

ANNEX 9

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

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **French**

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

Date: **14 July 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***

URGENT

**Confidential, *ex parte*, only available to the Registry, the Office of the Prosecutor
and the Defence for Mathieu Ngudjolo Chui**

Redacted version of

**Second report of the Registrar on the monitoring of Mathieu Ngudjolo Chui's
non-privileged communications further to the Registrar's decision of 12 February
2009**

Source: The Registrar

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

Office of the Prosecutor

Mr Luis Moreno Ocampo
 Mr Eric MacDonald

Defence Counsel

Mr Jean-Pierre Kilenda Kakengi
 Basila
 Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparations**

Office of Public Counsel for Victims

**Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Defence Support Section

Victims and Witnesses Unit

Maria-Luisa Martinod-Jacome

Detention Section

Anders Backman

**Victims Participation and Reparations
 Section**

**Other
 Presidency**

The Registrar of the International Criminal Court:

NOTING the Order of Trial Chamber II (“the Chamber”) of 18 December 2008;¹

NOTING the reports filed on 14 January 2009 by the Registrar;²

NOTING the 12 February 2009 “Registrar’s Decision on the Monitoring of the Non-privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui”,³ which she reaffirmed on 27 February 2009”;⁴

NOTING the *Order concerning the Defence Appeal to the Presidency Challenging the Registrar’s Decision on Monitoring of Non-Privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui*, issued by the Presidency on 25 February 2009;⁵

NOTING the “Explanation of the Registrar to the Presidency pursuant to the Presidency Order of 25 February 2009 in respect of Mr Mathieu Ngudjolo Chui” of 6 March 2009 (“Explanation of the Registrar”);⁶

NOTING the 8 June 2009 “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” (“First Report”) and the redacted version thereof, dated 19 June 2009;⁷

NOTING the *Order Inviting Observations from Mathieu Ngudjolo on Request 1200 of the Prosecutor (Regulation 101(3) of the Regulations of the Court) and Provisionally*

¹ ICC-01/04-01/07-800-Conf-tENG.

² ICC-01/04-01/07-827-Conf-Exp + Conf-Exp-Anx; ICC-01/04-01/07-828-Conf-Exp + Conf-Exp-Anx; ICC-01/04-01/07-829-Conf-Exp + Conf-Exp-Anx and ICC-01/04-01/07-830-Conf-Exp + Conf-Exp-Anx.

³ ICC-01/04-01/07-894-Conf-Exp.

⁴ ICC-01/04-01/07-932-Conf-Exp.

⁵ ICC-RoR221-01/09-3-Conf-Exp.

⁶ ICC-RoR221-01/09-2-Conf-Exp.

⁷ ICC-01/04-01/07-1233-Conf-Exp-Anx1-tENG.

*Prohibiting any Contact between Mathieu Ngudjolo and any other Person with the Exception of his Defence Team, issued by Trial Chamber II on 18 June 2009;*⁸

NOTING 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* (“the Decision”) of 24 June 2009;⁹

NOTING articles 67 and 68 of the Rome Statute, regulations 23 *bis*, 24 *bis* and 90 of the Regulations of the Court and regulations 173 to 185 of the Regulations of the Registry;

CONSIDERING that following the First Report, the Registrar intended to provide a report concerning the period after 31 January 2009;

CONSIDERING that the Chamber directed the Registry to file the supplementary report no later than 10 July 2009;¹⁰

CONSIDERING further that the Registry was instructed to inform the Chamber if it intended to reconsider the number of persons Mathieu Ngudjolo is currently authorised to contact by telephone;

CONSIDERING that some of the information contained herein may, to a varying degree, fall within the purview of investigations conducted by the Defence team in this case, insofar as it relates to initiatives taken by the resource person of the Defence team for Mathieu Ngudjolo and that therefore, based on the practice hitherto followed by the Registry, such information should not be disclosed to an opposing party should the Chamber decide to authorise the disclosure of this report;

⁸ ICC-01/04-01/07-1215-Conf-Exp-tENG.

⁹ ICC-01/04-01/07-1243-Conf-Exp.

¹⁰ ICC-01/04-01/07-1243-Conf-Exp, p. 22, point (2).

