Cour Pénale Internationale

International Criminal Court

Original: **French**

No.: **ICC-RoR217-02/08**
Date: **18 November 2008**

THE REGISTRAR

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO

PUBLIC REDACTED VERSION

Decision of the Registrar under Regulation 220 on Mathieu Ngudjolo's Challenge of the 7 November 2008 Decision of the Chief Custody Officer

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

Counsel for the Defence
Jean-Pierre Kilenda Kakengi Basila
Maryse Alié

REGISTRY

Registrar
Silvana Arbia

Detention Section
Anders Backman

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

CONSIDERING regulations 33, 90 and 100(1) of the *Regulations of the Court* and regulations 179, 180, 217, 218, 219 and 220 of the *Regulations of the Registry*;

I. PROCEDURAL BACKGROUND

On 7 February 2008, Mr Mathieu Ngudjolo Chui ("the Applicant") was admitted to the ICC Detention Centre pursuant to the warrant of arrest issued by Pre-Trial Chamber I.[1]

On 15 April 2008, the Applicant submitted an application for permission to visit on behalf of his wife; then, following discussions with the Chief Custody Officer, he submitted a fresh application for permission to visit for his entire family on 21 April 2008.

On 16 May 2008, the Registrar instructed the Chief Custody Officer to ask the Applicant to provide all information necessary for the formalities of applying for passports for his family members.

On 27 May 2008, [REDACTED] issue passports.

On 12 June 2008, on the basis of information received from the Applicant [REDACTED].

On 23 June 2008, the Registrar submitted a [REDACTED] report [REDACTED] to Pre-Trial Chamber I.[2]

On 11 September 2008, upon being informed of the outcome of the request [REDACTED], the Detention Section informed [REDACTED].

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[1] Pre-Trial Chamber I, *Warrant of Arrest for Mathieu Ngudjolo Chui*, ICC-01/04-02/07-1, 6 July 2007.
[2] ICC-01/04-01/07-629-Conf.

On 25 September 2008, on the order of Pre-Trial Chamber I,[3] the Registry submitted a second [REDACTED] report [REDACTED].

Having regard to the personal circumstances of the detained persons covered by the reports submitted to Pre-Trial Chamber I, the Registrar instructed the Detention Section to arrange, as a matter of priority, the family visit of the detained person admitted to the Detention Centre before the Applicant and who had not seen his family for a relatively longer period than was the case for the Applicant.[4]

On 22 October 2008 and as instructed by the Registrar, the Chief Custody Officer informed the Applicant that the Registry would directly pay for two airline tickets for this first family visit.[5]

The Chief Custody Officer also explained to the Applicant that he could receive either *two visits from three family members* or *three visits from two family members* over a calendar year, and that for the purposes of organising the first visit, he should designate which members of his family he would wish to see visit him in The Hague.

The Applicant decided to consult his counsel who, in turn, contacted the Registry on 23 and 27 October 2008 and was provided with clarification on these points by the Chief Custody Officer.

Further to the Registrar's decision to pay for only two airline tickets, the Chief Custody Officer – having conferred with the Registrar and then with the Applicant – informed the Applicant that the travel costs for two adults could cover the cost for two of his youngest children and his wife, that is, three persons in total.

On 29 October 2008, the Applicant decided that he could not choose from among his children and wished to be visited by his wife and last-born.

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[3] ICC-01/04-01/07-715.

[4] The difficulties involved in organising the visit meant that it was only finally settled on 6 November 2008.

[5] This includes all other travel-related costs such as visa, accommodation, medical insurance, etc.

On 31 October 2008, the Applicant filed a complaint with the Chief Custody Officer under regulation 217 of the *Regulations of the Registry*.

