

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 20 March 2012

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***

Public Redacted version of the

**Defence Appeal to the Presidency Challenging the *Décision du Greffier sur la*
"Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right
*to Communicate with Four Family Members and Friends"***

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 Katanga Mr David Hooper Q.C. Mr Andreas O'Shea
	Counsel for the Defence for Mathieu Ngudjolo Chui
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 Ms Silvana Arbia	Defence Support Section
Victims and Witnesses Unit	Detention Section Mr Anders Backman
Victims Participation and Reparations Section	Other Trial Chamber II

Introduction

1. The Defence, on behalf of Mr Germain Katanga, addresses the Presidency in relation to the *Décision du Greffier* sur la « Defence Request for Review of Registrar's Decision to Deny Mr. Katanga the Right to Communicate with Four Family Members and Friends », issued on 14 June 2010 (hereinafter referred to as the “Registrar’s Decision on Request for Review”).¹
2. In this Decision, the Registrar dismissed a request of the Defence for Mr. Germain Katanga (“Defence”) to review her earlier decision to deny Mr. Katanga the right to communicate with four family members and friends. [REDACTED],² [REDACTED].
3. In seeking review with the Registrar of her initial Decision, the Defence has abided by the complaint procedure in respect of decisions concerning the detention of a detained person rendered by the Registrar, as set out by the Presidency in its *Decision on the Application of Mr Germain Katanga in respect of the new policy in the detention centre on the registration of telephone contacts*.³ Pursuant to this complaint procedure, a detained person, with the assistance of counsel, may complain in writing against a decision issued by the Registrar at any time. The Registrar must issue a written reasoned decision on such a complaint within the time limits set out in regulations 219 and 220(5) of the Regulations of the Registry. Within 48 hours of notification of the Registrar’s decision on the detainee’s complaint, the detainee may address the Presidency in accordance with regulation 221(1) of the Regulations of the Registry.⁴
4. In accordance with this procedure, the Defence for Mr. Katanga hereby submits, on behalf of Mr. Katanga, an appeal to the Presidency in respect the Registrar’s refusal to add four names to Mr. Katanga’s list of contacts, thereby depriving him of his right to communicate with those persons. Arguments in support of this appeal are set forthwith.

¹ ICC-RoR220-01-10-2-Conf-Exp (issued Confidential and ex parte, available only to the Registry and the Defence for Germain Katanga).

² ICC-01/04-01/07-2085-Conf-Exp, Confidentiel Ex parte réservé au Greffe et à la défense de Germain Katanga.

³ ICC-RoR221-02/09-6-Conf, issued on 17 September 2009.

⁴ Ibid, para. 16. See also letter of 15 October 2009 (Reference : DCS/2009/284/MD/DSA/mr) by virtue of which the Director Division of Court Services informed defence counsel of this complaint procedure.

5. In submitting this appeal, the Defence has respected the deadline of 48 hours to submit any appeal against a Registrar's decision on detention matters, in line with Regulation 221(1) of the Regulations of the Registry (RoR). The Defence, however, submits that this deadline is too short and does not allow the Defence sufficient time to prepare a full and well-reasoned appeal to what it considers an important decision of the Registrar. When the Regulations were drafted, the Registrar may not have foreseen the complexity of the matters that would be raised before the Presidency under the complaint procedure.
6. According to the same Regulations, the Presidency must rule on such an appeal within fourteen calendar days in line with Regulation 219(3) or, if more time is required to resolve the issue, inform the detained person of the delay in accordance with Regulation 219(4) RoR. Until now, this procedure has not been followed and the Presidency has taken significantly longer to rule on issues raised by Mr. Katanga than was foreseen in the Regulations.
7. The Defence appreciates that the issues raised so far have been too significant to be ruled upon within two weeks and that more time was required for the Presidency to carefully consider them. For the same reason of complexity, the Defence would consider it appropriate that more time is given to the detained person to prepare an appeal. The Defence, therefore, independently of the substance of this appeal, requests the Presidency to review this deadline and set a more reasonable deadline for any future application.

