

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

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

Date: 13 March 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single judge

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF
THE PROSECUTOR**

v. Germain Katanga and Mathieu Ngudjolo Chui

Public Document

**Decision revoking the prohibition of contact and communication between
Germain Katanga and Mathieu Ngudjolo Chui**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric Macdonald, Trial Lawyer
Mrs Florence Darques-Lane, Legal
Adviser

**Counsel for the Defence of Germain
Katanga**

Mr David Hooper
Mr Göran Sluiter
Ms Caroline Buisman
Ms Sophie Menegon

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

Mr Jean-Pierre Kilenda Kakengi Basila

I, Sylvia Steiner, Judge at the International Criminal Court (“the Court”);

NOTING the “Urgent Request for the Scheduling of an *Ex Parte* Hearing to Discuss Issues Relevant to the Transfer of Mathieu NGUDJOLO”¹ (“the Prosecution Urgent Request”) filed on 6 February 2008, by which the Prosecution requests the Single Judge to convene an urgent *ex parte* hearing with the Prosecution and the Registry in order to, *inter alia*, discuss a temporary segregation of Mathieu Ngudjolo Chui in order to prohibit contact between him and Germain Katanga;

NOTING the “Decision convening a hearing on 6 February 2008”² issued by the Single Judge on 6 February 2008;

NOTING the hearing held *ex parte* and in closed session with the Prosecution and the Registry on 6 February 2008 in which the Prosecution made an oral request for the prohibition of any contact between Mathieu Ngudjolo Chui and Germain Katanga;³

NOTING the Oral Decision taken by the Single Judge at the 6 February 2008 hearing (“the Oral Decision”)⁴ in which (i) the Prosecution’s Request was granted and the prohibition of any contact between Mathieu Ngudjolo Chui and Germain Katanga was to be provisionally maintained until otherwise decided by the Single Judge; (ii) the Prosecution was ordered to file its application in writing by 7 February 2008; and (iii) the Registry was ordered to file its observations by 7 February 2008;

¹ ICC-01/04-02/07-8-US-Exp.

² ICC-01/04-02/07-9-US-Exp.

³ ICC-01/04-02/07-T-2-US-Exp-ENG ET.

⁴ ICC-01/04-02/07-T-2-US-Exp-ENG ET, p. 26, line 8 to p. 27, line 3.

NOTING the “Prosecution’s Urgent Application Pursuant to Regulations 90, 99(2) and 101(2) of the Court”⁵ (“the Prosecution Application”) filed by the Prosecution on 7 February 2008;

NOTING the “Observations on the implementation of an order of restriction to communication and contact between Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui until the initial appearance hearing of the latter”⁶ (“the Registry Initial Observations”) filed by the Registry on 7 February 2008 in which the Registry laid out four options for the practical implementation of the Single Judge’s Oral Decision;

NOTING the “Decision on the Prosecution’s Urgent Application pursuant to regulations 90, 99(2), and 101(2) of the Regulations of the Court”⁷ (“the Decision on the *Interim* Regime”) issued on 7 February 2008 by the Single Judge, in which the Single Judge, *inter alia*, partially reviewed and decided:

- (i) to provisionally implement the requested measures requested at paragraphs 15, 16, and 17 of the Prosecution’s Urgent Application in order to avoid any exchange of case-related materials between Germain Katanga and Mathieu Ngudjolo Chui;
- (ii) to provisionally prohibit any oral or written communication between Germain Katanga and Mathieu Ngudjolo Chui in relation to any public or confidential aspects of the their respective cases against them; and
- (iii) that the enforcement of the prohibition under (ii) shall be carried out in the same manner as other confidentiality obligations which were being enforced in relation to other detainees;

⁵ ICC-01/04-01/07-181-Conf; ICC-01/04-01/07-181-Conf-Anx; ICC-01/04-02/07-11-Conf and ICC-01/04-02/07-11-Conf-Anx.

⁶ ICC-01/04-01/07-184-Conf and ICC-01/04-02/07-12-Conf.

⁷ ICC-01/04-01/07-187 and ICC-01/04-02/07-15.

