

ANNEX 8

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



Original: **French**

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

Date: **24 June 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, available only to the Office of the Prosecutor, Mathieu Ngudjolo's
Defence and the Registry***

**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**

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

Mr Simo Vaatainen

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

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 regulations 23*bis* and 101 of the *Regulations of the Court* orders as follows:

1. On 8 June 2009, the Registrar submitted her first report on the monitoring of Mathieu Ngudjolo’s non-privileged telephone communications (“the Report”) to the Chamber.¹ This document follows the Registry’s decision dated 12 February 2009, ordering the post-factum monitoring of his telephone conversations since 1 October 2008 as well as the active monitoring, for a period of 14 days, of any future telephone conversations that he might have.²
2. By oral decision of 9 June 2009, the Chamber authorized the disclosure of the Report to the Prosecutor³ who on 12 June 2009 submitted an urgent request based on regulation 101(3) of the *Regulations of the Court* to the Chamber for the purpose of, *inter alia*, prohibiting all contact between Mathieu Ngudjolo and the outside and separating him from the other detained persons (“the Request”).⁴
3. Pursuant to the above-mentioned regulation 101(3), the Chamber informed Mathieu Ngudjolo of the existence of this Request in order to allow him to make observations if he so chose. It also took provisional measures prohibiting any

¹ Registry, “Premier 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”, 8 June 2009, ICC-01/04-01/07-1195-Conf-Exp. 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 to 15.

⁴ Office of the Prosecutor, “Mémoire urgent de l’Accusation, en application de la norme 101-3 du Règlement de la Cour, aux fins d’interdiction des contacts de Mathieu Ngudjolo avec l’extérieur et de séparation de Mathieu Ngudjolo d’avec les autres détenus”, 12 June 2009, ICC-01/04-01/07-1200-Conf-Exp. See also ICC-01/04-01/07-1233-Conf-Exp.

external contact, whether in the form of receiving or sending mail, telephone calls, visits or contact with his fellow detained persons.⁵

4. On 23 June 2009, Mathieu Ngudjolo's Defence presented the observations in accordance with the aforementioned regulation 101(3).⁶

I. Findings of the Registry and submissions of the parties

a. Findings of the Registry

5. Further to its decision of 12 February 2009, the Registrar analysed the transcripts of Mathieu Ngudjolo's telephone communications for the period of 1 October 2008 to 31 January 2009. Essentially, these demonstrate:

- that in October 2008, Mathieu Ngudjolo spoke to a person who requested instructions from the accused to ensure that the statements he might be required to give to the Defence team would be consistent with those of the Mathieu Ngudjolo; that during that same month and in the months that followed, during the course of his conversations, Mathieu Ngudjolo would sometimes suddenly change the language in which he was expressing himself;⁷
- that on several occasions in November 2008, Mathieu Ngudjolo used the telephone number of one of his "contacts" to talk to other persons;⁸
- that in December 2008 and January 2009, names of witnesses were disclosed to third parties, in particular, during secret meetings referred to in several

⁵ *Ordonnance aux fins de recueillir les observations de Mathieu Ngudjolo sur la requête 1200 du Procureur (norme 101-3 du Règlement de la Cour) et portant interdiction provisoire de tout contact entre cet accusé et toute autre personne à l'exception de son équipe de Défense*, 18 June 2009, ICC-01/04-01/07-1215-Conf-Exp. On 19 June 2009, this document was reclassified as confidentiel *ex parte*, only available to the Office of the Prosecutor, Mathieu Ngudjolo's Defence and the Registry.

⁶ Mathieu Ngudjolo's Defence, "Observations sur le Rapport du Greffe et la Requête du Procureur ayant motivé l'ordonnance ICC-01/04-01/07-1215-Conf-Exp du 18 juin 2009 de la Chambre de première instance", 23 June 2009, ICC-01/04-01/07-1238-Conf-Exp.

