

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoR221-02/09**

Date: **17 September 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

**Decision on the Application of Mr Germain Katanga in respect of the new policy in the
detention centre on the registration of telephone contacts**

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

**Counsel for the Defence for Mr Germain
Katanga**

Mr David Hooper
Mr Andreas O'Shea

**Counsel for the Defence for Mr Mathieu
Ngudjolo Chui**

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

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Detention Section

Mr Anders Backman

The Presidency of the International Criminal Court (hereinafter "Court") has before it the application of Mr Germain Katanga for judicial review of the policy introduced by the Registrar in the detention centre of the Court for the registration of the non-privileged telephone contacts of persons in the custody of the Court.

The application is dismissed for the reasons set forth below.

I. PROCEDURAL HISTORY

1. On 5 February 2009, the Chief Custody Officer of the detention centre of the Court informed all detained persons in writing that, pursuant to a decision of the Director of the Division of Court Services (hereinafter "Director"), a new policy for the registration of the non-privileged telephone contacts of detained persons would be implemented in the detention centre effective as of 6 February 2009 (hereinafter "Impugned Policy").¹
2. By letter dated 11 February 2009, the Director informed counsel for Mr Germain Katanga that he had instructed the Chief Custody Officer to implement the Impugned Policy.²
3. On 25 February 2009, Mr Germain Katanga (hereinafter "detainee") sought judicial review of the Impugned Policy from the Presidency (hereinafter "Application") requesting its reversal. In essence, the detainee submits that the policy violates his right, accorded by regulation 99(1)(i) of the Regulations of the Court, to communicate with his family, friends and non-privileged members of his defence team. The Presidency is further requested to suspend the Impugned Policy until final determination on the matter.³
4. On 26 March 2009, pursuant to the order of the Presidency of 23 March 2009 (hereinafter "Order of 23 March 2009"),⁴ the Registrar submitted explanations in respect of the Impugned Policy (hereinafter "Explanations").⁵
5. On 16 April 2009, the detainee responded to the Explanations of the Registrar (hereinafter "Observations").⁶

¹ ICC-RoR221-02/09-1-Conf-Exp-Anx1.

² ICC-RoR221-02/09-1-Conf-Exp-Anx2.

³ Defence Appeal to the Presidency on behalf of Mr Germain Katanga, in Respect of the New Policy, ICC-RoR221-02/09-1-Conf-Exp, paragraph 6.

⁴ Order concerning the "Defence Appeal to the Presidency on behalf of Mr Germain Katanga, in Respect of the New Policy", ICC-RoR221-02/09-3-Conf-Exp.

⁵ Registrar's Explanations Concerning the Reasons for the New Procedure for Detained Persons' Telephone Contacts, ICC-RoR221-02/09-4-Conf-Exp-tENG.

II. ADMISSIBILITY

6. The Presidency must resolve preliminary procedural issues concerning the admissibility of the Application.
7. A detained person has “the right to file a complaint against any administrative decision or order or with regard to any other matter concerning his or her detention” in accordance with regulation 106(1) of the Regulations of the Court.
8. The Regulations of the Registry establish a three-step complaints procedure: (i) A detained person may make an oral or written complaint on any matter concerning his detention to the Chief Custody Officer at any time. If the complaint is found to be without substance, the detained person and his counsel is notified in writing by the Chief Custody Officer of the reasons for the rejection of the complaint; (ii) The detained person may then address the Registrar concerning the decision taken by the Chief Custody Officer within 48 hours of notification of that decision; (iii) Following the decision of the Registrar on the complaint, the detained person may request the Presidency to review the decision of the Registrar within 48 hours of notification of that decision.⁷
9. In the instant case, the detainee has sought judicial review of the decision of the Chief Custody Officer directly from the Presidency. The detainee argues that the Application is admissible. It is submitted that, in adopting the Impugned Policy, “the Chief Custody Officer followed the instructions of the Director [the latter] acting generally on behalf of the Registrar”.⁸ The detainee submits that the Impugned Policy is an administrative decision of the Registrar as opposed to a decision of the Chief Custody Officer and, as such, “the appropriate procedure is to address the Presidency directly” in line with the decision of the Registrar of 12 February 2009, entitled “Registrar’s Decision on the Monitoring of Non-privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui”, which stated that “the Presidency has authority to rule on appeals of decisions made by the Registrar in respect of detention matters”.⁹

⁶ Defence Observations on the “Explications du Greffier sur les raisons motivant la nouvelle procédure relative aux contacts téléphoniques des personnes détenues”, ICC-RoR221-02/09-5-Conf-Exp.

⁷ See regulations 217(1), 219(5), 220(1) and 221(1) of the Regulations of the Registry. See also Decision of the Presidency of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 12.

⁸ Application, paragraph 2.

⁹ Application, paragraph 4 citing ICC-01/04-01/07-894-Conf-Exp, page 5.

10. The Presidency has had one previous occasion to consider the procedure applicable where the complaints procedure was initiated at step three, i.e. where the author of the impugned decision was the Registrar. In its Decision of 5 December 2008, the Presidency accepted the application for judicial review of the decision of the Registrar from the detained person directly.¹⁰ Following that precedent, the instant Application is properly before the Presidency. The detainee was well within his rights to infer that the Director, in instructing the Chief Custody Officer to implement the Impugned Policy, had acted on behalf of the Registrar. It is noted that the Director regularly represents the Registrar in proceedings before the Court, including in proceedings in the case against the detainee, and in proceedings concerning detention matters. For example, it is noted that the Explanations in the instant case were signed by the Director on behalf of the Registrar.¹¹ Further, the Registrar confirmed the policy as her own in the Explanations.¹²
11. By virtue of regulation 221(1) of the Regulations of the Registry, the detained person is required to address the Presidency in relation to a decision of the Registrar within 48 hours of notification of that decision. The instant Application was filed more than 48 hours of notification of the Impugned Policy.¹³ Nonetheless, due to the importance of the issues raised therein, relating to the rights of detained persons to communicate with the outside world from the detention centre, and the effect of the Impugned Policy on all detained persons, the Presidency will accept the Application, being of the opinion that it is not in the interests of justice to deprive the detainee of the opportunity to challenge the Impugned Policy.
12. Although the instant application is considered to be properly before the Presidency, the time is ripe to assess the procedure applicable to the scenario where the Registrar has herself taken a decision concerning detention. This is particularly so as the Registrar appears to be taking an increasing number of such decisions. The Presidency considers that where the Registrar has issued a decision concerning detention, there would be no reasonable prospect of the Chief Custody

