

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/07
Date: 18 December 2008

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF**

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Confidential

**Order Instructing the Registry to File Documents on the Influence that the
Accused may have Retained in the DRC and on the Pressure that they Might
Currently Exert on Victims and Witnesses**

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

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

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean-Louis Gilissen
Mr Hervé Diakiese
Mr Jean Chrysostome Mulamba
Nsokoloni

Legal Representatives of Applicants

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Mr Simo Vaatainen

Detention Section

Mr Anders Backman

**Victims Participation and Reparations
Section**

Other

The Presidency

Pursuant to articles 64(2), 64(3)(c), 64(6)(e), 67(2) and 68(1) of the *Rome Statute* ("the Statute"), rules 81 and 87 of the *Rules of Procedure and Evidence* ("the Rules") and regulations 23 *bis*, 24 and 24 *bis* of the *Regulations of the Court*, Trial Chamber II of the International Criminal Court (respectively "the Chamber" and "the Court") hereby orders:

I. Background

1. In their observations on the continued detention of Mathieu Ngudjolo and Germain Katanga, the Prosecutor and the Legal Representatives of the victims referred to the patent influence that the accused have allegedly maintained in the Democratic Republic of the Congo (DRC) and in Ituri in particular. They also highlighted the pressure that they might bring to bear on victims and witnesses.

2. With regard to the influence that Germain Katanga and Mathieu Ngudjolo have allegedly maintained,¹ the Prosecutor and the Legal Representatives of the victims recalled the prominent positions held by both accused, who were respectively head of the *Front des Nationalistes Intégrationnistes* (FNI) and the *Forces de Résistance Patriotiques en Ituri* (FRPI), which have allegedly still been very active in the DRC in the past few months.² In this regard, they referred to "[TRANSLATION][...] a resumption of hostilities attributed to militias with close ties to the FNI and FRPI led

¹ Legal Representative of Victims a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08: "*Observations du Représentant légal des victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur l'examen de la détention de Germain Katanga au Siège de la cour*", 24 November 2008, ICC-01/04-01/07-766, para. 14; Legal Representative of Victims a/0009/08 to a/0013/08, a/0015/08, a/0016/08: "*Observations écrites du représentant légal des victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur l'examen du maintien en détention de M. Mathieu Ngudjolo Chui*", 3 November 2008, ICC-01/04-01/07-743, para. 14; Legal Representative of Victims a/0333/07 and a/0110/08, "*Observations des victimes a/0333/07 et a/0110/08 sur la détention de Germain Katanga (Règle 118-2)*", 25 November 2008, ICC-01/04-01/07-773, p. 4.

² See, in particular, Legal Representative of Victims a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08 and a/0035/08: "*Observation du Représentant Légal des Victimes a/0015/08; a/0022/08; a/0024/08; a/0025/08; a/0027/08; a/0028/08; a/0029/08; a/0032/08, a/0033/08, a/0034/08; et a/0035/08 sur la détention de Germain Katanga*", 24 November 2008, ICC-01/04-01/07-768, para. 15.

by Mathieu Ngudjolo and Germain Katanga.”³ One victims’ representative recalled that the “[TRANSLATION] rebellion in Ituri led by the *Front Populaire pour la Justice au Congo* (FPJC) counts Mathieu Ngudjolo’s FNI amongst its members”.⁴ It is further noted that “[TRANSLATION] all [the] events [that occurred in September and October 2008 particularly in Ituri] show that the region in which the Bogoro tragedies occurred, [...] where many surviving victims and witnesses still live [...], is now overwhelmed by terror and bloodletting due, amongst others, to the same militia members that Germain Katanga led”⁵ and that, “[TRANSLATION] [...] in spite of his detention, his troops are just as vicious”.⁶

3. The Prosecutor and the Legal Representatives of the victims further submitted that this influence has remained intact thanks to the numerous networks that the accused can rely on locally in Ituri and in Kinshasa and to the connections maintained in the DRC with, amongst others, Ugandan authorities. With regard to Mathieu Ngudjolo, the Prosecutor mentioned his numerous networks and connections on account of the position he held within the FNI, the *Mouvement Révolutionnaire Congolais* and the armed forces of the Democratic Republic of the Congo.⁷ As concerns Germain Katanga, the Prosecutor recalls that “witnesses describe KATANGA’s various international connections with the Ugandan

³ ICC-01/04-01/07-743, para. 12.

