

ANNEX 17

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



Original: **French**

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

Date: **16 March 2010**

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

**Decision on the Registrar's report on the monitoring of some of Mathieu
Ngudjolo's conversations following the Registrar's decision on monitoring dated
22 January 2010**

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

Other

**Victims Participation and Reparations
Section**

Trial Chamber II of the International Criminal Court (“the Chamber” and “the Court” respectively), pursuant to articles 67 and 68 of the Rome Statute (“the Statute”) and regulation 101 of the Regulations of the Court, and on the basis of regulations 174 and 175 of the Regulations of the Registry, decides the following.

1. On 8 January 2010, as requested by the Chamber, the Registrar submitted a report¹ on the implementation of the fourth decision on measures to prohibit and restrict Mathieu Ngudjolo’s contact with the outside.²
2. The Registrar reported on the conditions under which Mathieu Ngudjolo had been allowed to resume partial contact with his co-detainees in the detention centre. She also explained that the Accused’s contact with the outside was limited to making telephone calls.
3. The Registrar further reported that Mathieu Ngudjolo had been visited [REDACTED]
[REDACTED]
[REDACTED]
4. She also emphasised that, since the Chamber’s decision authorising the Accused to communicate by telephone with members of his family or individuals of special interest to him,³ his conversations had not been monitored, and therefore the content of those conversations remained unknown. Accordingly, the Registrar suggested that the Chamber authorise her to “[TRANSLATION] carry out the non-selective, non-regular and non-systematic monitoring of some of Mathieu Ngudjolo’s communications [...]”.⁴ Lastly, she explained that if any new monitoring measures that might be put in place did not reveal any reprehensible conduct, she could recommend that

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

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

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

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

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

5. On 20 January 2010, the Chamber issued a decision⁵ taking formal note of the Registrar's suggestion that the Chamber authorise her to carry out random monitoring both of conversations conducted between 25 September 2009 and 20 January 2010, and of those engaged in subsequently. It further noted that, in accordance with regulations 174 and 175 of the Regulations of the Registry, it was for the Chief Custody Officer and the Registrar themselves to take the action they deemed appropriate in this regard.⁶
6. The Chamber further stated that, pending any additional information that it received from the Registry, the measures restricting Mathieu Ngudjolo's contact with his co-detainees during physical and outdoor activities should be maintained.⁷ However, it considered it necessary to direct the Registry to inform it by 29 January 2010 whether it intended to implement *post-factum* monitoring measures in the form of sampling.⁸
7. On 22 January 2010, the Registrar issued a decision ordering, *inter alia*, the Chief Custody Officer to carry out the non-regular, non-selective and non-systematic monitoring of Mathieu Ngudjolo's non-privileged communications between 25 September 2009 and 28 January 2010 and to take the necessary steps with the Court's Interpretation Unit to interpret and transcribe those communications.⁹

⁵ *Decision on the Registrar's Report on the Implementation of the Chamber's Decision of 4 December 2009 concerning the Restrictions imposed on Mathieu Ngudjolo*, 20 January 2010, ICC-01/04-01/07-1778-Conf-Exp-tENG.

⁶ ICC-01/04-01/07-1778-Conf-Exp-tENG, para. 9.

⁷ ICC-01/04-01/07-1778-Conf-Exp-tENG, p. 6.

⁸ ICC-01/04-01/07-1778-Conf-Exp-tENG, para. 10.

⁹ *Décision du Greffier ordonnant la surveillance des communications de Mathieu Ngudjolo non couvertes par le secret professionnel entre le 25 septembre 2009 et le 28 janvier 2010*, 22 January 2010, ICC-01/04-01/07-1785-Conf-Exp.

