

ANNEX 15

Confidential ex parte available to the Registry, Prosecutor and Defence of Mr Ngudjolo only



Original: **French**

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

Date: **4 December 2009**

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine 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

**Fourth decision on measures of prohibition and restriction of contacts 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 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), acting pursuant to articles 21(3), 67 and 68 of the Rome Statute (“the Statute”) and regulation 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 telephone communications (“the Initial Report”).¹ The report was prepared following the Registry’s 12 February 2009 decision 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 Prosecutor submitted to the Chamber an urgent application 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 Application”).⁴

3. In accordance with regulation 101(3), the Chamber informed Mathieu Ngudjolo of this Application in order to allow him to submit any observations. It also adopted temporary measures consisting of a prohibition of 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 contact with his fellow detainees.⁵

4. By decision of 24 June 2009, the Chamber took various measures intended 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 prohibit all visits and to separate the Accused from his fellow detainees in the Detention Centre.⁶ For each of these measures, the Chamber was at pains to emphasise that they were temporary and that it would review them once the Registry filed a supplementary report analysing 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, Mr Rock Banga Mateso and Mr 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 2009 in accordance with the Chamber's instructions ("the Second Report").⁹ On 16 July 2009, the Chamber 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 was to be analysed 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, Mathieu Ngudjolo's Defence and the Registry. On 23 June 2009, Mathieu Ngudjolo's Defence submitted its observations in accordance with 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 Having received observations on the two Reports both from the Defence for Mathieu Ngudjolo and from the Prosecutor, the Chamber rendered a further decision on 24 July 2009.¹²

6. After considering whether the restrictions and prohibitions imposed on 24 June 2009 were still justified and, if so, whether those that it was contemplating for the future were proportionate to the legitimate aim pursued, the Chamber in essence maintained the measures regarding outgoing and incoming mail and the prohibition on visits. However, it eased the measures governing telephone calls, authorising the Accused, subject to certain conditions, to communicate with his wife. It also relaxed those governing his contacts within the detention facility, authorising outings, walks and physical exercise in the company of individuals detained in other parts of the facility.

7. The Chamber re-emphasised that these measures were temporary and would be reviewed after 20 August 2009, when the Registry was due to report to the Chamber on their implementation.

8. In a report dated 20 August 2009, the Registry's Detention Section reported on how these various measures were being implemented, and provided the Chamber with all relevant information on Mathieu Ngudjolo's medical and psychological state.¹³ In a separate report dated 24 August 2009, [REDACTED], at the Chamber's express direction, submitted its observations on

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

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

¹² *Second Decision on Measures of Prohibition and Restriction of Contacts Both Outside and Inside the Detention Centre in respect of Mathieu Ngudjolo*, 24 July 2009, ICC-01/04-01/07-1334-Conf-Exp-tENG.

¹³ Registry, "Rapport du Greffier relatif à la mise en oeuvre de certaines des instructions contenues dans la Décision de la Chambre du 24 juillet 2009", 20 August 2009, ICC-01/04-01/07-1410-Conf-Exp.

the potential consequences for the protection of certain witnesses of its findings from the analysis of Mathieu Ngudjolo's recorded conversations.¹⁴

9. Lastly, in a further report dated 10 September 2009, the Registry informed the Chamber that it had taken the initiative in speaking to the Accused in order, *inter alia*, to discuss his personal situation, to raise the possibility of easing the restrictions and, at the Chamber's invitation, to assess whether the list of individuals with whom Mathieu Ngudjolo had been authorised to communicate prior to the imposition of the restrictive measures of 24 June and 24 July 2009 might be reconsidered ("the Report of 10 September 2009").¹⁵ At the end of this report, the Registry submitted to the Chamber proposals for:

- a gradual and monitored resumption of Mathieu Ngudjolo's contact with his fellow detainees in the Detention Centre;

- renewed contact with his resource persons, but only in the presence of Defence Lead Counsel; and

- subject to certain conditions, an increase in the number of persons with whom the Accused could have telephone contact, which is currently limited to his wife only.

