

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: ICC-01/04-01/07
Date: 21 February 2008

PRE-TRIAL CHAMBER I

Before: Judge Sylvia Steiner, Single Judge

Registrar: Mr Bruno Cathala

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

**URGENT
Public Document**

Decision Concerning Pre-Trial Detention of Germain Katanga

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor
Mrs Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Trial Lawyer
Mrs Florence Darques-Lane, legal
Adviser

Counsel for the Defence

Mr David Hooper
Mr Göran Sluiter
Ms Caroline Buisman

I, Judge Sylvia Steiner, judge at the International Criminal Court (the “Court”);

NOTING the “Decision concerning observations on the review of the pre-trial detention of Germain Katanga” (“the Decision”)¹ issued by the Pre-Trial Chamber I (“the Chamber”) on 24 January 2007;

NOTING the “Prosecution’s Observations on the Pre-Trial Detention of Germain KATANGA, Pursuant to the Statute and the Rules”² (“the Prosecution’s Observations”) filed by the Prosecution on 31 January 2008;

NOTING the “Response of the Defence to the Prosecution’s Observations on the Pre-Trial Detention of Mr. Germain KATANGA, pursuant to the Statute and the Rules”³ (“the Defence’s Response”) filed by the Defence on 7 February 2008;

NOTING the hearing held in closed session with the Prosecution and the Defence of Germain Katanga and the Defence of Mathieu Ngudjolo Chui on 12 February 2008;⁴

NOTING the “Defence observations in relation to the Single Judge’s oral request to file a complete application for interim release”⁵ (“the Defence’s Observations”) filed by the Defence on 18 February 2008;

NOTING articles 58, 60, 61 and 67 of the Rome Statute (“the Statute”), rules 118 and 119 of the Rules of Procedure and Evidence (“the Rules”) and Regulations 23, 28(2), 35 and 51 of the Regulations of the Court (“the Regulations”);

¹ ICC-01/04-01/07-163.

² ICC-01/04-01/07-174.

³ ICC-01/04-01/07-186.

⁴ ICC-01/04-01/07-T-18-Conf-ENG ET.

⁵ ICC-01/04-01/07-206-Conf.

CONSIDERING that the Defence for Germain Katanga filed on 7 February 2008 its response to the “Prosecution’s Observations”, in which:

1. It requested that pursuant to article 60 (3) of the Statute:

“the Pre-Trial Chamber conducts 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; or

in the alternative that its response is considered as an application for interim release, triggering the protection of Article 60(3) of the Statute, to which Mr Katanga is fully entitled;”

2. It alleged, pursuant to article 60(4) of the Statute, that “the conduct of the Prosecutor has no relevance for assessing the reasonable nature of the pre-trial detention period” and that “the relevant detention period of Mr. KATANGA’s is considerably longer than the period indicated by the Prosecutor, and is unreasonable;”
3. It requested an extension of time for the filing of copies of any authorities relied upon in the Defence Response or, if appropriate, internet links in accordance with regulation 23(3) of the Regulations;

CONSIDERING that the Defence gives no reason in support of its request for extension of time and therefore, regardless of whether the request was made prior to, or after, the expiration of the time limit given by the Single Judge in the Decision,⁶ the Defence has met neither the inability for reasons outside of its control standard nor the “good cause” standard provided for in regulation 35 of the Regulations;

⁶ As provided for in the Decision, the Defence had until 7 February 2008 at 16 00 hours to respond to the Prosecution’s Observations. According to the notification e-mail sent by Court Management-Court Records on 7 February 2008, the Defence Response, which included its request for extension of time, was filed on that day at 16 02 hours

CONSIDERING, nevertheless, that the Defence's failure to comply with the time-limit set out in the Decision is limited to Defence's list of authorities; and that, in light of the fact that the Defence has not yet filed its list of authorities, the Single Judge is of the view that it must do so at the earliest opportunity;

CONSIDERING further that, at the hearing held on 12 February 2008, it was stated that:

The Single Judge considers that the Defence response amounts to an application for interim release under Article 60(3) of the Statute and Rule 118 of the rules, and that therefore the appropriate procedure to deal with the matter for which observations were asked to the parties by the Single Judge in her decision of 24 January 2008 is the procedure provided for in the above-mentioned provisions to address requests for interim release.

