

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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Date: **24 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 for Mathieu
Ngudjolo and the Registry

**Second Decision on Measures of Prohibition and Restriction of Contacts Both
Outside and Inside the Detention Centre in respect of 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 Kagengi 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**

Others

Presidency
Appeals Chamber
Trial Chamber I

TRIAL CHAMBER II of the International Criminal Court (“the Chamber” and “the Court” respectively), acting pursuant to articles 67 and 68 of the Rome Statute (“the Statute”) and to regulations 23bis and 101 of the Regulations of the Court, decides as follows.

1. On 8 June 2009, the Registrar submitted to the Chamber her Initial Report on the monitoring of Mathieu Ngudjolo’s non-privileged communications (“the Initial Report”).¹ That document followed the Registry’s decision, filed on 12 February 2009, making an order for the *post-factum* monitoring of the accused’s telephone conversations since 1 October 2008, and for his future telephone conversations to be actively monitored for a period of 14 days.²

2. By oral decision of 9 June 2009, the Chamber authorised disclosure of the Report to the Prosecutor.³ On 12 June 2009, the latter submitted to the Chamber an urgent request under regulation 101(3) of the Regulations of the Court, seeking *inter alia* to prohibit all contact between Mathieu Ngudjolo and the outside and to separate him from the other detainees (“the Request”).⁴

3. In accordance with regulation 101(3) as aforesaid, the Chamber informed Mathieu Ngudjolo of this Request, in order to enable him to submit any observations. It also adopted temporary measures consisting of a ban on all contact with the outside,

¹ Registry, “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”, 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp-tENG. 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, “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”, 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp-tENG. See also ICC-01/04-01/07-1233-Conf-Exp.

including incoming and outgoing mail, telephone calls and visits, as well as on contact with his fellow detainees.⁵

4. By decision of 24 June 2009, the Chamber took various measures the purpose of which was to suspend Mathieu Ngudjolo's right to hold telephone conversations with the contacts registered by the Registry, to lay down conditions governing incoming and outgoing mail, to ban all visits and to separate the accused from the other persons held within the same detention centre.⁶ For each of these measures, the Chamber was concerned to make it clear that they were of a temporary nature and that the need to maintain them would be reviewed by it once it had received a supplementary report from the Registry containing an analysis of the content of the accused's conversations between 31 January and 12 March 2009 ("the Supplementary Report").⁷ Furthermore, the Chamber explained that these various measures did not apply to the accused's Defence team, with the exception of two resource persons, Messrs. Rock Banga Mateso and Christophe Koli Lopa.⁸

5. The Supplementary Report, containing an analysis of telephone conversations during the month of February 2009, was filed on 10 July in accordance with the Chamber's instructions ("the Second Report").⁹ On 16 July 2009, the Chamber also received a third report from the Registrar containing an analysis of telephone conversations between 1 and 10 March 2009 and between 17 and 31 May 2009 ("the Third Report"),¹⁰ the period from 17 March to 17 May 2009 to be dealt with in

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, the Defence for Mathieu Ngudjolo and the Registrar. On 23 June 2009 the Defence for Mathieu Ngudjolo submitted its observations under regulation 101(3) of the Regulations of the Court. See Defence for Mathieu Ngudjolo, "Observations on the Registry's Report and the Prosecutor's Brief Underpinning Trial Chamber II's Order ICC-01/04-01/07-1215-Conf-Exp of 18 June 2009", 23 June 2009, ICC-01/04-01/07-1238-Conf-Exp-tENG.

⁶ *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-01/04-01/07-1243-Conf-Exp-tENG, para. 33.

⁷ *Ibid.*, paras. 35 and 36.

⁸ *Ibid.*, para. 34.

⁹ *Ibid.*, paras. 33 and 36.

¹⁰ Registry, "Troisième 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", 16 July 2009, ICC-

subsequent filings.¹¹ The Chamber received the observations of the Defence for Mathieu Ngudjolo on the Second Report on 17 July 2009,¹² and those on the Third Report on 20 July 2009.¹³ The Prosecutor's observations, common to the two Reports, were filed on 20 July 2009.¹⁴

6. The purpose of the present Decision is to determine whether the measures currently in force should be lifted, maintained or varied, in light of the two above-mentioned Reports and of the requests by the Prosecutor and the Defence for Mathieu Ngudjolo in their most recent observations. The Decision will also respond to the latter's request for disclosure of the Registry's report on the arrangements for his separation from his fellow detainees.¹⁵

I. The Registry's findings and the parties' submissions on extension of the measures of prohibition and restriction

a. The Registry's findings

7. In her Second Report, the Registrar begins by explaining that she wishes to reiterate¹⁶ her comments in the First Report, which are in the following terms:

