

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: ICC-01/04-01/07
Date: **16 February 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 and the Defence for
Mathieu Ngudjolo Chui

**Observations of the Registry pursuant to regulation 24 *bis* (1) of the Regulations of
the Court further to the 9 December 2009 Appeals Chamber judgment (ICC-01/04-
01/07-1718-Conf-Exp)**

Source: The Registrar

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

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**Victims Participation and Reparations
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The Registrar of the International Criminal Court ("the Court");

NOTING the confidential, *ex parte* Prosecution and Mathieu Ngudjolo Chui *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*¹ issued by Trial Chamber II ("the Chamber") on 24 June 2009 ("the 24 June 2009 Decision");

NOTING the confidential, *ex parte* Prosecution and Mathieu Ngudjolo Chui *Judgment on the Appeal of the Prosecutor against the "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"*² issued by the Appeals Chamber on 9 December 2009 ("the 9 December 2009 Judgment");

NOTING Judge Sang-Hyun Song's dissent to the 9 December 2009 Judgment³ ("Judge Song's Dissent") registered on 16 December 2009;

NOTING articles 54 and 67 to 71 of the Rome Statute, rules 14 and 162 to 169 of the Rules of Procedure and Evidence ("the RPE"), regulations 23 *bis*, 24 *bis*, 90, 92 and 101(3) of the Regulations of the Court and regulations 171, 173 to 175 and 189 of the Regulations of the Registry;

RESPECTFULLY SUBMITS the observations hereunder:

1. Pursuant to regulation 23 *bis* (1) of the Regulations of the Court, the present observations are classified as "confidential, *ex parte*, only available to the Office of

¹ ICC-01/04-01/07-1243-Conf-Exp-tENG.

² ICC-01/04-01/07-1718-Conf-Exp.

³ ICC-01/04-01/07-1722-Conf-Exp, French version hitherto unavailable.

the Prosecutor and the Defence for Mathieu Ngudjolo Chui” to comport with the classification by the Trial Chamber and the Appeals Chamber of their respective documents to which these observations respond, *viz.*, the 24 June 2009 Decision and the 9 December 2009 Judgment.

CONCISE PROCEDURAL BACKGROUND

2. On 8 June 2009, the Registrar submitted to the Chamber her initial report on the monitoring of Mathieu Ngudjolo Chui’s non-privileged communications (“the Report”),⁴ further to the Registry’s 12 February 2009 decision ordering *post-factum* listening to his telephone conversations as of 1 October 2008 and the active monitoring over 14 days of his future telephone conversations.⁵

3. By oral decision of 9 June 2009, the Chamber authorised disclosure of the Report to the Prosecution.⁶

4. Further to an urgent motion of the Office of the Prosecutor founded on regulation 101(3) of the Regulations of the Court for, *inter alia*, the prohibition of all contact between Mathieu Ngudjolo Chui and the outside and his separation from the other detained persons,⁷ the Chamber issued its 24 June 2009 Decision.

5. By brief of 28 July 2009,⁸ the Office of the Prosecutor appealed the 24 June 2009 Decision.

⁴ ICC-01/04-01/07-1195-Conf-Exp-tENG.

⁵ ICC-01/04-01/07-894-Conf-Exp.

⁶ ICC-01/04-01/07-T-66-CONF-EXP-ENG ET 09/06/2009, p. 39, lines 11-15.

⁷ ICC-01/04-01/07-1233-Conf-Exp.

⁸ ICC-01/04-01/07-1340-Conf-Exp.