¹⁰ Reasons for the decision on the Applications for judicial review of Mr Jean-Pierre Bemba Gombo of 10 and 11 November 2008, ICC-01/05-01/08-310. That previously confidential decision was reclassified as public, pursuant to the Presidency's Decision of 3 September 2009, ICC-01/05-01/08-501-Conf.

¹¹ Explanations, page 11.

¹² Explanations, paragraph 1.

¹³ The Impugned Policy was notified in writing to all detained persons on 5 February 2009. Counsel for the detainee was notified of the Impugned Policy by letter dated 11 February 2009. The Application for judicial review was made to the Presidency on 25 February 2009.

Officer reversing the decision of his superior through the complaints procedure. As such, the Presidency sees no value in a detained person being required to approach the Chief Custody Officer in the complaints procedure against a decision of the Registrar concerning detention. The question then is: where does the avenue for the review of a decision of the Registrar concerning detention lie? The approach accepted by the Presidency in its Decision of 5 December 2008, and followed in the instant Application, was that such an application could be made directly to the Presidency. However, the Presidency is of the view that a procedure akin to that foreseen in the Regulations of the Registry should cater for situations where the Registrar, as opposed to one of the custody officers or the Chief Custody Officer, has taken a decision concerning detention.¹⁴

13. Whereas there are three opportunities for a detained person to seek review of a decision where the complaints procedure is initiated before the Chief Custody Officer pursuant to regulation 217 of the Regulations of the Registry, if the procedure followed in the Decision of 5 December 2008 is adopted in cases where the Registrar issues the impugned decision and the complaints procedure is initiated before the Presidency pursuant to regulation 221 of the Regulations of the Registry, the detained person is afforded only one opportunity to seek review of that decision, i.e. judicial review before the Presidency.
14. The lack of additional opportunities for review may be unfavourable to the detained person. Whilst the Registrar is not, unless otherwise provided in the Regulations of the Court and the Regulations of the Registry,¹⁵ required to seek the views of a detained person prior to taking a decision affecting him, the Presidency considers that, in the interests of fairness, the detained person should be afforded the opportunity to put to the Registrar his arguments against her decision. This step will allow the Registrar to review her own decision with the benefit of those arguments and thereafter to amend, reverse or confirm her decision. Following the issuance of the final decision of the Registrar, the detained person may thereafter seek judicial review of that decision from the Presidency. This two step approach will bring the situation where the Registrar has taken a decision concerning detention closer to the existing complaints procedure. Of course, the advantages to be derived from this process presuppose that the

¹⁴ For these purposes, decisions of the custody officers or the Chief Custody Officer include orders, instructions or policies concerning detention.

¹⁵ See regulation 95(2) of the Regulations of the Court and regulation 210(3) of the Regulations of the Registry relating to the disciplinary regime in detention.

Registrar shall provide sufficiently clear reasons for her initial decision at the time of its taking, to enable the detained person affected to understand its factual and legal basis and properly exercise his right to seek review.¹⁶

15. Where the impugned decision originates from the Registrar, fairness demands that the time limit for requesting that the Registrar review her own decision, in accordance with the above paragraph, be aligned with the time limit in the complaints procedure that applies where the impugned decision originates from a custody officer or the Chief Custody Officer. Thus, a detained person shall be entitled to address the Registrar at any time regarding a decision taken by the latter concerning his detention. This will ensure that a detained person has equal access to the complaints procedure regardless of whether the originating impugned decision concerning his detention is taken by a custody officer, the Chief Custody Officer or the Registrar. Moreover, if the 48 hours prescribed by regulation 220 of the Regulations of the Court were taken as the applicable time limit to request the Registrar to review her own decision it would, in any case, be possible for detained persons to circumvent this time limit by artificially initiating the complaints procedure through the Chief Custody Officer, pursuant to regulation 217 of the Regulations of the Registry, for which there is no time limit.
16. It follows from the above that where the Registrar has taken a decision concerning the detention of a detained person, the latter may complain *in writing* against that decision to the Registrar at any time. The Registrar shall notify the detained person and his counsel in writing of the decision on his complaint and the reasons therefor in line with the time limits set out in regulations 219 and 220(5) of the Regulations of the Registry. The detained person may thereafter address the Presidency within 48 hours of notification of the decision of the Registrar in line with regulation 221(1) of the Regulations of the Registry.
17. The above is without prejudice to any applications by detained persons for judicial review currently pending before the Presidency. It is similarly without prejudice to the three step complaints procedure, as set out in paragraph 8 above, applicable where the impugned decision originates from a custody officer or the Chief Custody Officer.

¹⁶ The Registrar was recently reminded in the decision of the Presidency of 6 August 2009, which recalled that of 20 December 2005 (ICC-Pres-RoC72-02-5, paragraphs 18, 19 and 25) of the necessity of providing clear reasons for her decisions, Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts, ICC-RoR56-01/09-2, paragraphs 13-19. In another decision being rendered today, the Presidency further addresses the importance of proffering reasons for decisions.

18. The Registrar is ordered to communicate the adjusted complaints procedure, set out herein at paragraphs 12-17, to all detained persons.

