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

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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

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

PUBLIC

**Defence Observations on the Review of Germain Katanga's Pre-Trial Detention
(Article 60 (3) of the Statute and Rule 118 of the Rules of Procedure and Evidence)**

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of Applicants
[1 name per team maximum]

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence for Germain Katanga hereby responds to the observations of the Prosecutor and the Representatives of Victims on the pre-trial detention of Germain Katanga at the seat of the Court. In doing so the Defence wish to make plain that its observations are not intended to be regarded as an application for interim release.

General Observations

2. The Defence emphasises the exceptional nature of pre-trial detention and the fact that the Prosecution bears the burden of proof in relation to the continuing existence of the conditions set forth in Article 58 (1) of the Statute. The Pre-Trial Chamber is under an obligation to ensure that a person is not detained for an unreasonable period prior to trial under Article 60 (4) of the Statute. The applicable law of the ICC regarding pre-trial detention must be applied and interpreted consistently with internationally recognized human rights, as provided for in Article 21 (3) of the Statute. The Defence submits that the longer an individual is in detention, the more reason there is to look critically at the grounds justifying such detention, as evidenced by Article 60 (4) of the Statute. The potential for infringement of the right to liberty increases as time progresses.

Response to Prosecution Observations of 24 July 2008

3. In its Observations,¹ the Prosecution submits that, as a result of the disclosure obligations, Germain Katanga has knowledge of the identities of Prosecution witnesses, and would, when released, be in a position to exert pressure on these witnesses and thereby obstruct the Court's proceedings.² This speculative argument is unsupported by evidence. There is no evidence that Mr Katanga has hitherto sought to influence any witness or would seek to do so if granted interim release.
4. Those witnesses who are alleged by the Prosecution to be most vulnerable have been taken into the witness protection scheme and others have preserved their anonymity. Disclosure is the obligation and responsibility of the Prosecution and a right of the suspect or accused person. It is submitted that, other than in the most exceptional circumstances, the fact that the Prosecution must regard its disclosure obligations in accordance with the Statute and Rules should not prejudice the defendant and cannot support an argument for detention.
5. The Prosecutor further submits that the condition in Article 58 (1) (b) (i) is fulfilled, because: (i) Germain Katanga's awareness of the weight of the evidence submitted at confirmation hearing would create a substantial risk for him trying to abscond from

¹ Prosecution's Observations on the Review of the Pre-Trial Detention of Germain KATANGA, 24 July 2008, ICC-01/04-01/07-696.

² *Ibid*, para. 12.

the jurisdiction of the Court, and (ii) Germain KATANGA's assumed recent mind-set as allegedly revealed by his refusal to attend the Confirmation Hearing would support the assessment that this substantial risk does exist.³

6. As to (i), the Defence submits that the confirmation hearing added little or no further weight to the evidence which, in the main, has been in the hands of the accused for many months. The confirmation hearing involved a summary of evidence and did not increase the scope of the evidence. As to (ii), the Defence repeats its earlier oral observations to the Chamber that Mr Katanga's absence was not a matter that arose because of the content of the confirmation hearing but from the deep dissatisfaction and distress felt by him at that time due to prolonged separation from his family.⁴ Rather, the Defence submits that a completely different argument emerges from those circumstances, namely that if a family visit to the Detention Unit is not possible then the Chamber may eventually consider alternatives of which interim release is one.
7. The Prosecution also submits that the confirmation of Mr Katanga has taken place in an expeditious manner.⁵ The Defence observes that the confirmation has been postponed on two occasions neither of which has been requested or caused by the Defence for Mr Katanga. As a result, the confirmation took place more than eight months after Mr Katanga was transferred from Kinshasa to The Hague and, therefore, cannot be said to have taken place in a particularly expeditious manner.

