

ANNEX 11

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: 17 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 Third 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 Éric MacDonald

Counsel for the Defence

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”) dated 18 December 2008;¹

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

NOTING the “Registrar’s Decision on the Monitoring of the Non-privileged Telephone Communications and Visits of Mr Germain Katanga and Mr Mathieu Ngudjolo Chui”³ dated 12 February 2009, reaffirmed on 27 February 2009 and 10 June 2009;⁴

NOTING the Presidency’s *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* dated 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” dated 6 March 2009;⁶

NOTING the “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” dated 8 June 2009 (“First Report”), in 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 Prohibiting*

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.

³ ICC-01/04-01/07-894-Conf-Exp.

⁴ ICC-01/04-01/07-932-Conf-Exp and ICC-01/04-01/07-1196-Conf-Exp.

⁵ ICC-RoR221-01/09-3-Conf-Exp.

⁶ ICC-RoR221-03/09-2-Conf-Exp.

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

*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 the Registrar’s report of 10 July 2009 on the monitoring of Mathieu Ngudjolo’s non-privileged communications, in the redacted version dated 14 July 2009 (“Second Report”);¹⁰

PURSUANT TO 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 Mathieu Ngudjolo Chui’s non-privileged telephone communications are being transcribed and analysed within the framework and periods defined by the aforementioned decisions of the Registrar;¹¹

CONSIDERING that it is evident from the communications analysed that Mathieu Ngudjolo is attempting to identify Prosecution witnesses via third parties who, in the Registrar’s view, are not individuals authorised to access such information, owing *inter alia* to its confidential nature;

CONSIDERING further that certain communications appear to indicate that third parties are attempting, with or without the assistance of the resource person from Mathieu Ngudjolo’s team, to coach witnesses prior to any meeting with Defence counsel;

⁸ ICC-01/04-01/07-1215-Conf-Exp-tENG.

⁹ ICC-01/04-01/07-1243-Conf-Exp-tENG.

¹⁰ ICC-01/04-01/07-1299-Conf-Exp.

¹¹ *Supra*, footnotes 3 and 4.

CONSIDERING that other evidence confirms the revelation in the Second Report that Thomas Lubanga Dyilo's resource person is collaborating or cooperating with Mathieu Ngudjolo;

CONSIDERING that some of the information contained in the present report may pertain to investigations conducted by the Defence team and that, in the Registrar's view, such information should not be disclosed to the opposing party if the Chamber should decide to authorise disclosure of this document;

CONSIDERING that the Registrar is unable to determine with certainty all of the information pertaining to the case and considers that owing to the Chamber's position, its greater knowledge of the case and its role, the latter is better able to rule on the nature and interest of such information;

SUMBITS the following report:

A – Languages of communication and periods covered by the report

1. The Registrar wishes to inform the Chamber that the conversations between Mathieu Ngudjolo and his contacts were held in Swahili, Lingala, Lendu or French, or a mix of those languages. Nevertheless, it is apparent from the monitoring of the conversations that the predominant language of communication in this case in May 2009 was Lendu/Kilendu.
2. The present report covers the periods of 1 to 17 March and 17 to 31 May 2009. Consequently, the period between 17 March and 17 May will be the subject of a subsequent report.

B – Matters pertaining to witnesses during the period covered in March 2009

Involvement of a third party named Mateso Lodya

3. On the subject of witnesses, during the period covered in March 2009, a conversation held in a language identified as Lendu shows that witnesses are to be identified by *Mateso Lodya*, a nurse,¹² and “prepared” ahead of the arrival of Mathieu Ngudjolo’s counsel in the field.¹³
4. A previous conversation of 10 March with the same nurse which starts in Swahili is interrupted by Mathieu Ngudjolo and continues in Lendu because it pertains to witnesses.¹⁴

C – Matters pertaining to witnesses during the period covered in May 2009

Involvement of Pastor Koli Lopa, resource person

5. A conversation on 24 May 2009 between Mathieu Ngudjolo and Pastor *Koli Lopa*¹⁵ shows that Pastor Koli Lopa’s mission will be to gather information about child soldiers who have been approached by the Office of the Prosecutor,¹⁶ by relying on his status within the Defence team. In fact, it appears that Mathieu Ngudjolo’s choice of Pastor Lopa is not unrelated to his ability to enter into

¹² [REDACTED].