⁷ ICC-01/04-01/07-1233-Conf-Exp-Anx1, paras. 3 and 4.

⁸ *Ibid*, para. 5.

conversations⁹ and that during of one of these, Mathieu Ngudjolo attempted to identify a Prosecution witness whom he considers “suspect”;¹⁰

– that in January 2009 in particular, Mathieu Ngudjolo was actively involved in preparing his case, separately, it would appear, from his Defence Team, by using third parties or acquaintances to identify witnesses or to gather information regarding any interviews which they may have undergone;¹¹

– that during that same period, Mathieu Ngudjolo spoke to his wife about the circumstances surrounding a witness’s withdrawal from the Lubanga case and that he transmitted information or instructions to her during her family visit to him in December 2008 in The Hague;¹²

6. The Registrar concludes as follows:

[TRANSLATION] It is important to observe that, while none of the communications transcribed (except for those the [REDACTED] provide any information that Mathieu Ngudjolo explicitly gave the order for a witness to be intimidated, the fact remains that, on the one hand, he is disclosing information about witnesses or potential witnesses to third parties and that, on the other, nobody can determine how the said third parties are using or will use this information, nor the initiatives that they might take and which could potentially interfere with the administration of justice, intimidate witnesses, violate the rights and freedoms of any person, or even breach a non-disclosure order issued by the Chamber, if that is not the case already.

Nevertheless, the Registrar wishes to emphasize that, as is the case for Germain Katanga, many of Mathieu Ngudjolo’s telephone contacts are probably former FRPI or FNI members, current FARDC members, members of their respective communities and that some of these contacts hold senior positions or wield moral, political or even military authority over communities. Some of them were militia leaders or leaders of their political wing, others are most certainly former combatants or militia members reintegrated into the FARDC during *brassage* in the army. These persons may actually have means or contacts making it possible for potential witnesses to be readily identified and located.¹³

⁹ *Ibid*, paras. 6 to 12.

¹⁰ *Ibid*, para. 13.

¹¹ *Ibid*, paras. 16 to 20.

¹² *Ibid*, para. 21.

¹³ *Ibid*, paras. 24 and 25 (footnotes omitted).

b. Submissions of the Prosecutor

7. In his Request, the Prosecutor notes that the Registry's report:

[TRANSLATION] Shows that Mathieu Ngudjolo is disclosing names of Prosecution witnesses, such as the name of P-28, to third parties by telephone; tends to indicate that Mathieu Ngudjolo disclosed the statement of witness P-250 to third parties; corroborates information available to the Prosecution indicating that Mathieu Ngudjolo interfered with witness [REDACTED] by telephone, reveals that Mathieu Ngudjolo specifically sought to speak to other members of the family of [REDACTED] and to identify with greater accuracy [REDACTED] which in this context can only be interpreted as an attempt to undermine these witnesses; sheds light on the pivotal role played in this interference by Mathieu Ngudjolo's wife who conveys information after her visits and telephone calls; reveals that Mathieu Ngudjolo is preparing his witnesses, as conveyed by the conversation of 3 October 2008 during which Jean Ngabu informed Ngudjolo of having "duly received the message" and asks "actually, what do they have to say so that their statement does not depart from" his; and highlights the active role played by various other local protagonists.¹⁴

8. In addition, according to the Prosecutor:

[TRANSLATION] This Report shows, moreover, that Mathieu Ngudjolo is exchanging information with the accused, Lubanga. Proof thereof can be found in the footnote on page 37 of the Registry's first report, which quotes Mathieu Ngudjolo's statements on the telephone about a witness in the Lubanga case and in which Mathieu Ngudjolo mentions a specific detail which he has no reason to know about.¹⁵

9. The Prosecutor thereby concludes that it is appropriate to provisionally prohibit Mathieu Ngudjolo from having any written or telephone contact with any person outside of the Detention Centre, to prohibit any visits, particularly those of his wife and family, and to separate him from his fellow detainees in the Detention Centre.¹⁶

10. The Prosecutor does, however, consider that Mathieu Ngudjolo may continue to receive or send mail on the condition that regulation 169 of the *Regulations of the Registry* is applied, that copies of incoming and outgoing correspondence are kept

¹⁴ ICC-01/04-01/07-1233-Conf-Exp-Anx2, para. 11 (footnotes omitted).