6. In its 9 December 2009 Judgment, the Appeals Chamber, Judge Song dissenting, reversed the 24 June 2009 Decision to the extent that said decision denied the Office of the Prosecutor full access to Mathieu Ngudjolo Chui's non-privileged conversations, remanding the matter to the Court *a quo* for it to rule anew pursuant to regulation 92(3) of the Regulations of the Court. The Appeals Chamber enjoined said Bench specifically to endeavour to strike a balance between the rights of the accused, as enshrined in article 67 of the Statute, as well as his right to privacy and right to conduct his defence, on the one hand, and the Prosecutor's responsibilities pursuant to article 54(1) of the Statute, on the other.⁹

7. In the reasons set forth in the 9 December 2009 Judgment, the Appeals Chamber analysed the 24 June 2009 Decision as having exercised the discretion of the bench to order or prohibit disclosure of a detained person's detention record or part thereof under regulation 92(3) of the Regulations of the Court.¹⁰ The Appeals Chamber held that the Trial Bench had erred in law by basing the exercise of the discretion thus vested on an understanding that the information extracted from monitoring could not be used at trial for evidentiary purposes.¹¹

LEGAL FOUNDATION OF THE PRESENT OBSERVATIONS

8. Prior to a re-determination by the Chamber on the opportuneness of disclosure to the Prosecution of information obtained through monitoring, the Registrar considers it necessary, in due discharge of her functions under regulation 24 *bis* (1) of the Regulations of the Court, to bring to the Chamber's attention the observations hereunder.

⁹ ICC-01/04-01/07-1718-Conf-Exp, para. 52

¹⁰ ICC-01/04-01/07-1718-Conf-Exp, para. 40.

¹¹ ICC-01/04-01/07-1718-Conf-Exp, para. 44.

9. Regulation 90(1) of the Regulations of the Court ordains that “the Registrar shall have overall responsibility for all aspects of management of the detention centre”. Accordingly, the Registrar bears responsibility for the establishment, maintenance and confidentiality of the detention record to which the 9 December 2009 Judgment adverts – subject to the power of the Chamber to order disclosure of the record under regulation 92(3) of the Regulations of the Court. Insofar as the 9 December 2009 Judgment concerns the modalities of exercise of the Chamber’s discretion under regulation 92(3) of the Regulations of the Court, the Registrar considers that the due discharge of her functions requires her to set out observations on the matter, which has been remanded to the Trial Chamber for a fresh determination.

10. Furthermore, since the 9 December 2009 Judgment contemplates the admissibility, for evidentiary purposes at trial, of information obtained through monitoring at the Registrar’s initiative in pursuance of regulation 90 of the Regulations of the Court and regulations 174(2) and 175(2) of the Regulations of the Registry, the Registrar considers that the due discharge of her functions requires her to set forth observations on the neutral role assigned to her by the statutory provisions of the Court and on the fact that the Registry cannot be cast as provider of evidence to the parties.

11. The Registrar therefore submits that the criterion of regulation 24 *bis* (1) of the Regulations of the Court is fully met in the instant case and respectfully prays the Chamber to entertain its observations.

CONTENT OF THE DETENTION RECORD

12. Under regulation 189 of the Regulations of the Registry, the detention record

shall contain *inter alia*:

- (a) Information concerning the identity of the detained person, the name of the person designated in accordance with regulation 186, sub-regulation 2 (i), to be informed of any event affecting the detained person and the means by which that person can be contacted;
- (b) A certified copy of the warrant of arrest and a certified copy of the document containing the charges against him or her once such document has been provided to the detained person;
- (c) Any order restricting access to news and contact issued in accordance with regulation 101 of the Regulations of the Court;
- (d) The date and time of admission;
- (e) The name of the detained person's counsel, if known, and changes in this regard, if any
- (f) The date, time and reason for all absences from the detention centre, whether for attendance at the Court, for medical treatment or other approved reasons, or on interim release, or on final release or transfer to another institution;
- (g) The number of days spent in custody.

