

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 8 April 2019

THE PRESIDENCY

Before: Judge Chile Eboe-Osuji, President
Judge Robert Fremr, First Vice-President
Judge Marc Perrin de Brichambaut, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

**IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA**

Confidential

**Defence Observations on the document 'Transmission of the Views of the Congolese
Authorities on the Defence Application for Reconsideration of the Presidency Decision
pursuant to article 108(1) of the Rome Statute'**

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
Ms Fatou Bensouda

**Counsel for the Defence for Germain
Katanga**
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State
Democratic Republic of the Congo

REGISTRY

Registrar
Mr Peter Lewis

Procedural Background

1. On 30 January 2019, the defence for Germain Katanga (“the defence”) filed its Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute (the “Application”).¹
2. On 4 February 2019, the Presidency issued its Order concerning the “Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute”, by which it requested the competent authorities of the Democratic Republic of Congo (the “DRC”) to provide any views on any matters raised in the Application by 20 March 2019.²
3. On 20 March 2019, the Registry filed the Transmission of the Views of the Congolese Authorities on the “Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute”, pursuant to which “it transmits, as an annex to this filing, a letter signed on behalf of the Minister of Justice of the [DRC] dated 18 March 2019 and its annexes, containing the views of the Congolese authorities” (the “DRC Views”); the Registry decided to classify the DRC Views “as confidential ex parte only available to the Registry as the Congolese authorities have not yet indicated the level of classification of the documents which they have provided.”³
4. On 1st April 2019, the defence requested the Presidency to order the reclassification of the DRC Views as confidential.⁴
5. On 2th April 2019, the defence was notified a confidential redacted version of the DRC Views.⁵

Classification

6. By an email of 4th April 2019, the defence was notified by the Registry that “the DRC judicial focal point has informed the Court that information provided by the DRC (ICC-01/04-01/07-3828+Conf-Exp-Anx) can be rendered public.” The defence was invited, as a matter of courtesy, “to propose redactions, if any, to ICC-01/04-01/07-3828+Conf-Exp-Anx at your

¹ ICC-01/04-01/07-3821-Conf and ICC-01/04-01/07-3821-Red.

² ICC-01/04-01/07-3822.

³ ICC-01/04-01/07-3828.

⁴ ICC-01/04-01/07-3829, Defence Request for disclosure of the Views of the Congolese Authorities on the “Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute”.

⁵ ICC-01/04-01/07-3828-Conf-Anx-Red.

earliest convenience, or by COB on 8 April 2019, so that any proposals can be transmitted to the Presidency for its determination.”

7. The defence makes no proposals in respect of redactions. The redactions made in the defence redacted filing of 30th January related to documents and information emanating from the DRC. Given the decision by the DRC that information provided by the DRC can be made public, those redactions are no longer required.

8. The present observations are classified as confidential in accordance with the current classification of the DRC Views, but the defence has no objection to their reclassification as public.

Defence submissions on the procedure

9. Pursuant to Regulation 24(5) of the Regulations of the Court, a party may file a reply with the Chamber’s leave only. There are no formal requirements that need to be met before such leave may be granted. However, it has been held that, as a matter of principle, a Chamber will “only grant leave to reply when the issue is novel or of particular importance.”⁶

10. The defence is of the view that it can respond to the DRC Views without leave to reply as this filing is not a response to the “Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute” but is rather a response to the Presidency’s request for such observations, as set out in the Presidency’s Order mentioned above.

11. The Statute further distinguishes, at Article 38, "The Presidency", and Article 39, the "Chambers". Therefore, it is submitted that Regulations 24 and 34, which relate to the filing of a reply before a "Chamber", do not apply to replies before the Presidency.

12. In addition, the proceedings before the Presidency pursuant to Article 108 of the Statute and Rule 214 to 216 of the Rules of Procedure and Evidence are *sui generis* proceedings in light of their specificity, as stressed by the defence in previous filings. This is the first time that Article 108 has been invoked, which makes that the proceedings themselves novel.

13. Accordingly, the defence submits that DRC Views raise issues that are novel and of particular importance to which a reply is warranted in any event.

⁶ ICC-01-04-01/07-3382.

Defence submissions on the substance

14. The defence, having had the opportunity to review the material submitted by the DRC authorities makes the following brief observations. In doing so it adopts the same pagination as appears on the bundle of documents provided by the DRC in PDF format which is paginated as pages 1 to 158.

15. Pages 1 to 51 merely copy and paste the Defence Application of 30th January 2019 in both original and redacted format and the Presidency Order of 4th February 2019.

16. Pages 52 to 65 contain the DRC submissions made relating to the defence application. It is divided into four sections, I, II, III and IV. Sections I and II are merely summaries of the defence application and the Presidency Order.

17. Pages 66 to 158 contain annexes to the DRC submissions.

DRC submissions on the status of the DRC proceedings against Mr Katanga

18. Section III of the DRC Views, at pages 56 to 59, relates to the status of the proceedings in DRC. The defence submits that little in the material demonstrates a purposeful attempt to prosecute the case against Mr Katanga and other accused and demonstrates no significant activity or progress over the past two years. That period of time must also be seen in the context of the longer period since 2005 in which the DRC authorities have been occupied with the case, including the case against the co-accused.

