

ANNEX 22

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



Original: **French**

No.: **ICC-01/04-01/07**
Date: **25 September 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

**Third 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 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**

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

¹Registry, “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.

²Registry, *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.

³ICC-01/04-01/07-T-66-CONG-EXP-ENG ET 09-06-2009, p. 39, lines 11-15.

⁴Office 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-01/04-01/07-1223-Conf-Exp.

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*

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 2009 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 subsequent filings.¹¹ Having received observations on the two Reports both from the

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 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-01/04-01/07-1308-Conf-Exp and ICC-01/04-01/07-1312-Conf-Exp (redacted version, available only 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.

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 basically maintained the measures regarding outgoing and incoming mail and the ban on visits. On the other hand, it eased the measures governing telephone calls, authorising the accused, subject to certain conditions, to communicate with his wife. It also relaxed the conditions for his contacts within the penal facility, authorising him to accomplish his outings, walks or physical exercise in the company of individuals detained in other parts of the facility.

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

8. In a report dated 20 August 2009, the Registry's Detention Section effectively gave an account of how these various measures were operating, as well as providing the Chamber with the necessary information on the physical and psychological state of health of Mathieu Ngudjolo.¹³ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
conversations.¹⁴

9. Finally, in a further report dated 10 September 2009, the Registry informed the Chamber that it had taken the initiative of meeting the accused in order, inter alia, to

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.

talk about his personal situation, to raise the possibility of an easing of restrictions and, in accordance with the Chamber's invitation, to discuss whether the list of persons with whom Mathieu Ngudjolo had been authorised to communicate before the imposition of the restrictive measures of 24 June and 24 July 2009 might be re-examined ("the Report of 10 September 2009").¹⁵ At the end of this Report, the Registry submitted to the Chamber proposals for:

- a gradual and controlled resumption of Mathieu Ngudjolo's contacts with his fellow detainees inside his detention centre;
- the renewal of contacts with his resource persons, but in the presence of Defence Lead Counsel;
- subject to certain conditions, an extension of the number of persons with whom the accused could communicate by telephone, currently restricted to his wife only.

I. Arguments of the parties

a. Observations of the Prosecutor

10. The Prosecutor submitted his observations on 17 September 2009, in which he generally indicated his opposition to the easing of restrictions proposed by the Registry.¹⁶ He states, however, that, if Mathieu Ngudjolo's psychological well-being should require it, an extension of telephone contacts with his family, subject to strict conditions, could be envisaged.¹⁷

11. More particularly, the Prosecutor considers that the Registry gives no reason to justify the grant of permission to communicate with other family or non-family

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.

¹⁶ Office of the Prosecutor, "Prosecution's Observations on Registry's Report regarding the Variation of the Restrictions Imposed Pursuant to Regulation 101 of the Regulations of the Registry", 17 September 2009, ICC-01/04-01/07-1477-Conf-Exp.

¹⁷ Ibid., p. 7.

members.¹⁸ He also stresses the role played by the wife of the accused in passing on useful information to certain of his associates.¹⁹

12. The Prosecutor further considers that at present Mathieu Ngudjolo fails to offer sufficient safeguards.²⁰ He points out that Mathieu Ngudjolo not only violated the administrative provisions governing the number of persons with whom he was permitted to communicate, but also ignored the Chamber's decisions relating to the disclosure of information, despite being aware that his conversations were being recorded and could be monitored.²¹

13. In the Prosecutor's view, the Registry's arguments regarding the threat to his psychological well-being as a result of his separation from his fellow detainees speaking the same language are purely hypothetical, by contrast with the real threats to witnesses.²² He further makes the point that the proposed measures are based on the assumption that Mathieu Ngudjolo will obey the Chamber's instructions on confidentiality, which is by no means certain. Finally, the Prosecutor observes that the proposed installation of audio-video equipment to monitor contacts between co-detainees capable of communicating in languages unknown to the detention centre teams is not an acceptable solution.²³

14. As regards resource persons, the Prosecutor considers that the bans on direct communication with Christophe Koli Lopa, Rock Banga Mateso and [REDACTED] must be strictly complied with.

¹⁸ Ibid., para. 3.

¹⁹ Ibid., para. 4.

²⁰ Ibid., para. 5.

²¹ Ibid., para. 6.

²² Ibid., paras. 7 and 8.

²³ Ibid., para. 10.

b. Observations of the Defence for Mathieu Ngudjolo

15. The Defence for Mathieu Ngudjolo submitted its observations on 22 September 2009.²⁴ It welcomes the Registry's initiative in asking the Chamber to ease the restrictions on its client and states that it fully approves them.²⁵ On the other hand, it strongly disputes the Prosecutor's remarks as to the measures proposed by the Registry being based on an assumption that Mathieu Ngudjolo will now comply with the Chamber's instructions regarding confidentiality. It is also surprised at his comments on the hypothetical nature of the threats to the accused's physical or mental well-being if the measures restricting his contacts inside the detention centre were to be extended.