¹⁵ *Ibid*, para 12.

¹⁶ *Ibid*, paras. 16, 17, 22 and 23.

and that regular reports made to the Chamber on the circumstances in which this correspondence is written.¹⁷

11. Lastly, he requests the disclosure of the recordings of the conversations referred to in the Report and its annex and the list of Mathieu Ngudjolo's telephone contacts maintained by the Registry.¹⁸

c. The Defence submissions

12. Mathieu Ngudjolo's Defence first submits that the accused "[TRANSLATION] acknowledges that the content of the conversations reproduced therein precisely reflects the actual conversations he had with his various interlocutors".¹⁹ Nevertheless, it asserts that Mathieu Ngudjolo never intended to jeopardize the safety of the witnesses whose identity had been revealed to him, whether that be intimidating or threatening them.²⁰

13. According to the Defence, the accused was motivated by the desire to participate in the determination of the truth.²¹ It explains that the sole objective of the contacts he endeavoured to make was to enable him to defend himself by obtaining information from any individual who could shed light on the Bogoro massacre for the Chamber.²²

14. Moreover, Mathieu Ngudjolo's Defence objects to the application of regulation 101(2) of the *Regulations of the Court* here and maintains that no "reasonable grounds" have been established.²³

¹⁷ *Ibid*, para. 19.

¹⁸ *Ibid*, paras. 28 to 34.

¹⁹ ICC-01/04-01/07-1238-Conf-Exp, para. 7.

²⁰ ICC-01/04-01/07-1238-Conf-Exp, paras. 8 and 14.

²¹ ICC-01/04-01/07-1238-Conf-Exp, paras. 10 to 17.

²² ICC-01/04-01/07-1238-Conf-Exp, para. 15.

²³ ICC-01/04-01/07-1238-Conf-Exp, paras. 18 to 24.

15. The Defence further states that the measures sought by the Prosecutor are not proportionate.²⁴ In this respect, it notes that the prohibition of any contact with the outside, including with family members and friends, must be considered to be “[TRANSLATION] cutting the detained person completely off from the world”²⁵ and as far as his children are concerned, contravenes article 7 of the Convention on the Rights of the Child. The Defence maintains that Mathieu Ngudjolo’s wife has merely provided him with help and assistance²⁶ because he is in “[TRANSLATION] deep mental distress”.²⁷

16. With respect to the request to separate Mathieu Ngudjolo from the other accused persons, the Defence considers that such a measure violates his freedom to communicate and has no legal basis. In this regard, it invokes regulation 201 of the *Regulations of the Registry* which sets out segregation measures and it submits that neither of the two grounds required for such a decision have been met in this instance.²⁸ It further invokes the decision issued on 13 March 2008 by the Single Judge revoking the prohibition on contact between Germain Katanga and Mathieu Ngudjolo which had been rendered on 6 February 2008.²⁹

17. Lastly, although the Defence appreciates the Prosecutor’s legitimate concern to ensure that witnesses and victims are protected within the meaning of article 68 of the Statute, it formally challenges his request for the disclosure of recordings of the conversations referred to in the Report as well as the list of contacts annexed thereto. The Defence recalls that measures taken in a specific detention context cannot be used against the detained person.³⁰

II. Analysis of the Chamber

²⁴ ICC-01/04-01/07-1238-Conf-Exp, paras. 25 to 52.

²⁵ ICC-01/04-01/07-1238-Conf-Exp, para. 27.

²⁶ ICC-01/04-01/07-1238-Conf-Exp, paras. 30 to 35.

