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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

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

Public Redacted Version

Defence Observations on the Detention of Mr Germain Katanga

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 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

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Pursuant to the Trial Chamber's *Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve)*,¹ and in response to the observations of the Prosecution and Victim Representatives,² the Defence for Germain Katanga submits the following observations.

General Observations

2. The Defence reiterates that pre-trial detention is the exception rather than the rule, and 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. There is 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 repeats its submission 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.³ In this regard, the Defence notes that Germain Katanga has been in prison in DRC since February 2005 and in The Hague since October 2007.
3. In the light of these principles it is incorrect to say that the Defence has failed to demonstrate a change in circumstances;⁴ it is for the Prosecution to demonstrate that there are still circumstances that justify Mr. Katanga's continued pre-trial detention.

¹ ICC-01/04-01/07-942, issued on 5 March 2009.

² Prosecutor v. Katanga & Ngudjolo, Prosecution's Observations on the Review of the Pre-Trial Detention of Germain KATANGA, 12 March 2009, ICC-01/04-01/07-953; Public Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur la détention de Germain Katanga (Règle 118-2), 12 March 2008, ICC-01/04-01/07-955 ; Public Observations des victimes a/0333/07 et a/110/08 sur la détention de Germain KATANGA (Règle 118-2 du Règlement de procédure et de preuve), 12 March 2008, ICC-01/04-01/07-951.

³ Prosecutor v. Katanga & Ngudjolo, 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, 8 August 2008, ICC-01-04-01-07-701, para. 2; reiterated in Defence Observations on the detention of Mr. Germain Katanga, 4 December 2008, ICC-01/04-01/07-780, para. 1.

⁴ ICC-01/04-01/07-950, paras. 14-15.

The Defence carries no burden to demonstrate that there is a change of circumstances justifying provisional release.

4. The Defence further notes that most of the concerns addressed by the Prosecution and Victim Representatives are related to a potential release to the Ituri region. Such concerns would not arise if the accused were released in The Netherlands or a neighbouring country. Attempts have been made to move The Netherlands and surrounding countries to host provisionally released ICC detainees and offer them alternative accommodation, but to no avail.⁵ The Defence submits that it would be appropriate for the ICC to re-enter into negotiations with The Netherlands, as well as nearby countries, to set up a facility to enable provisional release for future and current ICC detainees. This would be a practicable solution in many cases: it would avoid provisional detention in prison without putting any victim or witness at risk, while ensuring continued availability of the accused person for the purposes of the Court and contact with counsel.
5. So long as the host State and neighbouring States fail to cooperate in offering alternatives to pre-trial imprisonment of ICC detainees few requests for provisional release will have a realistic chance of success if there is no alternative but to return suspects and accused to the country where the alleged crimes were committed. It will be difficult for any Defence to demonstrate that the provisional release of an accused in the crime-base country, far from the ICC and outside the scope of its control, is risk-free, even when technically the Defence has no such burden. Without the existence of a practicable alternative in such circumstances, the review procedure set out in Article 60(3) and Rule 118(2) becomes, except in wholly exceptional circumstances, a hollow exercise.
6. Given the present refusal of the Netherlands to offer assistance in guaranteeing the provisional release of Mr. Katanga, and with no such facility available to the ICC in

⁵ See Prosecutor v. Katanga & Ngudjolo, Public Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence's Application for Interim Release of Germain Katanga, ICC-01/04-01/07-251; and its public Annex 1 containing a negative response from The Netherlands as regards any assistance it may offer to provisionally release Germain Katanga in The Netherlands. See also Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence's Application for Interim Release, ICC-01/04-01/07-306, and its Annexes 1, 2, 3 and 4, containing the observations of the United Kingdom, France, The Netherlands and Belgium about the eventual provisional release of Mathieu Ngudjolo on their territory.

any neighbouring State, the Defence sees no practical purpose served in applying for the provisional release of Mr. Katanga at this time. The Defence emphasises that Mr Katanga, though anxious to be released from prison, shares this pragmatic view. The Defence, however, sees no compelling ground for any State to refuse to provide facilities that help avoid the present position where the accused is held in close confinement. The Defence requests that the Trial Chamber order the Registrar to re-enter negotiations with The Netherlands and neighbouring States and to urge their full cooperation in finding a solution in respect of present and future provisional release applications.