II. The Chamber's analysis regarding a possible relaxation of the measures of prohibition and restriction

16. In accordance with the decisions rendered by it on 24 June²⁶ and 24 July 2009,²⁷ the Chamber will consider whether the measures of restriction and prohibition imposed by it are still justified and, if so, whether they remain proportionate to the legitimate aim pursued by it.

a. Are the contemplated restrictions justified?

17. 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.²⁸ Finally, it observes that the conduct of Mathieu Ngudjolo which led to this provision being implemented falls

²⁴ Defence for Mathieu Ngudjolo, "Observations de la Défense relatives aux « 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 » (ICC-01/04-01/07-1470-Conf-Exp du 15 septembre 2009)", 22 September 2009, ICC-01/04-01/07-1485-Conf-Exp.

²⁵ Ibid., paras. 4 and 7.

²⁶ ICC-01/04-01/07-1243-Conf-Exp.

²⁷ ICC-01/04-01/07-1334-Conf-Exp.

²⁸ Ibid., paras. 20-24.

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.

18. 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.

19. In effect, the Registry's findings in its Report of 10 September 2009 show that, following three months of particularly rigorous measures of prohibition and restriction, a notable change has taken place in Mathieu Ngudjolo's attitude and, in consequence, in his conduct. Thus, at a meeting with the Court's Director of the Division of Court Services, the accused gave "his word of honour" that he would no longer seek the assistance of third parties, or give instructions or pass on information which could cause harm to witnesses. Moreover, the Registrar was concerned to stress that extending the ban on all contact between the accused and his fellow detainees might affect him mentally, or indeed physically, particularly in view of the fact that the date for the opening of the trial has been put back by several weeks. Finally, the Chamber notes that it currently possesses no further transcript of the accused's conversations providing evidence of reprehensible conduct apart from that on which its previous decisions were based.

20. Given the information currently in its possession, and in light of this finding, which it cannot disregard, the Chamber takes the view that a relaxation of a number of the measures imposed on 24 July 2009 is justified. However, it considers that it cannot lift all of the measures already imposed, given, in particular, that it still awaits a report on the analysis of conversations between 17 March and 17 May 2009, as well as those covering the month of June 2009.

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

21. The change in Mathieu Ngudjolo's conduct accordingly impels the Chamber to make the following variations in the regime governing his permissible contacts with the outside. Such variation presupposes, however, total involvement on the part of Lead Counsel for Mathieu Ngudjolo's Defence, on whom it will be incumbent to see to it that his client complies strictly with the Chamber's new instructions. The latter will, moreover, request an appropriate representative of the Registrar solemnly to remind the accused, in the presence of Lead Counsel for the Defence, Mr Jean-Pierre Kilenda, of the precise terms of these measures, as well as of the conditions attached to them, explaining to him that they could be immediately reconsidered in the event of the slightest incident.

Telephone calls. The Chamber will not revisit the permission granted to the accused under the decision of 24 July to talk to his wife and children for 40 minutes per week, in accordance with arrangements determined by himself in agreement with the Registry. The Chamber decides, however, to maintain the conditions attached to such permission, namely that, given that they are intended to foster the maintenance of family bonds, conversations must be strictly confined to private matters, must be conducted in French, Swahili or Lingala; and must not touch on issues relating to witnesses in the case or involve the use of codes or pseudonyms. The Chamber further considers that it can accept the Registrar's proposal, in line with the Chamber's own suggestion, for reconsideration of the list of persons with whom the accused is permitted to make contact. The Chamber will accordingly now authorise him to have contact with several of the individuals on a list supplied by him at the Registry's request, given that these are persons from his immediate family circle, or of special interest to him and his family, and that all contact is, or remains, excluded with Prosecution witnesses. Such authorisation will henceforth apply to the following individuals:

- firstly: the accused's [REDACTED] ([REDACTED]), her husband ([REDACTED]), his [REDACTED] ([REDACTED]), a friend of the latter residing with him ([REDACTED]), two friends, described as elders, who can help him in the event of family problems [REDACTED], with each of whom he may talk for not more than 10 minutes every 15 days, making a total of 60 minutes of conversation every 15 days.
- secondly: the accused's elder brother ([REDACTED]), through whom he can speak to his mother ([REDACTED]), an [REDACTED] who takes care of the family's security and ensures that his army salary is paid, with each of whom he may talk for 10 minutes every 15 days, making a total of 20 minutes every 15 days.

The Chamber will attach to these authorisations the same conditions as those imposed for Mathieu Ngudjolo's conversations with his wife, as recalled above. It would moreover stress that any breach by the accused of these conditions will be noted in the course of such telephone monitoring measures as the Chief Custody Officer and the Registrar may deem it necessary to impose pursuant to regulations 174 and 175 of the Regulations of the Registry, and will result in an immediate review of his permission to communicate. The Chamber once again reiterates that these modified measures are imposed on a temporary basis and will be re-assessed once the Registry has provided it with a report on their operation, and on the analysis of conversations between 17 March and 17 May 2009 and during the month of June 2009. That report must be filed by 4 p.m. on 19 October 2009.