III. MERITS

A. Relevant part of the Impugned Policy

19. By the Impugned Policy, the detained persons are required to complete a "telephone number form" for all non-privileged telephone contacts and are authorised to call, and receive calls from, only those numbers registered on their lists of approved non-privileged telephone contacts (hereinafter "telephone contact list(s)") for which a form has been completed.¹⁷
20. The new telephone number form requires the detained person to provide the caller/callee's telephone number; the caller/callee's first name and surname, as well as surname at birth; the caller/callee's nationality; the caller/callee's date and place of birth; the caller/callee's country and city/village of residence; the nature of the detained person's relationship to the caller/callee; the languages spoken during the conversation and the names of any additional persons to whom the detained person may speak on each registered telephone number.¹⁸ The information provided is then subject to review over a fifteen-day period by the Registrar, who decides whether to approve or reject requests to register a contact on the detained persons' telephone contact lists.¹⁹
21. Paragraph 1 of the telephone number form requires the detained person submitting the form to declare in writing that he shall inform the custody officers every time a telephone number is used by him in order to speak to a person or persons other than the person against whom the number is registered. The policy allows the detained person to speak, in addition to the person against whose name the telephone number is registered, to his children under the age of eighteen and a maximum of two other people. The detained person is required to provide the custody officers with a completed form for each additional person to whom he has spoken and, if more than one, their order of intervention in the conversation.²⁰

¹⁷ ICC-RoR221-02/09-1-Conf-Exp-Anx1.

¹⁸ ICC-RoR221-02/09-1-Conf-Exp-Anx3.

¹⁹ ICC-RoR221-02/09-1-Conf-Exp-Anx2, ICC-RoR221-02/09-2-Conf-Exp-Anx, and Explanations, paragraph 4.

²⁰ ICC-RoR221-02/09-1-Conf-Exp-Anx3.

22. By reference to regulation 90 of the Regulations of the Court and regulation 207 of the Regulations of the Registry, paragraph 2 of the telephone number form requires the detained person, in writing, to “acknowledge that failure to abide by paragraph 1...will result in disciplinary sanctions and prohibition of calling this telephone number/person in the future”.²¹
23. With regard to the implementation of the Impugned Policy, the Presidency has understood the following. As of 6 February 2009, a detained person is authorised to call, and receive calls from, only numbers from his telephone contact list as that list stood on 1 December 2008. From 23 February 2009, the detained person is allowed to call only the numbers on that list for which a telephone number form has been completed. The fifteen-day waiting period does not apply to numbers appearing on the telephone contact list of the detained person on 1 December 2008. For numbers added to the detained person’s telephone contact list after 1 December 2008 and for new telephone contacts, there is no deadline for the completion of the telephone number form and the fifteen-day waiting period is applicable.²²

B. Reasons for the Impugned Policy

24. As reasons for the Impugned Policy, the Director, in his letter to counsel for the detainee, cited the “recent and constant increasing registration of telephone numbers by some detained persons including [the detainee]”, and justified the Impugned Policy by “the need to ensure a responsible management of the activities carried out at the detention centre as part of the judicial activity of the Court and according to the Regulations of the Registry”.²³ The Director stated that the Impugned Policy would allow the receipt of information regarding the contacts of each detained person and “avoid any situation that would not only jeopardise the requirement of a responsible management of the...detention centre but also put at stake the credibility of the detained persons due to incoherencies in information they...provided”.²⁴

²¹ ICC-RoR221-02/09-1-Conf-Exp-Anx3.

²² ICC-RoR221-02/09-1-Conf-Exp-Anx1.

²³ ICC-RoR221-02/09-1-Conf-Exp-Anx2.

²⁴ ICC-RoR221-02/09-1-Conf-Exp-Anx2.

C. Submissions of the parties

1. *Arguments of the detainee*

25. The detainee argues that the Impugned Policy has no justification nor proper legal basis and as such is a violation of his right, guaranteed by regulation 99(1)(i) of the Regulations of the Court, to communicate with his family and other persons.²⁵ It is argued that the regulations detailing the possible restrictions to that right (regulations 173 to 176 of the Regulations of the Registry) do not provide a legal basis for the requirements of the Impugned Policy.²⁶
26. Whilst the detainee accepts that a responsible management of the detention centre may require the use of a telephone contact list, he contests the type and amount of details required to be provided, in addition to the name, relationship to the detainee and telephone number of the caller/callee, before the Registrar considers adding a number to his telephone contact list; namely the new requirement upon detained persons to provide the caller/callee's: surname(s) at birth; date of birth; place of birth; and country and city/village of residence.²⁷ The detainee argues that the Impugned Policy is "unreasonable, disproportionate and...an unnecessary infringement upon [his] right to outside contact".²⁸ It is unreasonable in that the extensive and private information required by the Registrar is not the sort that can be expected to be known by the detainee.²⁹ It is disproportionate in that the information required by the Registrar may reduce the number of persons with whom the detainee can remain in contact, as people may be reluctant to provide the requisite information or the detainee may be embarrassed to request it.³⁰ Further, the Impugned Policy is an unnecessary intrusion into the private lives of potential callers/callees.³¹
27. The detainee also contests as unnecessary and disproportionate the further requirement of having to provide the names of additional people to whom he may speak on each individual telephone number. It is submitted that a detained person

²⁵ Application, paragraphs 15 and 16

²⁶ Application, paragraph 16.

²⁷ Application, paragraphs 10 and 11.

²⁸ Application, paragraph 12.

²⁹ Application, paragraph 12.

³⁰ Application, paragraph 12.

³¹ Application, paragraph 12.