13. In light of this provision, transcripts of calls monitored pursuant to regulations 174(2) and 175(2) of the Regulations of the Registry do not perforce form part of the detention record. In practice, the Registrar does not consider transcripts of telephone monitoring to fall within the material incorporated into said record. By way of reminder, the Registrar refers the Chamber to the document disclosed in Annex 1 to the "Confidential *Ex Parte* – Registry only – 'Report of the Registrar pursuant to the Chamber's Order of 18 December 2008'" filed on 14 January 2009,¹² which specifies which information forms part of the detention record and which does not. That document classifies "information relating to the monitoring of communications which do not reveal sensitive information about the management of the detention centre, custodial staff or Registry staff, or which might relate to the 'private life' of a detained person" as falling within category A2, "Confidential information not contained in the detention record". The information extracted from

¹² ICC-01/04-01/07-829-Conf-Exp-Anx, French version hitherto unavailable.

call monitoring at issue here falls within this category and the Registry does not consider it part of the detention record.

14. The Registrar further notes that neither the Appeals Chamber Judgment nor Judge Song's separate opinion consider transcripts of monitored telephone calls to be part of the detention record. The unanimous Appeals Chamber determination merely provides "that the legal basis for the Trial Chamber's decision was regulation 92 (3) of the Regulations of the Court which regulates access to the detention record of a detained person",¹³ a decision which the Court *ad quem* considered as vitiated by error of law. Nowhere did the Judgment state that the application of regulation 92(3) of the Regulations of the Court to information extracted from transcripts of monitored telephone calls was warranted, which would have signified that such information formed part of the detention record. The Appeals Chamber did not adjudge the matter, confining itself to stating that the Court *a quo* had erred in law in exercising the discretion vested in it by regulation 92(3) of the Regulations of the Court. Having identified this initial error of law, the Bench did not proceed to dispose of the matter of the applicability of regulation 92(3) of the Regulations of the Court to information extracted from the transcripts of monitored telephone calls.

15. In that the regard, the 9 December 2009 Judgment is wholly consistent with the Registrar's analysis that information derived from the transcripts of monitored telephone calls falls outwith the detention record.

¹³ ICC-01/04-01/07-1718-Conf-Exp, para. 40.

CONDITIONS FOR DISCLOSURE TO THE PARTIES OF INFORMATION EXTRACTED FROM THE TRANSCRIPTS OF MONITORED TELEPHONE CALLS

16. Inasmuch as the information extracted from transcripts of monitored telephone calls does not fall within the sphere of the detention record, the Chamber's discretion regarding the disclosure of information in said record pursuant to regulation 92(3) is extraneous.

17. The disclosure of information extracted from telephone call monitoring conducted pursuant to regulations 174(2) and 175(2) of the Regulations of the Registry is strictly governed by the statutory provisions of the Court.

18. Under regulation 171 of the Regulations of the Registry ("Obligation not to divulge material or information"), "[m]aterial or information obtained as a result of the examination of a detained person's mail or property, or by any other means, shall not be divulged to anyone other than the Registrar and the Chief Custody Officer or to any other person that may be granted this right by virtue of these Regulations, upon authorisation of the Registrar." The reference to "any other means" of obtaining information enfolds telephone call monitoring effected pursuant to regulations 174(2) and 175(2) of the Regulations of the Registry. Regulation 171 effectively prohibits disclosure of any information extracted from telephone calls to persons other than the Registrar and the Chief Custody Officer, save for those exceptions specifically laid down by the Regulations of the Registry.

19. Regulation 175(10) of the Regulations of the Registry provides for one such exception: "Any offending conversation which is transcribed shall be retained by the Registrar. Such transcripts shall not be handed over as evidence of contempt of the Court without prior notice and disclosure to counsel for the detained person." The

English version of regulation 175(10) of the Regulations of the Registry employs the word "contempt" to render the French "*outrage*".