On 7 November 2008, the Chief Custody Officer dismissed the complaint by decision notified to the Applicant.[6]

On 11 November 2008, the Applicant addressed the Registrar[7] under regulation 220 of the *Regulations of the Registry*, stating that:

- his application to the Registrar should not be barred for untimeliness, "[TRANSLATION] having been notified of the grounds for the impugned decision on 10 November 2008 only".[8]

- regulation 179(1) of the *Regulations of the Registry* "[TRANSLATION] [had] been violated" in that the conditions imposed on him did not allow him to maintain solid family links with his wife and children;[9]

- the information received on 22 October 2008 "[TRANSLATION] conditions and restricts [his] applications for permission to visit before [he has] even made them"[10] and that he wished to be assured that, in the future, the members of his family "[TRANSLATION] would all be able to come together, at least three times a year" to visit him;[11]

- he did not wish the visit being arranged currently to be affected by the present complaint;[12]

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[6] Annex.
[7] ICC-RoR217-02/08-1-Conf-Exp
[8] ICC-RoR217-02/08-1-Conf-Exp, p. 3.
[9] ICC-RoR217-02/08-1-Conf-Exp-Anx, p. 3.
[10] Ibid.
[11] Ibid., p. 4.
[12] Ibid.

II. TIME LIMIT FOR CHALLENGING THE IMPUGNED DECISION

1. The Applicant submits that his application to the Registrar should not be barred for untimeliness.

2. Under regulation 219(5) of the *Regulations of the Registry*, if a complaint is rejected, the detained person and his or her counsel shall be notified. Under regulation 220 of these same Regulations, the detained person may address the Registrar concerning any decision taken by the Chief Custody Officer under regulation 219 "within 48 hours from the notification of the decision".

3. Regulation 33(1)(c) of the *Regulations of the Court* states that "where the day of notification is a Friday, or the day before an official holiday of the Court, the time limit shall not begin to run until the next working day of the Court".

4. As is evident from the material in the record, the decision was notified on 7 November 2008, which was a Friday. Under regulation 33(1)(c) of the *Regulations of the Court*, the time limit should not begin to run until Monday 10 November 2008.

5. Without needing to rule on the other grounds raised by the Applicant, finds the appeal admissible as to form.

III. AS TO THE MERITS AND COMPLAINTS OF THE APPLICANT

a) With regard to the argument that regulation 179(1) of the Regulations of the Registry *has been violated*

6. In support of his application, the Applicant avers that the fact that the Registrar covers the costs of a visit by two persons "[TRANSLATION] amounts [...] to a

refusal because in any event certain [members of his family] cannot come" and that he "[TRANSLATION] cannot maintain solid family links" with his wife and children.[13]

7. In the impugned decision, the Chief Custody Officer considers that the visit had been authorised by the Registrar for "[TRANSLATION] the whole family" and that with regard to funding, "[TRANSLATION] there is no positive obligation [on the Registrar] to fund the family visits of detained persons".

8. Regulation 179(1) of the *Regulations of the Registry* provides *in fine* that "[t]he Registrar shall give specific attention to visits by family of the detained persons with a view to maintaining such links". Indeed, it is the view of the Registrar that family visits are particularly aimed at maintaining family links. The right to family visits is an internationally recognised right.[14] Accordingly, under rule 37 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*, "[p]risoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits". This provision is complemented by rule 92 of these same Standard Minimum Rules, which calls for "all reasonable facilities" to be given to allow the detained person to communicate with his or her family and friends or to "receiv[e] visits from them". The Registrar notes that the decision by the Chief Custody Officer cannot be construed as calling into question the right to family visits.

9. In analysing the complaint concerning the refusal of the visit, the Registrar recalls that regulation 179 of the *Regulations of the Registry* governs application forms for visits, as its title and the contents of its various provisions indicate.

10. In other words, this provision pertains first and foremost to applications for permission to visit and the prior approval of the Registrar for all visits to the Detention Centre. The obligation to apply for a permission to visit extends to all

[13] ICC-RoR217-02/08-1-Conf-Exp-Anx, p. 3.