NOTING the confidential *ex parte* document filed by the Registry on 12 February 2008 entitled “Observations on the implementation of the Decision of the Chamber on the Prosecution’s Urgent Application pursuant to regulations 90, 99(2) and 101(2) of the Regulations of the Court”⁸ (“The Registry Additional Observations”);

NOTING the hearing held in closed session on 12 February 2008⁹ with the Prosecution, the Defences for Germain Katanga and Mathieu Ngudjolo Chui, the Chief Custody Officer, and the representatives of the Registry;

NOTING the “Decision Convening a Hearing on 18 February 2008”¹⁰ (“the Decision of 14 February 2008”) issued by the Single Judge on 14 February 2008, in which the Single Judge ordered that the confidential redacted version of documents ICC-01/04-01/07-192-Conf-Exp and ICC-01/04-02/07-19-Conf-Exp and its confidential annex be notified to the Prosecution and the Defences for Germain Katanga and Mathieu Ngudjolo Chui; and decided that (i) the Prosecution had until Monday 18 February 2008 at 16h00 to file its additional observations, and (ii) the Defences for Germain Katanga and Mathieu Ngudjolo Chui had until Wednesday 20 February 2008 at 16h00 to submit their additional observations;

NOTING the “Prosecution’s Observations on the Registrar’s ‘Observations on the implementation of the Decision of the Chamber on the Prosecution’s Urgent Application pursuant to regulations 90, 99(2) and 101(2) of the Regulations of the Court’”¹¹ (“the Prosecution Additional Observations”) filed by the Prosecution on 18 February 2008;

⁸ ICC-01/04-01/07-192-Conf; ICC-01/04-01/07-192-Conf-Anx; ICC-01/04-02/07-19-Conf and ICC-01/04-02/07-19-Conf-Anx.

⁹ ICC-01/04-01/07-T-18-Conf-ENG ET and ICC-01/04-02/07-T-5-Conf-ENG-ET.

¹⁰ ICC-01/04-01/07-197 and ICC-01/04-02/07-25.

¹¹ ICC-01/04-01/07-205-Conf-AnxA and ICC-01/04-02/07-30-Conf-Anx.

NOTING “The Defence Observations on the Prosecution and Registrar’s Observations on the Implementation of the ‘*Decision of the Chamber on the Prosecution’s Urgent Application Pursuant to Regulations 90, 99(2) and 101 (2) of the Court*’”¹² filed by the Defence for Germain Katanga on 20 February 2008;

NOTING the “*Requête*”¹³ (“the Duty Counsel Request”) filed by the Duty Counsel for the Defence for Mathieu Ngudjolo Chui on 21 February 2008, in which Duty Counsel submitted that time limits should start running from the moment the Duty Counsel receives: (i) notification of the relevant documents in his working language; and (ii) notification of the confidential documents *via* DHL services;

NOTING the “Order concerning notification of Decision of 14 February 2008”¹⁴ issued by the Single Judge on 22 February 2008, in which the Single Judge ordered the Registrar to provide to the Chamber with information regarding the notification of the Single Judge’s Decision of 14 February 2008 to the Defence;

NOTING the “Information to the Chamber Concerning the Notification of Decision of 14 February 2008”¹⁵ filed on behalf of the Registrar on 22 February 2008, in which the Registrar informed the Single Judge that:

- (i) the Decision of 14 February 2008 had been notified to the Duty Counsel for Mathieu Ngudjolo Chui by email on 14 February 2008;
- (ii) the annex to document ICC-01/04-02/07-19-Conf-Exp had been reclassified as confidential on 15 February 2008; and

¹² ICC-01/04-01/07-213-Conf.

¹³ ICC-01/04-02/07-34.

¹⁴ ICC-01/04-02/07-36.

¹⁵ ICC-01/04-02/07-37 and ICC-01/04-02/07-37-Conf-Anx1 to Anx4.

- (iii) the annex to document ICC-01/04-02/07-19-Conf-Exp had been notified by means of courier services (DHL services) on 18 February 2008 and had been delivered on 19 February 2008 at 10h54;

NOTING the “*Enregistrement de la désignation de maître Jean Pierre Kilenda Kakengi Basila par M. Mathieu Ngudjolo Chui comme conseil et de la déclaration d’acceptation du mandat par le conseil*”¹⁶ filed by the Registry on 25 February 2008;

NOTING the “Decision on the Defence Request concerning time limits”¹⁷ (“The Decision on the Request of Duty Counsel”), issued by the Single Judge on 27 February 2008, by which the Duty Counsel for Mathieu Ngudjolo Chui was given until 29 February 2008 at 16h00 to file his observations on (i) the Prosecution’s request for prohibition of any contact between Germain Katanga and Mathieu Ngudjolo Chui; (ii) on the basis of the confidential redacted version of document ICC-01/04-02/07-19-Conf-Exp and its confidential annex; and (iii) the Prosecution’s additional observations;

NOTING the “*Observations de la Défense concernant la Demande du Procureur de mettre en place une mesure de ségrégation entre les détenus NGUDJOLO ET KATANGA, en application de la requête orale présentée par la Chambre préliminaire I lors de l’Audience du 12 février 2008*”¹⁸, filed by Defence for Mathieu Ngudjolo Chui on 29 February 2008;

NOTING the “Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI”¹⁹ (“Decision on Joinder”) issued on 10 March 2008,

¹⁶ ICC-01/04-02/07-42 and ICC-01/04-02/07-42-Anx1 to Anx2.