[TRANSLATION] It is important to observe that, while none of the communications transcribed (except for those the [REDACTED]) provide any information showing that Mathieu Ngudjolo explicitly gave the order for a witness to be intimidated, the fact remains that, on the one hand, he is disclosing information about witnesses or potential witnesses to third parties and that, on the other, nobody can determine how the said third parties are using or will use this information, nor the initiatives they might take which could potentially interfere with the administration of justice, intimidate witnesses, violate the rights and freedom of any

01/04-01/07-1308-Conf-Exp and ICC-01/04-01/07-1312-Conf-Exp (redacted version, only available to the Registry, the Prosecutor and the Defence for Mathieu Ngudjolo Chui).

¹¹ ICC-01/04-01/07-1308-Conf-Exp, paras. 1 and 2.

¹² Defence for Mathieu Ngudjolo, "*Observations de la Défense relatives au Deuxième Rapport du Greffier sur l'écoute des communications de Mathieu Ngudjolo non couvertes par le secret professionnel (ICC-01/04-01/07-1299-Conf-Exp du 14 juillet 2009)*", 17 July 2009, ICC-01/04-01/07-1313-Conf-Exp.

¹³ Defence for Mathieu Ngudjolo, "*Observations de la Défense relatives au Troisième Rapport du Greffier sur l'écoute des communications de Mathieu Ngudjolo non couvertes par le secret professionnel (ICC-01/04-01/07-1312-Conf-Exp du 17 juillet 2009)*", 20 July 2009, ICC-01/04-01/07-1320-Conf-Exp.

¹⁴ Office of the Prosecutor, "Prosecution's Observations on Registry's Second and Third Reports on the Analysis of the Telephone Conversations of Mathieu Ngudjolo", 20 July 2009, ICC-01/04-01/07-1321-Conf-Exp.

¹⁵ Defence for Mathieu Ngudjolo, "*Requête aux fins de communication du rapport du Greffe sur les modalités de séparation mises en place en application de la Décision 1243-conf-exp*", 2 July 2009, ICC-01/04-01/07-1262-Conf-Exp.

¹⁶ ICC-01/04-01/07-1291-Conf-Exp, para. 1.

person, or even breach a non-disclosure order issued by the Chamber – if that is not the case already.¹⁷

In addition, she points out that many of the telephone conversations from February 2009 relate to the preparation of the accused's Defence, to the investigations conducted by his team in the field and to his private life. These conversations have been reproduced in the Second Report only insofar as they involve individuals external to the Defence team.¹⁸

8. The Registrar stresses that analysis of the conversations shows that the accused is aware of the course of events in Thomas Lubanga's trial and of the situation of certain of the witnesses called to testify there. She adds that Mathieu Ngudjolo's resource person appears to be in close contact with the resource persons of Thomas Lubanga.¹⁹ She further notes that Mathieu Ngudjolo has discussed witnesses with persons other than members of his Defence team, in particular in the case of one such person [REDACTED], via the telephone number of the resource person of Thomas Lubanga ([REDACTED]).²⁰ The Registrar also reports on a conversation "in two parts" which Mathieu Ngudjolo would appear to have had on behalf of Germain Katanga.²¹

9. In her Third Report, the Registrar notes first of all that Mathieu Ngudjolo attempts to identify certain Prosecution witnesses, and in particular the family members of a protected witness, by approaching third parties, such as his resource person, Pastor Christophe Koli Lopa, or his own "big brother", [REDACTED] or a certain [REDACTED]. She also observes that certain of the conversations highlight the role played by third parties, in particular a certain Mateso Lodya, as well as by the accused's resource person, in endeavouring to "coach" witnesses before their meetings with Counsel from his Defence Team. The Registrar also emphasises the existence of contacts between Pastor Koli Lopa and [REDACTED] resource

¹⁷ ICC-01/04-01/07-1195-Conf-Exp, para. 24 (footnotes omitted).

¹⁸ ICC-01/04-01/07-1291-Conf-Exp, paras. 1 and 2.

¹⁹ Ibid., paras. 3-5.

²⁰ Ibid., paras. 6-10.