10. On 25 September 2009, the Chamber issued its third decision on measures prohibiting and restricting contact ("the Third Decision"). On that occasion, it considered that it was able to ease the measures which it had previously ordered, and authorised Mathieu Ngudjolo, subject to certain conditions:

- to communicate henceforth by telephone with persons other than his wife, specifically various other members of his family;

¹⁴ Registry, "██████ Report on the Analysis of the Non-Privileged Communications of Mathieu Ngudjolo Chui pursuant to Trial Chamber II Decision of 24 July 2009", 24 August 2009, ICC-01/04-01/07-1419-Conf-Exp.

¹⁵ Registry, "Propositions du Greffier à la Chambre aux fins d'assouplissement des mesures de restrictions imposées à l'encontre de Mathieu Ngudjolo en vertu de la norme 101 du Règlement de la Cour", 10 September 2009, ICC-01/04-01/07-1466-Conf-Exp.

- to enter into correspondence with persons other than his wife and children;
and

- to meet his fellow detainees daily in the only common area provided for them in the Detention Centre.

The arrangements thus authorised were also subject to the full involvement of Lead Counsel for the Accused, who was expressly required to ensure that his client strictly complied with the Chamber's new instructions.¹⁶

11. On 19 October 2009, the Registrar filed her fourth report on the monitoring of the Accused's non-privileged telephone communications¹⁷ ("the Report"). It was disclosed in redacted form to Mathieu Ngudjolo's Defence and to the Prosecutor, who submitted their observations on 13 and 16 November 2009¹⁸ respectively.

12. The Report concerned the content of telephone conversations during the periods from 17 March to 15 April 2009, 16 to 30 April 2009, 1 to 17 May 2009, 1 to 30 June 2009, 19 August to 25 September 2009 and 26 September to 16 October 2009 respectively. Concerning the period from 17 March to 19 June 2009, the day following the issuance of the decision imposing a temporary prohibition on any contact between Mathieu Ngudjolo and any other person,¹⁹ the Registry noted that in a number of conversations, information was exchanged on the matter of witness protection. The Report stated, however, that the conversations between 19 June and 16 October 2009, the period covered by the Chamber's restrictive measures, focused solely on family matters.

¹⁶ *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.

¹⁷ Registry, "*Quatrième rapport sur l'écoute des communications non couvertes par le secret professionnel de M. Mathieu Ngudjolo*", 19 October 2009, ICC-01/04-01/07-1542-Conf-Exp.

¹⁸ Office of the Prosecutor, "Prosecution's Observations on the Registry's 4th Report on the Non-Privileged Conversations of Mathieu Ngudjolo Chui", 13 November 2009, ICC-01/04-01/07-1639-Conf-Exp; Defence for Mathieu Ngudjolo, "*Observations de la Défense relatives au Quatrième Rapport du Greffier sur l'écoute des communications de Mathieu Ngudjolo non couvertes par le secret professionnel*", 16 November 2009, ICC-01/04-01/07-1644-Conf-Exp.

¹⁹ ICC-01/04-01/07-1215-Conf-Exp-tENG.

I. Arguments of the parties

a. The Prosecutor's observations

13. Having made the point that, due to the large number of redactions to the Report, he was only able to submit limited observations, the Prosecutor requested the Chamber to maintain the measures imposed by the third decision, dated 25 September 2009. In his view, those measures must be strictly implemented.

b. The observations of Mathieu Ngudjolo's Defence

14. Mathieu Ngudjolo's Defence again emphasised that the Accused's conduct was guided primarily by his interest in establishing the truth. In summary, it emphasised that he complied immediately with the measures ordered by the Chamber and that no incidents were reported. After challenging the Registry's interpretation of a number of statements he had made and after responding to the Prosecutor's arguments, Mathieu Ngudjolo's Defence requested that the restrictive measures currently imposed on the Accused be lifted immediately in order to allow him to devote his time to preparing for trial. In this regard, it emphasised Mathieu Ngudjolo's need for a modicum of social interaction, vital for his physical and mental health.

II. Discussion

15. In accordance with its decisions of 24 June,²⁰ 24 July 2009²¹ and 25 September 2009,²² the Chamber will consider whether the measures of restriction and prohibition it imposed are still justified, and if so, whether they remain proportionate to the legitimate aim pursued.