- calling a family member will generally be unaware of which other family members, if any, may be present and wishing to participate in the call.³²
28. It is further submitted that the fifteen-day waiting period for processing requests for adding a new number to the telephone contact list of the detainee is unreasonable and unnecessarily restrictive of his right to communicate.³³
29. The detainee grounds his Application not only in the texts of the Court, but also in international human rights instruments. The detainee argues, in the context of the right to respect for private and family life under article 8(2) of the European Convention on Human Rights and Fundamental Freedoms (hereinafter "European Convention"), that "restrictions on communications should be kept to a minimum".³⁴ The detainee also relies on paragraph 51 of the Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,³⁵ which states the importance of prisoners maintaining contact with the outside world and emphasises flexibility in the application of prison rules relating to contact for prisoners whose families live far away.³⁶
30. Reliance is also placed upon rule 24(1) of the European Prison Rules, which, according to its commentary, stipulates the duties upon prison authorities to ensure that the rights protected under article 8 of the European Convention are respected in the inherently restrictive conditions of the prison. That rule provides: "[p]risoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons". Restrictions are permitted pursuant to rule 24(2) to the extent that they "allow an acceptable minimum level of contact". Rule 24(5) places a positive obligation upon prison authorities to assist prisoners in maintaining adequate contact with the outside world. According to its commentary, loss of liberty should not entail loss of contact, which is vital for counteracting the potentially damaging effects of

³² Application, paragraph 13.

³³ Application, paragraph 14.

³⁴ Application, paragraph 17.

³⁵ Application, paragraph 17 citing CPT/Inf/E (2002) 1 - Rev. 2006.

³⁶ At paragraph 17 of his Application, the detainee further cites paragraph 51 of those Standards, which provides: it is "very important for prisoners to maintain reasonably good contact with the outside world. Above all, a prisoner must be given the means of safeguarding his relationships with his family and close friends. The guiding principle should be the promotion of contact with the outside world; any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations". In that context, the detainee notes the Committee's emphasis on the need for some flexibility as regards the application of rules on visits and telephone contacts vis-à-vis prisoners whose families live far away (thereby rendering regular visits impracticable). "For example, such prisoners could be allowed to accumulate visiting time and/or be offered *improved possibilities for telephone contacts with their families*" (emphasis added by the detainee).

imprisonment. The detainee emphasises that, pursuant to rule 99 of the European Prison Rules, any restrictions on the contact of untried prisoners with the outside world should be particularly carefully limited.³⁷ In this vein, the detainee stresses that he has not been convicted of any offence and is not being punished.³⁸

31. In accordance with the legal principles espoused above, infringements upon the fundamental rights of detained persons to communicate are permitted solely to the extent that they are reasonable, necessary and proportionate to any real and established risk of abuse to the system. In the absence of justifiable security concerns, the Presidency is requested to intervene to prevent the Registrar from acting in excess of what is reasonable.³⁹ In the interim, the Presidency is requested to suspend the Impugned Policy until final determination on the matter.⁴⁰

2. *Explanations of the Registrar*

32. Following the Order of 23 March 2009, the Registrar, in greater detail, "[e]xplain[ed] the reasons underlying the adoption of the [I]mpugned [P]olicy, particularly the fifteen-day waiting period".⁴¹ Deriving her power to promulgate the Impugned Policy from regulation 90 of the Regulations of the Court⁴² and her obligation under the Regulations of the Registry to maintain current information on the detained persons' telephone communications and the identities of their interlocutors in keeping with regulation 175(1) of the Regulations of the Registry,⁴³ the Registrar, in her Explanations, submits that the policy is justified for two key reasons, namely the need to maintain the good order and the safety of the detention centre and the need to ensure the proper administration of justice.⁴⁴
33. The Registrar submits that the Impugned Policy does not curtail the rights of detained persons to communicate with the outside world.⁴⁵ It aims to respond to the "inconsistency or lack of clarity in the information provided to date by certain detained persons about their telephone contacts" and to establish a procedure for the registration of telephone contacts which is transparent and accountable.⁴⁶

³⁷ Application, paragraph 18.

³⁸ Application, paragraph 19.

³⁹ Application, paragraphs 19 and 20.

⁴⁰ Application, paragraph 6.

⁴¹ Order of 23 March 2009, page 3.

⁴² Explanations, paragraph 5.

⁴³ Explanations, paragraphs 4 and 5.

⁴⁴ Explanations, paragraphs 2, 4 and 5.

⁴⁵ Explanations, page 3 and paragraph 10.

⁴⁶ Explanations, page 3 and paragraph 1.

According to the Explanations, the old policy was subject to abuse; in that detained persons associated several names with a single telephone number registered on their telephone contact list and spoke to parties other than the original registered caller/callee.⁴⁷ This occurrence was allegedly used to give instructions to persons who may interfere with the administration of justice.⁴⁸

34. It is necessary, it is argued, that the Registrar has sufficient information so as to enable her to decide whether to register a contact on a detained person's telephone contact list.⁴⁹ The information requested by the telephone number form enables the Registrar to assess whether the detained person may be attempting to carry out the activities set out in regulation 175(1) of the Regulations of the Registry, namely: arrange an escape, interfere with or intimidate a witness, interfere with the administration of justice, otherwise disturb the maintenance of the security and good order of the detention centre, jeopardise the interests of public safety or the rights or freedom of any person, or breach an order for non-disclosure made by a Chamber.⁵⁰ Without such information it would not be possible for the Registrar to take an informed decision with respect to the potential risks a particular contact may pose with respect to those activities.⁵¹ The information required by the telephone number form is of practical benefit as, in the event that the Registrar or a Chamber decides that the recorded calls of detained persons should be subsequently listened to, it enables the identities of third persons who might have talked to detained persons during telephone calls to be ascertained with less difficulty.⁵² It is argued that the "same procedure" applies to persons visiting the detained persons at the detention centre, in that visitors are requested to provide copies of their identification documents in support of their application forms for visits.⁵³

35. The Registrar explains that the fifteen-day waiting period is essential to "ascertain the truthfulness of the information provided and for the requisite security assessment" to be carried out.⁵⁴ It is argued that the fifteen-day waiting period is warranted considering the specific situation of mobile telephone users in the Democratic Republic of the Congo (hereinafter "DRC"), where the use of private

⁴⁷ Explanations, paragraphs 1 and 10.