Grounds for Registrar's Denial of Communication

8. The Registrar has allowed Mr. Katanga to be in communication with 18 out of 22 persons requested by Mr. Katanga. The Registrar rejected Mr. Katanga's request to be in contact with four persons, namely: [REDACTED].
9. In rejecting Mr. Katanga's request to be in communication with these persons, the Registrar gave the following reasons:
 - As for [REDACTED], the Registrar alleges that he has been informed [REDACTED].
 - As for [REDACTED], the Registrar alleges that Mr. Katanga frequently asked her [REDACTED] and her identity is unclear [REDACTED].

- As for [REDACTED], the Registrar alleges that she has a direct relation with [REDACTED], a former FRPI member with alleged links with the militia currently active in Ituri.
- As for [REDACTED], the Registrar alleges that he has been actively implicated [REDACTED].

10. In her Decision on Request for Review, the Registrar relied on those grounds and added the following details. As for [REDACTED], the Registrar reemphasized her uncertainty about the identity of this person.⁵

11. As for [REDACTED], the Registrar reiterates her allegation that she is connected with the [REDACTED]. Given that [REDACTED] has links with the militia currently active in Ituri, and given that [REDACTED] has allegedly played a role [REDACTED], the Registrar is unwilling to reconsider her initial denial of communication between [REDACTED] and Mr. Katanga.⁶

12. As for the Registrar's refusal to allow Mr. Katanga to communicate with [REDACTED], the Registrar did not raise any grounds in addition to her submissions raised in her initial Decision, namely that they played a role [REDACTED].

13. Given these circumstances, the Registrar reiterates that it is necessary to avoid contact between these persons and Mr. Katanga to protect the fair administration of justice. The Registrar submits that, given that [REDACTED] has not received the totality of the information available, it was not in a position to make an application to [REDACTED]. Accordingly, the Registry submits it is the only organ that can exercise control over the telephone contacts of Mr. Katanga.⁷

14. The Registrar further submits that, in authorizing contacts to be added to the list of contacts of the detainees, she must give due consideration to the risks for security and the good order of the detention centre, for the public security and the rights and liberties of persons, the protection of witnesses and the administration of justice.⁸

⁵ ICC-RoR220-01-10-2-Conf-Exp, page 5.

⁶ *Ibid*, page 5.

⁷ *Ibid*, page 5.

⁸ *Ibid*, page 5.

15. According to the Registrar, the power of the Chamber to impose restrictions of contacts and communication of a detained person on request of the Prosecution does not at all exclude the authority granted to the Registrar on the basis of Regulation 90 of the RoC to take any decision necessary for the good administration of the detention centre on the basis of Regulations 174 and 175 of the Regulations of the Registrar (RoR). This, according to her, has been confirmed by the Presidency in its Decision of 17 September 2009.⁹
16. The Registrar further states that, neither are the restrictions of communication imposed on Mr. Katanga disciplinary measures, nor do they fall under Regulation 99-4 of the RoC.¹⁰
17. On those grounds, in light of the alleged role these contacts have played previously and in light of their connections with third parties, the Registrar reiterates that her denial of communication between Mr. Katanga and these four persons is necessary to reduce any risk for the administration of justice.¹¹

Defence Submissions

18. The Defence respectfully requests the Presidency to overturn the Registrar's decision to deny communication between Mr. Katanga and these four persons, one of whom is [REDACTED]. The Defence submits that the Registrar has no legal basis for disallowing contact between Mr. Katanga and the four persons mentioned. The Defence further submits that the denial of this communication is unnecessary and unjustified in the circumstances.

No Legal Basis for Complete Ban on Communication

19. Irrespective of the foundation of the allegations, the Defence submits that Mr. Katanga should be allowed to communicate with these persons. The Defence submits that the Registrar has no legal basis for disallowing Mr. Katanga to communicate with any person he wishes to speak to. Pursuant to Regulation 99(1)(i) of the Regulations of the Court ("RoC"), any detainee has the right to communicate freely with his or her family and other persons. The Registrar may restrict this right in accordance with Regulation 99(2) RoC where 'necessary in the interests of the administration of justice or for the

⁹ ICC-RoR221-02/09-6-Conf, para. 46.

¹⁰ ICC-RoR220-01-10-2-Conf-Exp, page 6.

¹¹ *Ibid*, page 6

maintenance of the security and good order of the detention centre'. In line with Regulation 99(2) RoC, any such restriction shall be set out in the Regulations of the Registry.