8. On 19 February 2010, the Registrar submitted her report on the monitoring of some of Mathieu Ngudjolo's conversations ("the Registrar's Report"),¹⁰ which was made available to the Accused's Defence and the Prosecutor on 22 and 23 February 2010 respectively.
9. The Chamber invited the parties to file their observations on the Report by 12 March 2010. As of that date, only the Office of the Prosecutor had submitted its observations ("the Prosecutor's Observations").¹¹

1. The Registrar's Report

10. The Registrar first explained that she had limited herself to selecting 38 conversations at random from the 109 non-privileged telephone calls made by Mathieu Ngudjolo between 25 September 2009 and 28 January 2010.¹² She then noted that, with the exception of one conversation whose content was of particular interest, the monitored conversations focused on family, private or spiritual matters, as well as on subjects relating to third parties or relations of the detainee.¹³
11. However the Registry was unsure of the exact meaning of one passage of a conversation that took place on 9 October 2009 between Mathieu Ngudjolo and his brother [REDACTED]¹⁴ In this passage of two and a half lines, in a transcript of two and a half pages, the speakers discuss the situations of two individuals, in respect of whom it is difficult to understand why they are suddenly mentioned in the conversation. The verification carried out by the Registrar in this regard to determine, *inter alia*, whether the passage contained

¹⁰ "Rapport du Greffier sur l'écoute de certaines des conversations de Mathieu Ngudjolo suite à la décision de surveillance du Greffier en date du 22 janvier 2010", 19 February 2010, ICC-01/04-01/07-1890- Conf-Exp.

¹¹ Office of the Prosecutor, "Prosecution's Observations on Registry Report [ICC-01/04-01/07-1980-Conf-Exp]", 12 March 2010, ICC-01/04-01/07-1962-Conf-Exp.

¹² ICC-01/04-01/07-1890-Conf-Exp, para. 1.

¹³ *Ibid.*, para. 2.

¹⁴ *Ibid.*, para. 3.

a coded message, proved unsuccessful and were not, in any case, such as to allow the Registrar to draw any “particular” conclusions against the Accused.¹⁵ Accordingly, the Registry states that it leaves the question of how to deal with the information gathered on this point to the Chamber’s discretion.¹⁶

2. The Prosecutor’s Observations

12. The Prosecutor considers first of all that it is necessary to continue monitoring Mathieu Ngudjolo’s non-privileged telephone conversations. He justifies his argument on the grounds that the Accused has previously used these means of communication for illegal purposes, and that any recurrence might have consequences for the safety of witnesses and the integrity of proceedings. He also emphasises that it is essential to carry out *post-factum* monitoring of all non-privileged conversations in order to ensure that no codes are being used for illegal purposes, since random monitoring is inadequate in this respect.¹⁷
13. The Prosecutor further maintains that relaxation of the measures separating Mathieu Ngudjolo from his co-detainees during sports and outdoor activities is unjustified. The purpose of maintaining such a measure is, in his view, to prevent any further conduct on the part of the Accused that would affect the safety of witnesses or interfere with the course of justice.¹⁸ He also recalls Mathieu Ngudjolo’s contact with Thomas Lubanga and the latter’s resource person, and the contact between Mathieu Ngudjolo’s former resource person and Thomas Lubanga’s resource person.¹⁹ Finally, the Prosecutor emphasises that Mathieu Ngudjolo’s past illegal conduct involving the means of

¹⁵ *Ibid.*, para. 7.

¹⁶ *Ibid.*, para. 8.

¹⁷ ICC-01/04-01/07-1962-Conf-Exp, para. 1.

¹⁸ *Ibid.*, para. 13.

¹⁹ *Ibid.*, para. 14.

communication available to him, and the fact that the trial has commenced, militate in favour of maintaining the measures imposed by the Chamber.²⁰

3. DISCUSSION

14. The Chamber recalls that, in its decision of 24 June 2009²¹ prohibiting and restricting Mathieu Ngudjolo's contact both with the outside world and inside the detention centre, it took care to emphasise the importance for a detainee to be able to remain in contact with the outside and, in particular, to maintain personal and emotional ties with his or her family, especially after a protracted period of detention. It also wished to emphasise that it was for it to ensure that the restrictive measures that it might be led to take had a legitimate purpose, were justified and were strictly proportionate to the legitimate purpose sought. In this regard, it can only emphasise that proportionality must be assessed not only on the basis of the type of measures imposed but also on their duration.