⁴ Legal Representative of Victims a/0036/08, a/0037/08, a/0038/08, a/0039/08, a/0043/08, a/0044/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0071/08, a/0073/08, a/0076/08, a/0077/08, a/0079/06, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08, a/0078/08, a/0109/08: “*Observations des victimes sur la détention de Mathieu Ngudjolo Chui*”, 6 November 2008, ICC-01/04-01/07-740, para. 2.

⁵ Legal Representative of Victims a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/108/08 et a/0109/08: “*Observations de la Représentante Légale des Victimes a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/108/08 et a/0109/08 sur la détention de Germain Katanga (Règle 118-2)*”, 26 November 2008, ICC-01/04-01/07-774, para. 15.

⁶ ICC-01/04-01/07-774, para. 16.

⁷ Office of the Prosecutor, “Prosecution’s Observations on the Review of the Pre-Trial Detention of Mathieu Ngudjolo Chui”, 6 November 2008, ICC-01/04-01/07-742, para. 15.

authorities directly and through designated intermediaries”⁸ and states that Germain Katanga had “the connections as well as the means to flee”.⁹

4. Regarding the pressure that the accused might exert on victims and witnesses, the Prosecutor recalls that members of the FNI and/or the FRPI have already pressured prosecution witnesses.¹⁰ He adds that witnesses interviewed by the Office of the Prosecutor all stated that they feared the measures that might be taken by Mathieu Ngudjolo if he became aware of the contact they had had with him. He also recalls the words of a witness to the effect that individuals had attempted to identify persons close to the FNI and/or the FRPI who had or might have cooperated with his Office.¹¹ The Legal Representatives of the Victims also emphasised “[TRANSLATION] the ease with which it would be possible [for Mathieu Ngudjolo] to exert pressure on witnesses”.¹² As concerns Germain Katanga, the Prosecutor states that he “still wields influence within the DRC and has established contacts and access to resources [...] that would enable him to pressure, threaten or harm said witnesses”.¹³

5. Both Defence Counsel challenged what they consider to be mere allegations. According to Mathieu Ngudjolo’s Defence, he is not at all involved in the armed operations conducted by the FPJC, a movement about which he knows nothing, in the creation of which he played no role and to which he provides no support.¹⁴ His Defence noted that no “[TRANSLATION] official, or indeed unofficial, reference is offered as proof of any connection whatsoever between [Mathieu] Ngudjolo and the

⁸Office of the Prosecutor, “Prosecution’s Observations on the Review of the Pre-Trial Detention of Germain Katanga”, 26 November 2008, ICC-01/04-01/07-775, footnote 22.

⁹ICC-01/04-01/07-775, para. 19.

¹⁰ICC-01/04-01/07-742, para. 16; Legal Representative of Victims a/0333/07 and a/110/08: *Observations des victimes a/0333/07 et a/110/08 sur la détention de Mathieu Ngudjolo Chui (règle 118-2)*, 6 November 2008, ICC-01/04-01/07-741, p. 4; ICC-01/04-01/07-773, p. 4.

¹¹ICC-01/04-01/07-742, footnote 19.

¹²ICC-01/04-01/07-741, p. 4.

¹³ICC-01/04-01/07-775, para. 20.

¹⁴Defence team for Mathieu Ngudjolo Chui: *“Observations de la Défense par rapport à la détention de Mathieu Ngudjolo (Règle 118-2 du Règlement de Procédure et de Preuve)”*, 12 November 2008, ICC-01/04-01/07-746, para. 15.

FPJC".¹⁵ Mr Ngudjolo's Defence pointed out that since he was taken into custody, Mathieu Ngudjolo has "[TRANSLATION] never established any contact or link whatsoever that could compromise him to the extent where he would be considered to be an important linchpin in the current hostilities [which are] wrongly blamed on him [...]".¹⁶ It challenged the existence of a "[TRANSLATION] wide network both in Congo and abroad".¹⁷ It stated that he "[TRANSLATION] has no relations in political and military circles abroad".¹⁸ Finally, it added that "[TRANSLATION] all his telephone contacts are closely monitored and [that] it is patently obvious that had he had any inappropriate contact, measures would have been taken to restrict his communication and to impose disciplinary sanctions [...]".¹⁹

6. Germain Katanga's Defence challenges the sweeping and unsubstantiated statements regarding an alleged link between Germain Katanga and the presence of rebel groups in Ituri.²⁰ It considers that the alleged link between the FNI and the FRPI, on the one hand, and the current FPJC, on the other hand, are mere rumours.²¹ Finally, it recalls that the person concerned has been in custody in The Hague for more than a year and has limited access to visitors, and his telephone calls are monitored, and that these circumstances would not allow him to maintain relations with rebels in Ituri.²²

II. Analysis by the Chamber

7. The arguments set forth above are primarily in respect of the issue of detention, and the Chamber is aware that a number of them were put forward for the purpose of assessing the risks that the release of the accused in the DRC might pose for

¹⁵ ICC-01/04-01/07-746, para. 13.

