

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-
Date: **25 February 2009**

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Confidential

**Ex parte only available to the Defence Teams for Mr Katanga and Mr Ngudjolo
and the Registry**

**Defence Appeal to the Presidency on behalf of Mr Germain Katanga, in Respect
of the New Policy**

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor

**Counsel for the Defence for Germain
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Mr David Hooper

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Mr Jean-Pierre Kilenda Kakengi Basila

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section
Anders Backman

**Victims Participation and Reparations
Section**

Other

Introduction – Jurisdiction of the Presidency

1. The Defence, for and on behalf of Mr Germain Katanga, addresses the Presidency in relation to a new policy introduced at the ICC detention unit as regards the registration of non-privileged telephone numbers.
2. Whilst the detainees have been informed of this new policy by the Chief of Custody Officer (in letter DS_2009_011_AM_im dated 5 February 2009), in adopting this new policy, the Chief Custody Officer followed the instructions of the Director of the Division of Court Services, acting generally on behalf of the Registrar. In his letter of 5 February 2009 to the detainees, the Chief Custody Officer explained that, “following the decision of the Director of Court Services, a new policy on telephone numbers is applicable in the Detention Centre”.
3. On 11 February 2009, by letter DCS/2009/050/MD/dsa, the Director of Court Services informed Counsel for Germain Katanga of the new policy on adding non-privileged telephone numbers for detainees, saying: “As you may be aware, I have instructed the Chief Custody Officer to implement a new policy on the registration and the updating of telephone contacts provided by the detained persons”.
4. Accordingly, it is not in dispute that the Chief Custody Officer has implemented the new policy regarding the registration of non-privileged telephone numbers on direct instructions from the Director of Court Services. Since, therefore, this is a Registrar’s administrative decision rather than a decision of the Chief Custody Officer, the appropriate procedure is to address the Presidency directly. This is in line with the Registrar’s own proposition set out in her Decision on the Monitoring of Non-privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui, issued on 12 February 2009,¹ that the Presidency “has authority to rule on appeals of decisions made by the Registrar in respect of detention matters”.
5. The Presidency is already seized with the Urgent – Confidential Ex parte, available only to the Registry, the Office of the Prosecutor and the Defence, Defence Appeal to the President Challenging the *Registrar’s Decision on the Monitoring of Non-Privileged Telephone Communications and Visits of Mr. Germain Katanga and Mr. Mathieu Ngudjolo Chui*, filed on 20 February 2009.²
6. Given that the proposed policy directly implicates Mr. Katanga’s right to freely communicate with his family, friends and non-privileged members of his Defence team and is effective as of 23 February 2009, time is of the essence. The Defence request the Presidency to suspend the implementation of the policy until the matter has been reviewed by the Presidency.

¹ ICC-01/04-01/07-894-Conf-Exp

² ICC-RoR221-01/09-1-Conf-Exp + Annex

New Policy on Registration of non-privileged numbers

7. This appeal complaint concerns the new policy on telephone numbers applicable in the Detention Centre as of 6 February 2009 pursuant to the decision of the Director of Court Services of the Registry as conveyed to the detainees by letter DS_2009_011_AM_im dated 5 February 2009 and to their counsel on 11 February 2009, by letter DCS/2009/050/MD/dsa.
8. The Chief Custody Officer has explained the new policy as follows:³
 - The only non-privileged numbers that you are authorized to call are the numbers from the list of your non-privileged telephone numbers made before the 1st of December 2008;
 - Concerning the abovementioned list of non-privileged telephone numbers, you have to fill in a telephone number form for each number on this list that you intend to call in the future by 23 February 2009. Past this date, you will be allowed to call only the numbers for which you provided a filled-in telephone number form;
 - For any new non-privileged numbers, including numbers provided since the 1st of December 2008, you will have to provide a filled-in telephone number form and wait 15 days between the provision of this form and the addition of the new number to your list of non-privileged telephone numbers.
9. The Director of Court Services explained the necessity of this new policy as follows:⁴

“The decision was issued after the recent and constant increasing registration of telephone numbers by some detained persons including your client. It is furthermore justified by the need to ensure 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. In other words, the new policy, will allow, on the one hand, to receive from each detained person, bearing full responsibility, information regarding his contacts – regular or temporary – and, on the other hand, to avoid any situation that would not only jeopardize the requirement of a responsible management of the ICC detention centre but also put at stake the credibility of the detained persons due to incoherencies in information they would have provided.”

Concerns subject to this Appeal

10. The Defence accepts that a responsible management of the ICC detention centre may require the use of a list of non-privileged telephone numbers. However, the Defence objects to the type and amount of details required to be provided before the Registrar considers adding a number to the list.

³ DS_2009_011_AM_im dated 5 February 2009

⁴ DCS/2009/050/MD/dsa dated 11 February 2009.

11. In addition to the provision of the name, telephone number and relationship of the proposed caller the new requirements demand the detainee to provide the following additional information;

Caller's surname(s) at birth (earlier family names);

date of birth (day-month-year);

place of birth;

country and city/ village of residence.