²⁷ ICC-01/04-01/07-1238-Conf-Exp, para. 30.

²⁸ ICC-01/04-01/07-1238-Conf-Exp, paras. 36 to 43.

²⁹ Pre-Trial Chamber I, *Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui*, 13 March 2008, ICC-01/04-01/07-322, para. 30

³⁰ ICC-01/04-01/07-1238-Conf-Exp, paras. 45 to 52.

18. The Chamber is mindful of how important it is for a detained person to be able to maintain contact with the outside, particularly to maintain personal and emotional ties with his family, especially after a prolonged period of detention. For this reason, it must ensure that the restrictions requested by the Prosecutor are justified and proportionate to the aim pursued, by applying and by interpreting the provisions of the Regulations of the Court and the Registry, which themselves are subordinate to the Statute and the *Rules of Procedure and Evidence* ("the Rules"), in accordance with internationally recognized human rights.

19. In this regard, the European Court of Human Rights (ECHR) considers that any interference by a public authority with the exercise of the right to respect for a detained person's private and family life as well as correspondence must meet the following requirements:

- be in accordance with the law;
- be necessary, *inter alia*, for the prevention of disorder and crime and the protection the rights and freedoms of others; and
- remain proportionate to the legitimate aim pursued.³¹

The Chamber intends to assess the Request against these three criteria.

a. Are the planned restrictions justified?

20. As to whether the planned restrictions are consonant with the law, the Chamber recalls that regulation 101(1) of the *Regulations of the Court*, which regulates the routine functioning of the Court,³² allows the Chamber, at the request of the Prosecutor, to order that access to the news be restricted, if it is considered necessary

³¹ ECHR, *Messina v. Italy*, Judgment, 28 September; *Lavents v. Latvia*, Judgment, 28 November 2002; *Van der Van v. The Netherlands*, Judgment, 4 February 2003; *Kornakovs v. Latvia*, Judgment, 15 June 2006; *Moiseyev v. Russia*, Judgment, 9 October 2008.

³² Article 52 of the Statute.

in the interests of the administration of justice, in particular, if unrestricted access could prejudice the outcome of the proceedings against that detained person.

21. Furthermore, paragraph 2 of this same regulation allows the Prosecutor to request the Chamber to prohibit or regulate contact between a detained person and any other person, with the exception of counsel, or to set the conditions under which that contact may be established, if the Prosecutor has reasonable grounds to believe that such contact:

- a) Is for the purposes of attempting to arrange the escape of a detained person from the detention centre;
- b) Could prejudice or otherwise affect the outcome of the proceedings against a detained person, or any other investigation;
- c) Could be harmful to a detained person or any other person;
- d) Could be used by a detained person to breach an order for non-disclosure made by a judge;
- e) Is against the interests of public safety;
- f) Is a threat to the protection of the rights and freedom of any person.

22. The *criteria* for implementing measures restricting or prohibiting communication are therefore expressly stated in the provisions governing the Court, be it regulation 101 of the *Regulations of the Court* or regulations 169 to 184 of the *Regulations of the Registry*. The latter pertain, *inter alia*, to the procedures for incoming and outgoing mail and to the monitoring which may be undertaken in relation to correspondence, telephone calls and both the passive and active monitoring thereof, the criteria for granting permission to visit and the monitoring of such visits.

23. Such provisions can be readily accessed by any detained person, either directly or via his or her counsel; these are clearly set out and make it possible to predict to a reasonable degree the consequences of abusing approved communication facilities. The Chamber wishes to emphasize that Mathieu Ngudjolo is aware of these various

provisions, since the Registrar implemented the measures under regulations 174 and 175 of the *Regulations of the Registry* against him on 12 February 2009,³³ and that the accused person intended to challenge them.³⁴ It is clear from the Defence Observations that the accused “[TRANSLATION] has taken due note” of the First Report of the Registry following its decision of 12 February 2009.³⁵

24. This notwithstanding, under regulation 101(2) of the *Regulations of the Court*, the *modalities* for the implementation of the aforementioned measures are expressly left to the Chamber’s discretion, the judges being nevertheless free to refer, where necessary, to the provisions of the *Regulations of the Registry*, particularly those of regulation 169, which governs monitored incoming and outgoing mail.