Response to Observations of Legal Representatives of Victims a/0009/08 etc

8. The Defence notes the following in respect of the observations of the legal representative of victims.⁶
9. For reasons indicated above the Defence objects to the qualification 'boycotting', in respect of Germain Katanga's absence from the confirmation hearing.⁷ Reasons, of a humanitarian and human rights nature, have been provided. The representative has failed to indicate the relevance of the absence of Mr Katanga from the confirmation hearing to the present matter.
10. The representative has submitted that release of Germain Katanga could result in (i) interference with the administration of justice, and (ii) continuation of commission of

³ *Ibid*, para. 13.

⁴ ICC-01/04-01/07-T-45-ENG, page 2 lines 6-16; ICC-01/04-01/07-T-46-ENG, page 9 line 17 – page 11 line 6.

⁵ ICC-01/04-01/07-696, para. 16.

⁶ ICC-01/04-01/07-695.

⁷ *Ibid*, para. 9.

crimes by militias in DRC.⁸ Both observations are speculative and do not suffice to justify continuing pre-trial detention. As with the Prosecution the argument appears to focus on a situation of release in the DRC, without conditions and guarantees of control. The Defence submit that a variety of options exist short of detention, at a variety of places, including the host-state, which can eliminate any such suggested risk.

Final Observations in light of failing disclosure obligations

11. The Defence submits that account should be taken of such future developments in the case as may be reasonably anticipated. In particular, the Defence submits that the Pre-Trial Chamber, in exercising its duty to review its ruling on detention, can and should take into account the current and possible future position of the Prosecution in respect of disclosure obligations. The Decision of the Trial Chamber to release Mr. Lubanga⁹ because of serious and systematic violations of the Prosecutor's duty of disclosure is relevant to the present case due to the similarity of the basic problem. It is uncertain that the problem will be remedied sufficiently to permit a trial to take place at all. A situation where eventual trial for Mr. Katanga is uncertain renders the continuation of detention increasingly inappropriate.
12. The Defence bears in mind the language of the Pre-Trial Chamber's Decision of 20 June 2008¹⁰ whereby the Prosecutor is expected to improve his performance in respect of disclosure obligations. Furthermore, the Pre-Trial Chamber expressed its readiness to intervene prior to issuing a decision on the confirmation of charges 'as the ultimate guarantor of the fairness of the proceedings and of rights of Germain Katanga', if there continues to be no progress in lifting confidentiality restrictions.¹¹ It is submitted that such intervention can be exercised in the context of reviewing pre-trial detention, not only with the direct aim to sanction Prosecutorial unlawful conduct, but also to ensure that a person is not deprived of his liberty when it is highly uncertain whether the case can in fact be brought to trial. The most recent report by the Prosecutor shows some, though little, movement in the position.¹² The Defence respectfully remind the Chamber that Germain Katanga has been in pre-trial detention since March 2005, and at the request of the ICC since early July 2007. It being the duty of the Pre-Trial

⁸ *Ibid*, paras. 16 and 17.

⁹ ICC-01/04-01/06-1418.

¹⁰ ICC-01-04-01-07-621.

¹¹ *Ibid*, para. 104.

¹² Prosecution's ninth report, 4th August 2008. ICC-01/04-01/07-700.

Chamber to minimize detention it cannot overlook the foreseeable and, at this stage, increasingly likely option that the trial may be stayed.

Conclusion

13. The Pre-Trial Chamber is requested to assess continuing detention on remand in light of its Decision of 20 June 2008 and the Decision ordering the release of Mr. Lubanga and to acknowledge that a continuation of the present impasse in disclosure obligations by the Prosecution will eventually leave the Chamber with no alternative but to order the release of Mr Katanga from detention. The Defence requests the Pre-Trial Chamber to consider, in the course of this review procedure, the possible future development of this case, as an element of its inherent power to ensure fairness and its discretionary power not to extend its ruling on detention (as provided for in Article 60 (3) of the Statute).

Respectfully submitted,



David HOOPER

Dated this 8th August 2008

At Amsterdam, London