

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **7 June 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**

**Defence Observations on the Conditions of Detention of Three Defence  
Witnesses**

**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.  
Mr Andreas O'Shea

**Counsel for the Defence for Mathieu  
Ngudjolo Chui**

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

**Legal Representatives of Victims**

Mr Jean-Louis Gilissen  
Mr Fidel Nsita Luvengika

**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**

Ms Maria-Luisa Martinod-Jacome

**Detention Section**

Mr Anders Backman

**Victims Participation and Reparations  
Section**

**Other**

Me Ghislain M. Mabanga

## A. Nature of the problem

1. On the 1<sup>st</sup> June 2011 the Defence for Mr Katanga (“Defence”) received information concerning the three Defence witnesses Floribert Ngabu Njabu, Pierre Célestin Pichou Iribi Mbodina and Charif Manda Ndadza Dz’Na. It appeared that they had been moved from the prison facility where they had been housed to the same unit where the two accused Germain Katanga and Mathieu Ngudjolo are detained. In the light of the restriction on contact between the accused and these three witnesses this move has affected the conditions of detention of those witnesses.
2. The restriction on contact firstly has the result that this restriction is extended to all the detainees held at the ICC facility to prevent indirect contact between the accused in this trial and the witnesses. This has become necessary because of the very limited space within the detention facility. The consequence is that for substantial periods of the day they are detained in cells and have limited communication with anyone, including amongst themselves. They are deprived of group contact with the other detained persons, all of whom are African, as well as the possibility of community life including making and sharing African meals together.
3. These witnesses came to The Hague to testify and have subsequently claimed asylum. The only reason for their incarceration is to ensure their return to the DRC where they are classified as prisoners. They are not convicted prisoners anywhere and, according to evidence heard in the trial, have not been appraised with any degree of clarity as to the factual and legal foundation of the charges against them. It follows that within the DRC they therefore fall within the category of persons presumed innocent being detained for the purpose of trial. In such circumstances, their detention should not be effected under onerous conditions.
4. The Defence has already expressed its position orally<sup>1</sup> and so the present argument merely resumes and complements the position, especially in the light of the facts as presented by the Registry.<sup>2</sup>

<sup>1</sup> ICC-01/04-01/07-T-273-CONF-ENG ET 01-06-2011, page 39 and following.

<sup>2</sup> ICC-01/04-01/07-2983-Conf-Red, Version confidentielle expurgée du Rapport du Greffe sur les conditions de détention actuelles des trois témoins détenus, 6 June 2011.

5. This filing is submitted confidentially as it refers to confidential submissions of the Registry, but the Defence has no objection to its reclassification as public.

#### **B. Interest of the Defence in this matter**

6. The three witnesses in question are witnesses called by the defence. The accused feels a degree of responsibility for their well-being having brought them from the DRC in his defence and the Defence certainly have a subsidiary obligation to be concerned as to the conditions under which its witnesses appear before the court. This raises a legitimate humanitarian interest in their well-being.
7. It further goes to the fairness of the trial since it impinges upon the ability of the defence to call witnesses under conditions favourable to the securing of their evidence before the court. (consider Article 67(1)(e) ). In the event that it becomes known that detained witnesses suffer while in The Hague it becomes more difficult to secure agreement on the part of such witnesses to testify.
8. Apart from the accused interest in the well-being of his witnesses; it appears from the analysis conducted by the Registry that to the extent that there is a diminution in the numbers of hours outside the cells for the four witnesses there is also a corresponding diminution in the number of hours that the others detainees, including the accused can spend outside their cells.<sup>3</sup>

#### **C. Room for possible derogation from the principle of non-contact**

9. The principle of non-contact between witnesses is designed to ensure the integrity of the evidence called before the court.
10. This principle is sound but not absolute. As with any procedural principle it must be balanced against other competing interests, particularly where the rights of individuals are affected. In creating such balance it is submitted that an inquiry is desirable into the necessity and proportionality of the measure in the pertaining circumstances.

---

<sup>3</sup> ICC-01/04-01/07-2983-Conf-Red, para. 5.

11. Thus, it is to be noted that in the *Lubanga* proceedings, derogation was made from the principle in circumstances where the evidence in the case had been closed.<sup>4</sup>

#### **D. Necessity of the continued restriction in contact**

12. In determining the question of necessity, it is worth pausing for a moment on the notion of preserving the integrity of evidence. The expression 'integrity of the proceedings' has been employed both by the Prosecutor and by the Legal Representatives of the two groups of victims as the premise for opposing the Defence request. Nonetheless, this notion has not been defined by those who employ in order to understand exactly how the integrity of the proceedings is undermined.