⁴⁸ Explanations, paragraph 10.

⁴⁹ Explanations, paragraph 4.

⁵⁰ Explanations, paragraph 4.

⁵¹ Explanations, paragraph 4.

⁵² Explanations, paragraph 6.

⁵³ Explanations, paragraph 2.

⁵⁴ Explanations, paragraph 7.

fixed-line telephones is “virtually inexistent...[and a]s a result, most Congolese people use mobile telephones”.⁵⁵ The Registrar explains that it is essential to identify the contacts of detained persons, especially as there is no real possibility of registering the details of sim cards, which are readily available on the black market. It is noted that in “late 2008”, the government of the DRC, apparently driven by security needs, decided that “cellular subscribers would be identified”.⁵⁶ The Registrar submits that the information required by the telephone number form is that which will enable such subscribers to be identified and traced.⁵⁷

36. It is further argued that the fifteen-day waiting period is reasonable, being identical to the period reserved for the analysis of information provided in application forms for visits pursuant to regulation 179 of the Regulations of the Registry.⁵⁸ The Registrar submits that the waiting period does not preclude her from issuing a decision before that time limit has elapsed, taking into account the usefulness of the information available.⁵⁹ The Registrar further submits that calls may be authorised in emergency situations or to satisfy a particular need.⁶⁰
37. In the event of a refusal to authorise the registration of a number on a detained person’s telephone contact list, the Registrar maintains that the detained person shall be notified of the reasons therefor.⁶¹ The Registrar further maintains that completed telephone number forms shall be destroyed at the end of court proceedings in the spirit of regulations 174(4) and 175(7) of the Regulations of the Registry.⁶²

3. *Observations of the detainee*

38. By his Observations, the detainee submits that the Explanations of the Registrar are not persuasive of any necessity of the restrictions on his right to communicate with the outside world and prays the Presidency to reverse the Impugned Policy.⁶³
39. The detainee submits that none of the detention units of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for

⁵⁵ Explanations, paragraph 9.

⁵⁶ Explanations, paragraph 9.

⁵⁷ Explanations, paragraph 9.

⁵⁸ Explanations, paragraph 7.

⁵⁹ Explanations, paragraph 7.

⁶⁰ Explanations, paragraph 11.

⁶¹ Explanations, paragraph 12.

⁶² Explanations, paragraph 12.

⁶³ Observations, paragraphs 1 and 2.

Rwanda or the Special Court for Sierra Leone (hereinafter "ICTY", "ICTR" and "SCSL" respectively) have considered it necessary to introduce a similar policy. In those institutions, detained persons are "entitled to call anyone they wish, unless there are specific allegations of witness interference or contempt" in which case temporary measures may be taken which interfere with the detained persons' right to communicate freely. In the absence of any specific allegations, interference would not be justified. Similarly, in the absence of any specific concerns, the instant Impugned Policy is unjustified.⁶⁴

40. It is argued that at the detention centre, detained persons may not make or receive telephone calls directly. In order to speak to a detained person, a caller must ring the detention centre, give his or her name and request that the detained person return his or her phone call, which is, in and of itself, a screening policy sufficient to maintain the good order and security of the detention centre. In any case, all non-privileged calls are recorded and may be actively monitored in accordance with regulation 175 of the Regulations of the Registry.⁶⁵
41. It is reiterated that it is unreasonable to expect a detained person to wait fifteen days before he can call a person who is not on his telephone contact list in view of the reality in the DRC which is that people frequently change numbers and move to and from regions. As such, if the detainee has to wait fifteen days before he can speak to a person, that person may have left or become unreachable. It is argued that this is particularly obstructive to the preparation of the detainee's defence case, as if someone who has information relevant to his case is within reach for only a short time, it is important that the detainee is able to contact that person urgently.⁶⁶ In that regard, the detainee is not reassured by the submission of the Registrar that in exceptional circumstances the Chief Custody Officer may authorise a detained person to make a telephone call in cases of urgency or particular need, which themselves remain unclear.⁶⁷

⁶⁴ Observations, paragraph 3.

⁶⁵ Observations, paragraph 4.

⁶⁶ Observations, paragraph 6.

⁶⁷ Observations, paragraph 7.

D. Determination of the Presidency

42. The point at issue in the instant Application is whether the Impugned Policy is an unjustified interference by the Registrar with the detainee's right to communicate with family and friends. It is recalled that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no sensible person who has properly applied his or her mind to the issue could have reached.⁶⁸
43. The right of detained persons to communicate with persons outside of the detention centre is clearly established by regulation 99(1)(i) of the Regulations of the Court, which provides that "[e]very detained person shall be entitled...[t]o communicate by letter or telephone with his or her family and other persons". The importance of detained persons maintaining contact with family members in particular has been recognised by the Presidency in previous decisions.⁶⁹ However, that right is not absolute. Regulation 99(2) of the Regulations of the Court provides that the rights of detained persons, including the right to communicate by telephone, may be subject to any "any restrictions necessary in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre".
44. The Presidency accepts that the Impugned Policy, which requires that the detainee submit certain information about a person with whom he wishes to have contact and imposes a fifteen-day waiting period before that person may be added to his telephone contact list and hence before a person may contact, or be contacted by, the detainee, could potentially interfere with the detainee's right to communication under regulation 99(1)(i) of the Regulations of the Court.
45. In the instant case, in order to determine the validity of the Impugned Policy, the Presidency will ask: whether the policy is in accordance with the law; whether the

⁶⁸ The standard of judicial review was defined by the Presidency in its decision of 20 December 2005, ICC-Pres-RoC72-02-5, paragraph 16, and supplemented in its Decision of 27 November 2006, ICC-01/04-01/06-731-Conf, paragraph 24.

