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

Date: 3 March 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr. Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public

Prosecution's Observations on the Pre-Trial Detention of Germain KATANGA

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Pursuant to the Single Judge's decision of 21 February 2008,¹ the Office of the Prosecutor ("Prosecution") respectfully submits its observations on two issues concerning the pre-trial detention of Germain KATANGA ("KATANGA"), under Articles 60(3) and 60(4) of the Rome Statute of the International Criminal Court ("Statute").²

First, the Prosecution submits that "review" under Article 60(3) can be triggered only by a prior "ruling" of the Pre-Trial Chamber ("PTC") upon an initial application for interim release by the detained person pursuant to Article 60(2). Second, KATANGA has not been detained for an unreasonable period due to the inexcusable delay of the Prosecution, pursuant to Article 60(4).

Background

1. On 22 June and 25 June 2007, the Prosecution filed a joint application for the issuance of Arrest Warrants against KATANGA and Mathieu NGUDJOLO ("Arrest Warrant Application").³ On 2 July 2007, a Warrant of Arrest was issued against KATANGA ("Arrest Warrant").⁴
2. On 18 October 2007, KATANGA was transferred to the seat of the International Criminal Court ("Court").⁵

¹ ICC-01/04-01/07-222, p. 8.

² ICC-01/04-01/07-222, pp. 5-6 and 8.

³ ICC-01/04-01/07-31-US-Exp, 22 June 2007; ICC-01/04-01/07-33-US-Exp, 25 June 2007.

⁴ ICC-01/04-01/07-1.

⁵ ICC-01/04-01/07-40.

3. On 24 January 2008, the Single Judge of PTC I (the "Single Judge") requested observations from the Prosecution regarding KATANGA's pre-trial detention at the Court.⁶
4. On 31 January 2008, the Prosecution submitted its observations on KATANGA's pre-trial detention, pursuant to Article 60(4) of the Statute.⁷
5. The Defence submitted its observations on KATANGA's pre-trial detention on 7 February 2008 ("Defence's Response").⁸ In the alternative, the Defence submitted that its observations should be treated as an application for interim release.⁹
6. At a hearing held in closed session on 12 February 2008, the Single Judge decided to treat the Defence Response as an application for interim release,¹⁰ and requested that the Defence provide information as to the State to which KATANGA sought to be released, pursuant to Regulation 51 of the Regulations of the Court ("Regulations").¹¹
7. On 18 February 2008 the Defence filed further observations stating that: "[i]t is not in a position to file a 'complete application for interim release' by 18 February 2008" ("Further Observations").¹²
8. On 21 February 2008, the Single Judge issued a decision concerning KATANGA's pre-trial detention.¹³ The Single Judge requested that the

⁶ ICC-01/04-01/07-163.

⁷ ICC-01/04-01/07-174.

⁸ ICC-01/04-01/07-186.

⁹ ICC-01/04-01/07-186, para. 22.

¹⁰ See ICC-01/04-01/07-T-18-ENG-ET, p. 6, lines 19-25 and p. 7, lines 1-10.

¹¹ ICC-01/04-01/07-T-18-ENG-ET, p. 4, lines 4-17.

¹² ICC-01/04-01/07-206-Conf, para. 6.

¹³ ICC-01/04-01/07-222.

Prosecution file observations on issues raised by the Defence at paragraph 41 of the Defence's Response.¹⁴ The Defence submitted questions regarding Article 60(3) and Article 60(4) of the Statute.¹⁵

9. First, the Defence asked the Single Judge:

(i) To conduct under article 60(3) of the Statute a full and autonomous review of Mr. KATANGA's detention, with burden of proof on the Prosecutor in respect of evidence, grounds and duration justifying continuing detention ("the Defence First Request").¹⁶

10. In this context, the Single Judge raised two points for consideration:

(i) [E]ven in the absence of a specific obligation, the Single Judge, as the ultimate guarantor of the rights of the Defence, would not be precluded from conducting, when the circumstances so require, a *proprio motu* review to determine whether the conditions for pre-trial detention continue to be met; and
(ii) The circumstances in the present case are such that, in order to avoid any prejudice to Germain Katanga, a *proprio motu* review to determine whether the conditions for pre-trial detention continue to be met is warranted due to the fact that (a) the Defence filed an application for interim release on 7 February 2008 [...]; and (b) on 18 February 2008, Defence Counsel for Germain Katanga has withdrawn the application for interim release because he is not yet in a position 'to advance a specific scheme to be applicable on interim release at this moment.'¹⁷