¹⁷ ICC-01/04-02/07-45.

¹⁸ ICC-01/04-02/07-46.

¹⁹ ICC-01/04-01/07-257 and ICC-01/04-02/07-48.

whereby Pre-Trial Chamber I ("the Chamber") decided to join the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui*;

NOTING article 67 of the *Rome Statute* ("the Statute"), rule 22 of the *Rules of Procedure and Evidence* ("the Rules"), regulations 90, 91, 99(2) and 101(2) of the *Regulations of the Court* ("the Regulations"), and regulations 201 to 204 of the *Regulations of the Registry* ("the RoR");

CONSIDERING that, in the Prosecution's Application, the Prosecution, pursuant to regulations 90, 99 and 101 of the Regulations, (i) requested the Single Judge to prohibit "any contact between Germain KATANGA and Mathieu NGUDJOLO (together referred to as "Detainees"), upon the latter's arrival at the Detention Unit, based on Regulation 101 (2) of the Regulations of the Court";²⁰ (ii) justified its application by submitting that:

"because it has reasonable grounds to believe that such contact could: prejudice or otherwise affect the outcome of the proceedings against each of the Detainees, adversely impact ongoing or further investigations, harm victims or witnesses or any other person, or be used by the Detainees to breach an order for non-disclosure made by a Judge";²¹

CONSIDERING that on the Prosecution Additional Observations, the Prosecution stressed that:

"In light of the current custodial regime at the Court's Detention Unit and Mr. KATANGA's refusal to acknowledge the measures implementing the Judge's Order, Options 1 and 2 set out in the Registrar's Initial Observations would not sufficiently guard against a potential breach of the Decision. The Prosecution contends that the Registrar's Observations further militate for the implementation of Options 3 and 4, as proposed by the Registrar's Initial Observations because they would adequately implement the Decision and satisfy the Prosecution's concerns";²²

²⁰ ICC-01/04-01/07-181-US-Exp, p. 2.

²¹ ICC-01/04-01/07-181-US-Exp, p. 2.

²² ICC-01/04-02/07-30-Conf-Anx, para.4.

CONSIDERING that, according to the Registrar, option 3 consists of “moving Mr. Ngudjolo Chui to a cell in the International Criminal Tribunal for the Former Yugoslavia wing”²³, and option 4 consists of “mov[ing] Mr. Ngudjolo to a cell in the Host Prison, within a detention facility that could be an annex to the ICC Detention Center”;²⁴ and that according to the Single Judge the adoption of any of these two options would amount to a *de facto* segregation of Mathieu Ngudjolo Chui from all the other persons, including Germain Katanga, currently detained at the Detention Center;

CONSIDERING that, in the view of the Single Judge, it is important to distinguish between (i) the restriction of communication and contact “between a detained person and any other person” pursuant to regulation 101 of the Regulations, and (ii) segregation of a detained person “from all or some of the other detained persons” pursuant to regulation 201 of the RoR;

CONSIDERING that, according to regulation 201 (1) of the RoR, the segregation between two co-detained persons can only be based on one of the following two grounds: (i) preventing the detained persons in question from creating or contributing to any potential conflict in the detention center; or (ii) avoiding danger to the detained persons in question;

CONSIDERING that the Prosecution does not allege that any incident that would fall into the above grounds has taken place in the present case;

CONSIDERING, further, that according to regulation 201 (1), (2) and (10) of the RoR, the competent organ to order the segregation of one or more detained persons is the Chief Custody Officer; that the Registrar must be informed within 24 hours of such an order and may revoke or vary the conditions of segregation; and that a

²³ ICC-01/04-02/07-12-Conf, p. 5.