25. Since these restrictive provisions are consonant with the law, it is now appropriate to ensure that the provisions whose implementation the Prosecutor is requesting have a legitimate aim and are absolutely necessary in the case at hand.

26. Specifically, from the findings already made by the Registry during the period of 1 October 2008 to 31 January 2009, it is apparent that Mathieu Ngudjolo is using the means of communication provided to him to: enter or attempt to enter into contact, even if only indirectly, with certain witnesses or their close relations; enquire about the position other witnesses intend to adopt when testifying; facilitate the disclosure of information about witnesses, particularly at secret meetings in the Democratic Republic of the Congo (DRC);³⁶ seek out persons, other than the

³³ 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.

³⁴ Mathieu Ngudjolo’s Defence, “*Requête de la Défense suite à la «Décision du Greffier relative à la surveillance des communications téléphoniques et des visites de Germain Katanga et de Mathieu Ngudjolo Chui non couvertes par le secret professionnel»*”, 24 February 2009, ICC-01/04-01/07-921-Conf-Exp. See also *Décision disant n’y avoir lieu à statuer sur la requête de la Défense de Mathieu Ngudjolo suite à la décision du Greffier relative à la surveillance des communications téléphoniques et des visites de Germain Katanga et de Mathieu Ngudjolo Chui non couvertes par le secret professionnel*, 2 March 2009, ICC-01/04-01/07-936-Conf-Exp.

³⁵ ICC-01/04-01/07-1238-Conf-Exp, para. 6.

³⁶ ICC-01/04-01/07-1233-Conf-Exp-Anx1, paras. 4 to 22.

members of his Defence team, who will take steps to identify or approach witnesses or their close relations.³⁷

27. The transcripts of conversations which took place during that same period establish the active, even essential, role of the accused's wife, who receives and then transmits instructions from her husband either by telephone or during her visits to him, as was the case for example after her last visit in December 2008.³⁸

28. It is also apparent from the findings of the Registry that Mathieu Ngudjolo and Germain Katanga have at least one contact in common in the person of the latter's brother-in-law.³⁹ Similarly, the content of certain conversations about the withdrawal of a witness called to testify in the Lubanga case indicates that Mathieu Ngudjolo is also able to communicate via Thomas Lubanga.⁴⁰

29. Lastly, it is appropriate to emphasize that Mathieu Ngudjolo is in fact communicating with a far greater number of individuals than only the contacts registered by the Registry, since the same telephone can be used locally by several persons, and that while conversing on the telephone, he often switches suddenly to a language other than French or Lingala.

30. All the facts thus identified give rise to the serious concern that, if this is not immediately halted, this accused person will be able to continue to exert a negative influence on the outcome of the proceedings against him, attempt to approach certain witnesses or their close family members or even harm them and continue to disclose information which the Chamber wishes to keep confidential, all of which falls within the meaning of regulations 101(2)(b),(c) and (d) of the *Regulations of the Court*.

³⁷ *Ibid*, para. 19.

³⁸ *Ibid*, particularly footnotes 10, 11, 13 and 16.

³⁹ *Ibid*, para. 20.

⁴⁰ *Ibid*, para. 21.

31. Accordingly, it is necessary to take measures against Mathieu Ngudjolo to restrict and even prohibit communication, in order to put an end to this conduct which has already been reported. It is equally vital to prevent any further intervention by him which might obstruct or disrupt the conduct of the proceedings and affect the witnesses' safety. This is imperative for the proper administration of justice.