20. The Regulations of the Registry ("RoR") include the possibility for passive and active monitoring of telephone calls under Regulations 174 and 175, as were referred to by the Registrar in her Decision on Request for Review. The RoR do not include any regulation allowing a complete ban on communication with any person. The Defence maintains that the Chamber is the only organ of the court which is allowed to impose such a complete ban on communication under Regulation 101 RoC.
21. The Registrar instead maintains that she has this power, independently of the powers of the Chamber to impose measures on an application pursuant to Regulation 101 RoC. In stating this, the Registrar relies on paragraph 46 of the Presidency's Decision of 17 September 2009. The Defence, on the other hand, gives a different interpretation to this Decision than the Registrar appears to do.
22. In respect of the Registrar's powers under Regulation 90(1) RoC, the Presidency has held that this regulation allows the Registrar and the Chief Custody Officer "to control the communications of detained persons, which must include the imposition of restrictions upon communication with specific individuals where justified, for example in order to prevent the detained persons from engaging in the activities outlined in regulation 175(1) of the Regulations of the Registry."¹² To enable the Registrar and the Chief Custody Officer to properly exercise this power, the Presidency held that they should be allowed "to have access to information about the persons with whom the detained persons are in contact".¹³
23. Thus, the Presidency allowed the Registrar to have access to information about the contacts of the detainees with a view to ensure that the detainees are not engaged in behaviour described under Regulation 175(1) RoR. In the respectful submission of the Defence, this reasoning from the Presidency cannot be interpreted as granting the Registrar authority under Regulation 90(1) RoC to completely ban contact between Mr. Katanga and persons he wishes to communicate with. Such ban can only be

¹² ICC-RoR221-02/09-6-Conf, issued on 17 September 2009, para. 46.

¹³ Ibid, para. 46.

imposed temporarily if Mr. Katanga does not provide the Registrar and Chief Custody Officer with accurate details of the person he wishes to contact.

24. The Defence submits that any other interpretation would violate Regulation 99(2) RoC, pursuant to which any restriction the Registrar may impose on the general entitlements of the detained persons under Regulation 99(1) shall be set out in the Regulations of the Registry. The Regulations of the Registry allow the Registrar to passively or actively monitor the telephone conversations of a detained person.
25. In case of active monitoring, there must be a reasonable ground to believe the detainee may be attempting to engage in conduct described in Regulation 175(1) of the RoR. There is no Regulation in the RoC or RoR allowing the Registrar to restrict communication between a detained person and his friends and family. Given the importance of the right of detained persons to freely communicate with their friends and family, a fundamental right which is also set out in Regulation 99(1)(i) RoC, any restrictions of this right must have a clear and explicit legal basis. Regulations 174 and 175 cannot, by analogy, be invoked to serve as a legal basis for the restrictions imposed.
26. The Defence further submits that the Registrar cannot circumvent Regulation 99(2) RoC by relying on her overall responsibility for all aspects of management of the detention centre, including security and order, under Regulation 90(1) RoC. Regulation 99(2) RoC is explicitly applicable to any restrictions on the rights of the detainee set out in Regulation 99(1) RoC. As such, it is a *lex specialis* of the more general obligation set out under Regulation 90(1) RoC, which cannot be bypassed in any circumstances.
27. The Registrar submits that the restrictions imposed do not fall under Regulation 99(2) RoC but under Regulation 90(1) RoC. The Defence does not understand the Registrar's basis for asserting this. The Defence submits that the measure clearly interferes with Mr. Katanga's right to freely communicate with his family and other persons pursuant to Regulation 99(1)(i) RoR. Indeed, the Registrar denies Mr. Katanga the right to speak to his [REDACTED] and other close family members and friends. The Registrar's denial of this right is a clear restriction of Mr. Katanga's right to communicate with his friends and family under Regulation 99(1)(i), which can be

restricted only on the basis of a clear and explicit legal provision in accordance with Regulation 99(2) RoC. As aforementioned, this clear provision cannot be circumvented by relying on a general provision, such as Regulation 90(1) RoC.

28. In the absence of any explicit legal provision allowing the Registrar to deny contact between Mr. Katanga and his friends and family, the Chamber has the exclusive power to impose such restrictions under Regulation 101 RoC. [REDACTED].

29. [REDACTED].