²⁴ ICC-01/04-02/07-12-Conf, p. 6.

detained person may file a complaint against any such order on segregation with the Chief Custody Officer, the Registrar and the Presidency pursuant to regulations 217 to 222 of the Regulations;

CONSIDERING that, with regard to the possibility of imposing, pursuant to regulation 101 of the Regulations, measures to restrict the communication and contact between Germain Katanga and Mathieu Ngudjolo Chui that would not amount to a *de facto* segregation regime, the Single Judge considers that the Prosecution Application is characterised by the following features:

- (i) the measures requested by the Prosecution do not aim at restricting communications and access of Germain Katanga and Mathieu Ngudjolo Chui with the outside world, but they aim at restricting communications and access between co-detainees;
- (ii) the measures requested by the Prosecution are not based on any previous specific violation of the detention regime by either Germain Katanga or Mathieu Ngudjolo Chui; and
- (iii) the measures requested constitute an important restriction of the rights provided for by the detention regime set forth in the Regulations and the RoR to Germain Katanga and Mathieu Ngudjolo Chui, and therefore they can only be imposed if the requirements of necessity and proportionality are met;²⁵

²⁵ ICC-01/04-01/06-108; see also ICTY, *The Prosecutor v Slobodan Milosevic* [IT-02-54], Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Council (1 November 2004), para. 17, where the Appeals Chamber stated that "[w]hen reviewing restrictions on fundamental rights such as this one, many jurisdictions are guided by some variant of a basic proportionality principle: any restriction of a fundamental right must be in service of "a sufficiently important objective," and must "impair the right... no more than is necessary to accomplish the objective"; and ICTY, *The Prosecutor v Fatmir Limaj* [IT-03-66], Decision on Fatmir Limaj's Request For Provisional Release, para.13, where the Appeals Chamber stated that "when interpreting Rule 65(B) and (D) of the Rules, the general principle of proportionality must be taken into account. A measure in public international law is proportional only when it is (1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target".

CONSIDERING that, the Prosecution has not provided any concrete evidence to support its allegations that Germain Katanga and Mathieu Ngudjolo Chui might discuss confidential materials for the purpose of threatening or harming witnesses and victims, or for the purpose of breaching non-disclosure orders made by the Single Judge; that even the Prosecution stated at the Hearing of 12 February 2008 that the measures it was seeking from the Single Judge were “a preventive action”;²⁶ and that, therefore, the Single Judge is of the view that the Prosecution’s allegations are purely speculative;

CONSIDERING further that the Chamber has joined the cases of *The Prosecutor v. Germain Katanga* and *The Prosecutor v. Mathieu Ngudjolo Chui* because:

The Prosecution sought initially to prosecute jointly Germain Katanga and Mathieu Ngudjolo Chui, as shown by the Prosecution’s joint application for warrants of arrest against them for crimes allegedly committed during, and in the aftermath, of the joint attack on the village of Bogoro by the FNI and FRPI on 24 February 2003; that the warrants of arrest issued by the Chamber for both Germain Katanga and Mathieu Ngudjolo Chui upon the Prosecution’s joint application are in respect of their alleged co-responsibility for the crimes allegedly committed during and in the aftermath of the said attack on the village of Bogoro; that all supporting materials and evidence in the Prosecution’s joint application relate to both alleged co-perpetrators;²⁷ and that the Prosecution has requested that the Chamber join the cases;²⁸

CONSIDERING that, in the view of the Single Judge, under the present circumstances, Germain Katanga and Mathieu Ngudjolo Chui have the right pursuant to article 67 (1) of the Statute to discuss the evidence on which the Prosecution intends to rely at the confirmation hearing in order to properly prepare their Defences; and that, in the absence of any concrete evidence that Germain Katanga and Mathieu Ngudjolo Chui are fabricating testimony or evidence, the

²⁶ ICC-01/04-01/07-T-18-Conf-ENG ET, page 40 line 4 to page 41 line 7 and ICC-01/04-02/07-T-5-Conf-ENG ET, page 40 line 4 to page 41 line 7.

²⁷ “Submission of the Redacted English and French Versions of Prosecution’s Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI” (ICC-01/04-01/07-196; ICC-01/04-01/07-196-Conf; ICC-01/04-01/07-196-Conf-AnxA; ICC-01/04-01/07-Conf-AnxA1-AnxA10 and ICC-01/04-01/07-196-AnxB) and “Submission of the Redacted English and French Versions of Prosecution’s Application for Warrants of Arrest against Germain KATANGA and Mathieu NGUDJOLO CHUI” (ICC-01/04-02/07-24; ICC-01/04-02/07-24-Conf; ICC-01/04-02/07-24-Conf-AnxA; ICC-01/04-02/07-24-Conf-AnxA1-A10 and ICC-01/04-02/07-24-Conf-AnxB).

²⁸ ICC-01/04-01/07-195 and ICC-01/04-02/07-22.