⁶⁹ Decision of 4 November 2008, ICC-RoR217-01/08-10-Conf-Exp, paragraph 57 and Decision of 10 March 2009 entitled "Decision on 'Mr Mathieu Ngudjolo's Complaint Under Regulation 221(1) of the Regulations of the Registry Against the Registrar's Decision of 18 November 2008'", ICC-RoR217-02/08-8, paragraph 35.

policy is directed at a legitimate aim; and, finally, whether the interference with the rights of the detainee is necessary and proportionate to any legitimate aim pursued. That test is in line with that previously applied by the Presidency in its Decision of 5 December 2008 in determining whether the Registrar had acted within her powers in deciding to monitor the visits of a detained person and, noting the terms of article 21(3) of the Rome Statute, is consistent with that applied by the European Court of Human Rights in considering the legitimacy of interference by detaining authorities with the right of a detained person to respect for his private and family life under article 8 of the European Convention.⁷⁰

1. In accordance with the law

46. The Registrar has the authority to request detained persons to provide information about their contacts derived from her overall responsibility for the management of the detention centre, pursuant to regulation 90(1) of the Regulations of the Court. By virtue of that provision, the Registrar has the authority to make all decisions relating to the detention centre, including decisions relating to the security and good order of the detention centre. The Registrar and the Chief Custody Officer have the power to control the communications of detained persons, which must include the imposition of restrictions upon communication with specific individuals where justified, for example in order to prevent the detained persons from engaging in the activities outlined in regulation 175(1) of the Regulations of the Registry. This power cannot be properly exercised unless the Registrar and the Chief Custody Officer have access to information about the persons with whom the detained persons are in contact. Whether the ICTY, ICTR or SCSL require persons in their custody to complete a similar telephone number form is not, in and of itself, definitive of the legality of such a policy at the Court. Those institutions, like the Court, allow the Registrar and/or the Commanding Officer/Chief of Detention of their detention centres to prohibit, regulate or set conditions on contact between persons in their custody and other persons in particular circumstances.⁷¹

⁷⁰ Decision of 5 December 2008, paragraph 36 citing *Vlasov v. Russia*, no. 78146/01, Judgment of 12 June 2008, paragraph 123.

⁷¹ ICTY Rules Governing the Detention of Persons awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal, Rev. 9, 21 July 2005, (IT38/Rev.9), rule 64; ICTR Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, rule 64; SCSL Rules Governing the Detention of Persons Awaiting Trial or Appeal before the

47. Further, the Impugned Policy, in seeking information relating to the contacts of detained persons, is in keeping with the spirit of regulation 173(1) of the Regulations of the Registry which requires the Chief Custody Officer to maintain a log of all incoming and outgoing telephone calls of detained persons. The log is required to "clearly show the name and telephone number of the caller, the time, date and duration of the call". As such, the Regulations of the Registry already require that detained persons provide information about their telephone contacts; at minimum their name and telephone number. That regulation does not prevent additional information from being sought. In practice, prior to the implementation of the Impugned Policy, the Registrar compiled a telephone contact list for each detained person comprising the name of the caller/callee, the telephone number of the caller/callee and, in addition, the relationship of the caller/callee to the detained person.
48. For the above reasons, the Presidency finds the first limb of the test to be satisfied.

2. *Legitimate aim*

49. The Registrar submits that the Impugned Policy went towards the preservation of the good order and safety of the detention centre and to ensuring the proper administration of justice; the old telephone contact registration system having been subject to "abuse", with detained persons having spoken to persons other than those registered against a telephone number on their telephone contact lists and having registered more than one person against a telephone number. The Impugned Policy aims to introduce a screening process in the telephone contact registration system (akin to that applicable to the procedure for visits to the detention centre pursuant to regulation 180 of the Regulations of the Registry), whereby all telephone contacts are to be checked and approved by the Registrar.
50. It is recalled that the right of detained persons to communicate by telephone may be restricted, pursuant to regulation 99(2) of the Regulations of the Court "in the interests of the administration of justice or for the maintenance of the security and good order of the detention centre". The Presidency is equally satisfied that the Impugned Policy satisfies the second limb of the test, having been directed at those legitimate aims.

Special Court for Sierra Leone or Otherwise Detained on the Authority of the Special Court for Sierra Leone (as adopted on 7 March 2003 and amended on 14 May 2005), rule 47.

51. The Presidency is aware from previous judicial review proceedings that there have been instances where persons other than the original registered caller/callee were spoken to during telephone calls. Whilst it is both natural and practical for detained persons to wish to talk to other family or friends present during a telephone call to the original registered caller/callee, the Presidency accepts that the lack of information regarding these third persons presents a gap in the information required to be logged by the Chief Custody Officer under regulation 173(1) of the Regulations of the Registry and potentially allows detained persons to communicate with persons who they have been, or indeed would be, restricted from contacting by the Chief Custody Officer, Registrar or relevant Chamber. It is legitimate to screen the telephone contacts of detained persons in order to prevent contact with such persons or attempts to carry out the activities listed in regulation 175(1) of the Regulations of the Registry. The collation of information relating to the contacts of detained persons will go to assisting the Chief Custody Officer in creating an accurate log of persons spoken to during incoming and outgoing telephone calls in accordance with regulation 173(1) of the Regulations of the Registry and, in the event that the monitoring of telephone communications of a detained person is ordered pursuant to regulation 175 of the Regulations of the Registry, it will assist the Registry in the identification of contacts.
52. As to the submission of the Registrar that the detained persons register several names against a single telephone number, in light of the information revealing that most people in the DRC do not have fixed land lines and share mobile phones, the Presidency does not find the association of telephone numbers to more than one name on the telephone contact lists of detained persons, in and of itself, to be a strange occurrence. However, it accepts that if multiple unregistered people may be contacted via one telephone number without the knowledge of the Chief Custody Officer this again presents a lacuna in the information required to be logged by the latter and may allow detained persons to communicate with persons who they have been, or indeed would be, restricted from contacting, and for the reasons set out in the above paragraph, it is reasonable that the Registrar should seek to discover the identities of those with whom the detained person is conversing.

