Cour
Pénale
Internationale

International
Criminal
Court

Original: **French**

No.: **ICC-RoR221-02/09**
Date: **26 March 2009**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Fatoumata Dembele Diarra, First Vice-President
Judge Hans-Peter Kaul, Second Vice-President

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 Defence and the Registry**

Registrar's Explanations Concerning the Reasons for the New Procedure for Detained Persons' Telephone Contacts

Source: **The Registrar**

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga
Mr David Hooper

Legal Representatives of Victims

Counsel for the Defence of Mathieu Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Prof. Jean-Pierre Fofé Djofia Malewa

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for the Defence

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Ms Silvana Arbia and Mr Didier Preira

Defence Support Section

Victims and Witnesses Unit

Detention Section
Mr Anders Backman

Victims Participation and Reparations Section

Other

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

NOTING regulations 23 *bis*, 90 and 99 of the *Regulations of the Court* and regulations 173 to 180 and 221 of the *Regulations of the Registry* (hereinafter "RoR");

NOTING the Registrar's filings of 6 March 2009;[1]

CONSIDERING that the Presidency instructed the Registrar to explain the reasons for the new procedure for detained persons' telephone contacts, particularly the 15-day period between the date of submission of new contacts and their registration on the list of detained persons' contacts;[2]

CONSIDERING that in the view of the Registrar, the new procedure in no way introduces disproportionate or unreasonable measures but responds to the requirements set out in the Court's basic texts and the inconsistency or lack of clarity in the information provided to date by certain detained persons about their telephone contacts;

Accordingly **EXPLAINS** the reasons underpinning the impugned decision as follows:

1. In the filings of 6 March 2009, the Registrar had the occasion to indicate some of the parameters taken into consideration to justify her decision to set up a procedure for registering telephone contacts which is more transparent and responsible both from the point of view of the information provided by the

[1] ICC-RoR221-03/09-2-Conf-Exp & ICC-RoR221-01/09-4-Conf-Exp.
[2] ICC-RoR221-02/09-3-Conf-Exp.

detained persons and the management thereof by the detention centre within the framework of the *Regulations of the Registry*. These parameters, which were brought to the attention of the detained persons, include a noted increase in telephone numbers; the discovery, upon subsequent listening to telephone communications not covered by professional secrecy, that the detained persons were able to communicate with persons other than those of whom the guards had been informed; and the fact that despite having the same telephone number, the names of the recipients on the list of telephone contacts for different detained persons had been written differently.

2. The introduction of a procedure enabling the collection of accurate information about detained persons' telephone contacts is in fact related to the need to maintain good order and safety in the detention centre, as well as to other requirements such as those in regulation 175(1) of the RoR. Accordingly, the impugned decision is justified in light of all of these requirements. The same procedure applies to the contacts of detained persons who wish to visit them at the detention centre. In particular, in support of the duly completed form for visits, they are asked to provide a copy of an identification document, in this instance a photocopy of their passport. In the view of the Registrar, detained persons' external contacts do not consist solely of visitors to the detention centre. On the contrary, they also include any person who communicates by telephone with a detained person, irrespective of whether he or she is a potential visitor or has already visited the detention centre, as is the case for certain telephone contacts, even if it is possible that in view of particular circumstances others would not be able to visit them in The Hague.

3. In order to facilitate the provision of the information required in the form, and when the telephone contact has already visited the detained person, it is accepted that the detained persons may refer to the form for visits which was

initially received by the detention centre, so as to avoid them having to fill out the entire form. This was the case for certain contacts since the implementation of the new procedure.

4. The Registrar's obligation under the Court's basic texts means that she shall take the necessary measures to minimize the risk of escape, interference with the administration of justice, intimidation of victims or witnesses or jeopardising public order and infringing the freedoms of others. Consequently, the importance of providing data or information about detained persons' contacts, whether in relation to telephone calls or visits, is consistent with the spirit and letter of the *Regulations of the Registry*. The decision which is the subject of the complaint must therefore be interpreted or assessed both, in light of the need to ensure the good order and safety of the detention centre and various requirements relating to the proper administration of justice. Accordingly, it appears vital in respect of telephone communications, as it is for applications for visits, that the Registrar have sufficient information to be able to make an informed decision as to whether it is necessary or not to authorise a given contact. The form therefore serves to obtain a minimum amount of information from detained persons about the telephone contact which the Registrar will then be able to have checked before authorising or not the registration of the number on the approved list of contacts. Without this form and without the subsequent information which it allows the Registry to obtain, it is not possible for the Registrar to issue an informed decision – that is, a decision which takes account of the potential risks which a contact may pose particularly with respect to the requirements set out in regulation 175(1) of the RoR. This is also the purpose of the application form for visits.[3]

[3] See also regulation 180 of the RoR.