[14] See principle 19 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*; article 12 of the *Universal Declaration of Human Rights*.

visitors, including the family members of a detainee – whose visits, it should be emphasised, are not privileged visits. The Registrar's oversight in this case must therefore be considered chiefly in light of the regulation as a whole. In this respect, it is clear that regulation 179(1) emphasises family visits as opposed to other visits, so that the Registrar may give them specific attention. A review of international provisions similar to rule 92 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* shows that detention authorities are generally required to facilitate family visits. In practice, this facilitation includes the provision of visiting space, information intended to help the family travel to the detention place and, in the case in point, to provide assistance in, for instance, applications for the issuance of passports or visas.

11. In the view of the Registrar, the language of regulation 179(1) cannot be construed as imposing an obligation on the Registrar to fund family visits. Accordingly, a distinction should be drawn between *authorising a visit* and *funding a visit*. Authorisation would imply prior approval by the Registrar once the requisite application form has been submitted. This is what the Applicant did on 21 April 2008. Authorising the visits of family members does not compel the Registrar to fund them. Contrary to the provisions governing legal assistance paid by the Court where the defendant or accused is indigent, the funding of visits is not a positive rule provided for in the Court's texts. Nor is there any general principle of law, treaty provision, or case-law – whether from the European Court of Human Rights or from other similar courts – establishing a positive obligation on detention authorities to fund family visits. Equally, the phrase "give specific attention" in regulation 179(1) cannot be construed as establishing an obligation to fund family visits.

12. Moreover, regulation 180 of the *Regulations of the Court*, to which the Applicant refers in the complaint addressed to the Chief Custody Officer, is not applicable in this respect as he bases his reasoning on the funding of a visit for two family members to conclude that the visit had been denied and therefore that there had

been a breach of regulation 179(1). The Registrar is of the opinion that regulation 180(4) is applicable in cases where she declines to authorise a visit. This is not the case here:

- firstly, because the application for permission to visit submitted by the Applicant on 21 April 2008 was approved and the Registrar ordered that necessary arrangements be made with the relevant authorities to facilitate the issuance of passports for his family;

- in addition, because the Registrar has always emphasised in the reports[15] submitted to the Pre-Trial Chamber that regulation 179(1) does not require the Registry to fund family visits;

- lastly, because the conditions or criteria set forth in regulation 180 do not apply to the case in point.

13. The details concerning the organisation of visits as communicated to the Applicant, and subsequently to his counsel, should not be construed as limitations or restrictions within the meaning of regulation 180.

b) With regard to the argument that the information received on 22 October conditions and restricts future visits and the need to be assured that the Applicant's whole family will visit him at least three times a year

14. The Applicant's argument notably concerns the frequency of visits and the number of persons per visit. The Applicant also considers that it is not "[TRANSLATION] unreasonable" to wish to be visited by the whole of his nuclear family "[TRANSLATION] at least three times a year".

15. With regard to the first point, namely the frequency of visits and number of visitors, the Registrar recalls that, through contact between Registry officials and the Applicant as well as his fellow detainees, all detainees as well as the Applicant's

[15] *Infra* footnotes 2 and 3, and also ICC-01/04-01/07-733.

counsel are aware of the reasons behind the consultations undertaken by the Registrar at the request of the States Parties. Moreover, on 8 and 9 July 2008, as part of the consultations undertaken at the request of the Assembly of States Parties – which echoed the reservations of the Committee on Budget and Finance with regard to the funding of family visits for indigent detainees – the Registrar held a seminar in which the Applicant's counsel participated.

16. It is clear that, with regard to the question of the frequency of visits and number of visitors, the information provided on 22 October 2008 was as a result of the instructions given to the Chief Custody Officer by the Registrar, who alone has the power to authorise visits; this is in fact evident from Chief Custody Officer's decision: "[TRANSLATION] on the one hand, Mr Mathieu Ngudjolo has not yet submitted an application for permission to visit for the future and, on the other hand, because only the Registrar is authorised to approve or refuse visits".[16]

17. The Registrar wishes to recall that the authorisation of a visit does not imply, *de facto*, that the persons for whom permission to visit is granted may all go to the Detention Centre at the same time. The application for permission to visit forms specify the number of visitors allowed by the Detention Centre. Three adults and three children may attend a single visit. These requirements take account of practical necessities such as the Detention Centre's capacity to host and supervise visits.