²¹ Ibid., para. 11.

person for Thomas Lubanga. Finally, she notes that Mathieu Ngudjolo has breached the provisions regarding the number and identities of persons authorised to communicate with him by telephone.

b. The Prosecutor's submissions

10. In the Prosecutor's view, the Second and Third Registry Reports show that Mathieu Ngudjolo, despite knowing that his calls are being monitored, is continuing to interfere with the course of justice by attempting to identify certain Prosecution witnesses and to influence the testimony of individuals before they are interviewed by his own Defence team.²²

11. In regard to the Second Report, the Prosecutor considers that it discloses in particular breaches of orders issued by the Chamber on document confidentiality, as well as attempts by the accused to put pressure on witnesses' families.²³ He also notes the existence of a conversation between the accused and the resource person for Thomas Lubanga, and the resultant risk of transmission of confidential information.²⁴ He notes, finally, that the accused has spoken with individuals not covered by the calling procedure put in place at the detention centre.²⁵

12. In regard more particularly to the Third Report, the Prosecutor observes that Mathieu Ngudjolo deliberately switches languages during his conversations in order to avoid being understood, and that he has chosen his second resource person on the basis of his ability to make contact with witnesses, to "coach" them or to influence them. He also stresses the fact that there have been exchanges of information between the accused, Thomas Lubanga and the latter's resource person.²⁶

13. All of these findings accordingly impel the Prosecutor to request the Chamber to maintain permanently the separation order imposed by it, and to prohibit all contact

²² ICC-01/04-01/07-1321-Conf-Exp, para. 3.

²³ Ibid., para. 4.

²⁴ Idem.

²⁵ Ibid., para. 5.

²⁶ Ibid., para. 6.

by the accused with the outside, with the exception of family members.²⁷ He further considers that the conditions suggested by the Registry should also include active monitoring of conversations with his family, a ban on any discussion of the case with them, and instant termination of the call if he uses any language other than Lingala or Swahili.²⁸ The Prosecutor also considers that not only Mathieu Ngudjolo, but also his Defence team, must be prohibited from all communication with its two current resource persons, Rock Banga Mateso and Christophe Koli Lopa, because of the role played by them in identifying, intimidating or influencing Prosecution witnesses.²⁹ A like prohibition should, in the Prosecutor's view, be imposed in respect of [REDACTED], resource person for Thomas Lubanga.³⁰

14. Finally, the Prosecutor requests the Chamber :

- to reclassify the three Registry Reports as "confidential *ex parte*" documents, also available only to the Defence for Germain Katanga, since he considers that they contain information relevant to the preparation of the latter's Defence, which he is required to disclose pursuant to rule 77 of the Rules;³¹
- to order the Registrar to conduct an analysis of the recordings of the non-privileged conversations of Germain Katanga between 1 December 2008 and 28 February 2009, in accordance with regulation 175(1) of the Regulations of the Registry; and
- to order the Registry to make the Second and Third Reports available to Trial Chamber I, since they disclose exchanges of confidential

²⁷ Ibid., para. 7.

²⁸ Ibid., para. 8.

²⁹ Ibid., para. 11.

³⁰ Ibid., para. 12.

³¹ Ibid., para. 13.

information between Mathieu Ngudjolo and Thomas Lubanga capable of affecting the proceedings concerning the latter.³²

c. The Defence arguments

15. In regard to the Second Report, the Defence for Mathieu Ngudjolo again contends that his conduct has been dictated solely by a concern to strive to determine the truth.³³ The Defence stresses that it has not been proved that he has committed any breach justifying the measures imposed on him, or that he has threatened, or attempted to threaten, intimidate or influence Prosecution witnesses or his own witnesses.³⁴ The Defence again refers, *inter alia*, to the confusion which has arisen regarding the name of a certain [REDACTED]³⁵ and asks, “[TRANSLATION] given the number of translation problems raised [...], to have transmitted to it, and to it alone, all of the extracts from the recordings cited in the reports”.³⁶ It also revisits the ban on telephone contacts, which it considers no longer justified and, as regards the Registry’s proposal for the possible resumption of family contacts, disputes the proposed duration of telephone conversations, which it regards as far too short.³⁷ The Defence likewise contends that none of the six grounds set out in regulation 101 of the Regulations of the Court is present here.³⁸ It accordingly concludes that the measures imposed on the accused should be lifted as a matter of urgency, for it considers them disproportionate and unjustified, “[TRANSLATION] excessive and inhumane”,³⁹ and it asks the Chamber to [TRANSLATION]:

- note the absence of any evidence to show that Mathieu Ngudjolo has acted in a manner contrary to the rules governing the Court’s proceedings;
- order the Registry to transmit, for consideration by the Defence alone, extracts from the recordings cited in the two Reports;
- lift without further delay the restrictions imposed on Mathieu Ngudjolo; and

³² Ibid., para.15.

³³ ICC-01/04-01/07-1313-Conf-Exp, paras. 15 and 16.

³⁴ Ibid., paras. 16, 31 and 36.

³⁵ Ibid., para. 19.