11. Secondly, the Defence asked the Single Judge:

(ii) To declare pursuant to article 60(4) of the Statute that the detention period of Germain KATANGA is unreasonable ('the Defence Second Request').¹⁸

Review under Article 60(3) of the Statute is triggered only by a prior initial ruling on an application for interim release

12. The Single Judge raised for consideration whether the Single Judge has a *proprio motu* power under Article 60(3) of the Statute to review the grounds justifying KATANGA's continued detention even where the Defence has

¹⁴ *Ibid.* p. 8. The Single Judge referred to paragraph 41 (a), (c), (d), (e), (f), (g), and (h) of the Defence's Response.

¹⁵ *Ibid.*, pp. 7-8.

¹⁶ *Ibid.*, pp. 5-6.

¹⁷ *Ibid.*, pp. 6-7.

¹⁸ *Ibid.*, p. 6.

withdrawn its initial application for interim release.¹⁹ The Prosecution respectfully submits that the review envisioned in Article 60(3) can commence only after there has been a prior “ruling” on a formal application for interim release made under Article 60(2) of the Statute.

13. Both Article 60(3) of the Statute and Rule 118(2) of the Rules of Procedure and Evidence (“Rules”) are predicated on a prior “*ruling on the release or detention*.” The Appeals Chamber has previously held that (i) any review of detention under Article 60(3) of the Statute must be based on a prior “ruling” on an application for interim release; and (ii) a Pre-Trial Chamber’s decision on the issuance of an Arrest Warrant does not constitute a prior ruling capable of triggering Article 60(3) review.²⁰ The Prosecution submits that the Single Judge should follow this decision, for the following reasons.

14. As the Appeals Chamber reasoned, the statutory scheme is clear. The “ruling” subject to “review” under Article 60(3) is the Pre-Trial Chamber’s prior decision on an application for interim release under Article 60(2), not the decision on issuance of the Arrest Warrant.²¹ As the Appeals Chamber explained:

As the Pre-Trial Chamber correctly pointed out, both article 60(3) and rule 118(2), which require the Pre-Trial Chamber to review its ruling on release or detention, appear directly after provisions which provide for applications for interim release by the person subject to a warrant of arrest. It is therefore logical to interpret the review under article 60(3) to follow from, and be dependent upon, a ruling on a previous application by the detained person for interim release.²²

¹⁹ ICC-01/04-01/07-222, pp. 6-7.

²⁰ ICC-01/04-01/06-824, para. 95: “The Appeals Chamber does not accept [...] that the ruling referred to in article 60(3) must be read more broadly and that the Warrant of Arrest amounts to such a ruling.” See also para. 99: The Appeals Chamber observed that the drafters’ intention in Article 60(3) of the Statute was very clear so that if they had intended that the ‘ruling’ in Article 60(3) should refer to the Arrest Warrant then it could reasonably be expected that they would have expressly said so.

²¹ ICC-01/04-01/06-824, para. 94.

²² *Ibid.*, para. 94. See also ICC-01/04-01/06-976, para. 6: The Trial Chamber said that “Article 60(3) of the Statute requires the Pre-Trial Chamber to review periodically its decision on interim release.”

15. The Appeals Chamber further reasoned that a contrary reading of the Statute would make no sense. Thus, interpreting the periodical review obligation of Article 60(3) to trigger review of detention *before* any ruling on an application for interim release would oblige the Pre-Trial Chamber to review the appropriateness of the issuance of the Arrest Warrant every 120 days, even where the Arrest Warrant had not been executed and no-one had been detained.²³

16. The Prosecution contends that the language of Article 60(3) of the Statute is clear that without any prior ruling on an application for interim release there is no power, *proprio motu* or otherwise, under Article 60(3) of the Statute to conduct a full and autonomous review as to whether the grounds justifying detention continue to be met.²⁴

17. Finally, undertaking review of the grounds justifying detention without a formal Defence application for interim release would be an inefficient use of this Court's resources. Until the Defence offers concrete information concerning (i) the guarantees, if any, it can provide to ensure that KATANGA will appear at trial, and not endanger victims or witnesses while on release; and (ii) the State(s) as to which interim release is sought, any review of the conditions justifying his detention would be premature.