Outgoing and incoming mail. The Chamber considers that it can lift the prohibition on 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 and his wife and children. It will, however, maintain, and extend to all of the correspondence hereby authorised, the conditions laid down in the decisions of 24 June and 24 July 2009, namely the following:

- 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, by 4.00 p.m. on 19 October 2009, submit to the Chamber a report on the implementation of these instructions, and shall inform it of any difficulties engendered thereby.

Visits. In its Report of 20 August 2009, the Registry stated that any organisation of visits was currently subject to the decision of the Congolese authorities, who had sole authority to issue new types of passport. The Chamber will therefore not lift for the time being the prohibition imposed by it, and will leave it to the Defence for Mathieu Ngudjolo to submit to it, in due course, a request for permission to visit once current problems with the issue of cross-frontier documents have been resolved.

Contacts with fellow detainees. The Chamber is bound in this regard to pay particular attention to ensuring that the measures imposed are strictly proportionate to the aim pursued. It is conscious of the Registrar’s finding following her interview on 3 September 2009 with Mathieu Ngudjolo, and mindful of the potential consequences for the latter of an extension, if not absolutely justified, of the measures depriving him of all contact with his fellow detainees from the African continent, the only persons within the detention centre with whom he can converse. The Chamber will therefore accept in part the Registry’s proposals, which it considers reasonable and appropriate. It accordingly authorises Mathieu Ngudjolo to meet daily with his fellow detainees, but only in the common area used for cooking, eating and watching broadcasts of audio-visual material, as well as on Sundays, if desired, in the premises reserved for religious services, it being understood that:

- these contacts must take place in the presence of at least one detention centre guard;
- the accused cannot at any time be alone with any of his fellow detainees;
- any exchange of documents with the latter is absolutely forbidden;
- all contact shall be prohibited in individual cells and in the ablutions area.

However, the Chamber will not for the time being reconsider its prohibition on contacts of this kind during sporting activities and outdoor exercise, since it is a great deal more difficult to monitor detainees' activities at such times. The resultant easing of current restrictions on the accused could, however, be reconsidered at any time, should the Chamber be informed by the Registry of any incident while they are in operation.

Contacts with resource persons. As already indicated in its decision of 15 September 2009, the Chamber considers that it does not currently have available to it the necessary information to enable it to lift the ban on all contact between Mathieu Ngudjolo and the resource persons of his Defence team.²⁹ It recalls, however, that it has authorised, exceptionally and subject to strict conditions, the holding of working meetings involving, in the presence of the accused and under the responsibility of Lead Counsel, his entire Defence team. Such authorisation is basically justified by the Chamber's obligation under article 67(b) of the Statute to provide the Defence with the necessary facilities for the preparation of its case. The Chamber is further concerned to make it clear that it is through Mr Jean-Pierre Kilenda, Lead Counsel, and through him alone, that Mathieu Ngudjolo may henceforth make contact with resource persons. These restrictions on contacts are, again, temporary and may be reconsidered once the Chamber has received the Registry's report referred to in paragraph 20 above.

²⁹ *Décision sur la requête 1457-Conf-Exp de la Défense de Mathieu Ngudjolo*, 15 September 2009, ICC-01/04-01/07-1472-Conf-Exp.

III. Additional remarks

22. In the Chamber's view, this relaxation of restrictions also entails increased vigilance on the part of the Victims and Witnesses Unit. The Chamber accordingly instructs the Unit to inform it if, since 9 June 2009, the situation in terms of witness security has been affected. If such should be the case, the Unit must make the necessary proposals to the Chamber, liaising if necessary with the Office of the Prosecutor, in order to remedy the situation. The Chamber likewise requests the Unit to inform it as a matter of urgency of any matter which leads it to believe that any of the measures of relaxation provided for in this Decision could affect the security of a witness.

FOR THESE REASONS, the Chamber

1. ORDERS the Registry, immediately on the filing of this Decision, to take the measures set out in paragraph 21 hereof;

2. INSTRUCTS the Registry to file, by 4.00 p.m. on 19 October 2009, its report on the operation of the measures concerning telephone calls, outgoing and incoming mail, and the new arrangements for contacts between the accused and the resource persons of his Defence team, it being understood that any incident noted must forthwith be reported to the Chamber;

3. ORDERS the Registry to file, by 4.00 p.m. on 19 October 2009, a detailed report on the operation of the new arrangements for separation within the detention centre, it being understood that any incident noted must forthwith be reported to the Chamber;

4. ORDERS the Registry, and the Unit in particular, to inform it whether, since 9 June 2009, the security of witnesses has been affected, and to report to it on any potential negative change in the security situation of witnesses as a result of the new arrangements for communication laid down in this Decision; and

5. REQUESTS the Registrar, or an appropriate representative, solemnly to remind the accused, in the presence of his Lead Counsel for the Defence, Mr Jean-Pierre Kilenda, of the terms of the new measures, and of the conditions attached to them, explaining to him that the slightest incident could lead to their being immediately reconsidered.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed] 25/9/09

Judge Hans-Peter Kaul

Dated this 25 September 2009

At The Hague, The Netherlands