contravenes the applicable Regulations or the order of the Chamber, or if the detained person were to use a different language which is not understood by the person monitoring the call, the call would be terminated;

d) The person monitoring the conversation would be asked to produce a brief summary of each conversation.

24. Consequently, an effective active monitoring of the non-privileged telephone communications would imply that the detained person would be entitled to less telephone communications than he/she would normally be.

25. Taking into account the regime imposed by regulation 184 of the RoR and the necessity to ensure an efficient management of the detention centre - with as few consequences as possible for the daily schedule of other detained persons-, an active monitoring will also considerably affect the frequency and length of visits to the detained person. A language component might also affect the daily schedule of the detained person :

a) The CCO will request an advance notification of the language that the detained person wishes to use with his visitor 48 hours before the visit in order to allow the booking of an interpreter;

b) If the language used is French or English (the working languages of the Court), the visit will last 2 hours. This is feasible because a

French/English speaking assistant present at the detention centre can undertake the active monitoring (the audio-recording of the conversation);

c) If the language used is other than French or English, namely Lingala in the case at hand, an interpreter will be booked and the visit will last up to 1 hour [REDACTED]

[REDACTED] Indeed, the only fully trained Lingala interpreters will be made available only for a maximum of one hour with a 5-minutes-break every 20 minutes, and taking into account other assignments related to court proceedings.

B- The daily regime of all detained persons under an all-encompassing monitoring system

26. The Registrar is of the opinion that if there is reasonable suspicion that there may be an attempt by the detained person to engage in activities listed under regulation 101 of the RoC or regulations 175(1) and 184(1) of the RoR, an all-encompassing monitoring system would be most effective. In this regard, the Registrar notes that whereas active monitoring of telephone communications could be a safeguard to avoid dissemination of confidential information, its effectiveness would be compromised by the fact that, an order for active monitoring does not seem to extend to other non-privileged forms of communication, especially communications within the detention centre among the detained persons.

27. The registrar draws the attention of the Chamber to the fact that the daily regime of other detained persons would be affected in case of an all-encompassing monitoring pursuant to regulation 101 of the RoC.

28. Indeed, the design of the detention centre, [REDACTED]

[REDACTED]
[REDACTED], it is likely that they will all be in position to share and communicate information with each other. [REDACTED]

[REDACTED]

[REDACTED]

29. Bearing in mind that [REDACTED]

[REDACTED] the Registrar is of the view that the Chamber would need to consider that though each detained person is supposed to deal with his own case file they all share to some extent the perception that the Court as a whole is against them, and might find alternative ways to assist any of them subject to restrictions to contacts and news. [REDACTED]

[REDACTED]

¹² It is indeed the Registrar's conviction that in a situation of joinder of trials or cases, a decision imposing the active monitoring of one detained person should extend to the other

30. Furthermore, and in view of the implications of an all-encompassing system of monitoring aiming to prevent contact between co-detained persons, it might be possible for the Chamber to contemplate the possibility to divide the detained persons into groups within the detention centre. [REDACTED]

[REDACTED]³

C- Staff and Language issues

31. [REDACTED]

32. [REDACTED]

[REDACTED]

the custody officers to handle telephone calls and other administrative-related matters. Despite the efforts of the detention centre to prevent communication or contact that would serve for the exchange of information and/or news between the detained persons, the limitations [REDACTED]

[REDACTED]

33. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

34. It is the Registrar's understanding that the implementation of an order on monitoring of communications and visits should indicate all relevant mechanisms to be used, duly taking into account its consequences on the daily management of the detention centre and how it may affect the daily schedule of other detained persons.

V- Other elements for consideration

35. The Registrar seizes this opportunity to bring to the attention of the Chamber other elements that might be relevant to fully assess the issue of monitoring of communications and visits. They relate to implicit safeguards resulting from the procedure of monitoring, to information required for the log of telephone communications maintained by the CCO and to the confidential nature of the detention record of the detained persons.

A- The implicit safeguards resulting from the procedure of monitoring and the issues related to the log of telephone communications

36. Upon admission to the detention centre, every detained person is informed that his non-privileged communications will be subject to passive monitoring. Passive monitoring of telephone communications provides an opportunity to the Chamber or the Registrar to listen at a later stage to the recorded communications should there be reasonable grounds to believe that the detained person may have engaged or may attempt to engage in the activities referred to under regulation 175(1) of the Registry

37. Passive monitoring of telephone communications also aims at preserving the right to privacy of the detained persons who should not be “systematically” monitored. Informing in advance the detained person about the existence of passive monitoring is both to prevent situations where he might challenge the legality of the monitoring, but it is also a pre-emptive measure that would generally prevent the detained person from engaging in offending activities. However, it may happen that a detained person’s behaviour goes against what is expected from him despite his knowledge that his communications may be listened to at a later stage, if required. A detained person may therefore still engage into offending activities.