18. The Prosecution submits that as the Defence has withdrawn its application for interim release, and there has been no prior ruling on any application for

²³ ICC-01/04-01/06-824, para. 99: The Appeals Chamber observed that even though Thomas LUBANGA was in detention:

[...] there are and will be other cases in which an arrest warrant is not executed until many months after it had been issued. To require a review of a warrant of arrest at least every 120 days in such circumstances – prior to the person subject to the warrant being in detention – does not appear to be a logical interpretation of the requirements of article 60(3).

²⁴ See Defence First Request, *see supra*, para. 9 and *see supra*, para. 10.

release, at this stage Article 60(3) does not authorise a review of the grounds justifying continued detention. The Prosecution respectfully submits that the Single Judge should wait until the Defence files a formal application for interim release as required under Article 60(2) of the Statute,²⁵ complying with all procedural requirements, before considering whether there exist grounds to justify continued detention.

19. The Prosecution submits that when it filed the Application for an Arrest Warrant against KATANGA, the Prosecution met its burden pursuant to Article 58(1) of the Statute. Once the Defence makes an application for interim release, the Prosecution will demonstrate that the conditions under Article 58(1) of the Statute continue to be met. Until such time, the Prosecution will refrain from making any observations regarding the terms and requirements of Article 60(2) of the Statute.

20. The Prosecution acknowledges that there are separate processes for review under Article 60(3) and Article 60(4) of the Statute. Under Article 60(3) of the Statute (and its accompanying provision, Rule 118), any initial ruling upon an application for interim release is reconsidered at least every 120 days. In contrast, under Article 60(4) of the Statute, the Pre-Trial Chamber may separately and independently review KATANGA's period of detention to determine if he has been held for any unreasonable period due to inexcusable delay of the Prosecution.²⁶ However, Article 60(4) of the Statute

²⁵ ICC-01/04-01/06-824, paras. 101-106: The Appeals Chamber considered in some detail what would amount to a 'proper' application for interim release that would trigger the review mechanism under Article 60(3) of the Statute.

²⁶ ICC-01/04-01/06-824, para. 98. The Appeals Chamber said that:

[t]here is a distinct and independent obligation imposed upon the Pre-Trial Chamber to ensure that a person is not detained for an unreasonable period prior to trial under article 60(4) of the Statute. While the review under article 60(3) ensures that any ruling upon an application for interim release is specifically reconsidered at least every 120 days, there is, in addition, an obligation upon the Pre-Trial Chamber to review the overall period of the detention of the suspect under article 60(4).

does not provide any basis for the review of the grounds justifying continued detention under Article 58(1) of the Statute.

Pursuant to Article 60(4) of the Statute, KATANGA's pre-trial detention is not unreasonable and is not due to any inexcusable delay of the Prosecutor

21. Article 60(4) provides that the "Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor." In the instant case, there is no basis to suggest that the period of KATANGA's pre-trial detention has been unreasonable, let alone that there has been any inexcusable delay by the Prosecutor.

22. First, KATANGA has not been detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor because, under Article 60(4), the Pre-Trial Chamber must ensure, not that a person is not detained for *any* unreasonable period prior to trial, but only for an unreasonable period *due to inexcusable delay by the Prosecutor*" (emphasis added).²⁷ The requirements of "unreasonable period" and "due to inexcusable delay by the Prosecutor" are conjunctive in nature.²⁸ Where, as here, the language of the Statute is clear, the Pre-Trial Chamber should follow it.

²⁷ Only inexcusable delay caused by the Prosecution, not that of any other entity must be considered. See *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, 3 November 1999, paras. 54 and 61. See also *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, 31 March 2000, paras. 54-55. Article 60(4) of the Statute "does not protect a person from unreasonable lengths of detention, but only unreasonable lengths of detention occasioned by inexcusable delay by the Prosecutor." K. Khan, "Article 60: Initial Proceedings before the Court", in *Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 780. See Knoop, CJ, *Theory and Practice on International and Internationalised Criminal Proceedings* (2005), p150: Knoop argues that inexcusable delay "seems to incorporate the notion of abuse of process."