5. Being in detention and awaiting a decision having a *res judicata* effect on the guilt or innocence of a person cannot diminish the sense of responsibility and transparency expected of a detained person. When some of the contacts can be reached only via a shared telephone number, detained persons are under the obligation to mention them. As the experience of *post factum* listening has shown and as the detained persons themselves will undoubtedly confirm, the telephone communications intended for contacts whose names have been provided to the guards have quite often been used to talk to other persons. Although the Registrar has the obligation under the *Regulations of the Registry* to maintain up-to-date information on detained persons' telephone communications and the identities of the people with whom they speak, this obligation derives also from the Registrar's overall mandate under regulation 90 of the *Regulations of the Court* and does not exempt detained persons from providing information about third persons who have had the opportunity to speak to them on the telephone. The new procedure therefore clearly sets out that at the end of his or her telephone communication, the detained person has the responsibility to inform the guards of the identities of the additional persons with whom he or she conversed – particularly if these persons have not been initially identified by a form or do not officially use the telephone of the main receiver of the call. The procedure relates less to the detained person's or recipient's minor children but rather to any adults who talked to the detained person during a telephone call.

6. In addition to the foregoing, the impugned decision is of practical benefit without however challenging the rights of the detained person. Indeed, if the Registrar or a Chamber decides that the telephone communications shall subsequently be listened to months or even years after they took place, the new procedure makes it possible to ascertain more easily the identities of third persons who might have talked to the detained person during telephone calls. It

would also enable, when necessary or required, the Chamber or the Registrar to be informed or provided with clear information in the event of any breaches.

7. With respect to the 15-day period, this time is essential to ascertain the truthfulness of the information provided and for the requisite security assessment. This time period is identical to the period for the analysis of information provided in applications for visits under regulation 179 of the RoR. Some people might argue that there is no explicit provision for such a security assessment to be undertaken. Nonetheless the assessment flows from the Registrar's obligation to ensure good order and safety in the detention centre and that the requirements related to the proper administration of justice are maintained. It also flows from the fact that in order to explain a refusal to register a contact, the Registrar must be in a position to provide the reasons underpinning her decision which is possible only after verifying the information provided by the detained person and the security assessment. The services or resources used in the process require a reasonable period of time to verify the truthfulness of the information and to assess whether or not there is a risk which would justify not authorising a given contact. In fact, authorisation of a contact is the rule and denial the exception. This time period does not preclude the Registrar from issuing a decision before the 15 days elapse in the light of the usefulness of the information available.

8. In practice, the 15-day period is not sufficient for an in-depth assessment of the information provided but the Registrar considers that it is reasonable in view of what a more thorough analysis or verification of the information would require. Therefore, for an equivalent number of days, this time period is shorter than the one applied to applications for visits, which in addition to a duly completed form, require a photocopy of the visitor's passport which may in any case be physically identified during the said visit. However, it is a different matter for

those detained persons' telephone contacts who are not known to the detention centre administration or to the Registry as long as they are identified only by their name, first name and telephone number, unless they are fairly well known.

9. Alternatively, in addition to those aspects mentioned above, the specific situation of users of mobile or cellular telephones in the Democratic Republic of the Congo constitutes an argument in favour of the 15-day period which applies to all contacts irrespective of their place of residence. In the Democratic Republic of the Congo, private fixed-line telephones are virtually inexistent, except in telecentres which are starting to grow and which allow persons who do not own cellular phones to make calls. As a result, most Congolese people use mobile telephones. In such circumstances, out of a population of close to 55 million, including 7 million subscribers to the four private providers in the Democratic Republic of the Congo,[4] it is essential to identify detained persons' contacts especially in view of the situation on the ground where SIM cards can be readily acquired on the street, that is to say on the informal market, without there being any real possibility of registering the details of the telephone's owner. Furthermore, it was in view of the situation on the ground and for security reasons that the Congolese government recently decided, in late 2008, that cellular subscribers would be identified. Such a decision, driven by security needs, is comparable to measures taken in the European context, particularly the directive of 15 March 2006.[5] This directive seeks to ensure that information on subscribers is available "for the purpose of the investigation, detection and prosecution of serious crime (...)"[6] and allows, *inter alia*, the gathering of:

[4] http://www.apc.org/fr/blog/africa/atelier-dechange-sur-la-perennite-des-telecentres- , accessed on 24 March 2009 at 19h25.
[5] Directive 2006/24/EC of the European Parliament and of the Council of the European Union of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal of the European Union, L 105/54, 13.04.2006.
[6] Article 1 of the directive.

a. data necessary to trace and identify the source of a communication. With respect to telephony, this comprises: the telephone number of the person making the call; the name and address of the subscriber or registered user;

b. data necessary to trace and identify the destination of a communication (identical information to the foregoing but relating to the recipient of the communication);

c. data necessary to ascertain the date, time and duration of a communication;

d. data necessary to ascertain the communication equipment used or what purports to have been used as communication equipment.

In the context of the aforementioned directive, the requisite data are those which enable the subscribers to be identified and traced. The limited amount of information required in this regard must be viewed in the context of the effective and sophisticated identification and tracing means available to European Union Member States and the level of cooperation between them. Although it can be argued that such a directive is motivated by the prevention, investigation, detection and prosecution of criminal offences, particularly organised crime, with respect to the impugned procedure before the Presidency, the nature and gravity of the crimes for which the persons falling within the jurisdiction of the Court are being detained must not be disregarded, even though it is acknowledged that a final decision thereon has not yet been issued.

10. The procedure which is the subject of the complaint before the Presidency is, in all respects, proportionate to the situation at issue. The fact that the detained

person does not call his or her contacts directly other than through a guard who dials the number and transfers the communication does not have the function or goal of preventing that person from using the communication to speak to persons other than those of whom the guards have been officially notified in advance. The Registrar is of the opinion that detained persons have the right to communicate with the outside world in complete privacy. To this end, practical and technical arrangements have been made to enable them to exercise such a right without restrictions, even if restrictions may be introduced on grounds of legitimate imperatives.[7] Nevertheless, the Registrar maintains that the implementation of the impugned procedure in no way seeks to curtail the rights of the detained persons since it does not intend to prevent them from contacting people when there is no justification to do so. The abuse of the initial system, which in this instance amounted to providing the names of contacts to the guards, sometimes on scraps of paper, or just stating the name and number, or even just providing a first name and number, has in fact been exacerbated by the fact that certain detained persons wrote identical numbers with different names on their respective lists or talked to third persons using telephone numbers provided, going so far as to give instructions to persons who may interfere with the administration of justice.[8] The new procedure does not seek to curtail the right of detained persons to communicate externally. It establishes, as is the case for visits, modalities which enable the information provided by detained persons to be better analysed with respect to, *inter alia*, the requirements pertaining to the maintenance of the good order and safety of the detention centre and the proper administration of justice. The procedure in no way reduces the opportunities available to detained persons to contact the outside world. In addition to the 200 minutes of free call-time granted to all

[7] ECHR, Case *K U. v. Finland*, (Application no. 2872/02), Judgment of 2 December 2008, paragraph 49: “Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.”
[8] ICC-RoR221-01/09-4-Conf-Exp., p. 9-10, para 12, footnote 26.

indigent detained persons, benefits in terms of very attractive rates have been offered to all the detained persons to enable them to communicate with their contacts for as long as possible.

11. The Registrar wishes to reiterate that in the implementation of the new procedure when the requisite information in the form is not provided, without prejudice to the Presidency's decision in this case, the form will be returned to them for completion. If it is necessary to make exceptions to enable detained persons to make certain calls due to emergency situations or a particular need – as stated in the new procedure and as recently agreed by the Registrar – the Chief Custody Officer may authorise such calls.

12. Lastly, in the event of refusal to authorise the registration of a number on the list of a detained person's telephone contacts, the Registrar will notify the detained person of the reasons for her decision. It goes without saying that, as is the case for recorded telephone communications, the forms provided during the detention period will be shredded at the end of the Court proceedings, in accordance with the spirit of the provisions of regulations 174(4) and 175(7) of the RoR.

[signed]

Marc Dubuisson

Director, Division of Court Services

on behalf of

Silvana Arbia

Registrar

Dated this 26 March 2009

At The Hague, The Netherlands