38. The RoR exclude a "systematic" suspicion on any detained person. In other words, there is no provision for the listening of the telephone communications of a detained person without a serious suspicion. In such circumstances, one could allow a random listening of recorded non-privileged communications without targeting a specific detained person – i.e. equal treatment to all detained persons¹⁵.

39. Technically, passive monitoring implies that a log of all incoming or outgoing calls is maintained by the CCO, containing the name and telephone number of the caller, the time, date and duration of the call (regulation 173) and the recording of the calls. Regulation 173 does not clearly empower the CCO to require from the detained persons to provide full details of their interlocutors – full name, address, nature and duration of the relationship, frequency or date of last contact, etc. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In this regard, it appears that the prerogatives of the CCO regarding the maintenance of the log of telephone communications are very restrictive. In this regard, an order by the Chamber may give the CCO the authority to require from the detained persons additional information regarding the content of the log of telephone communications. The Registrar is contemplating the possibility to request the authorities of the country of which the detained persons are nationals to assist the Court by asking national telephone companies to provide information on the contacts of the detained persons or confirm the information provided to the CCO by the latter.

¹⁵ The Registrar is contemplating the possibility to propose an amendment of the Regulations to allow a random listening of the recorded telephone communications.

B- The confidential nature of the detention record

40. The Registrar wishes to indicate that there are certain restrictions related to the communication of information pertaining to the custody of persons detained pursuant to article 58 of the Rome Statute. Indeed, information regarding a detained person may be public and confidential. While regulation 92(1) of the RoC provides that the detention record of the detained person is confidential, regulation 189 of the RoR provides a non-exhaustive list of information contained in the detention record. It is essential to distinguish information to which access may be granted to the parties and the conditions pertaining to that access from information that cannot be disclosed.

41. On the one hand, there is information not contained in the detention record which is *under seal*, because only accessible to the Registrar, the Director of the Division of Court Services, to limited staff of the ICC Detention centre and to the Presidency (Category A1)¹⁶. On the other hand, there is *confidential* non contained in the detention record because it can only be made accessible to persons authorised by the Registrar, or disclosed pursuant to an order by the Chamber or the Presidency in specific cases (Category A2)¹⁷. Decisions authorising access to such confidential information are made on a case by case basis upon assessment of the need and with due consideration for the good order and security of the detention centre.

42. With respect to information contained in the detention record, there are two categories: confidential and public information. *Confidential* information falling under regulation 92 of the RoC can be made accessible to the detained person, his or her counsel and other persons as authorised by the Registrar; or

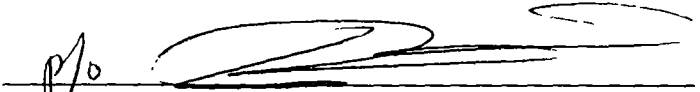
¹⁶ See Annex

¹⁷ Ibid

which can be disclosed pursuant to an order by the Chamber or the Presidency in specific cases (Category B1)¹⁸. Should it be determined that the disclosure of such information would be detrimental for the proper management of the Detention centre, this information shall be withheld as per the meaning of regulation 92(2) of the RoC.

43. The second category of information in the detention record is, in general, public (Category B2)¹⁹. It can be made accessible to the detained person, his or her counsel and other persons. It does not require any redaction.

44. In light of the classification above, following an active monitoring of telephone calls and visits, not all information can be disclosed to the participants, namely the Defence and the Office of the Prosecutor. It is likely that the Defence is authorised to have access to certain information – confidential information in and out of the detention record -, but the Registrar is of the view that the preservation of the neutral role of the Registry commands that, as a general practice, it should not provide the Office of the Prosecutor with information pertaining to the detention record especially information classified sensitive, i.e. confidential, or information which is not part of the detention record but is classified under seal, save under a specific order by the Chamber.



Marc Dubuisson, Director of the Division of Court Services
on behalf of
Silvana Arbia, Registrar

Dated this 14 January 2009

At The Hague, Netherlands

¹⁸ Ibid

¹⁹ Ibid