30. [REDACTED].¹⁴ [REDACTED].¹⁵

31. Under Regulations 174 and 175, the Registrar is authorized to passively and, or actively monitor the telephone conversations of a detained person. However, for active monitoring, there must be a reasonable ground to believe that the detained person may be attempting to: (a) arrange an escape; (b) interfere with or intimidate a witness; (c) interfere with the administration of justice; (d) otherwise disturb the maintenance of the security and good order of the detention centre; (e) jeopardize the interests of public safety or the rights or freedom of any person; or (f) breach an order for nondisclosure made by a Chamber.

32. Even if Regulation 175 was re-interpreted to allow the Registrar to impose measures other than those of active monitoring as described under this Regulation, the Defence submits that the Registrar is unjustified in imposing the measures imposed. The Registrar has not given any indication that she has a reasonable ground to believe that Mr. Katanga may be attempting to engage in such conduct.

The prohibition is not necessary or justified

33. Even if the Registrar has the authority to prohibit Mr. Katanga from communicating with the four persons mentioned, the Defence submits that this restriction on his right to freely communicate with his family and friends is unnecessary and unjustified. [REDACTED].¹⁶

¹⁴ [REDACTED].

¹⁵ *Ibid*, paras. 73-78.

¹⁶ ICC-01/04-01/07-2018-Conf-Exp, rendered on 1 April 2010, para. 72.

34. [REDACTED].¹⁷

35. Thus, the Defence submits that the Registrar should not deny communication between Mr. Katanga and persons on the basis that they assist him in [REDACTED]. The Defence fails to see the harm in allowing Mr. Katanga to be in direct communication with [REDACTED].

36. [REDACTED].¹⁸ [REDACTED]. In completely disallowing Mr. Katanga to communicate with these persons, the Registrar seriously undermines Mr. Katanga's right to communicate with the outside world. [REDACTED].

37. [REDACTED].

38. [REDACTED].¹⁹

39. [REDACTED]. The Defence, therefore, fails to see any good reason for denying Mr. Katanga communication with [REDACTED], even if she has some relation with the wife of someone who has links with the militia.

40. The restriction imposed by the Registrar on Mr. Katanga's right to communicate with his family and friends is also excessive to any wrong not yet committed. [REDACTED]. To prohibit Mr. Katanga from communicating with his direct family members and close friends is, therefore, excessive as a preventive measure.

41. In assessing the reasonableness of the restrictions imposed, the Defence invites the Presidency to consider the criteria as applied in the ICTY in relation to the imposition of similar restrictions. In the ICTY, Rule 64(A) of the Rules of Detention allows the Prosecutor to request the Registrar "to prohibit, regulate or set conditions for contact between a detainee and any other person if the Prosecutor has reasonable grounds for believing that such contact (i) could prejudice or otherwise affect the outcome of [...] the proceedings against the detainee [or] (ii) could be harmful to the detainee or any other person."

¹⁷ Ibid, para. 71.

¹⁸ Ibid, para. 72.

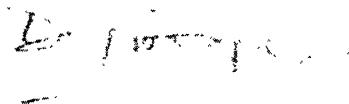
¹⁹ Ibid, para. 74.

42. ICTY jurisprudence has clarified that, in deciding whether to grant such a request, the Registrar must have assessed whether the request is in compliance with laws, compliance with the rules of natural justice and procedural fairness, and whether it is based on only relevant material and compliance with basic standards of reasonableness.²⁰ In *Seselj*, for example, it was held that the right of a detainee to contact others may only be subject to conditions where the request for such conditions is not arbitrary, justified and made on reasonable grounds.²¹

Relief Sought

43. On these grounds, the Defence prays that the Presidency overturns the Registrar's Decision to deny Mr. Katanga the right to communicate with four close family members and friends.

Respectfully submitted,



David HOOPER, Q.C.

Dated this 20 March 2012

At The Hague

The Netherlands

²⁰ Prosecutor v. Kvočka et al, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Zigic, February 7, 2003, para. 13; Prosecutor v. Lukić & Lukić, Decision on Milan Lukić's Appeal Against the Registrar's Decision of 18 November 2008, November 28, 2008, para. 9.

²¹ Prosecutor v. Seselj, Decision on Appeal Against the Registrar's Decision of 19 October 2006, November 23, 2006, para. 10.