²⁸ *Ibid.* K. Khan, p. 779, noting that the "unreasonable period" and "inexcusable delay" requirements are conjunctive in nature. See M. Marchesiello, "Proceedings before the Pre-Trial Chambers", in *The Rome Statute of the International Criminal Court: A Commentary*, Volume II, Cassese, Gaeta & Jones (eds.), Oxford University Press, 2002, p.1241, footnote 8:

Art. 60(4), then, does not protect a person from any . . . but only such event being determined by "inexcusable delay by the Prosecutor." This may seem

23. Second, the period of KATANGA's pre-trial detention to date is not unreasonable because that period commenced only on 18 October 2007 – when KATANGA was transferred to the seat of the Court. The period of KATANGA's prior detention in the Democratic Republic of Congo ("DRC") – i.e. from 10 March 2005 to 18 October 2007 - is not relevant for the purposes of considering the reasonableness of his pre-trial detention under Article 60(4). As the Appeals Chamber has held, when assessing reasonableness under Article 60(4), where the alleged crimes for which the person is detained by national authorities are "separate and distinct from the alleged crimes that led to the issuance of the warrant for arrest,"²⁹ the period in national custody is not relevant.

24. Similarly, where the prior detention was not part of the "process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court,"³⁰ "there is no reason to take that period into account for the purpose of Article 60(4) of the Statute."³¹ In the instant case, KATANGA's prior detention in the DRC was not part of the process of bringing him to justice for the crimes that form the subject-matter of proceedings before the Court since KATANGA was held for alleged crimes that are separate and distinct from the alleged crimes that led to the issuance of the Arrest Warrant by the PTC.

25. Additionally, the Prosecution contends that any alleged violations of a person's rights in pre-trial detention with their national custodial State are

unreasonable, but there is plausibility in such a limitation if one considers the unusual difficulties and obstacles – investigative, logistical, procedural – the Prosecutor is confronted with in establishing international criminal justice.

²⁹ ICC-01/04-01/06-824, para. 121.

³⁰ ICC-01/04-01/06-772, para. 44.

³¹ ICC-01/04-01/06-824, para. 121.

relevant, for the purposes of Article 60(4), only where it is established that there was *concerted action* between the Court and those national authorities.³² KATANGA has at no time alleged that there has been any concerted action between the Court and national authorities as regards his detention in the DRC.

26. Finally, the Prosecution observes, as it has submitted in its observations of 31 January 2008, that KATANGA has not been detained for an ‘unreasonable period’ prior to trial.³³ The Defence itself acknowledges that KATANGA’s period of detention at the seat of the Court has been for a reasonable period of time.³⁴

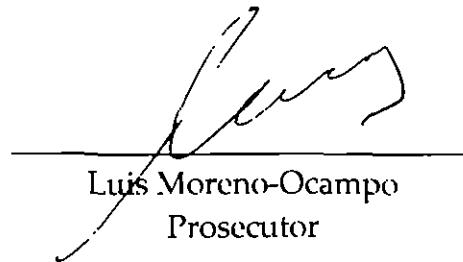
³² ICC-01/04-01/06-512, p. 11. See also ICC-01/04-01/06-772, para. 42. The Appeals Chamber concluded that: “Mere knowledge on the part of the Prosecutor of the investigations carried out by the Congolese authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose.”

³³ ICC-01/04-01/07-174, para 5.

³⁴ ICC-01/04-01/07-186, para 38.

Conclusion

For the foregoing reasons, the Prosecution respectfully submits that (i) Article 60(3) does not authorize the Pre-Trial Chamber to review KATANGA's detention until and unless the Defence first files and the PTC then rules on a formal application for interim release as required under Article 60(2); (ii) KATANGA has not been detained for an unreasonable period due to inexcusable delay of the Prosecutor, pursuant to Article 60(4).



Luis Moreno-Ocampo
Prosecutor

Dated this 3rd day of March 2008

At The Hague, The Netherlands