20. The concept of "*outrage*" or "contempt" is not defined in any of the Court's statutory provisions, but is well known to other international criminal courts and tribunals and is specifically defined in rule 77 of the RPE of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), rule 77 of the RPE of the International Criminal Tribunal for Rwanda ("ICTR") and rule 77 of the RPE of the Special Court for Sierra Leone ("SCSL"). The equivalent to these various jurisdictions' RPE provisions is found in the statutory provisions of the Court, at article 70 ("Offences against the administration of justice") and article 71 ("Sanctions for misconduct before the Court") of the Rome Statute. The parallelism between the concept of "*outrage*" (contempt) at regulation 175(10) of the Regulations of the Registry and that of "Offences against the administration of justice" at article 70 of the Rome Statute finds further support in the similar conduct warranting the monitoring of calls pursuant to regulation 175(1), such as "[i]nterfer[ing] with or intimidat[ing] a witness", "[i]nterfering with the administration of justice" or "[b]reach[ing] an order for non-disclosure made by a Chamber", and certain conduct constituting offences against the administration of justice under article 70(1)(c), such as "[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony [...]".

21. The kindredness of the concepts of *outrage* (contempt) under regulation 175(10) of the Regulations of the Registry and offences against the administration of justice under article 70 of the Rome Statute brings to the fore a specific exception to the absolute confidentiality of information extracted from monitored telephone calls under regulation 171 of the Regulations of the Registry: the commission of an

offence against the administration of justice or a breach of victim or witness security. Information concerning a possible offence against the administration of justice may therefore be disclosed to the Chamber pursuant to regulation 175(10), as may information concerning victim or witness security on the basis of article 68(1) of the Rome Statute (responsibility of "the Court" to protect victim and witness security). By contrast, information in other categories, pertaining, for instance, to the commission of crimes set forth in the document containing the charges, remains within the purview of the prohibition under regulation 171 of the Regulations of the Registry and must not be disclosed.

22. As to information imparted to the Court on a possible offence against the administration of justice or breach of victim or witness security, it rests with the Chamber seized thereof to decide how to proceed. The Chamber may thus determine the propriety of disclosure to the Office of the Prosecutor of information concerning the security of victims or witnesses, particularly Prosecution witnesses. Where an offence against the administration of justice is suspected, the bench shall, in accordance with article 70 of the Rome Statute and rules 162 to 169 of the RPE of the Court, first decide whether to exercise jurisdiction (rule 162 of the RPE). It may also decide whether to disclose information on a possible offence against the administration of justice extracted from monitored calls to the Office of the Prosecutor, which will decide how to proceed under rule 165(1) of the RPE.

EXCLUSION OF INFORMATION CONTAINING INCRIMINATING OR EXCULPATORY EVIDENCE FOR USE AT TRIAL FROM THE CATEGORY OF INFORMATION EXTRACTED FROM MONITORED CALLS WHICH MAY BE TO DISCLOSED TO THE CHAMBER

23. In addition to the general non-disclosure obligation under regulation 171 of Regulations of the Registry, the prohibition on disclosure of information containing

incriminating or exculpatory evidence of relevance to the case at bar is underpinned by a threefold concern: the legality of the evidence, the protection of the impartiality of the Bench, and the neutrality of the Registry.

24. As regards the legality of the evidence, insofar as current statutory provisions in force at the Court only provide for disclosure to the bench of information extracted from monitored calls where commission of contempt is suspected or to protect victim or witness security, it would be unfair to the person under prosecution if the monitoring of telephone conversations were to be used for purposes other than those of which counsel and client are apprised, particularly for gathering incriminating evidence in the case against that person. The need to respect the rights of the accused and the exigencies of a fair and impartial trial when determining the admissibility of evidence is specifically mentioned at article 69(4) of the Rome Statute and has been recalled on numerous occasions in the jurisprudence of the Court.¹⁴ Any future Court ruling that information extracted from monitored calls could be used as incriminating evidence at trial would require prior notice thereof to be afforded to all detained persons and their counsel. Such a ruling could not be retroactive or take immediate effect on past monitored calls. Indeed, the European Court of Human Rights ("the ECHR") has held that "[TRANSLATION] the telephone communications enfolded by the concepts of 'private life' and 'correspondence' within the meaning of article 8(1) aforementioned, their interception, the storage of the data thus obtained and their potential use in criminal proceedings instituted against the applicant amount to 'interference by a public authority' in the exercise of the right vested in said person by article 8" and as such had to be expressly in accordance with the law (see, *inter alia*, the judgments in

¹⁴ ICC-01/04-01/06-803-tEN, paras. 71-90; ICC-01/04-01/717, paras. 92-93; ICC-01/04-01/06-1399, paras. 23-24.