³⁶ Ibid., para. 23.

³⁷ Ibid., paras. 24-30.

³⁸ Ibid., paras. 33 and 38.

³⁹ Ibid., paras. 42 and 46.

- authorise Mathieu Ngudjolo to call his family and persons close to him without any further restrictions as to time, and to receive visits.⁴⁰

16. In its observations on the Third Report, the Defence for Mathieu Ngudjolo again stresses the fact that the majority of the non-privileged conversations in question relate to the preparation of his defence.⁴¹ It is thus surprised that the Prosecutor has received the Report, despite the fact that, in its view, this does not reflect any express request by the Chamber, unlike the Supplementary Report requested by the latter in its decision of 24 June 2009.⁴² The Defence likewise strongly objects to the “[TRANSLATION] accusatory tone”⁴³ employed by the Registry to describe the role of the resource persons, and points out that the latter have “[TRANSLATION] the same obligations as the other members of defence teams in terms of ethics and confidentiality”.⁴⁴ Confirming, moreover, the arguments set out in its observations of 17 July 2009 on the Second Report, the Defence again emphasises that the conditions for applying regulation 101 of the Regulations of the Court do not appear to it to be met.⁴⁵ Finally, it reiterates its desire for the urgent lifting of the measures imposed on the accused, which it considers unjustified, disproportionate and of excessive duration. The Defence concludes its submissions by asking the Chamber to [TRANSLATION]:

- note the absence of any confirmation of the allegations under regulation 101(3) [of the Regulations of the Court];
- lift without further delay the restrictions imposed on Mathieu Ngudjolo;
- authorise Mathieu Ngudjolo to call his family and persons close to him without any further restrictions as to time, and to receive visits;
- order the Registry to consult the Defence on possible redactions, so as not to repeat the violation of the specific rights of the accused in relation to investigations.⁴⁶

II. The Chamber’s analysis regarding the extension of measures of prohibition and restriction

⁴⁰ Ibid., p. 19.

⁴¹ ICC-01/04-01/07-1320-Conf-Exp, para. 16.

⁴² Ibid., paras. 21-23.

⁴³ Ibid., p. 8.

⁴⁴ Ibid., para. 25.

⁴⁵ Ibid., paras. 38-41.

⁴⁶ Ibid., p. 15.

17. In accordance with the decision rendered by it on 24 June 2009,⁴⁷ the Chamber will consider whether the measures of restriction and prohibition imposed by it are still justified and, if so, whether those which it contemplates for the future are proportionate to the legitimate aim pursued by it.

a. Are the contemplated restrictions justified ?

18. The Chamber would begin by recalling that it has already held that regulation 101 of the Regulations of the Court expressly provides for the possibility of prohibiting or regulating contacts between a detained person and any other person, with the exception of counsel. It has also pointed out that the conditions and modalities for the implementation of measures of this kind are set out in that same regulation, which is readily accessible to the accused.⁴⁸ Finally, it observes that the conduct of Mathieu Ngudjolo which led to this provision being implemented falls within the terms of paragraph 2, subparagraphs (b), (c) and (d), of the above-mentioned regulation 101, inasmuch as it could in particular prejudice or affect the outcome of the proceedings, or could be harmful to any person, or could be used by a detained person to breach an order for non-disclosure made by a judge.

19. The Chamber must now satisfy itself that maintenance of the measures already ordered by it still represents the pursuit of a legitimate aim and remains absolutely necessary.

20. In effect, the Registry's findings in the course of the month of February 2009, and again during part of the months of March and May 2009, confirm those set out in the Initial Report and show that, during these various periods, Mathieu Ngudjolo essentially continued to use the means of communication available to him in order:

- to obtain information on the situation of certain Prosecution witnesses;
- to verify information concerning the identity of other witnesses;

⁴⁷ ICC-01/04-01/07-1243-Conf-Exp.

⁴⁸ Ibid., paras. 20-24.

- to attempt, in particular with the assistance of his resource persons, to approach certain of his own witnesses before they are interviewed by members of his Defence team;

- to transmit requests for information from Germain Katanga;

thereby communicating on occasion with his interlocutors in a manner that violated the new procedure instituted by the Registry for telephone calls.

21. In light of this finding, the Chamber considers that it is unable, in current circumstances, to lift any of the measures imposed on 24 June 2009. It is indeed essential to avoid any renewal of conduct of a similar nature, and to continue to prevent any further action on the part of the accused which could hinder or interfere with the conduct of the proceedings or affect the security of witnesses. To this end, and in light of the additional material available to it, the Chamber finds itself compelled to impose further prohibitions, while at the same time taking the view that it can modify certain of the measures currently in force so as to render them less restrictive.

b. Are the contemplated restrictions proportionate to the legitimate aim pursued ?