CONSIDERING that by virtue of her position, the Registrar is not in a position to determine with certainty which information is relevant to the case and takes the view that the Chamber, due to its role, is better placed to determine the nature or relevance of the information;

HEREBY SUBMITS this report:

A/ Preliminary observations

1. The Registrar wishes to point out that in February, most of Mathieu Ngudjolo's telephone conversations related to the preparation of his defence and to the investigations conducted by his team in the field. These conversations have not been reproduced herein, except for the conversations which, whilst they relate to his investigations or the preparation of his defence, involve third parties unconnected to the Defence team – excluding on occasion the conversations with his resource person. Therefore, the Registrar wishes to reiterate the observations she made in the First Report¹¹ on the steps these contacts might potentially take.
2. Furthermore, it should be noted that other telephone conversations are private calls to his family.

B/ Analysis of the telephone communications from 1 February to 28 February 2009

B/1 – Communications establishing a link with Thomas Lubanga's trial or his resource person:

3. Conversations between Mathieu Ngudjolo and his wife¹² or his resource person support or confirm the observations in the First Report that Mathieu

¹¹ ICC-01/04-01/07-1233-Conf-Exp-Anx1-tENG, p.15, para. 24.

¹² Conversation 154 of 1 February 2009: EP: **But there was a boy who testified against Thomas Lubanga. He was abducted and enlisted in the armed service. We also heard of the abduction.**/ MN: That is the boy who refused to speak before the Court. Are you able to listen to the excerpts of these testimonies on the radio or television, in the outside world? Do they show these testimonies?/ EP: Never./ MN: **On that same day, a child and father were brought in because they were together. On the first day, the child told the truth but on the second day, when the**

Ngudjolo appears to be well-informed about the situation of certain witnesses appearing in Thomas Lubanga's trial.¹³ The information shared with his resource person was elicited in their conversation related to the investigations conducted by the resource person.¹⁴ The discussion referred to the preparation of witnesses by non-governmental organisations, which were not identified, sometimes with the involvement of these children's parents.¹⁵

father was due to testify, he did not appear./ EP: The father did not appear?/ MN: That has never happened before! Things are becoming serious here as the lies surface on the other side.

¹³ ICC-01/04-01/07-1233-Conf-Exp-Anx1-tENG, p. 14, para. 21.

¹⁴ Conversation 153 of 1 February 2009: MN: Anyway, this is good as they are being exposed. **Yes, they cannot hurt other people's children through lies and arrest accused persons on the basis of lies.**/ Banga: It's disgraceful!/ MN: We need the truth and yet they are only telling lies./ Banga: That does not exist./ MN: Yes./ Banga: We will finally understand. Even just with the evidence we have on your file, I can say this: they will be exposed./ MN: Yes, yes, with the work you have been doing. Yes, the people here will fall apart, someone will collapse, will have a heart attack in this Court and die [laughter] / MN: Do you know that the second witness did not testify? He refused, he fell ill./ [laughter]/ Banga: Is that true?/ MN: Yes, do you think this is a joke? **On the first day, the child fell apart and said: I will only tell the truth. They said: only tell the truth. They asked him for his name. He told them his name. Which village are you from? He did not respond: silence. A second question, were you a soldier? He said: no; I was not a soldier. Really, you were not a soldier? That is true, I was not a soldier. They asked him, are you telling the truth? I am telling the truth. The hearing was adjourned and the child was taken out to be brainwashed. They were with the child for 2 hours and 45 minutes. They brought him back to the courtroom after 2 hours and 45 minutes. Then the child said: "This time, I am going to speak and I will only tell the truth. Whatever I told them there was untrue. The NGO instructed us and prepared the texts and statements which they drilled into us for three years. They taught us how to argue and give false testimony. Moreover, when I arrived here, everything I signed in my statement had been falsified. I was not a soldier; I was never enlisted in the armed forces. I was at school".** When the child was testifying, everyone in the Court held their breath. But the examination did not take place.

¹⁵ *Ibid* MN: I'm fine. What are people saying about the trial of our brother here?/ Banga: People were dissatisfied after the initial appearance. They are saying that it would be better to resolve our cases here as opposed to referring them to the Court, which is not doing its job./ MN: Were the proceedings transparently broadcast to the population in the DRC?/ Banga: No, they were not broadcast. Except for the people who could follow the case on the Internet or on a foreign radio station, the rest of the population is oblivious. But still, they are being informed by word-of-mouth. People are aware of what is happening here. Really! **In fact, yesterday I was contacted by NGOs which I will not identify over the telephone. A friend of mine told me that he had worked for an NGO, and that they approached parents so that their kids would give false testimony.** [REDACTED]. **They negotiated with the children or with their parents.** This included children who were never in the army and young girls under the age of 18 years. They dictated what the children should say in their testimony. I cannot name this NGO, but it is an international NGO./ [laughter]/ [REDACTED].