Malone v. United Kingdom, 2 August 1984, Series A no. 82, p. 30, para. 64; *Kruslin v. France* and *Huwig v. France*, 24 April 1990, Series A No. 176-A and 176-B, p. 20, para. 26, and p. 52, para. 25, *Halford v. United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III, pp. 1016-1017, para. 48; *Aalmoes and 112 others v. the Netherlands* (Dec), no. 16269/02, 25 November 2004; *Dimitru Popescu v. Romania* (no. 2), no. 71525/01, 26 April 2007, para. 61).

25. The Registrar further notes that the use of information extracted from monitored calls as incriminating evidence at trial is antithetical to the right of the accused not to be compelled to testify or to confess guilt and to remain silent, as expressly provided under article 67(1)(g) of the Rome Statute. ECHR case law makes clear: "The right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused" (see, *inter alia*, *Saunders v. the United Kingdom*, 17 December 1996, paras. 68-69; *O'Halloran and Francis v. the United Kingdom* [GC] nos. 15809/02 and 25624/02, paras. 53-63; *Bykov v. Russia*, no. 4378/02, 10 March 2009, para. 92).

26. As to the protection of the impartiality of the Bench, the Chamber must decide whether it may receive from the Registry, which is not a party to the proceedings, incriminating or exculpatory evidence which was not raised, tendered or canvassed by the parties in respect of its admissibility or relevance in accordance with established procedural rules. Hence, the Chamber will determine whether access to such information in this manner may affect its impartiality.

27. Thirdly, the use at trial of evidence extracted from telephone monitoring directed by the Registrar of her own initiative may compromise her indispensable neutrality in the proceedings before the Court. The neutrality of the Registry has frequently been recalled in the jurisprudence of the Court as an essential guarantor of the integrity of judicial proceedings,¹⁵ including by the Appeals Chamber.¹⁶ Such neutrality is at variance with parties' access to evidence which may be used at trial, especially where generated at the Registrar's initiative, as is the case of the monitored calls at issue.

28. Lastly, for the sake of clarity the Registrar considers it worth contemplating a scenario where information extracted from telephone calls indicates that an offence against the administration of justice may have been committed or which, in any other way, may endanger victim or witness security, and which at the same time may constitute incriminating or exculpatory evidence in the case. In such an eventuality, the Registrar would view any indication in such information that an offence against the administration of justice may have been committed or that victim or witness security may have been compromised to suffice for the non-disclosure obligation under regulation 171 of the Regulations of the Registry to be waived, thereby binding the Registrar to transmit said observations to the Chamber in accordance with regulation 175(10) of the Regulations of the Registry and disclose them to Defence counsel for the person, notwithstanding the evidentiary potential of such information in the case.

¹⁵ ICC-02/04-01/05-147, para. 38; ICC-01/04-01/07-776, para. 94.

¹⁶ ICC-01/04-01/07-776, paras. 90, 92.

CONDITIONS FOR THE USE OF TELEPHONE CALL MONITORING

29. Lastly, in the Registrar's view, it bears recalling that a decision to monitor telephone calls must, as the texts now stand, be founded on one of the grounds set forth in regulation 175(1) of the Regulations of the Registry. Were the Chamber to envision ordering the Registry to monitor calls for purposes other than those enumerated in regulation 175(1) of the Regulations of the Registry, such as the generation of evidence in the case, the Registrar would be required first to amend the Regulations of the Registry in accordance with the procedure prescribed by rule 14(1) of the RPE, subject to the prior approval of the Presidency.

[signed]

Silvana Arbia, Registrar

Dated this 16 February 2010
At The Hague, the Netherlands