19. The DRC provides some of the history of the proceedings which show a few non-evidentiary hearings in 2016. Since then, there has, as the defence submitted in its Application, been little activity. In April 2017 the proceedings appear to have come to a halt following an incident in court involving Maître Ngomo on 14 April 2017 and a recusal motion by the accused. Maître Ngomo has been subjected to a disciplinary sanction – suspension of his legal activities for a month - in disputed and questionable circumstances. This has been further elaborated upon in the Defence Application of 30th January 2019 and contributes to the unfairness of the proceedings against Mr. Katanga.

20. The recusal motion concerned the President of the Military Court whose presence as a judge of the case was disputed on the basis that he had been, at the time of the events the subject of the charges, an active member of an opposing armed group or militia - the RCD/K-

ML. If that was the case, then he should not have been President of the Military Tribunal. The objection was not sustained, though the basis for rejecting it seems to be that the RCD/K-ML had itself been absorbed into the national army by the time the objection related. It is difficult, nevertheless, to see how in such circumstances an argument of actual or apparent bias could not be sustained on the facts. In any event, that officer later stepped down and no longer forms part of the Tribunal. Subsequently, two other judges of the panel 'retired' or left and were/or are in the process of being replaced. There have not been further hearings over the past two years. The DRC submissions state that is because the court building is shared by another court pre-occupied with the election process in DRC. It also raises an alleged problem in forming a court panel due to the judges having other duties. The fact remains that the DRC has been unable to provide a court or the means to try the case in breach of its duty to do so.

DRC submissions on the (un)fairness of the proceedings against Mr Katanga

21. Section IV of the DRC Views, at pages 60 to 65, addresses some of the points raised in the defence Application for reconsideration, in particular the absence of progress of the case and the failure to expedite. The matters referred to in Section III are repeated.

22. The defence does not dispute that the Presidency Article 108 Decision permitted Mr Katanga to be prosecuted. As to the failure by the DRC to investigate the case against him during the past three years, no evidence is provided in the submission that such an investigation has in fact taken place. The defence refers to its earlier submission in the case.

23. ***Lack of sufficient notice of the charges against Mr Katanga.*** That is still the case in the defence submission. The specificity of the charges does not go further than appears at page 72 of the annexes. This is the extent of the details of charges. Contrary to the DRC submissions, there is a reference in the Annexes to Mr Katanga asking for such details and even raising the issue of *obscure libelli*: pursuant to the two *Feuilles d'audience* of 10/02/2017, at pages 109-110 and 117, Mr Katanga is here on record asking for details of the charges; an objection 'obscuri libelli' is made. No material has been provided in the Annexes sufficient to indicate that the DRC has discharged its duty in providing Mr Katanga with sufficient notice of the charges and evidence against him. There is no evidence of investigations having taken place.

24. ***Lack of legal aid / financial assistance.*** No material is provided to demonstrate that an effective legal aid system is available. The ICC declared Mr Katanga indigent and the

DRC provides no evidence to the contrary. The DRC states that as Mr Katanga was a militia leader many years ago, it can be assumed he must have funds. That is an unreasonable presumption without evidence to support it. The DRC further states that Mr Katanga has been and continues to receive his wages as a Brigadier in the army. That is simply not the case. When Mr Katanga was detained in the Netherlands, Mr Dubuisson and the ICC Registry made considerable efforts to get the salary paid but it never came about. There were always excuses presented by the DRC authorities. The same situation has occurred over the past three years. The money appears to have disappeared into other pockets without reaching Mr Katanga. Consequently, throughout the time he has spent since returning to the DRC, Mr Katanga has had to rely on the goodwill of lawyers to help him. Nor do his co-accused have legal aid. The reality is that there does not appear to be any legal aid system available to an accused in the DRC other than through *pro bono* assistance. The *Feuille d'audience* of 17/02/2017, at page 125, demonstrate that Mr Katanga informed the Court that he had no income and sought assistance.


25. ***Absence of appeal on the facts.*** That remains the case. There is no appeal on the facts from the Military Court, which is confirmed by the DRC Views.

Conclusion

26. For the forgoing reasons, as well as those submitted in the initial Application of 30th January 2019, the defence respectfully requests the Presidency to:

- (v) Reconsider its Decision relating to article 108;
- (vi) Revoke its permission to the DRC to prosecute Mr Katanga for the crimes set out in the 'Décision de renvoi';
- (vii) Order the DRC to discontinue the proceedings against Mr Katanga; and
- (viii) Order the DRC to release Mr Katanga immediately upon revocation of the Court's permission for these proceedings.

Respectfully submitted

A handwritten signature in black ink, appearing to read 'D Hooper', with a long horizontal flourish extending to the left.

David Hooper Q.C.

Dated this 8th April 2019,

25 Bedford Row, London. WC1.