²⁰ ICC-01/04-01/07-1243-Conf-Exp-tENG.

²¹ ICC-01/04-01/07-1334-Conf-Exp-tENG.

²² ICC-01/04-01/07-1498-Conf-Exp-tENG.

a. Are the contemplated restrictions justified?

16. The Chamber recalls firstly 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 detainee and any other person, with the exception of counsel. Secondly, it has previously pointed out that the conditions and arrangements for implementing measures of this kind are set out in that same regulation, to which the Accused has ready access.²³ Lastly, it observes that Mathieu Ngudjolo's conduct which led to the implementation of this provision falls within the purview of regulation 101(2)(b), (c) and (d), inasmuch as it could 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.

18. The Chamber must now satisfy itself that maintaining these measures remains consistent with a legitimate aim and continues to be absolutely necessary.

19. In the Chamber's view, the analysis of the conversations between 17 March and 19 June 2009, although covering a period prior to its first decision on measures of prohibition and restriction, demonstrates the gravity of the violations committed by Mathieu Ngudjolo at that time. It also demonstrates the extent to which Mathieu Ngudjolo appears to have failed to assess the effect that his conduct might have on the subsequent developments in the substantive proceedings, despite his protestations of good faith in the aforementioned observations of 16 November 2009. Admittedly, by virtue of the restrictions on contact, the Chamber has received no new evidence that the Accused continued such conduct, and if no new misconduct has been observed, this a direct result of those restrictions. However, in the Chamber's view, the fact remains that the particular gravity of the Accused's conduct, not on isolated occasions but on a regular basis over an extended period of time, combined with the Chamber's inability at the present time to assess whether

²³ *Ibid.*, paras. 20 to 24.

the Accused is actually aware of the unlawfulness of his actions, does not allow the Chamber, as matters stand, to consider the possibility of easing restrictions.

b. Are the continued restrictions proportionate to the legitimate aim sought?

20. In light of the information at its disposal, the Chamber will therefore maintain the measures which it ordered in its decision of 25 September 2009, since in its view they remain proportionate to the legitimate aim sought. Once substantive hearings have resumed, it will assess whether it is appropriate to order a further easing of restrictions, or even to revert to the pre-18 June 2009 situation.

21. However, on the matter of visits, the Chamber recalls that in September 2009 the Registry reported that the arrangement of visits was dependent on the Congolese authorities, who alone had the power to issue new types of passports. In its third decision of 25 September 2009, the Chamber stated that it would still consider any requests for permission to visit once the problems with issuing cross-border documents had been resolved. In this regard, it notes that it received such a request from Mathieu Ngudjolo's Defence on 18 November 2009 for a visit due to be made between 11 and 23 December 2009.²⁴

22. At this stage of the proceedings, and noting that the Accused "[TRANSLATION] has been in pre-trial detention since February 2008 and has received only one visit from his nuclear family (2 out of 7)",²⁵ the Chamber considers that it must take into account the Accused's requests for both family and conjugal visits. Indeed, it recalls that the right to receive visits is expressly provided for in regulation 100 of the Regulations of the Court and, in its view, these requests are consistent with

²⁴ Defence for Mathieu Ngudjolo, "*Requête de la Défense de Mathieu Ngudjolo sollicitant de la Chambre de Première Instance II l'autorisation de visites familiales et conjugales*", 18 November 2009, ICC-01/04-01/07-1648-Conf-Exp.

²⁵ ICC-01/04-01/07-1644-Conf-Exp, para. 44.

international case law on the rights of detainees to maintain some family contact.²⁶ The Chamber further recalls that in the instant case it has never ordered a total prohibition on contact between the Accused and his wife and that, since its first decision, it has simply ensured that such contact has been regulated. Accordingly, in its view, the meetings between Mathieu Ngudjolo and his wife authorised by the Chamber today are also consistent with its previous decisions.