22. The Registry's new findings, as recalled above, impel the Chamber to make the following modifications in the regime governing Mathieu Ngudjolo's contacts with the outside.

Telephone calls. The Chamber considers that it is necessary to maintain suspension of permission to communicate with the "contacts" registered by the Registry, which Mathieu Ngudjolo had enjoyed until the decision on temporary prohibition taken on 18 June 2009, but with the exception, as the Registry suggests in its Second Report,⁴⁹ of conversations with his wife and children. Those conversations must be limited to 40 minutes per week, divided, at the option of the accused, into two conversations of

⁴⁹ ICC-01/04-01/07-1291-Conf-Exp, para. 16.

20 minutes each, or into three conversations of two times 15 minutes and one of 10 minutes. Since their purpose is to maintain family bonds, they must accordingly be strictly confined to private matters, be conducted in French, Swahili or Lingala, not touch on issues relating to witnesses in the case or involve the use of codes or pseudonyms. The Chamber would stress that any breach by the accused of these conditions will be noted in the course of the passive monitoring to which he is currently subject pursuant to regulation 174 of the Regulations of the Registry, and will result in an immediate review of his permission to communicate. These modified measures are imposed on a temporary basis and will be re-assessed after 20 August 2009, when the Registry is to provide the Chamber, by not later than 4.00 p.m, with a report on their operation.

With regard to the Prosecutor's request for the institution of active monitoring, the Chamber would point out that, pursuant to regulation 175 of the Regulations of the Registry, such a decision is a matter for the Chief Custody Officer and the Registrar, who is responsible for taking such action in this regard as they may consider appropriate.

Outgoing and incoming mail. The Chamber will maintain the measures adopted on 24 June 2009. It accordingly suspends the accused's right to receive or send mail from or to any person other than those listed in paragraph 1 of regulation 169 of the Regulations of the Registry. Such suspension is again imposed on a temporary basis and will be further reviewed at a later date. The Chamber will, however, authorise outgoing mail addressed to the wife and children of Mathieu Ngudjolo, and incoming mail addressed to him by those same persons, subject to the following conditions:

- all correspondence must be in French or Lingala; otherwise it will not be sent or delivered and will be retained by the Registry;
- after being "reviewed" in accordance with paragraph 1 of regulation 169 of the Regulations of the Registry, items of opened mail shall, in accordance with

paragraph 3 of that regulation, be delivered to the accused or posted to the addressee;

- the Registry shall, on 20 August 2009, submit to the Chamber a report on the implementation of these instructions and shall inform it of any difficulties engendered thereby.

Visits. The Chamber can see no reason which would allow it, in present circumstances, to reconsider the prohibition imposed on 24 June 2009. It recalls that, until now, the only visits to Mathieu Ngudjolo have been from members of his family, and that the attitude adopted by his wife, as well as her role in passing on her husband's instructions to contacts in the DRC, are in large part the cause of the current ban. The Chamber is aware, however, that an application has been in progress since February and is currently facing various administrative obstacles. In the event that these should be removed, the Chamber invites the Registry to notify it forthwith, so as to enable it, if appropriate, to reconsider its decision.

Contacts with fellow detainees. The information contained in the Second Report compels the Chamber to maintain unchanged the measures separating Mathieu Ngudjolo from fellow detainees from the DRC like himself, as well as from Mr Charles Taylor. [REDACTED]

[REDACTED] However, being conscious of Mathieu Ngudjolo's resultant sense of isolation, the Chamber would ask the Registry to devise, and then put into effect, as soon as possible, some form of measure that would enable Mr Ngudjolo to accomplish his outings, walks or physical exercise in the company of individuals detained in other parts of the facility. However, the Chamber maintains its wish for Mathieu Ngudjolo to remain in the cell that he currently occupies, so that he may access the record of the case via Ringtail.

23. The Chamber once again recalls that the suspension and banning orders discussed above do not apply to the accused's Defence team, albeit with the exception of the two resource persons, Messrs. Rock Banga Mateso and Christophe Koli Lopa. As regards these two individuals, the Prosecutor's request for them to be banned from communicating in any way with Mathieu Ngudjolo is thus moot, since such a ban has already been in existence since 18 June 2009, and was confirmed on 24 June 2009. On the other hand, the ban cannot be extended to the accused's Defence team, as the Prosecutor suggests. Thus the Chamber would point out that, pursuant to article 7(4) of the Code of Professional Conduct for Counsel, resource persons are an integral part of a defence team, and a prohibition of this kind could hence affect the free exercise of the rights of the defence.

