

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-  
Date: **16 April 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 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 Observations on the "Explications du Greffier sur les raisons motivant la  
nouvelle procédure relative aux contacts téléphoniques des personnes détenues"**

**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**

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Ngudjolo Chui**

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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

Anders Backman

**Victims Participation and Reparations  
Section**

**Other**

## Defence Observations

1. The Defence for Mr. Germain Katanga submits that the Registrar's explications justifying the new telephone policy in place in the detention unit since February 2009 are not persuasive of any necessity for the restrictions on the detainees' right to freely communicate with the outside world. In particular, the Registrar does not explain why it is considered necessary to have very private and detailed information from the callers, such as the caller's surname(s) at birth (earlier family names), date of birth (day-month-year), place of birth, country and city/ village of residence.
2. Even after carefully examining the Registrar's explications, the Defence fails to understand why the provision of these details is necessary to "préserver le bon ordre et la sécurité du quartier pénitentiaire, ainsi que d'autres exigences telles celles figurant à la norme 175-1 du RdG"<sup>1</sup> (to preserve the good order and security in the detention centre and other requisites such as those set out in Regulation 175-1 of the Regulations of the Registry). The Registrar does not offer any more specific reasons why her policy is necessary and the Defence is unaware of any concerns or complaints that any of the detainees have abused the telephone system as it was in place.
3. It is noteworthy that none of the detention units of the ad hoc Tribunals have considered it necessary to introduce a similar policy. In the International Criminal Tribunal for Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), and the Special Court for Sierra Leone ("SCSL"), there is no screening policy as to whom may be called. Non-privileged phone calls are recorded but detainees are entitled to call anyone they wish, unless there are specific allegations of witness interference or contempt. In such situation, temporary measures may be taken which intervene with the detainee's right to freely communicate with the outside world. In the absence of any specific allegations, such measures would not be justified. In ordinary situations, detainees may use the phone when it pleases them and personally call whomever they wish to call. In the ICTY, detainees even have their own telephone in their cell and, unless specific circumstances justify intervention, may use it freely without any screening. The Defence is unaware of any difficulty that has arisen from this free telephone policy at the ad hoc Tribunals.
4. The ICC detention centre has taken a different approach. Already under the old telephone system, detainees could not make phone calls directly or be called by anyone. When someone wishes to speak to an ICC detainee, this person has to ring the detention centre, give his or her name and request that the detainee will return his or her phone call. This, in and on its own, is a screening policy which should be sufficient to maintain the good order and security of the detention centre. In addition, all non-privileged phone calls are recorded and can be actively monitored in cases under Regulation 175 of the Regulations of the Registry.
5. Accordingly, and in the absence of any specific concerns, the Defence reiterates that "the requirement to disclose such extensive and private details is unreasonable, disproportionate and is an unnecessary infringement upon the detainee's right to

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<sup>1</sup> ICC-RoR221-02-09-4-Conf-Exp, para. 2.

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”.<sup>2</sup>

6. The Defence further reiterates that it is unreasonable to expect a detainee to wait for 15 days before he can make a call to a person who was not yet on the list. The Registrar refers to the realities in DRC where landlines are rare and most numbers are from mobile phones.<sup>3</sup> It is as much a reality in DRC that persons frequently change numbers and move to and from the region. It can, therefore, be a real problem if a detainee has to wait 15 days before he can speak to a person. Such a person may have left and be unreachable. This may particularly be obstructive to the preparation of Mr. Katanga's defence. When someone who has information relevant to Mr. Katanga's defence case is within reach but for a short time only, it is important that Mr. Katanga can contact such a person with urgency.
7. In this regard, the Registrar's assurance that, in exceptional circumstances, the Chief of detention may authorise a detainee to make a phone call for reasons of urgency or a particular need,<sup>4</sup> does not reassure the Defence. It is unclear in what circumstances the Chief of detention would make such an exception. The detainee should not have to request for an exceptional favour and be subject to the mercy of the Chief of detention to grant him what he is in fact entitled to. It is respectfully submitted that such phone calls should be permitted as the rule, restrictions permitted in exceptional circumstances only, and not the exception.
8. Based on these grounds and those set forth in *Defence Appeal to the Presidency on behalf of Mr Germain Katanga, in Respect of the New Policy*<sup>5</sup>, the Presidency is asked to intervene to prevent the Registry acting in excess of what is reasonable and to disallow the unnecessary and unjustified measures imposed on the ICC detainees.

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<sup>2</sup> ICC-RoR221-02/09-1-Conf-Exp, para. 12.

<sup>3</sup> ICC-RoR221-02-09-Conf-Exp, para. 9.

<sup>4</sup> ICC-RoR221-02-09-4-Conf-Exp, para. 11.

<sup>5</sup> Submitted on basis of confidentiality and ex parte only available to the Defence Teams for Mr Katanga and Mr Ngudjolo and the Registry, dated 25 February 2009.

Respectfully submitted,



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David Hooper

Dated this 16 April 2009

At London