32. It is now important to determine those measures which should be taken to this end and to ensure that they are proportionate to the aim pursued.

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

33. The Registry's findings recalled above have led the Chamber to regulate Mathieu Ngudjolo's contacts with the outside as follows.

Telephone calls. The Chamber considers it necessary to suspend the authorisation to communicate with the "contacts" registered by the Registry which Mathieu Ngudjolo had been thus far allowed to do until the decision on provisional prohibition issued on 18 June 2009. This suspensive measure is currently being ordered on a provisional basis until the Chamber has ruled on the Registry's supplementary report⁴¹ on the analysis of the accused's conversations between 31 January and 12 March 2009 ("the Registry's Supplementary Report") which, in any event, must be filed before 4 p.m. on 10 July 2009.

Incoming and outgoing mail. The Chamber intends to suspend the possibility for the accused to receive mail from, or address mail to, any person other than those listed in paragraph 1 of regulation 169 of the *Regulations of the Registry*. This suspensive measure is being ordered on a provisional basis for the period specified above in this paragraph. Nevertheless, the Chamber authorizes outgoing mail to Mathieu

⁴¹ *Ibid*, para. 30.

Ngudjolo's wife and children and incoming mail to him from these same persons under the following conditions:

- correspondence must be in French or Lingala, failing which it will not leave or be delivered within the Detention Centre and will be retained by the Registry;
- after being "reviewed" in accordance with regulation 169(1) of the *Regulations of the Registry*, items of opened mail shall be delivered to the accused or posted to the addressees pursuant to sub-regulation 3;
- the Registry shall submit a weekly report to the Chamber on the implementation of these instructions and shall inform it of any difficulties to which they may give rise.

Visits. According to the information provided by the Registry in its report of 14 January 2009,⁴² since he has been detained in The Hague, Mathieu Ngudjolo has only received visits from members of his family. The Chamber considers that, as matters now stand, it must put an end to this, particularly considering the attitude taken by his wife and the role that she plays in transmitting her husband's instructions to contacts in the DRC. Accordingly, the Chamber provisionally prohibits all visits for the period specified above in this paragraph.

Contact with the other detained persons. The Chamber considers that it is also necessary to end Mathieu Ngudjolo's thus far daily contact with his fellow detained persons in the Detention Centre. This prohibition measure is being ordered on a provisional basis for the period specified above in this paragraph. However, the Chamber invites the Chief Custody Officer to take any measure, specifically to keep him in the cell he currently occupies or in a cell which provides him with the equivalent environment and facilities, to facilitate his access to communal and exercise areas and to give him the opportunity to continue to access the record of the case via Ringtail, whilst

⁴² Registry, "*Rapport du Greffe sur la situation particulière de Mathieu Ngudjolo Chui relativement au nombre et à la fréquence de ses contacts avec l'extérieur et aux éventuelles mesures prises à son égard en vertu des normes 169, 175 et 180 du Règlement du Greffe*", 14 January 2009, ICC-01/04-01/07-828-Conf-Exp, para. 1.

ensuring that Mathieu Ngudjolo does not meet with his fellow detained persons. The Chamber requests the Registry to provide it with a report before 4 p.m. on 29 June 2009 setting out the measures taken for the effective implementation of this separation. It emphasizes that this measure must in no way be confused with the segregation provided for by regulation 201 of the *Regulations of the Registry*. The latter can be ordered only for two very specific reasons: to prevent two or more detained persons from creating or contributing to any potential conflict in the Detention Centre or to avoid any danger to the detained persons in question. It is carried out under the strict medical supervision of the medical officer and cannot be used as a disciplinary measure. In this case, the sole aim of the separation measure which has been ordered is to prevent Mathieu Ngudjolo from entering into or attempting to enter into contact with witnesses via one of his fellow detained persons, who, like him, is a DRC national. That scenario is referred to in both the Report and the Request. The measure is therefore dictated by the compelling concern to protect the witnesses.