¹³ Conversation 13 of 13 March 2009. According to the interpreter, “the first man [Mathieu Ngudjolo speaks to two individuals during one telephone conversation], **Mateso, is tasked by MN to recruit and prepare new witnesses ahead of the lawyers’ upcoming visit.** [REDACTED]”.

¹⁴ Conversation 30 of 10 March 2009. MA: As well as that, secondly, I’m telling you that those who wanted to instil fear in the people from here said that when the lawyers arrive there... [MN interrupts the speaker in Kilendu and asks him to change languages; the conversation continues in Kilendu]. According to the interpreter’s [REDACTED], the two men speak about the testimonies and **the method of recruiting new witnesses prior to the lawyers’ arrival.**

¹⁵ [REDACTED].

¹⁶ Conversation 1 of 24 May 2009. According to the interpreter, “MN briefs Pastor Lopa [REDACTED]. **His mission will be to elicit information about child soldiers, including those approached by Prosecution investigators, test them, contact their parents, attempt to win them over, discreetly monitor their contacts and invite them** to meet the lawyers as soon as they arrive in the field.”

contact with witnesses and to be discreet, as is apparent in a conversation of the same day.¹⁷ Pastor Lopa's capabilities are strengthened by the opportunities he has seized to "prepare the ground", *inter alia* by taking advantage of activities organised by NGOs in which he participates.¹⁸

6. The Registrar would like to specify that Pastor *Koli Lopa* – registered with the Defence Support Section under the name *Christophe Koli Lopa* – became the team's resource person on 13 May 2009. In Mathieu Ngudjolo's application dated 16 February 2009 to have him added to his contact list, he is identified as a friend and pastor [REDACTED]. It is stated on the registration form for telephone contacts that he speaks French, Swahili and Kilendu.
7. Other conversations indeed show that Pastor *Koli Lopa* is involved in the preparation of testimonies and conducts investigations to identify the whereabouts of witnesses, with whom he appears already to be in contact.¹⁹ Mathieu Ngudjolo actually asked Pastor *Lopa* to identify the [REDACTED]
 [REDACTED]²⁰ The Registry recalls in this respect that on 2 January 2009 Mathieu Ngudjolo had already asked an individual answering to the name of [REDACTED] to identify the telephone number of a [REDACTED] had mentioned to Mathieu Ngudjolo that [REDACTED] was a witness in his case and had been interviewed by the Prosecution investigators.²¹ The issue of identifying the [REDACTED] also emerges from another conversation, in which Mathieu

¹⁷ Conversation 2 of 24 May 2009, MN and Chief Manu [REDACTED]. According to the interpreter, MN informs Manu that his lawyers will be arriving in Bunia on 4 June 2009 and that he has **appointed Pastor Lopa as his resource person to help him with his case. MN justifies his choice of Pastor Lopa because of his discretion and his access to witnesses in order to "prepare" them better.**

¹⁸ Conversation 25 of 20 May 2009. According to the interpreter, "Pastor Lopa in turn informs MN that a British NGO is shortly going to start an outreach campaign on sustainable development. **Pastor Lopa views it as a good opportunity to 'prepare the ground' better on MN's behalf.**"

¹⁹ **Conversation 3 of 24 May 2009.** According to the interpreter, "Pastor Lopa informs MN of his upcoming contact with another witness".

²⁰ **Conversation 8 of 22 May 2009.** According to the interpreter, "Lastly, MN asks him if he has made enquiries about the [REDACTED] **he has heard so much about**".

²¹ See First Report, footnotes 29 and 32, and more comprehensively, pp. 10-12.

Ngudjolo tells Pastor *Lopa* that the [REDACTED] in question had testified in The Hague and that he was called [REDACTED].²²

8. [REDACTED].