4. During another conversation with someone called [REDACTED] who is however registered as *Gokpa Lobho* on the list of Mathieu Ngudjolo's telephone contacts, they discussed the credibility of one of the witnesses in the Lubanga trial.¹⁶

5. On analysing the communications, it is apparent that Mathieu Ngudjolo's resource person maintains close relations with Thomas Lubanga's resource person.¹⁷ Judging from the content of conversations, this association is linked to the two cases. It is apparent, *inter alia*, that it was at the express request of Mathieu Ngudjolo that his resource person, *Rock Banga Mateso*, made contact with [REDACTED]¹⁸

B/2 – Communications with a third party unconnected to the Defence team regarding witnesses:

6. Two telephone conversations in particular attracted the Registry's attention because of the content and the telephone number used. These conversations took place [REDACTED]. Thus, [REDACTED] the subject-matter of the conversations. During the first conversation,¹⁹ Mathieu Ngudjolo asked his conversation partner to verify certain information regarding the identity of witnesses. The conversation partner, [REDACTED] responded that he would need the personal details of the people in question. The rest of the conversation was about a

¹⁶ **Conversation 35 of 20 February 2009:** MN: We are only waiting for the beginning of the trial, which we have been told will be in June./ [REDACTED] With respect to old Thomas's trial, is it progressing well?/ MN: Very well. **Most of his witnesses are falling apart [French: *craquer*]./ [REDACTED] They were spitting [French: *cracher*] [...]./ MN: **No, they are falling apart. In other words instead of telling the truth, they are having a hard time narrating the fabrications they were taught./** [REDACTED] May God protect you. This is a momentous event. There are at least three Congolese Iturians at the ICC. It's a momentous event. If not us, our children will surely write your story./ MN: Indeed.**

¹⁷ **Conversation 116 of 5 February 2009:** Banga [REDACTED] **Because I had to conclude my interview with [REDACTED]**

Conversation 120 of 5 February 2009: [REDACTED] **and I will also do it as soon as I am done with the gentleman, as I am currently communicating with Thomas Lubanga's resource person./** MN: [REDACTED].

¹⁸ **Conversation 146 of 2 February 2009:** [REDACTED] MN: **If you could take some time tomorrow, I also want you to call this resource person of Thomas's. I'd like you to meet him, because I've spoken to him, [REDACTED]. He'll also explain a number of things to you.**

¹⁹ **Conversation 124 of 4 February 2009**

certain [REDACTED] and they both lamented his death. [REDACTED].²⁰ In this respect, the Chamber might consider prohibiting all future communication between [REDACTED] and Mathieu Ngudjolo, which would result in his removal from the list of telephone contacts held by the Detention Centre.

7. The second conversation [REDACTED] echoes the preceding conversation and also broaches other issues. The Registrar submits its contents for the Chamber's assessment.²¹

8. Finally, the Registrar wishes to draw the Chamber's attention to the fact that, although at the time Mathieu Ngudjolo's contact list included a telephone number for [REDACTED] both of the above-mentioned conversations were conducted via the telephone number registered to [REDACTED] who also appears on Mathieu Ngudjolo's list of telephone contacts and, of course, on Thomas Lubanga's list. It should be recalled that before a new procedure was implemented under which the registration of telephone contacts was subject to the Registrar's prior authorisation and therefore to their identification by the Registry, the lists were updated according to information expected to be provided in good faith by the detainees. The Registry's analysis reveals that the telephone number used by Mathieu Ngudjolo for both conversations in February 2009 does appear on Mathieu Ngudjolo's list under the name of [REDACTED]²² who is listed as a *friend*. Paradoxically, the same number on the list of Thomas Lubanga's contacts, updated on 18 December 2008, is associated with the name of [REDACTED] identified by the person concerned as a *brother* (of Thomas

²⁰ [REDACTED]

²¹ [MN asks [REDACTED] whether he is in Bunia and [REDACTED] responds in the affirmative. MN then asks [REDACTED] to identify the "youngsters" who were under his command within the MRC and are apparently [REDACTED] ct with the NGOs ... [REDACTED] agrees to carry out the mission by contacting certain (unidentified) people who would help him get the list of these "youngsters". He also agrees to make every effort to reach their parents. MN claims that there was no transparency in the work conducted by the Prosecutor's investigators. He believes that the "youngsters" (prosecution witnesses) were "influenced" by the NGOs. Some "fell apart" during their testimonies in The Hague. [REDACTED] then informs MN that an Assistant Commander of Operations in the East (unidentified) has been placed under "house arrest". [REDACTED]

²² This is in accordance with the updated list of 5 November 2008.