12. It is submitted that the requirement to disclose such extensive and private details is unreasonable, disproportionate and is an unnecessary infringement upon the detainee's right to outside contact. It is unreasonable as it is not the sort of information that can be expected to be known by the detainee. It is also an unnecessary intrusion into the private life of others. The requirement is disproportionate in that it may reduce the number of persons with whom the detainees can remain in contact, as many people may be reluctant to provide such information or the detainee may be embarrassed to request it. It should be noted that the new rules intrude into the private lives of potential callers and to an extent that the Defence submits is unnecessary in the known circumstances.
13. A further requirement is that the detainee is requested to provide the names of the 'additional people that I shall speak to on this telephone number'. Failure to provide the names will be a breach of the proposed telephone regulations. However, a detainee telephoning a family member, for example, will generally be unaware of what, if any, other members of his family may be present and wishing to participate in the call. There may, for example be children present who wish to speak to the detainee. This new rule is, in the submission of the Defence, a further example of an unnecessary restriction being imposed, disproportionate to the reasonable objective of such rules.
14. The Defence also raises objection in respect of the duration of 15 days for processing requests for adding a new number to the list. The Defence submits that this is unnecessarily restrictive of the detainee's right to contact. It is unreasonable to expect a detainee to wait for two weeks before he can make a call. It is to be noted that the system that has been in place from the outset does not permit the detainee to call on his own behalf. All calls have to be made by staff at the Detention unit to the party nominated by the detainee. There is no evidence known to the Defence that the detainees have abused the system.
15. The Defence submits that the new policy on the registration of non-privileged telephone numbers significantly affects the detainee's entitlement to communicate by telephone with *family and other persons* pursuant to Regulation 99(1)(i) of the Regulations of the Court (RoC).
16. The Defence submits that the violation of Mr. Katanga's right to communicate with family and other persons has neither a justification nor proper legal basis. Regulation 91(1) RoC provides that '[a]ll detained persons shall be treated with humanity and

with respect for the inherent dignity of the human person'. Regulation 99 RoC stipulates the 'general entitlements of detained persons' and recognizes in this respect under (i) the entitlement to communicate by letter or telephone with his or her family and other persons. Paragraph 2 of Regulation 99 RoC stipulates that details will be set out in the RoR including "any restrictions necessary in the interests of the administration of justice or for the maintenance of the security good order of the detention centre". Regulations 173 to 176 of the RoR provide for such details and the possible restrictions to the entitlements under Regulation 99(1)(i). Regulations 173 to 176 of the Regulations of the Registry (RoR) set out the details and possible restrictions to the right to communicate with family and other persons as referred to under Regulation 99(2) RoC. It is submitted that Regulations 173 to 176 do not provide for a legal basis for the requirements under the new telephone policy.

17. It is held, with regard to possible restrictions of the right to family life under Article 8(2) of the European Convention on Human Rights (ECHR) that 'restrictions on communications should be kept to a minimum'. Paragraph 51 of the standards as developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (CPT/Inf/E (2002) 1 - Rev. 2006) provides that 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'. The CPT, in the same paragraph of its Standards, further asks for special attention and flexibility for the situation of those individuals whose families live far away. In respect to this category of detainees, the CPR suggests that 'for example, such prisoners could be allowed to accumulate visiting time and/or be offered improved possibilities for telephone contacts with their families'.

18. Contemporary standards relating to individuals deprived of their liberty have been laid down by the Council of Europe in the 2006 version of the European Prison Rules (EPR). Rule 24(1) of the EPR – which is meant to stipulate the duties prison authorities have to ensure that the rights under Article 8 ECHR are respected in the 'inherently restrictive conditions of the prison (see commentary to the EPR under Rule 24) - states that '[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 organizations and to receive visits from these persons'. Paragraph 2 of Rule 24 provides that restrictions are permitted to the extent that they 'allow an acceptable minimum level of contact'. Paragraph 5 holds that '[p]rison authorities shall assist prisoners in maintaining adequate contact with the outside world [...]', referring to positive obligations on the authorities in this respect. The commentary to the EPR provides for valuable guidance in interpreting the instrument. In respect of Article 24, it starts off by stating that '[l]oss of liberty should not entail loss of contact with the outside world. On the contrary, all prisoners are entitled to some such contact and prison authorities should strive to create the circumstances to allow them to maintain it as best as possible'. The commentary further states that

‘[c]ontact with the outside world is vital for counteracting the potentially damaging effects of imprisonment’. Important is the reference to Rule 99 while stressing that this rule ‘makes it clear that *untried prisoners* should also be allowed to keep in contact with the outside world and that *restrictions, if any, on such contact should be particularly carefully limited*’ [emphasis added].

19. The Defence emphasises that Germain Katanga is detained but not convicted of any offence. He is not being punished. Effecting his rights as an individual to make or receive a simple call from his wide circle of family and friends should be done on a reasonable and restrained basis, proportionate to any real and established risk of abuse of the system by him.

Conclusion

20. In accordance with these legal principles, infringements upon the fundamental rights of the ICC detainees are permitted solely to the extent necessary and proportionate to the reasonable and justifiable requirements of security concerns. In the absence of circumstances justifying the further demands to provide such additional information the Presidency is asked to intervene to prevent the Registry acting in excess of what is reasonable.

21. The Defence attaches the following annexes:

Annex 1: Letter DS_2009_011_AM_im to all detained persons dated 5 February 2009

Annex 2: Letter DCS/2009/050/MD/dsa from the Director of Court Services to Mr Hooper, dated 11 February 2009

Annex 3: Formulaire d’enregistrement de numéro de téléphone

Respectfully submitted,



David Hooper

Dated this 25 February 2009

At The Hague, Netherlands