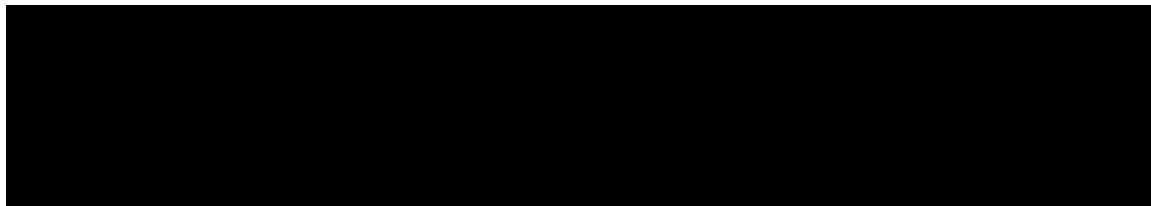
23. It will therefore be for the Registry to implement these two types of measures for the relevant period at a frequency and following arrangements that it deems the most appropriate.

24. Furthermore, being mindful of the submission by the Defence for Mathieu Ngudjolo that Mr Ngudjolo could be deprived of collective outings and communal sports activities during the coming weekends and hence during the period of the substantive hearings, the Chamber invites the Registry to take, in conjunction with the Detention Centre's administration, all appropriate measures to enable Mathieu Ngudjolo, if he so wishes, to continue to engage in this type of outdoor activity.

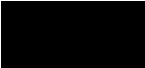
25. More generally, the Chamber considers that the stance that it has adopted still renders it necessary for the [REDACTED] to maintain its duty of care.

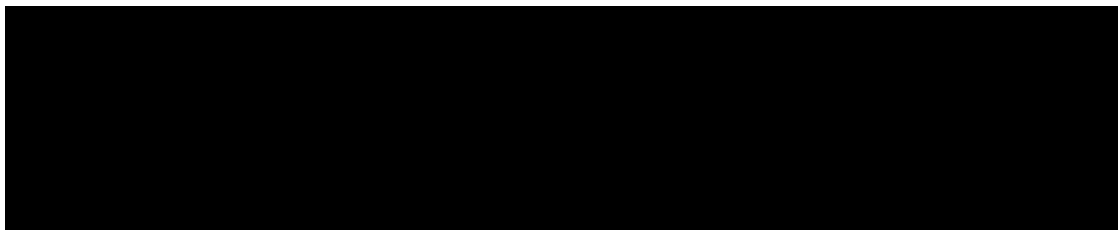
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²⁶ European Court of Human Rights (ECHR), *Messina v. Italy*, no. 25498/94, 28 September 2000, paras. 61 to 63: "61. The Court observes that any detention which is lawful for the purposes of Article 5 of the Convention entails by its nature a limitation on private and family life. However, it is an essential part of a prisoner's right to respect for family life that the prison authorities assist him in maintaining contact with his close family". See also: ECHR, *Kalashnikov v. Russia* (dec.), no. 47095/99, 18 September 2001, para. 7; ECHR, *Estrikh v. Latvia*, ref. 73819/01, 18 January 2007, paras. 165 to 166 and 169; ECHR, *Vlassov v. Russia*, no. 78146/01, 12 June 2008, para. 123. Lastly, see: International Criminal Tribunal for Rwanda, *The Prosecutor v. Ndindiliyimana, The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64*, Case No. ICTR-2000-56-T, 25 November 2002, para. 10; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Krajisnik, Decision on the Defence's Request for an Order Setting Aside, in Part, the Deputy Registrar's Decision of 3 February 2004, 14 May 2004*, Case No. IT-00-39-T, para. 9.



FOR THESE REASONS, the Chamber

- 1) **ORDERS** the Registry to maintain the measures set out in the Third Decision, whilst ensuring that all the necessary arrangements are made in order that Mathieu Ngudjolo may continue to engage in the communal outdoor activities available during weekends;
- 2) **AUTHORISES** the Registry to organise the family and conjugal visits referred to in paragraphs 21 to 23 of the present decision;
- 3) **ORDERS** the Registry to file, by 4 p.m. on 9 January 2010, a detailed report on the implementation of all prohibition and restriction measures currently in force, it being made clear that any incidents must be brought to the Chamber's attention immediately; and
- 4) **ORDERS** the Registry, and particularly  to state, where applicable,



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

[signed]
Judge Bruno Cotte
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Christine Van den Wyngaert

Dated this 4 December 2009

At The Hague, The Netherlands