¹⁶ ICC-01/04-01/07-746, para. 23.

¹⁷ ICC-01/04-01/07-746, para. 24.

¹⁸ ICC-01/04-01/07-746, para. 25.

¹⁹ ICC-01/04-01/07-746, para. 16.

²⁰ Defence team of Germain Katanga, "Defence observations on the detention of Mr Germain Katanga", 4 December 2008, ICC-01/04-01/07-780, para. 3.

²¹ ICC-01/04-01/07-780, para. 3.

²² ICC-01/04-01/07-780, para. 3.

victims and witnesses. This notwithstanding, a careful study of the influence that the accused may still wield in the DRC and the pressure that they might currently exert on victims and witnesses also has repercussions on the Chamber's review of applications to restrict the Prosecutor's disclosure obligation under rule 81 of the Rules.

8. In reviewing applications under rule 81(4) of the Rules aimed at ensuring the security of witnesses, victims and their family members under article 68 of the Status, the Chamber must ensure that measures to redact a document and thereby restrict the rights of the Defence are taken for the purpose of protecting persons at risk, and that they are strictly necessary and sufficiently counterbalanced by the procedures it takes.²³ As the Appeals Chamber recalled, it is possible, in some cases, that persons whose names appear in prosecution witness statements may be endangered if their identity is revealed to an accused, and the issue of whether this risk is real should be determined on a case-by-case basis. The assessment of the accused persons' allegedly continued influence and the pressure they might exert directly or indirectly on the victims and witnesses is therefore particularly useful to the Chamber's determination, on a case-by-case basis, of requests for redactions it receives. In spite of its limited and general nature, an up-to-date assessment would enable it to ascertain the soundness of certain Prosecution arguments and not be left with unsubstantiated claims concerning possible risks that may ensue from the disclosure of unredacted or insufficiently redacted evidentiary material.

9. The Chamber is mindful that any application under rule 81 of the Rules must be carefully reviewed by the Court on a case-by-case basis in accordance with the Appeals Chamber's directions, with a view to conducting the proceedings in all fairness and with full respect for the rights of the accused.²⁴ Such case-by-case review

²³ Appeals Chamber: *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475, para. 59.

²⁴ Appeals Chamber: *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under*

is essential and the Chamber intends to abide by it when reviewing any pending or future application.²⁵ The Chamber recalls in this regard that the redaction of witness statements is an exception to the general rule of disclosure.²⁶ If less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.²⁷ In any event, the assessment required by the Chamber is not designed to enable it to prejudge the merits of rule 81 applications but rather, in reviewing them on a case-by-case basis, to follow a path that is as accurate and enlightened as possible.

10. Further, the Chamber considers that it must recall that Defence Counsel are bound by the duty to respect professional secrecy and confidentiality stipulated in article 8 of the *Code of Professional Conduct for counsel*. Indeed, Mathieu Ngudjolo's Defence made a point of citing this requirement at the status conference of 28 November 2008. On that occasion, it emphasised that Defence Counsel are bound by oath and "that the Prosecutor can trust [them] and hand to them all the materials that are in his possession [...] without needing to redact them".²⁸

11. Concerning the accused, the Chamber notes the provisions of regulations 99 to 101 of the *Regulations of the Court* pertaining to the general entitlements of an accused to visits and restrictions to access to news and contact with other persons, and notes

Rule 81", 14 December 2006, ICC-01/04-01/06-773; Appeals Chamber: *Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-475, 13 May 2008, ICC-01/04-01/07-475, in particular paras. 59, 72 and 73; Appeals Chamber, *Judgement on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements"*, 13 May 2008, ICC-01/04-01/07-476; Appeals Chamber, *Judgement on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9"*, 27 May 2008, ICC-01/04-01/07-521, in particular para. 35.

²⁵ Office of the Prosecutor: *Requête de l'Accusation aux fins d'expurger la seconde déclaration du témoin W-280*, 10 December 2008, ICC-01/04-01/07-789.

