

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **25 March 2011**

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

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

Confidential

**URGENT Defence Request for Authorisation for
Mr. Ndjabu Ngabu (DRC-D02-P-236), Mr. Pitchou Iribi (DRC-D02-P-0228) and Mr.
Charif Ndadza (DRC-D02-P-350) to meet with Germain Katanga**

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

Mr Luis Moreno Ocampo, Prosecutor
Mr Eric Macdonald, Senior Trial Lawyer

**Counsel for the Defence for Germain
Katanga**

Mr David Hooper Q.C.
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Legal Representatives of Victims

Mr Jean-Louis Gilissen
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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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. On 23 March 2011, the judges issued an oral decision pursuant to which visits of witnesses to Mr. Katanga may be authorized by them exceptionally and on a case-to-case determination, in line with *Décision relative à la requête du Bureau du Procureur aux fins de communiquer avec le témoin P-250* [hereinafter 'Decision relative to P-250'].¹ This Decision holds that parties are not allowed to be in contact with their witnesses until after all the evidence has been submitted in the case.² Only in their oral decision of 23 March, the judges made it explicit that the parties include the accused.
2. Accordingly, any request for a witness to meet Mr. Katanga after completion of his testimony must be submitted to the Chamber on an individual basis. The Chamber will then consider on a case-to-case determination whether exceptional circumstances justify the granting of such request.³ Another request must then be submitted to the Registry to arrange the logistics of such visit.
3. The Defence had not previously cited this decision relative to P-250 because it had not realised this decision intended to encompass visits from witnesses to Mr. Katanga after their testimony. The Defence emphasizes that it requests authorization for such visits merely to give an opportunity to the witness to greet Mr. Katanga after six years of separation and for Mr. Katanga to thank the witness for having made the effort to come all the way to The Hague to testify in his defence. The Defence sees no harm in such a supervised and monitored visit. Counsel and other members of Mr. Katanga's defence team are familiar with the practice at the other international criminal tribunals where such visits are granted routinely and without any problem. Accordingly, the Defence did not foresee this issue would raise any difficulty.
4. The Defence hereby requests the Chamber to waive the prohibition for the parties to speak to their witnesses as set out in the Decision relative to P-250 and authorize a meeting between the accused and the three detained witnesses, Mr. Ndjabu Ngabu (DRC-D02-P-236), Mr. Pitchou Iribi (DRC-D02-P-0228) and Mr. Charif Ndadza (DRC-D02-P-350). This request is based on these general grounds as well as on the following grounds.

¹ ICC-01/04-01/07-2711-Conf, issued on 18 February 2011.

² *Ibid*, para. 10.

³ ICC-01/04-01/07-T-238-ENG ET WT 23-03-2011 pages 5 - 7.

General Observations

5. The Defence recalls that several international and regional instruments provide for the legal right of a detained person not only to family visits, but also, to visits of friends.⁴ Such visits can have but positive effects on the health of the detained person and on his ability to participate actively in the proceedings before the Court,⁵ and thus entail benefits for the detained person and for the Court.⁶
6. The European Court of Human Rights has frequently emphasized that human rights must be interpreted in a practical and effective way rather than in a theoretical and illusory manner.⁷ In the instant case, the granting of a visit from friends must be implied to give effect to a right that would otherwise be ineffective in the particular circumstances of Mr. Katanga (his detention in Western Europe, which is otherwise inaccessible for his friends and family, save when they testify at the seat of the Court).
7. Furthermore, the Presidency at the Court has emphasized that and that “[p]rison conditions that infringe prisoners’ human rights are not justified by lack of resources.”⁸ Nor, then, can refusal to permit visits to Mr. Katanga be permitted on the

⁴ Article 37 of the Standard Minimum Rules for the Treatment of Prisoners (1977) (“Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits”); Article 92 of the Standard Minimum Rules for the Treatment of Prisoners (“An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution”); Article 24.1 of the Recommendation Rec(2006)2 of the Committee of Ministers to members on the European Prison Rules (“Prisoners 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 organisations and to receive visits from these persons”).

⁵ See Report by the Registrar to Assembly of State Parties of the International Criminal Court. Report of the Court on family visits to indigent detained persons. 2008, para. 16 (The Registrar found that there can be no absolute restriction to the derogable right of family visits, since preventing all visits “could have negative consequences on the health of the detained person and on his/her ability to participate actively in the proceedings before the Court”).

⁶ See Report by the Registrar to Assembly of State Parties of the International Criminal Court. Report of the Court on family visits to indigent detained persons. 2008, para. 19 (In light of the fact that the Registrar found no legal principle in case law, customary law, or general principles of law recognizing the right of indigent detained persons to family visits requiring the Court to fund those visits, the Registrar argued that funding such visits would entail benefits for the detained persons, their families, and the Court).

⁷ See *Airey v Ireland*, no. 6289/73, Judgment of 9 October 1979, para. 24; *Artico v Italy*, no. 6694/74, Judgment of 13 May 1980, para. 33; *United Communist Party of Turkey v Turkey*, no. 133/1996/752/951, Judgment of 30 January 1998 [Grand Chamber], para. 33.

⁸ Recommendation Rec(2006)2 of the Committee of Ministers to members on the European Prison Rules Article 4.

grounds of lack of resources.

Exceptional Circumstances

8. Mr. Ndjabu and Mr. Pitchou Iribi have been arrested simultaneously with Germain Katanga in February 2005. Since this date, they have been held in Kinshasa prison together with others. Until today, they share a similar fate, that is, they are all still in prison, be it in different locations. Until Mr. Katanga's transfer to The Hague in October 2007, they were in prison together. Since his transfer, they have not seen each other anymore.
9. Mr. Charif Ndadza was arrested in September 2010 and transferred to the central prison in Kinshasa long after Mr. Katanga's transfer to The Hague. They have not had an opportunity to see each other since 2005.
10. A simple greeting would encourage the prisoners at both ends in their difficult situation. The Kinshasa prisoners would like to be given an opportunity see in person how Mr. Katanga's health and morale is, and vice versa. They would like to exchange news about their families and their well-being on a more personal level. The Kinshasa detainees are cut off from their community in Kinshasa. Accordingly, there is clearly no risk in allowing such meeting to take place.
11. Such meeting can take place in prison in French or Swahili in order to allow adequate monitoring. According to the Registry, it would be easy to arrange such meeting at the prison after the end of their testimonies without logistical difficulties.⁹ The meeting between the first witness and Mr. Katanga did not pose any difficulties.
12. On those grounds, the Defence requests the Chamber to authorize a meeting between Mr. Katanga and the three Kinshasa prisoners.

⁹ 2784-Conf, para. 20.

Respectfully submitted,



David HOOPER Q.C.

Dated this 25th of March 2011

At The Hague, Netherlands