18. These 'restrictions' may be eased if the Registrar so decides and depending on the personal circumstances of each detainee. In the present case, if the Applicant were to decide to himself fund a visit by his entire family, the Registrar would have to take account of his personal circumstances and the practical considerations to allow, if such were the case, a visit by his entire family.

19. In addition to such considerations, it is the view of the Registrar that it is less the practical aspects of arranging visits than their funding that is the main basis of

[16] See Annex.

the Applicant's challenge. In this regard, the Registrar refers the Applicant to her response above in respect of the first complaint based on the violation of regulation 179(1).

20. Although there is no positive obligation to fund the family visits of detained persons, the Registrar has, in practice, taken account of the situation of detained persons to decide at her discretion to meet all or part of the costs of family visits. In this respect, she decided to take account of, *inter alia*, the indigence of the detained persons, their family circumstances, the duration of the separation between the detained person and his family prior to his or her transfer to the Detention Centre and, in particular, whether this exceeded 18 months, as well as available resources.

21. Managing the Detention Centre implies making adjustments to allow for its proper administration. In line with this, the Registrar may take certain decisions, some at her own discretion – within the terms of her mandate – and others directly pursuant to and dictated by the regulations. In the present case, it should be noted that there are no provisions compelling the Registrar to fund family visits, much less – having considered the status of each detained person and decided that funding is warranted – to do so for the whole family in one visit. The Registrar is responsible for managing the funds allocated by States Parties for the administration of the Court. She is required to manage the funds "in a reasonable manner", ensuring that justice is properly administered.

22. Although the Registrar favours funding family visits in the absence of a positive obligation, she has to apply strict and objective criteria so that this is not interpreted negatively by States which might then cut off the funding. This position takes account not only of the circumstances in which the Applicant finds himself, but also of the effect that an unfavourable decision of the States Parties could have on the wishes of other current or future detainees in the Detention Centre concerning family visits.

23. The frequency of visits and the number of visitors favoured by the Registrar and which she in fact referred to the States Parties, who fund the Court's budget, is, as such, a measure that should, beyond the regulatory framework, enable detainees to be visited regularly by their families and in a reasonable fashion in the course of one or two calendar years.

24. With regard to the second point, that is the non "unreasonableness" of at least three visits per year by the entire nuclear family, the Registrar considers that, if the Applicant funds the visits himself, in case of authorisation, measures could be taken to facilitate them, taking account of the Detention Centre's capacity and schedule.

25. The Registrar further notes that the Applicant's application proposes conditions different from the Registrar's, with a minimum of three visits per year for the whole of his nuclear family, but she regrets to emphasise that the Applicant himself expressed the wish that during his first visit, he should receive only two members of his family in spite of the standing offer to fund a visit by three people, including two of his children. The Registrar cannot change the criteria adopted and authorise a visit by the whole family at the same time, as this would be interpreted as a violation of the principle of the sound management of the public funds entrusted to her.

26. If the outcome of the consultations and the ensuing decision by the States Parties enabled family visits to be funded in line with the Applicant's proposals, measures would be taken in this regard. Such is not the case under current circumstances and the Registrar cannot commit to obligations exceeding the resources at her disposal, as no one can be expected to do the impossible.

c) With regard to the current arrangements for a family visit not being affected by the Applicant's complaint

17. The Registrar echoes the decision of the Chief Custody Officer, and confirms that the current arrangements being made for the visit of the Applicant's spouse and new-born child are and shall remain entirely unaffected by the present proceedings.

IN CONCLUSION,

REJECTS the Applicant's application.

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

Dated this 18 November 2008

At The Hague, The Netherlands