²⁶ Appeals Chamber: *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence"*, 13 October 2006, ICC-01/04-01/06-568, para. 36, ICC-01/04-01/06-773, para. 33.

²⁷ ICC-01/04-01/07-475, para. 61.

²⁸ ICC-01/04-01/07-T-53-ENG ET WT 28-11-2008, p. 69, lines 16-20.

the decision of the Single Judge rendered on 7 February 2008.²⁹ The Chamber is mindful of the provisions of regulations 167 to 184 of the *Regulations of the Registry* which pertain in particular to procedures for receiving and sending mail and packages, telephone calls and their monitoring, criteria for granting permission to visit and the supervision and monitoring of such visits. However, the Chamber would like to know precisely how these various provisions of the *Regulations of the Registry* are implemented and the grounds on which the Chief Custody Officer bases his conclusion that there are reasonable grounds to believe that a detainee is attempting to interfere with or intimidate a witness through his contact with the outside world.

FOR THESE REASONS,

The Chamber requests the Registry to file the following documents no later than 14 January 2009:

- 1) a general report labelled "Confidential, *ex parte*, available only to the Registry" setting out precisely the arrangements and criteria under which are effected the controls and monitoring prescribed by regulations 169, 175, 180 and 184 of the *Regulations of the Registry* in order to determine whether there are reasonable grounds to believe that a detained person is attempting to interfere with or intimidate a witness, jeopardise public safety or the rights or freedoms of any person, or to violate a non-disclosure order made by a chamber. The report should indicate the criteria used to ascertain the existence of such grounds and explain to what extent the detention officer authorised to conduct such a study is familiar with the case file;

²⁹ Pre-Trial Chamber I, *Decision on the Prosecution's Urgent Application pursuant to regulations 90, 99(2) and 101(2) of the Regulations of the Court*, 7 February 2007, ICC-01/04-01/07-187.

- 2) a report labelled "Confidential, *ex parte*, available only to the Office of the Prosecutor and the Defence" on the specific situation of Mathieu Ngudjolo and Germain Katanga, setting out the number and frequency of their dealings with the outside world (mail, telephone calls and visits) and indicating whether it is possible for them to correspond via e-mail. The report should indicate whether the restrictive measures provided for in regulations 169, 175 and 180 referred to above have already been implemented;
- 3) a report labelled "Confidential, *ex parte*, available only to the Office of the Prosecutor, the Defence and the Legal Representatives of anonymous and non-anonymous victims":
 - a. assessing the influence that Mathieu Ngudjolo and Germain Katanga have allegedly maintained in the DRC in general and in Ituri in particular, where the events of which the Chamber is seized occurred;
 - b. listing the information in the possession of the Registry with regard to the link existing between Mathieu Ngudjolo's FNI and Germain Katanga's FRPI, on the one hand, and the current FPJC, on the other hand, and with regard to the role that the two accused might have played during the recent military operations in Ituri attributed to militias close to the movements they led; and
 - c. setting out and, if applicable, analysing the information in their possession regarding the pressure that Mathieu Ngudjolo and Germain Katanga exerted or might exert on victims and witnesses from the detention centre of the Court, where they are being held.

The Prosecutor shall file his response to the reports mentioned in points 2 and 3 above no later than on 21 January 2009 at 16.00 hours.

The Legal Representatives of the victims shall file their response to the reports mentioned in point 3 above no later than on 21 January 2009 at 16.00 hours.

The Defence teams of Mathieu Ngudjolo and Germain Katanga shall file their response to the reports mentioned in points 2 and 3 above no later than on 28 January 2009 at 16.00 hours.

Pursuant to regulation 24 of the *Regulations of the Court*, the Chamber authorises the Registry to file a reply pertaining to the reports referred to in points 2 and 3 above no later than on 4 February 2009 at 16.00 hours.

The Chamber instructs the Prosecutor, the Legal Representatives of the victims and Defence Counsel to submit their arguments as precisely as possible, referring, where applicable, to relevant names and dates, and to include any material in support of their response and the information mentioned in paragraphs 3 and 4 of this order.

The Chamber reserves the right to rule on the Prosecutor's applications for redactions before the above-mentioned documents are submitted. It wishes to be informed of any restrictive measures about which the Registry might inform the Presidency pursuant to regulations 169, 175 and 184 of the *Regulations of the Registry*.

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

[signed]
Judge Bruno Cotte,
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Fumiko Saiga

Dated this 18 December 2008

At The Hague, The Netherlands