██████████²³ Under the same number, Mr ██████████ is listed as a *friend* on Thomas Lubanga's contact list updated on 21 January 2009; whereas the most recent list updated on 6 June 2009 clearly indicates that ██████████ is a *friend* and *resource person*.

9. In light of the foregoing, it should be recalled that it was precisely in order to prevent abuses discovered following other measures for listening to non-privileged communications that the new procedure for registering contacts was set up. This procedure allows a better management of requests submitted by detainees and a more effective application of the rules and regulations. Thus, when the detained persons requested that the resource person of the other team be added to their respective contact lists, the Detention Centre sought the teams' consent. In fact, an express request was made to each counsel, drawing their attention to article 28 of the Code of Professional Conduct for counsel, which stipulates that any contact between a member of one team and the client of another team shall be subject to the prior approval of the latter's Counsel. After Thomas Lubanga's Counsel had communicated her approval to the Chief Custody Officer on 5 May 2009, ██████████ was added to Mathieu Ngudjolo's list of telephone contacts.

10. Another conversation [REDACTED] between Mathieu Ngudjolo and his brother ██████████ also known as ██████████ related to contacts with witnesses' families. It cannot be concluded whether this concerned protected witnesses.²⁴ Nonetheless, even if it is a conversation with a person other than a

²³ In other words, knowing that ██████████ was a resource person in Thomas Lubanga Dyilo's team long before November 2008, the information presumed to have been provided in good faith was incorrect. It was therefore not a number associated with a person by the name of Lubanga, even though some may be inclined to argue that in certain regions of the world, cousins and friends may be called or referred to as a "brother".

²⁴ **Conversation 140 of 3 February 2009:** ██████████ reports to him about his contacts with certain families of witnesses ██████████ MN congratulates him and asks him to dig deeper on the issue of the "youngsters" (witnesses) who were recruited during the event at MRC. ██████████ complains about the lack of fuel and means of communication. MN informs ██████████ of the incident that oc ██████████ on the first day of Thomas Lubanga's hearing when a witness withdrew his testimony. They then speak at length about the

member of the Defence team,²⁵ according to the Registrar's assessment, the end of the conversation could be connected to the preparation of Mathieu Ngudjolo's defence.

B/3 – Communication concerning Germain Katanga

11. The Registry identified the excerpts of a two-part conversation between Mathieu Ngudjolo and Colonel [REDACTED] as requests made by Germain Katanga, which either corroborate the information that Germain Katanga has maintained links with the FPJC²⁶ and is therefore seeking information [REDACTED], or constitute information that would form part of a defence strategy geared towards a specific viewpoint, issue or piece of evidence to be argued before the Chamber, or it could be curiosity whose motive the Registrar is unable to establish.²⁷ [REDACTED].²⁸

B/4 – Communications revealing Mathieu Ngudjolo's interest in the careers of other military personnel and the protection afforded to his family in Bunia

12. In various conversations, it appears that Mathieu Ngudjolo remains informed of the progress of young soldiers and other senior officers with whom he must have consorted in the Congolese army. This is the case for two

hearings where certain witnesses who claimed to have stayed in Bogoro could not even describe this locality.]

²⁵ With respect to the member of the Defence team, the following conversation between Mathieu Ngudjolo and Rock Banga, the resource person, is noteworthy. **Conversation 80 of February 2009: MN:** I would also have liked every small detail to be thoroughly checked, because there are other youngsters (*that is, the witnesses*) who are changing their name, as soon as they arrive here at the Court. Everything must be done to unearth these details even if they change or obscure their names. So we know who says what. [REDACTED].

²⁶ See ICC-01/04-01/07-1195-Conf-Exp-tENG, p. 9, para. 14

²⁷ **Conversation 10 of 24 February 2009:** [REDACTED].