Observations in answer to specific arguments addressed by the parties

7. The Defence submits that many of the observations made by the Prosecution and Victim Representatives are general and not specifically related to any potential consequences that would be caused by Germain Katanga's provisional release. It is estimated that the situation in Ituri is currently volatile, irrespective of whether Germain Katanga is released or not. The Appeals Chamber has held that a general finding concerning the security in Ituri constitutes insufficient justification for the imposition of protective measures, such as redactions of identifying details of persons.⁶ Similarly, it can be argued that such general security concerns do not justify any further detention of Mr. Katanga, particularly in light of the Appeals Chamber's holding that "the unreasonableness of any period of detention prior to trial cannot be determined in the abstract, but has to be determined on the basis of the circumstances of each case".⁷
8. The observations that more specifically concern Mr. Katanga are mostly unsubstantiated. For instance, the Defence is in the dark as to the foundation of the allegation of one of the Victim Representatives that "l'accusé dispose toujours d'une grande aura dans sa région et a la capacité de mobiliser des foules de « fanatiques »

⁶ Prosecutor v. Lubanga, ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, at para 21.

⁷ Appeals Chamber, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "*Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo*", 13 February 2007, ICC-01/04-01/06-824, para. 122; reiterated by this Trial Chamber in Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, ICC-01/04-01/07-794-tENG, para. 15.

qui considèrent qu'un seigneur de guerre tel Germain Katanga est une « icône » défendant les intérêts de son ethnie et qui doit être soutenue ; que le risque de représailles serait encore plus important en cas de libération de l'accusé ».⁸ It is, the Defence submits, no more than hyperbole on the part of the author.

9. As for the Prosecution's observation that, "in September and October 2008, members of the Force de Résistance Patriotique en Ituri ("FRPI") and other forces now in the Front Populaire pour la Justice au Congo ("FPJC"), tried to re-take Bogoro and neighbouring villages, leading to mass displacement of civilians",⁹ the Defence refers to this Trial Chamber's *Second Review of the Decision on the Conditions of Detention of Germain Katanga*, where it noted that there was insufficient evidence to substantiate any claim of any link between the Accused and the clashes in September and October 2008.¹⁰ Nor, so far as the Defence is aware, has there been an attempt to take Bunia since the UPC attack of May 2003. The Defence is consequently concerned that the Prosecution has raised these unfounded allegations.
10. The Prosecution further alleges that the FNI and/or FRPI members have already interfered with Prosecution witnesses, allegedly under the Accused's instructions.¹¹ The Prosecution refers to a Decision where these allegations were noted but they were not established and, until now, no finding has been made that Mr. Katanga interfered with witnesses.
11. Recently, allegations have been made by Victim Representatives to the effect that they received threats, which have also been presented as a ground for prolonging Mr. Katanga's provisional detention.¹² The Defence is wholly unaware what if any basis there is for such allegations. The Defence rejects these allegations. The Defence submits that the substance of any such an allegation be disclosed to Mr. Katanga.

⁸ ICC-01/04-01/07-951, Page 5.

⁹ ICC-01/04-01/07-953, para. 15.

¹⁰ Second Review of the Decision on the Conditions of Detention of Germain Katanga, 12 December 2008, ICC-01/04-01/07-794-tENG, para. 13.

¹¹ ICC-01/04-01/07-953, para. 16 with reference to ICC-01/04-01/07-88-Conf, para. 18.

¹² ICC-01/04-01/07-951, page 5.

12. The Defence urges all the parties to refrain from making these unsubstantiated and highly prejudicial allegations without submitting material in support.

13. The lack of foundation of any link between Mr. Katanga and recent problems in Ituri, or the alleged interference with witnesses, or the unsubstantiated claim of influence is further confirmed [REDACTED].

14. The Defence further observes that one of the Victim Representatives refers, again, to Mr. Katanga's choice not to appear for the second half of the confirmation hearing as a sign of his lack of cooperation.¹³ In this regard, the Defence refers to the Trial Chamber's *Second Review of the Decision on the Conditions of Detention of Germain Katanga*, observing that "absence from certain hearings cannot constitute an argument to be taken into account in determining the likelihood of the accused's appearance".¹⁴

Conclusion

15. The Defence requests the Trial Chamber to consider these submissions in determining whether Mr. Katanga's pre-trial detention should be extended. Further, the Defence requests the Trial Chamber to assist in establishing negotiations between the ICC and The Netherlands and neighbouring countries for the purpose of putting in place arrangements and facilities that will permit the provisional release of a detained person in those countries.

Respectfully submitted,



David HOOPER

Dated this 19 March 2009

At London

¹³ ICC-01/04-01/07-950, para. 16.

¹⁴ ICC-01/04-01/07-794-tENG, para. 11.