13. The integrity of the proceedings must be taken to refer to the integrity of evidence. The question therefore rests primarily on the problem of potential contamination of the evidence of one witness by another. It is submitted that it is difficult to accept that this is an evident difficulty in the present situation.

14. The Prosecutor's main argument for maintaining the restriction is the possibility of the witnesses having to be recalled. On the basis of the evidence provided by these witnesses and in the absence of any obvious reason or any credible reason provided by the Prosecutor as to why they would need to be recalled, it seems highly unlikely that this would occur; certainly before the close of the Katanga defence or even the close of the defence evidence in general.

15. The Prosecutor has provided no guidance as to the circumstances of recall which he has in mind. Effectively, this is a rare situation which arises in the light of exceptional

---

<sup>4</sup> Cf. ICC-01/04-01/07-T-273-CONF-ENG ET 01-06-2011, page 55, l. 7-16 :

7 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Kilenda.

8 We will not at this moment hand down a decision, but the

9 suggestions which you have made have a certain managerial advantage. I

10 would like to share with you a mail which I've just received now which

11 might be helpful. This is the instruction that Trial Chamber I

12 apparently gave to the Registry about lifting of restrictions, and it

13 reads as follows:

14 "Given that the presentation of evidence was completed on the

15 20th of May, the order of Trial Chamber I banning the contact between

16 witnesses in the Lubanga case is no longer applicable."

- circumstances. For example, if an accused changes his lawyer in the midst of proceedings and there are substantial grounds for believing that the examination of the witness by the first lawyer had been conducted with gross incompetence, the Chamber might consider it appropriate to order the recall of the witness. Another example would be where there had been a material non-disclosure on the part of the prosecution which significantly affected the way in which the Defence had approached its witness. The witnesses in question have been very extensively questioned on the areas of their evidence which have related to matters upon which they had largely personal knowledge.
16. It is envisaged that it is only a matter of weeks before the evidence for Katanga is concluded. So the moment that the question of recall could arise would in all probability be at a time when the defence evidence has been concluded thus putting this situation in parallel with that in the *Lubanga* proceedings.
17. It is submitted that relying on the prosecution argument in relation to recall of the witnesses would found the 'necessity' of applying the principle of non-contact on a possibility which for the moment remains little more than fanciful.
18. In so far as the prosecution argument makes reference to possible retrial, this does not distinguish the situation from that in the *Lubanga* proceedings. It also ignores the fact that retrial is an exceptional scenario which might occur right at the end of an appeal process and in circumstances where it would be virtually impossible to control the continued contact between other witnesses who might have testified in the original trial. It is to be remembered of course that even in the original trial there was no attempt to control contact between witnesses before they testified.
19. In the current circumstances, all three witnesses have concluded their testimony and the accused were present throughout that testimony. So the integrity of the evidence is likely to be well preserved with very little if no scope for the accused to manipulate the evidence by virtue of contact with these detained witnesses.
20. In effect, having been present during the entire testimony of the witnesses in question, any form of influence on the evidence of Katanga has already been effected. Any further contact is unlikely to have any impact upon the evidence of Mr Katanga since

it is he who is at the centre of the case and he is in the best position to describe what he was doing and what he knew or intended during the relevant period.

#### **E. Proportionality of the continued restriction in contact**

21. The proportionality must of course be viewed in the light of the doubtful necessity as outlined above. Such necessity as there is must, in addition, be measured against the burden which is now placed upon the witnesses, the accused and the system itself.
22. On the basis of the Registry's analysis, in every 24 hours period the witnesses only leave the restrictive confines of their cells for a maximum of 6 hours and twenty minutes. The rest of the time would be time in solitary confinement.
23. The restriction, as it stands, cannot be understood as proportional in this context, particularly when one considers that there will be a knock on affect on the situation of the accused persons. All of these individuals are presumed innocent. The question of proportionality must naturally also be considered in the light of the existence of other possible, less restrictive measures such as the possibility of narrowing the restriction only to direct contact between the two accused and the witnesses, not including indirect contact through other detainees.
24. Lastly, it should be born in mind that the prosecution itself provides a form of supervision over the contamination of evidence and any affect on the integrity of the proceedings. This is the exercise of the right to cross-examine, a right which the prosecution has thus far extensively exercised with respect to the question of inter witness contact. It is hard to see how the affect is any different as between pre-testimony contact and the present situation where amongst the persons concerned by this application it is the accused who are left to testify, the witnesses having completed their input.

**Relief sought**

25. Accordingly, the Defence requests the lifting of the contact restriction as between the three witnesses and the accused

Respectfully submitted,



---

David HOOPER Q.C.

Dated this 7 June 2011

At The Hague