15. To this end, the Chamber embarked upon a constant review of the Accused's situation in the light of regular reports requested from the Registry. Accordingly, the Chamber issued successive decisions on:

- 24 July 2009;²²
- 25 September 2009,²³ ordering a considerable relaxation of some of the measures that it had previously instituted, and inviting the Accused's Lead Counsel to

²⁰ *Ibid.*, para. 15.

²¹ *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. 18.

²² *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.

²³ *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.

ensure personally that the Accused complied strictly with the Chamber's new instructions;

- 4 December 2009,²⁴ authorising, *inter alia*, the Registry to arrange family and conjugal visits; and
- 20 January 2010,²⁵ the decision that led to the Registrar's Report.

16. In view of the latest random monitoring carried out by the Registry and the observations it made, *inter alia*, in its aforementioned reports of 8 January and 19 February 2010, the Chamber considers that it is possessed of sufficient information to conclude that Mathieu Ngudjolo has ceased the misconduct that led to the imposition of restrictions on his communication with the outside as from 18 June 2009. It considers, therefore, that the latest prohibition or restriction measures still in force are no longer justified and should now be lifted, and that Mathieu Ngudjolo must revert to his situation prior to 18 June 2009, when the decision imposing the initial interim measures was rendered.

17. As to the possibility of continuing to monitor the Accused's non-privileged telephone conversations, as suggested by the Prosecutor, the Chamber recalls that it is for the Chief Custody Officer and the Registrar to decide whether it is appropriate to take any further action in this regard.

18. Concerning the monitoring of all of Mathieu Ngudjolo's telephone conversations, the Chamber considers that the 38 conversations selected randomly by the Registry constitute a large enough sample to enable it to assess the changes in Mathieu Ngudjolo's conduct.

19. Likewise, it no longer appears necessary, in the Chamber's view, to maintain the measure separating Mathieu Ngudjolo from his co-detainees who, like

²⁴ *Quatrième décision sur les mesures d'interdiction et de restriction de contacts avec l'extérieur comme au sein de l'établissement pénitentiaire concernant Mathieu Ngudjolo*, 4 December 2009, ICC-01/04-01/07-1709-Conf-Exp.

²⁵ *Decision on the Registrar's Report on the Implementation of the Chamber's Decision of 4 December 2009 concerning the Restrictions imposed on Mathieu Ngudjolo*, 20 January 2010, ICC-01/04-01/07-1778-Conf-Exp-tENG.

him, are of African origin, during sports and outdoor activities. Besides the fact that these measures have been in force for almost nine months, the Chamber emphasises that it has not received any reports of misconduct since Mathieu Ngudjolo was authorised to communicate with his co-detainees, subject to certain conditions, in the communal areas of the detention centre.

20. However, as it has taken pains to do in each of the decisions listed above, the Chamber directs the Victims and Witnesses Unit ("the VWU") to maintain particular vigilance and to transmit any information suggesting that the situation of witnesses might be affected by a resumption of the actions of which Mathieu Ngudjolo has been previously accused.

21. Likewise, the Chamber feels bound to ask the Registrar or one of her authorised representatives to solemnly remind the Accused, in the presence of Mathieu Ngudjolo's Lead Counsel, that the occurrence of any further incident could lead to the reimposition of measures to prohibit and/or restrict communication with the outside world and inside the detention centre.

FOR THESE REASONS, the Chamber

- 1) **ORDERS** the Registrar to lift the measures currently in force prohibiting and restricting Mathieu Ngudjolo's communication with the outside world and inside the detention centre;
- 2) **ORDERS** the Registrar, and in particular the VWU, to notify it should the situation of witnesses appear to be affected by any resumption of the misconduct alleged against Mathieu Ngudjolo; and
- 3) **REQUESTS** the Registrar or one of her authorised representatives to solemnly remind the Accused, in the presence of his Lead Counsel Mr Jean-Pierre Kilenda, that the occurrence of any further incident may lead to the immediate reimposition of the restrictions lifted on this day.

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 16 March 2010

At The Hague, the Netherlands