Involvement of other individuals: [REDACTED]

9. It is worth noting that, as in the First and Second Reports of the Registrar, other individuals are involved in the identification of witnesses at Mathieu Ngudjolo's behest. For example, a person answering to the name of [REDACTED] [REDACTED] elder brother of Mathieu Ngudjolo – also helps to "prepare the ground"²³ and to ensure that the witnesses are able to persuade the Defence counsel.²⁴
10. Furthermore, analysis of another conversation shows that [REDACTED] acts as an intermediary and has been able to contact child soldiers for whom he is to arrange contact with Pastor *Lopa*.²⁵ Moreover, Mathieu Ngudjolo instructs him to identify [REDACTED]²⁶ [REDACTED].
11. Another individual, who answers to the name of [REDACTED] according to the telephone conversations but who appears under a different identity on the list

²² Conversation 25 of 20 May 2009. "MN [REDACTED]
 [REDACTED]

²³ Conversation 12 of 22 May 2009. According to the interpreter, [REDACTED] tells him that he has a meeting with Mr B. [Banga Mateso Rock, resource person] and will report back to him on their meeting. **They then cast some doubt on the loyalty of the youngster [REDACTED] but the youngster [REDACTED] is more 'loyal' in their view.**"

²⁴ Conversation 6 of 30 May 2009. According to the interpreter, "MN asks the pastor for news and information about the witnesses whom the lawyers are due to meet [REDACTED] **is insistent that he will see to it that these witnesses persuade the lawyers.**"

²⁵ Conversation 45 of 18 May 2009. According to the interpreter, [REDACTED] reports to MN on the progress of preparation work in the field and **contact made with certain child soldiers targeted by the ICC Prosecution investigators. MN praises him and tells him to put them in contact with Pastor Lopa**".

²⁶ Conversation of 19 May 2009. According to the interpreter, "MN asks [REDACTED] to find out about a man by the name of [REDACTED] who is reported to be the [REDACTED]
 [REDACTED]"

of telephone contacts at the Detention Centre,²⁷ is also involved in identifying witnesses. For example, in one conversation Mathieu Ngudjolo asks Pastor Lopa to initiate contact with [REDACTED] to obtain important information.²⁸ The same individual says that [REDACTED] has told him of the choice of Lopa as a resource person and that, along with [REDACTED] they will share the work.²⁹ This conversation shows that [REDACTED] is actively involved in identifying child soldiers and establishing contact with their parents. Furthermore, Mathieu Ngudjolo explains the importance of locating children and the need not to lose touch with them in order to put them in contact with his lawyers.³⁰ Read in light of and together with the conversation of 27 May, the conversation of 19 May confirms in any event that at least one child is in the process of being “prepared” to make statements consistent with Mathieu Ngudjolo’s wishes when his lawyers arrive in the field to interview him/her/them.³¹ The content of the conversation shows that [REDACTED] plays a part in the preparation of the children and that certain children have been identified as living in Kinshasa.³² It can be concluded that in the

²⁷ [REDACTED].

²⁸ **Conversation 37 of 19 May 2009.** According to the interpreter, “MN asks Pastor Lopa to contact [REDACTED] urgently, since he has important information for him.”

²⁹ **Conversation 38 of 19 May 2009.** [REDACTED] “I was with [REDACTED] yesterday. We talked. He gave me a brief report.” [REDACTED] [REDACTED] **old me that pastor Lopa has been appointed as a resource person?” / MN: “Yes, indeed.” / Chief [REDACTED]: “Tell him that we’ll share the tasks.”**

³⁰ *Ibid.*: MN: “Have you been able to contact the parents?” / [REDACTED] “I’ve met one. But I didn’t go into detail. I was scoping out how the land lies. / MN: “Quite. **The main thing is to find out where they are** (the child soldiers in question and their parents) **and to monitor them discreetly.** As soon as the lawyer gets there, put them in touch with him.” / [REDACTED] “[REDACTED]” / [REDACTED] “There’s another youngster who’s coming. **We’ve already tried to speak with him.** I’ll see him once more to check. As soon as it’s known when the delegation’s coming, I’ll go and look for him.”