34. The Chamber recalls that the suspension and prohibition measures set out above do not apply to the accused person's Defence Team, with the exception, however, of two resource persons, Mr Rock Banga Mateso and Mr Christophe Koli Lopa.

35. The Chamber emphasizes that it is ordering all of these measures on a provisional basis and that it permits the accused to continue to correspond by letter, under certain conditions, with the members of his immediate family. In so doing, it considers that an appropriate balance has been struck between the right of any detained person to maintain his or her family life and have contact with the outside, and the absolute necessity to avoid any obstruction to the conduct of the proceedings and to protect the witnesses and their close relations from any potential pressure or act of intimidation. All these measures are absolutely necessary to put an end to the

reported activity and, according to the Chamber, are proportionate to the legitimate aim pursued.

36. Lastly, the Chamber recalls that, once the Registry's supplementary Report has been filed by 10 July 2009 at the latest, it will review the need to maintain the restrictive and prohibition measures which have been ordered. Furthermore, it requests the Registry to keep it closely informed of what is being done and any difficulties encountered in implementing the orders.

III. The Prosecutor's disclosure request

37. At the end of his Request, the Prosecutor asks the Chamber to order the disclosure of the recordings of the telephone conversations referred to in the Report – including those relating to conversations in a language other than French or Lingala – with the summaries or transcripts prepared by the interpreters.⁴³

38. He also requests the Chamber to order the Registry to provide him with the list of telephone "contacts" as well as the annex to the Report or a revised version thereof.⁴⁴

39. He considers that this information will enable him to better assess the individual protective measures which he is required to take under article 68 of the Statute and to support any additional request based on regulation 101 of the *Regulations of the Court*. He further maintains that, given its in-depth knowledge about the situation of each of the witnesses, his Office can make better use than the Registry of all of the information disclosed by these recordings.⁴⁵ Lastly, according to the Prosecutor:

[TRANSLATION] Some conversations constitute incriminating evidence and therefore contribute to the determination of the truth in this case. Some other conversations may

⁴³ ICC-01/04-01/07-1233-Conf-Exp-Anx2, para. 28.

⁴⁴ *Ibid*, para. 34.

⁴⁵ *Ibid*, paras. 29 to 31 and 35.

be used not only by the Prosecution but also by Germain Katanga during the cross-examination of Mathieu Ngudjolo's Defence witnesses: the conversations potentially fall under article 67(2) of the Statute and rule 77 of the *Rules of Procedure and Evidence*.⁴⁶

40. The Chamber recalls that the requested recordings of the conversations obtained thanks to the passive monitoring measures were ordered by the Registry on the basis of regulations 174 and 175 of the *Regulations of the Registry* for the sole purpose of ensuring that the communication facilities provided to the accused were being used appropriately. Therefore, in no way did this interference with the confidentiality of Mathieu Ngudjolo's correspondence seek to facilitate the post factum gathering of new evidence in support of the prosecution. Nor was it ordered by a judicial authority which had expressly decided to retain control thereover. The Chamber considers, that at this stage in the proceedings, the Prosecutor cannot use the content of these conversations to make a determination of the truth. The monitoring measures ordered sought an entirely different aim and their use for the purposes of prosecution could be challenged on the basis of a possible abuse of process and on the ground that the information thus gathered was not equitably obtained.⁴⁷ Furthermore, the Chamber specifically notes that none of the texts governing the Court explicitly provide for the possibility of using the recordings ordered on the basis of regulations 174 and 175 of the *Regulations of the Registry* for purposes other than those for which they were laid down. Accordingly, it considers that the recordings of the conversations need not be fully disclosed to the Office of the Prosecutor for their possible use as incriminating or exonerating evidence.

41. Still, the Chamber considers that this information indisputably deserves to be subjected to a very thorough analysis in view of the Court's witness protection obligations under article 68 of the Statute. They must be used, *inter alia*, to assess whether there is a reason to reconsider and, if necessary, to reinforce the protective measures currently provided to some of the witnesses referred to in the recorded conversations.