24. Nonetheless, the Chamber feels bound to call the specific attention of Mathieu Ngudjolo's Defence team to the role played in particular by Christophe Koli Lopa in the days immediately following the confirmation of his appointment.⁵⁰ In this regard, the Chamber can only express its surprise at the comments in the Defence observations on the Third Report, which strictly confine themselves to the conditions for the appointment of resource persons, and to the permitted communications between such persons. The conduct of this member of the Defence team should, on the contrary, have alerted Mathieu Ngudjolo's Counsel, as his supervisor within the meaning of article 7(4) of the Code of Professional Conduct for Counsel, whose provisions are moreover expressly recalled in the Registrar's letter confirming the former's appointment as resource person.

25. The Chamber would therefore stress the particular responsibility of Counsel for Mathieu Ngudjolo in relation to the conduct of all of the members of his team. If future Registry reports were to confirm Christophe Koli Lopa's conduct, and if it were to be shown that he was persisting in such conduct, the Chamber could not preclude having recourse to article 32 of said Code of Conduct. Such would in

⁵⁰ Letter from the Registry dated 13 May 2009, entitled "*Confirmation de votre désignation comme personne ressource*", DSS/2009/158/AM.

particular be the case where Counsel for Mathieu Ngudjolo took no action to put a stop to his investigator's reprehensible conduct, including, if necessary, by excluding him from his team.

26. It goes without saying that Mathieu Ngudjolo cannot be permitted to have telephone conversations, through Christophe Koli Lopa, with [REDACTED] resource person for Thomas Lubanga. The Chamber would, moreover, draw the attention of Counsel for the Defence of Mathieu Ngudjolo to his obligation to ensure that his investigator refrains in future from discussing this case, and in particular the situation of the witnesses, with [REDACTED]

27. The Chamber would also again stress that all of these measures are imposed on a provisional basis, and that the accused is still allowed to continue to correspond by mail, under certain conditions, with close family members, and that the Chamber will now authorise him, again subject to certain conditions, to talk to them on the telephone. It is thus not the Chamber's wish, as the Prosecutor requests, that the measures adopted by it should be of a permanent character. In this way, the Chamber considers that it has achieved a fair balance between, on the one hand, the rights of every detained person to the preservation of his or her family life and to retain contacts with the outside world and, on the other hand, the overriding need to preclude any hindrance to the conduct of the proceedings and to protect witnesses and their families from any pressure or intimidation. All of these measures are absolutely necessary in order to put an end to the conduct found to have occurred, and, in the Chamber's view, are proportionate to the legitimate aim pursued.

28. Finally, the Chamber recalls that the need for these restrictions and prohibitions to be maintained will be reviewed after 20 August 2009. It requests the Registry, moreover, to keep it informed of how they are operating in practice, as well of any difficulties encountered by it in implementing them, in particular as regards the new arrangements for the separation of the accused from his fellow detainees.

29. Finally, in regard to the other requests submitted by the Prosecutor, the Chamber considers that it can only be to the advantage of Trial Chamber I for it to be informed of the links between the resource persons of Mathieu Ngudjolo and those of Thomas Lubanga, as well as of the exchanges of information recorded, which could compromise the protective measures ordered by it in the case currently before it. The Chamber therefore requests the Registry to allow Trial Chamber I to have access to the Registry's Second and Third Reports.

30. On the other hand, as regards the reclassification of the Reports so as to enable them to be disclosed to the Defence for Germain Katanga pursuant to rule 77 of the Rules, the Chamber has already held that information obtained from conversations recorded for a totally different purpose cannot be used at trial in the present case.⁵¹ Without prejudice to the position to be adopted by the Appeals Chamber on this point, the Chamber cannot accept the Prosecutor's request.

31. In regard to the request for an analysis of the recordings of Germain Katanga's telephone conversations between 1 December 2008 and 28 February 2009, the Chamber is bound, here again, to remind the Prosecutor that, under regulations 174 and 175 of the Regulations of the Registry, this is a matter falling within the sole competence of the Chief Custody Officer and the Registrar. The Chamber can thus only draw the attention of the the Registrar to this issue, leaving it to her to take such action as she considers appropriate.

32. Having noted what it considers to be frequent errors of "translation", or rather of interpretation, of the content of the recordings, the Defence for Mathieu Ngudjolo "[TRANSLATION] asks to have transmitted to it, and to it alone, all of the extracts from the recordings cited in the reports".⁵² The Chamber will grant this request, since it could effectively enable Counsel for the accused to correct possible errors, but also, and above all, in accordance with article 7(4) of the Code of Professional Conduct for

⁵¹ *Decision on the Appeals by the Prosecutor and the Defence of Mathieu Ngudjolo Chui against Decision 1243 of 24 June 2009*, 14 July 2009, ICC-01/04-01/07-1303-Conf-Exp-tENG, para. 10.