³¹ **Conversation 15 of 27 May 2009.** MN: **Do those youngsters – well, I know that you have already spoken to him – I think that those youngsters will be available?** / [REDACTED] **Oh yes. They will already be prepared and ready on the 4th. We will ask them to stick around.**

³² *Ibid.*: MN: But would it not be better for them to meet the pastor first? (.../ [REDACTED] OK, this has to be properly planned. Here, we did indeed speak with the visitor you sent to me [Pastor Lopa?]. We have several things planned. / M: So, the parents of those youngsters – my people will meet them in private. You’ll see how it can be arranged, but this time, they have to meet in private. / [REDACTED] Ah, now, how are they going to manage to meet in private? Because I spoke to [REDACTED] agreed that, for this meeting, we have to speak to them in such a way that they don’t know which investigation it relates to. What will they do? / MN: No, no, the lawyers have the right to speak to them openly. / [REDACTED] OK. / MN: [REDACTED]. The main thing is to know their plan, how and where they are living. Th [REDACTED] the lawyers’ work now.” / [REDACTED] “They say that their youngsters are in Kinshasa and they are the ones who usually speak clearly.”

division of tasks with *Lopa*, [REDACTED] [REDACTED] is particularly involved in matters pertaining to the children.³³

12. Other individuals also appear to be involved, as is apparent from a conversation between [REDACTED] and Mathieu Ngudjolo.³⁴

Identification of Prosecution witnesses and their family members [REDACTED]

13. [REDACTED].^{35 36 37}

14. [REDACTED].

15. [REDACTED].

16. [REDACTED].³⁸

D – Confirmation of links with Thomas Lubanga Dyilo or at the very least with his resource person

17. In a conversation dated 18 May 2009, Mathieu Ngudjolo asks Pastor *Lopa* to contact [REDACTED]⁹ and informs [REDACTED] that he is being sought by Pastor *Lopa*.⁴⁰ The conversation of 18 May shows that other individuals are also associated with Mathieu Ngudjolo’s initiatives.⁴¹

³³ **Conversation 2 of 31 May 2009:** MN: OK. But those **other youngsters**, are they the only ones who live close to his place over there?" / [REDACTED] "Yes, **those youngsters are there.**" / M: "And are **those parents** still there?" / [REDACTED] They are there **on stand-by.**"

³⁴ *Infra*, **Conversation 43 of 18 May 2009.**

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

³⁸ [REDACTED].

³⁹ **Conversation 43 of 18 May 2009.** According to the interpreter, "MN tells Pastor *Lopa* to contact a man called [REDACTED]. He then instructs him on how to go about preparing the ground better: he recommends discretion and asks him to listen a lot. **Lastly, he asks him to collaborate with** [REDACTED]"

⁴⁰ **Conversation 18 of 22 May 2009.** According to the interpreter, "MN tells him that Mr B. [a lawyer] is actively looking for him in connection with an important document he has to provide to him. [REDACTED]"

18. For the Chamber's information, [REDACTED] is an influential member of the [REDACTED]. He rose through the ranks of the UPC to become Thomas Lubanga Dyilo' [REDACTED] and was later appointed as the [REDACTED]. Upon Thomas Lubanga Dyilo's arrest, [REDACTED] joined Mathieu Ngudjolo's MRC, and in [REDACTED] he became the [REDACTED]. As noted previously in the Second Report, he is currently a resource person in Thomas Lubanga Dyilo's team.

E – Violation of the new rules governing telephone calls

19. The conversation involving Mathieu Ngudjolo, [REDACTED] and the individual possibly identified as [REDACTED] is one example of the numerous occasions covered by this report where Mathieu Ngudjolo refers to the new rules⁴² but nonetheless breaches those concerning the number of authorised persons and their identity.⁴³ Since early February 2009, new rules have been in place restricting telephone communications to a maximum of three persons per telephone line, with the exception of the detained person's spouse and minor children, provided that a request has been submitted for the two persons linked to the telephone number and that they have received the Registrar's prior approval. Hence it is apparent that Mathieu Ngudjolo intended to flout these new rules.

promises to e-mail it to him by 8 a.m. the following day. Then, MN asks him whether he has already met Pastor Lopa. He answers that he has not and asks for Pastor Lopa's mobile phone number. MN tells him the number: [REDACTED]. [REDACTED] then asks what time is best to reach him. MN advises him to call after 6 p.m. because he is in training until then."