⁴⁶ *Ibid*, para. 33 (footnotes omitted).

⁴⁷ ECHR, *Huwig v. France* and *Kruslin v. France*, Judgments of 24 April 1990.

[REDACTED]

[REDACTED]

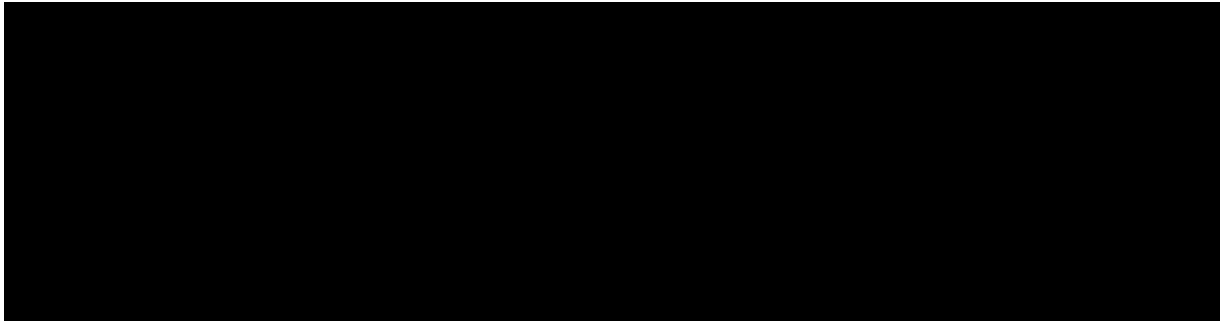
[REDACTED]

44. When assessing each of the conversations, it will therefore be appropriate for the

[REDACTED]

⁴⁸ Appeals Chamber, *Judgment on the appeal of the Prosecutor against the “Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” of Pre-Trial Chamber I*, 26 November 2008, ICC-01/04-01/07-776, para. 98 (footnotes omitted).

45. With respect to the Prosecutor's request for disclosure of the list of "contacts" annexed to the Report, the Chamber must recall that the information contained therein relates to the private life of the accused and that, as matters now stand, it cannot be separated from the content of the recorded conversations. It goes without



46. Finally, the Chamber now has the opportunity to recall that, when faced with possible abuse, the Registry, and only the Registry, is responsible for reducing the number of "contacts" on the list. To this end, the Chamber requests the Registry to inform it if it intends to take initiatives in this regard and, if so to specify the nature and time period within which it intends to take them.

FOR THESE REASONS, THE CHAMBER

- 1) **ORDERS** the Registry to take, upon filing of this decision, all the restrictive and prohibition measures set out paragraph 33, it being recalled that the said measures do not apply to the four members of the Defence team;
- 2) **DIRECTS** the Registry to file by no later than 4 p.m. on 10 July 2009 the supplementary Report referred to at paragraph 33 of this decision;
- 3) **ORDERS** the Registry to file, as of 4 p.m. on 3 July 2009, the weekly report on the implementation of the exchange of correspondence with the family, as mentioned at paragraph 33 of this decision;

4) **DIRECTS** the Registry to file by no later than 4 p.m. on 29 June 2009 the report on the modalities for separation in the Detention Centre referred to at paragraph 33 of this Decision;

5) **DIRECTS** the [REDACTED]

6) **ORDERS** the Registry, and in particular the [REDACTED]

[REDACTED] referred to at paragraphs 44 and 45 of this decision;

7) **INVITES** the Prosecutor and the Registry to put forward any joint proposal on witness protection; and

8) **REQUESTS** the Registry to inform the Chamber if it intends to reconsider the number of persons Mathieu Ngudjolo is currently authorised to contact by telephone.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Hans-Peter Kaul

Dated this 24 June 2009

At The Hague, The Netherlands