3. *Necessity and Proportionality*

53. The detention regime allows for the routine recording of the telephone conversations of detained persons and does not allow the recordings to be listened to without just cause. As such, having accepted that the Registrar was directing the Impugned Policy at the legitimate aims of preserving the good order and safety of the detention centre and ensuring the proper administration of justice, other than requesting detained persons to provide the personal details of their contacts for verification, it is not apparent what other steps the Registrar could have taken in order to manage and screen the contacts of detained persons.
54. The Presidency turns now to examine whether the specific requirements of the telephone number form are necessary and proportionate to the legitimate aims pursued.

(a). Telephone contact form: Required information

55. The detainee objects to the type and amount of details required by the telephone number form in addition to the name, relationship to the detained person and telephone number of the caller/callee, specifically: the caller/callee's name at birth; the caller/callee's date and place of birth; the caller/callee's country and city/village of residence; and the names of any additional persons to whom the detained person may speak on each individual telephone number. It is argued that this information may not be known to the detainee or may not be sought by him due to embarrassment. It is also argued that the telephone number form is an invasion of the privacy rights of individuals with whom the detainee wishes to speak to the extent that they will be reluctant to provide the requisite information.
56. The Presidency accepts the submission of the Registrar that the personal details requested in the telephone information form, including the name at birth, date and place of birth, and country and city/village of residence of potential contacts, are those that will enable the verification of the identities of contacts through a general background check prior to authorising their inclusion in a detained person's telephone contact list and in the event of any subsequent monitoring measures.
57. For individuals with whom the detainee maintains a close relationship, such as his close family and friends, most of the required personal information would be

known to him or easily discovered. Whilst the Presidency accepts that it is entirely possible that the detainee may not wish to request certain information from contacts or that contacts may not wish to provide certain information to him, any interference with the detainee's right to communicate is necessary and proportionate to the legitimate aims pursued.

58. With respect to the detainee's objection to being required to provide the names of additional people to whom he may speak on any given telephone number on the basis that he cannot be expected to know who may be present when he makes a call, the Presidency considers this to be a reasonable request on the part of the Registrar in view of the fact that persons in the DRC ordinarily share mobile telephones. It also goes to assisting the Registrar in screening potential contacts and identifying contacts in the event of monitoring measures for the purposes of preventing the activities set out in regulation 175 of the Regulations of the Registry. The requirement is clearly directed at those persons who the detainee may reasonably anticipate being present when a call is placed or received and would wish to speak and discrepancies may be remedied by the further requirement to list the persons actually spoken to *ex post facto*.
59. Individuals wishing to contact detained persons may legitimately be subjected to reasonable security measures. The Presidency accepts that the situation where an individual wishes to speak to a detained person may usefully be analogised with the situation where an individual wishes to visit a detained person. Visitors to the detention centre must be approved by the Registrar.⁷² The Regulations of the Registry set out the security measures to be taken in respect of such persons; visitors must complete an application form for visits,⁷³ and, in order to gain access into the detention centre, must provide an official identification document bearing a photograph⁷⁴ (which would be expected to include much of the information required in the telephone number form, including the document holder's full name, date of birth and city or village of residence) and would doubtless be denied entry to the detention centre if they fail to provide the requisite documents. As such, insofar as it may constitute an interference with the private lives of potential contacts, the specific requirements of the telephone number form are similarly necessary and proportionate to the legitimate aims pursued.

⁷² Regulation 179(1), Regulations of the Registry.

⁷³ Regulation 179(1)-(2), Regulations of the Registry.

⁷⁴ Regulation 180(5), Regulations of the Registry. See also Explanations, paragraph 8.

(b). Telephone contact form: Waiting period

60. In relation to the waiting period, the Presidency finds that simply requiring detained persons to submit a telephone number form without an attendant procedure to confirm the veracity of the information provided would be of little value. It is reasonable that the Registrar establish a waiting period in order to “ascertain the truthfulness of the information provided and for the requisite security assessment” to be made before deciding whether to approve a contact for inclusion in a telephone contact list.⁷⁵ That period is applicable to telephone numbers that did not appear on the telephone contact lists of detained persons as of 1 December 2008. The Presidency notes that although the waiting period restricts the detainee’s right to communicate within that period, it does not constitute an indefinite deprivation of that right. Whilst the Registrar has not expressly reasoned, in her Explanations, the significance of the date of 1 December 2008, which constitutes the cut-off date for the application of the waiting period, there has been no prejudice caused to the detainee by that fact. The Impugned Policy was notified to the detainee on 5 February 2009 but was not implemented until 23 February 2009. During that 17-day period between notification and implementation, the detainee would have had the opportunity to call persons added to his telephone contact list between 1 December 2008 and 5 February 2009 in order to obtain the necessary additional details.
61. Whilst the Presidency is not fully appraised of the way in which the Registrar seeks to carry out these security checks or the resources available to the Registrar to do so, in so far as the Registrar seeks to cross-check the information on the telephone number forms with records collected by the DRC, the Registrar’s argument is not wholly convincing. As the Explanations themselves indicate, the prevalence of the black market for sim cards in the DRC and the fact that the government of the DRC only began collecting information relating to mobile telephones in late 2008 may indicate that such records are likely to be unavailable in most cases.⁷⁶ It is, however, reasonable for the Registrar to conduct a general background check in order to confirm the identities of potential contacts using other procedures at her disposal.

⁷⁵ Explanations, paragraph 7.