⁵² ICC-01/04-01/07-1313-Conf-Exp, para. 23.

Counsel, it will enable him to satisfy himself that the resource persons are not acting in breach of their professional obligations and, if such were to be the case, forthwith to take the appropriate action, as explained in paragraphs 24 and 25 above. It therefore orders the Registry to transmit to the Defence for Mathieu Ngudjolo the relevant extracts from the conversations cited in the Second and Third Reports.

33. Finally, the Chamber recalls that it has already responded, in its Decision of 20 July 2009, to Mathieu Ngudjolo's request for the Registry to be invited to consult it beforehand on any redactions to its reports.⁵³

III. The request by the Defence for Mathieu Ngudjolo for disclosure of the Registry's report on the arrangements for separation of the accused from his fellow detainees

34. In its Decision of 24 June 2009, the Chamber requested the Registry to submit to it a report setting out the measures taken in order effectively to separate Mathieu Ngudjolo from his fellow detainees. The Registry filed its report on 29 June 2009.⁵⁴ It briefly refers therein to the fact that Mathieu Ngudjolo has never so far corresponded with his family by mail, and then proceeds to set out certain considerations regarding the number of persons whom the accused is currently authorised to contact by telephone.

35. In its request, the Defence for Mathieu Ngudjolo emphasises that the above report is an integral part of its client's detention record, and that the Defence is entitled to have confidential *ex parte* access to it.⁵⁵ The Chamber notes that, under regulation 189 of the Regulations of the Registry, the detention record shall include "any order restricting access to news and contact issued in accordance with regulation 101 of the Regulations of the Court". The Chamber considers that the report on the implementation of an order based on this latter provision and

⁵³ *Decision on the Defence Request relating to the Registrar's Third Report on the Monitoring of Mathieu Ngudjolo's Communications*, 20 July 2009, ICC-01/04-01/07-1319-Conf-Exp-tENG, para. 12.

⁵⁴ Registry, "*Rapport du Greffe sur la mise en oeuvre au quartier pénitentiaire des restrictions des communications et de contacts imposées par la Chambre à l'encontre de Mathieu Ngudjolo Chui*", 29 June 2009, ICC-01/04-01/07-1253-Conf-Exp.

⁵⁵ ICC-01/04-01/07-1262-Conf-Exp, para. 12.

prohibiting contacts between fellow detainees must be regarded as forming an integral part of that order, albeit with the exception of matters relating inter alia to the internal operation of the detention centre and of the relevant Registry departments.

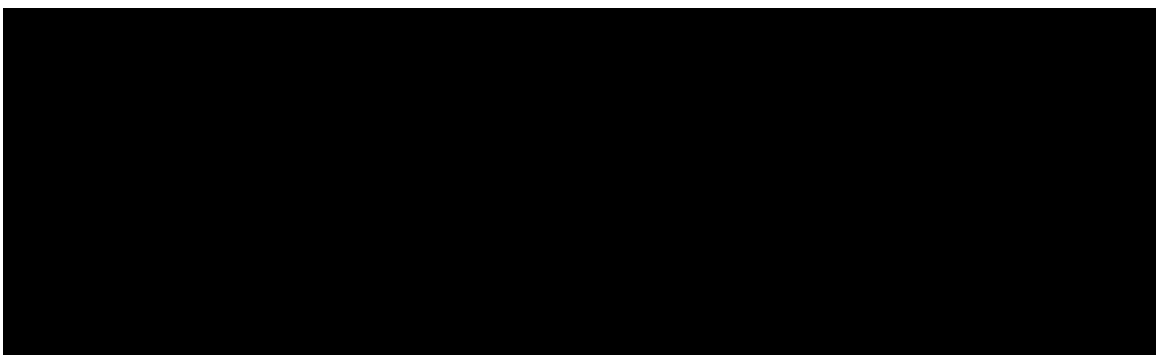
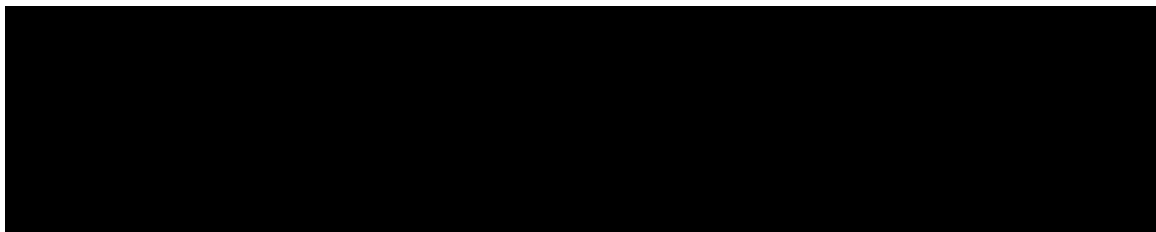
36. The Chamber further notes that the Defence for Mathieu Ngudjolo rightly invokes paragraphs 1 and 2 of regulation 92 of the Regulations of the Court, which provide that the detention record shall be confidential and accessible to the detained person and his or her counsel, “save as regards such information as the Chief Custody Officer, in consultation with the Registrar, determines should be withheld in the interests of the proper management of the detention centre”.⁵⁶ The word “confidential” as used in regulation 92 should primarily be understood in the sense of regulation 14 of the Regulations of the Registry, which makes it clear that the confidentiality of a document means only that it must not be disclosed to the public. It follows that the *ex parte* confidentiality claimed by the accused in support of a prohibition on its being disclosed to any other party or participant is not specifically provided for in regulation 92 of the Regulations of the Court. Nonetheless, the first paragraph of that regulation must be read in light of its other provisions, whose effect is that the detention record must be regarded as a confidential *ex parte* document available only to the accused’s Defence and to the Registry. Thus paragraph 4 states that the detained person shall be informed of any request for access to his detention record and shall be given the opportunity to be heard or to submit his views before any decision by the Chamber on its disclosure.