Single Judge does not consider that the exercise of this fundamental right can prejudice in any way or otherwise affect the outcome of the proceedings against each of them;

CONSIDERING, further, that as the Defence for Germain Katanga has pointed out, the case law of the European Court of Human Rights ("the ECHR"), the International Criminal Tribunal for the former Yugoslavia ("the ICTY") and the International Criminal Tribunal for Rwanda ("the ICTR") cited by the Prosecution does not offer any support for the Prosecution request because:

- (i) the Prosecution has not explained the relevance of the ECHR jurisprudence in the cases of *Hirst v. UK*, *Dickson v. UK* and *Shelly v. UK* for the purpose of the Prosecution Application;
- (ii) save for one precedent in the case of the *The Prosecutor v. Zejnil Delalic et al.*, all other ICTY and ICTR case-law cited by the Prosecution concerning the cases of *The Prosecutor v. Augustin Ndindiyimana*, *The Prosecutor v. Andre Ntagerura*, *The Prosecutor v. Vojislav Seselj* and *The Prosecutor v. Slobodan Milosevic*:
 - a. refers to restrictions of communications and contact of a detained person with the outside world, and not between either co-detainees (and much less between persons jointly prosecuted); and
 - b. are based on previous specific violations of the detention regime by the detained persons against whom such measures were requested;

CONSIDERING that the Decision of the President of the ICTY restricting the contact between two persons jointly prosecuting in the case of *The Prosecutor v. Zelnij Delalic et al.* was triggered by the fact that the relevant co-accused did not comply with the ICTY Rules of Detention, insofar as they exchanged notes surreptitiously by hiding them in an area accessible to both in order to circumvent any monitory or scrutiny by the ICTY custody officers; and that this Decision is also clearly distinguishable from the facts of the present case in that, in the view of the Single Judge, the Annex to the

Registry Additional Observations do not show that Germain Katanga made any attempt to breach the Decision on the Interim Regime insofar as he did not try to communicate with Mathieu Ngudjolo Chui, but quite the opposite he “said that he wanted to be locked up all the time and would indicate himself when he would want to go for a shower or something else so the new arrival could be out of his cell all the time”;²⁹

CONSIDERING that the Single Judge is particularly concerned by the fact that the Prosecution, whose activities must be directed by the principle of objectivity pursuant to article 54 (1) (a) of the Statute, has used in support of the Prosecution Application a number of sources that manifestly do not offer any support for its application; and that, in the view of the Single Judge, the Prosecution must refrain in future applications from resorting to this practice in order to mislead the Single Judge;

CONSIDERING, further, that, according to article 21 (1)(c) of the Statute, national case law can only constitute a subsidiary source of law before this Court, insofar as it shows the existence of a general principle of law that can be derived from “national laws of legal systems of the world” and is not inconsistent with the Statute and with international law and internationally recognized norms and standards;

CONSIDERING in this regard that, in the view of the Single Judge, the analysis of the national case law made in the Prosecution Application is limited to merely two national jurisdictions and the Prosecution does not explain how it supports its application for restriction of communications and contact of two co-detained persons – much less of two persons prosecuted jointly - in the absence of concrete evidence of any previous specific violation of the detention regime aiming at threatening or harming witnesses, breaching non-disclosure orders by the Single Judge or fabricating testimony or evidence;

²⁹ ICC-01/04-02/07-19-Conf-Exp-Anx, p. 1.

CONSIDERING that, despite the assurances given by the Defence of Germain Katanga at the hearing held on 18 February 2008, the Single Judge is concerned by about the attitude of Germain Katanga in refusing to acknowledge to the instructions given by the Chief Custody Officer for the implementation of the Decision on the *Interim* Regime; and that, although the Single Judge does not consider that Germain Katanga or Mathieu Ngudjolo Chui have made any attempt to date to breach the Decision on the *Interim* Regime, both must acknowledge and comply with the instructions given by the Chief Custody Officer, failing which they could be subjected to disciplinary proceedings as provided for in the RoR;

CONSIDERING, that, for the reasons above, the Single Judge is of the view that there is no need to impose at this stage any measures restricting the communication and contact between Germain Katanga and Mathieu Ngudjolo Chui; and that therefore there is no need to address the proportionality requirement;

FOR THESE REASONS

DECIDE to reject the Prosecution Application;

DECIDE to revoke the provisional measures ordered in the Decision on the *Interim* Regime issued on 7 February 2008.

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



Judge Sylvia Steiner
Single Judge

Dated this Thursday 13 March 2008

At The Hague

The Netherlands