⁴¹ *Supra*, footnote 39.

⁴² **Conversation 9 of 14 March 2009:** MN: OK, I'll call you – I have your number, as you know. Unfortunately, under the conditions in force here, we have to wait two weeks before calling a new number. I'll wait for two weeks to call you on your number.

⁴³ **Conversation 88 of 2 March 2009:** Three men: [REDACTED] his elder brother, and two other, unidentified men. **Conversation 13 of 13 March 2009:** MN speaks in turn to three men, including Mateso (Mateso Lodya, to whom the phone belongs), the second could not be identified, and the third answers to the name of [REDACTED]. **Conversation 9 of 14 March 2009:** MN speaks in turn to [REDACTED] and "Chief" [no doubt [REDACTED]]. **Conversation 9 of 22 May 2009:** MN and an unidentified individual using [REDACTED]'s phone.

IN CONCLUSION,

- (1) The Registrar is of the view that, although detained persons or their counsel are free to choose resources persons who are from every indication close to the detained persons, either because they used to belong or still belong to the same political party or community or because of other affiliations, such a situation does not exempt them from exercising a degree of ethics, in particular where the defence strategy is supposed to be defined by the detained persons together with their counsel or the entire team. This is particularly applicable for detained persons where – as some of the conversations show – witnesses are requested or encouraged to provide Defence counsel with a version of the facts which has been previously arranged with the support of the detained person,⁴⁴ his close associates or other contacts. ██████'s words reveal a distorted perception of or even disregard for such ethics.⁴⁵ While there is cause to address the issue of the responsibility of the intermediaries used by Mathieu Ngudjolo, the same issue arises as to his own responsibility, insofar as he is fully informed of the facts and the conversations confirm that he is fully aware of them. Such conduct is even more reprehensible in light of the fact that he was aware that monitoring of his communications might recommence following the Registrar's second decision, dated 27 February 2009;⁴⁶

⁴⁴ **Conversation 38 of 19 May 2009.** [REDACTED] / ██████ Yes, he must belong to that group. Otherwise, it would be difficult. / MN: **Does he at least support us? Does he report the facts in the way that we prepared him to? Has he confirmed the facts?** / ██████ Yes, he's confirmed them. / MN: That's good / ██████ **There's no problem on that front.** / MN: You – meet with the youngster. I don't know the pastor's schedule but I'll tell him to do all he can to contact you today or tomorrow so that you can go and meet this youngster together. I'll tell him to take some notes and to "prepare" him. That way, when they (*the lawyers*) arrive, they'll find the ground already prepared.

⁴⁵ **Conversation 15 of 27 May 2009.** M: So, my people are going to meet those youngsters' parents in private. You'll see how it can be arranged, but this time, they have to meet in private. ██████ Ah, now, how are they going to manage to meet in private? Because I spoke to ██████ we said that, for this meeting, we have to speak to them in such a way that they don't know which investigation it relates to. What will they do? See also footnote 24 *supra*.

⁴⁶ *Op. cit.*

- (2) The Registrar wishes to state that, while there is no information in the conversations which the interpreters were able to understand which would appear to suggest that Mathieu Ngudjolo is attempting to harm witnesses, he nevertheless clearly makes reference to Prosecution witnesses – children, as it happens – whom his close associates are to “size up” and “monitor” and whose parents they are to contact;
- (3) [REDACTED];
- (4) The Registrar recalls that she is willing to submit to the Chamber a version of this report with proposed redactions, should the Chamber so decide, for the purposes of disclosure to the Defence and the Prosecution, and to submit to the Chamber at a later date the Registry’s analysis of the communications which are currently being transcribed.

p.p. [signed]

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

Dated this 17 July 2009,
At The Hague, The Netherlands