37. It follows that the Registry’s report of 29 June 2009 should be disclosed only to the Defence for Mathieu Ngudjolo, since it forms part of the detention record, and this is, in principle, available only to the Defence and to the Registry. The Chamber would, however, make it clear that any information relating to the internal operation of the detention centre and of the relevant Registry departments must be deleted from the report.

⁵⁶ Ibid., paras. 16 and 17.

IV. Additional remarks

38. Finally, the Chamber would recall the importance it attaches to the protection of victims and witnesses. To this end, in its decision of 24 June 2009 it requested the



FOR THESE REASONS, the Chamber

1. **ORDERS** the Registry, immediately on the filing of this Decision, to take the measures of restriction and prohibition set out in paragraphs 22, 23 and 26 of this Decision, it being understood that those measures do not apply to the four members of the Defence team;

2. **INSTRUCTS** the Registry to file, by 4.00 p.m. on 20 August 2009, its report on the operation of the measures concerning telephone calls and outgoing and incoming mail;

3. **ORDERS** the Registry to file, by 4.00 p.m. on 20 August 2009, a report on the new arrangements for separation within the detention centre that it has considered itself able to implement;

⁵⁷ ICC-01/04-01/07-1243-Conf-Exp, paras. 41-44.

4. REMINDS Counsel for the Defence of Mathieu Ngudjolo of his obligations under article 7(4) of the Code of Professional Conduct for Counsel;

5. INSTRUCTS the Chamber to give Trial Chamber I access to the Second and Third Reports;

6. DISMISSES the Prosecutor's request for the Second and Third Report to be reclassified with a view to their disclosure to the Defence for Germain Katanga, as discussed in paragraph 30 of this Decision;

7. FINDS THAT IT CANNOT RULE on the Prosecutor's requests for the institution of active monitoring of Mathieu Ngudjolo's conversations with members of his family, and for analysis of the recordings of Germain Katanga's conversations as referred to in paragraph 31 of this Decision;

8. ORDERS the Registry to transmit to the Defence for Mathieu Ngudjolo relevant extracts from the conversations cited in the Second and Third Reports, as referred to in paragraph 32 of this Decision;

9. INSTRUCTS the Registry to disclose to the the Defence for Mathieu Ngudjolo as soon as possible a redacted version of the report of 29 June 2009 on the arrangements for separation within the detention centre, as referred to in paragraph 37 of this Decision;

10. REMINDS [REDACTED],

11. ORDERS the Registry, and [REDACTED] in particular, to submit to the Prosecutor any recommendations that it considers necessary, including such disclosure of extracts from conversations and particulars of "contacts" as it deems strictly necessary, in accordance with paragraph 38 of this Decision;

12. INVITES the Prosecutor and the Registry to consult together to produce any joint proposal for the protection of witnesses that they consider necessary;

13. REQUESTS the Registry to inform it whether it wishes to reconsider the number of persons whom Mathieu Ngudjolo is currently permitted to contact by telephone.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed] 24/7/09

Judge Hans-Peter Kaul

Dated this 24 July 2009

At The Hague, The Netherlands