⁷⁶ Explanations, paragraph 9.

62. In respect of the duration of the waiting period itself, the detainee argues that circumstances in the DRC are such that an individual he wishes to contact may become unreachable before the waiting period has elapsed.⁷⁷ The Presidency recognises that under the present circumstances in the DRC any delay may thwart the detainee's efforts to contact certain individuals urgently and interfere with his right to outside contact. That interference is balanced against the reasons underlying the waiting period as outlined above. Moreover, it is noted that the Registrar was guided, reasonably, by the fifteen-day waiting period established in regulation 179 of the Regulations of the Registry for requests for visits.
63. The Presidency notes that the Registrar has committed to issuing a decision before the fifteen-day waiting period has elapsed whenever possible.⁷⁸ In the event that the screening mechanisms available to the Registrar are exhausted prior to the expiration of the fifteen-day waiting period, it is expected that a decision as to whether to approve the addition of a contact to the telephone contact list of a detained person shall be taken at that instance rather than being deferred until the expiration of the fifteen-day waiting period. The Registrar is expected to provide reasons to a detained person for any decision not to approve a contact for inclusion in their telephone contact list as she has undertaken to do.⁷⁹ To minimise any interference with the rights of the detained persons, the Registrar is further expected to allow calls to be made on an emergency basis within the fifteen-day waiting period where appropriate as she has undertaken to do.⁸⁰

(c). Conclusion

64. It follows from all the above that the Impugned Policy is in conformity with the Regulations of the Court and the Regulations of the Registry and any interference with the rights of the detainee or his potential contacts is necessary and proportionate to the legitimate aims pursued. For the above reasons, the Application is dismissed. The Presidency, being aware of that outcome did not deem it necessary to address the application to suspend the Impugned Policy.

⁷⁷ Observations, paragraph 6.

⁷⁸ Observations, paragraph 6.

⁷⁹ Explanations, paragraphs 7 and 12.

⁸⁰ Explanations, paragraph 11.

IV. OBSERVATIONS

65. The telephone number form states that the failure of the detained person to inform the custody officers each time a telephone number is used by him to speak to persons other than the person against whom it is registered "will result in disciplinary sanctions and prohibition of calling this telephone number/person in the future" in accordance with regulation 207 of the Regulations of the Registry and regulation 90 of the Regulations of the Court.
66. It is noted that pursuant to regulation 207(a) of the Regulations of the Registry, a failure to obey orders or instructions given by members of staff of the detention centre constitutes a disciplinary offence. The Presidency finds that the Impugned Policy may properly be regarded as an order or instruction falling within the meaning of regulation 207(a) of the Regulations of the Registry.
67. Pursuant to regulation 208 of the Regulations of the Registry, the Chief Custody Officer has a discretion as to whether to commence disciplinary proceedings against a detained person suspected of committing a disciplinary offence. However, the telephone number form appears to strip the Chief Custody Officer of that discretion by stating in mandatory language that a failure to abide by the terms of the telephone number form will automatically result in disciplinary sanctions.
68. The telephone number form also appears to mandate the type of disciplinary measure to be imposed by the Chief Custody Officer against a detained person as a sanction for a breach of discipline relating to the telephone number form, namely: the prohibition of calling the registered telephone number/person in the future. The Presidency accepts that the removal of telephone privileges may be a reasonable punishment for breaches relating to the telephone number form since the circumstances of the offence are directly related to the use or abuse of such privileges. However, the form again appears to remove the discretion the Chief Custody Officer to impose other disciplinary measures that he sees fit against a detained person in the event that the latter is found guilty of the offence with which he has been charged, such as an oral or written warning or written notice of a suspended punishment. Further, the prohibition of calling the registered number/person "in the future" appears to indicate that the disciplinary measure stipulated in respect of breaches of the telephone number form is indefinite. This is contrary to regulation 211(b) of the Regulations of the Registry setting out the

disciplinary measures which the Chief Custody Officer may invoke, and providing that the "[r]emoval or reduction of privileges or of the use of personal possessions, e.g. television, radio or books" shall not exceed a period of one week.

69. The telephone number form should be amended to reflect the fact that disciplinary sanctions are a possibility rather than a certainty, the fact that the prohibition of calling a registered number/person as a disciplinary sanction is a possibility rather than a certainty and the fact any restriction on calling the registered number imposed shall be for a period not exceeding one week. This may be achieved simply by amending paragraph 2 of that form, as cited in relevant part above at paragraph 65, by substituting the word "will" for "may", substituting the word "and" for "such as", and substituting the words "in the future" for the words "for a period not exceeding one week". However, the modalities of the amendment are left to the Registrar.

V. CLASSIFICATION

70. The Presidency notes that all documents and orders in the instant Application were filed with a confidential *ex parte* classification. In its view, nothing said in this decision *prima facie* qualifies it as "confidential *ex parte*". If, however, there is any factual or legal basis for retaining the confidential classification of the instant decision or if there is any information requiring redaction prior to publication, the detainee may inform the Presidency thereof by 4pm on 5 October 2009. The Registrar may file any response thereto or provide additional reasons as to why the instant decision should retain its confidential classification or indicate if there is any information requiring redaction prior to publication by 4pm on 19 October 2009. The Presidency will thereafter rule on whether the classification should be maintained and the need for any redactions.

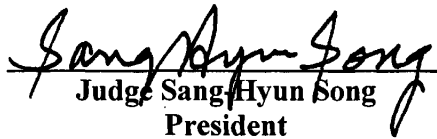
The Application is dismissed.

The Registrar is ordered forthwith to:

Communicate the complaints procedure set out herein at paragraphs 12 to 17 to all detained persons; and

Amend the telephone information form in line with the observations made herein at paragraphs 65 to 69.

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


Judge Sang-Hyun Song
President

Dated this 17 September 2009

At The Hague, Netherlands