²⁸ *Ibid.* [(...) *The Major hands the phone back to Colonel [REDACTED] They resume their discussion in Swahili* MN: Thank you for all the clarification. [REDACTED]/ Col. [REDACTED] That is all I know. I do not have any further information. Convey my greetings to [Germain Katanga]./ MN: I will do so. [*The Major answering to the name [REDACTED] is undoubtedly the contact listed as [REDACTED] on the list of contacts, infra, footnote 32.*]

conversations held in a Lendu dialect with Colonel [REDACTED]²⁹ in which reference is made to [REDACTED] Peter and Cobra.³⁰

13. With respect to Mathieu Ngudjolo's relationship with members of the FARDC and which the Registrar mentioned, two conversations in particular revealed that [REDACTED]
 [REDACTED]³¹ [REDACTED].

14. A conversation with [REDACTED] seems to indicate that a letter was sent by Mathieu Ngudjolo to a certain Colonel [REDACTED]. However, there is no record at the Detention Centre that a letter was sent by Mathieu Ngudjolo. The Registrar cannot provide the Court with clarification on this issue, but wishes to bring this to the Court's attention for assessment.³²

²⁹ **Conversation 66 of 13 February 2009:** [Colonel [REDACTED] informs MN of the latest transfers within the FARDC army. This concerns some of their former troops: [REDACTED] and others have been sent to Kisangani for commando training. They are apparently being trained by the Americans. [REDACTED] and the others are being trained in Kamina. They are apparently being trained by the Chinese and will form part of the Rapid Response Force. **Peter and Cobra** have apparently remained in Kinshasa. MN informs [REDACTED] of the developments in the trial of Thomas Lubanga which, in his eyes, is progressing well. According to him, certain witnesses are falling apart. They apparently criticised the Prosecutor's investigators and the NGOs which "conditioned" them for "exploiting" them. [REDACTED]./ MN asks him to congratulate all the "youngsters" selected for training at the various military training centres around the country. He then asks about the fate of the "youngsters" – [REDACTED] and others. [REDACTED] responded that these were waiting for the second list].

Conversation 33 of 21 February 2009: [MN was very interested in the training of his "youngsters" dispersed in Kisangani, Kinshasa and Kamina. He wished to find out more about the schedule and the duration of the training. Colonel [REDACTED] informed him that the training would last nine months. MN asked the Colonel to convey his encouragement to all the "youngsters". Colonel [REDACTED] also gave him **Cobra's** number [...]]

³⁰ For information about these individuals, see ICC-01/04-01/07-1195-Conf-Exp-tENG, p.10, para. 15. It is not certain that [REDACTED] is the same [REDACTED] to which the First Report refers, since he was apparently arrested "for being behind the fall of Goma" (para. 20, footnote 36).

³¹ **Conversation 11 of 24 February 2009:** [REDACTED]./ Col. [REDACTED]

Conversation 8 of 25 February 2009: MN [...]

Wife: OK.

³² Conversation 10 of 24 February 2009: [REDACTED] [...]. Have you already had a telephone conversation with Colonel [REDACTED]? [REDACTED] I had a telephone call with him before but I have not called him recently. I instead speak to Colonel [REDACTED]. [REDACTED] When he received your letter, a week ago, he refused to eat. He was remorseful. We all panicked. We were like the offspring antelope whose mother had been eaten by a lion. The children are orphans.

15. It should be noted that the interpreter's ability to determine the substance of the conversations held in a language other than Lingala or Swahili, in this case Lendu, provided an understanding of the discussions between Mathieu Ngudjolo and some of his contacts. The Registrar deemed it necessary to mention only the conversations which may be of some interest to the Chamber.

C – Reviewing Mathieu Ngudjolo's contacts:

16. The Registrar invites the Chamber to consider the possibility of allowing Mathieu Ngudjolo to communicate with his wife if the restrictive measures are preserved. These communications must be circumscribed, *viz.*, limited to his wife and children – although the transcripts do not show that he communicates with them frequently – with the conversation lasting a maximum of 20 minutes divided into 10 minutes each and in Lingala or Swahili. He should not raise matters concerning witnesses or use coded language or pseudonyms. The Chamber may also determine any other additional conditions that it considers necessary. All conversations in breach of the Chamber's order will result in a re-examination of this relaxation.

pp. [signed]

Marc Dubuisson, Director of the Division of Court Services
For Ms Silvana Arbia, Registrar

Dated this 14 July 2009

At The Hague, The Netherlands