Nevertheless, the Single Judge would like to call the attention of the Defence of Germain Katanga, that is, its response of 7 February 2008, does not provide all the information required by Rule 51 of the regulations of the Court, including the determination of the stage --the state to which Germain Katanga seeks to be released. Hence, the Single Judge will give the Defence of Germain Katanga until Monday, 18 January, at 6.00, to file a complete application for interim.⁷

CONSIDERING that, at the same hearing, the following exchange took place between the Single Judge and the Defence of Germain Katanga:

MR. SLUITER: You asked the Defence of Mr. Katanga to submit an application for interim release the 18th of February, I think. It was in the observations mentioned as an alternative. Does it mean, can we conclude from this, that you have decided negatively on our first point in those observations? Thank you. This was our question.

JUDGE STEINER: The Defence of Mr. Germain Katanga deserves such clarification on the issue. The Single Judge is requesting -- is receiving the Defence observations as an application for interim release. This was one of the alternatives given by the Defence and the Single Judge decided on the second alternative, to consider the observations as a formal application for interim release. What the Single Judge is now deciding is that in order to have the request formally complete to be submitted to the Prosecution and to the state, that some information that is missing in its observations must be filed by Monday, the 18th of February. Has the Defence been clarified on this topic?

MR. SLUITER: Yes, thank you, your Honour.⁸

⁷ ICC-01/04-01/07-T-18-ENG-ET, p. 4, lines 4 to 17.

⁸ ICC-01/04-01/07-T-18-ENG-ET, p. 6, lines 19 to 25 and p. 7, lines 1 to 10.

CONSIDERING nevertheless that, in the Defence's Observations, the Defence now submits that "[i]t is not in a position to file a 'complete application for interim release' by 18 February 2008"⁹ because:

The Defence therefore considers the position to be that the Chamber has not moved to a decision in respect of any of the matters raised in the Defence response of 7th February 2008 but has requested, in effect, that the Defence provide (*sic*) it with details of the arrangements proposed by the defence in the event of interim release. However, the Defence are (*sic*) not in a position to advance a specific scheme to be applicable on interim release at this moment. The Chamber will appreciate that such arrangements are difficult and time consuming to organise. For that reason the Defence are (*sic*) not in a position today to provide the details necessary in an application for interim release.¹⁰

CONSIDERING that, in the view of the Single Judge, the Defence's Observations amount to a withdrawal of the Defence application for interim release;

CONSIDERING therefore that, in the view of the Single Judge, the Defence, after making a request for interim release in its 7 February 2008 Defence's Response, is now, on 18 February 2008 withdrawing such a request for interim release because - despite the fact that Germain Katanga has been under pre-trial detention at the Detention Center at the seat of the Court since 18 October 2007 - according to Defence Counsel, the Defence is not yet prepared to file a complete application for interim release;

CONSIDERING that, after the Defence's withdrawal for interim release, the Single Judge is left with the following two requests by the Defence:

- (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

⁹ ICC-01/04-01/07-206-Conf, para. 6.

¹⁰ ICC-01/04-01/07-206-Conf, para. 3.

respect of evidence, grounds and duration justifying continuing detention (“the Defence First Request”);¹¹ and

- (ii) To declare pursuant to article 60 (4) of the Statute that the detention period of Germain Katanga is unreasonable (“the Defence Second Request”);

CONSIDERING, in relation to the Defence First Request, that, according to the “Decision on the Application for the Interim Release of Thomas Lubanga Dyilo”,¹² issued by Judge Claude Jorda acting as Single Judge on 18 October 2006 - and confirmed by the Appeals Chamber’s “Judgement 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 - the Chamber’s obligation to periodically review whether the conditions for pre-trial detention continue to be met is only triggered by the first ruling of the Chamber on a request for interim release by the Defence;

CONSIDERING that, in the view of the Single Judge, due to the following reasons there is no need to address the merits of the Defence’s allegation that the two above-mentioned decisions erred in the interpretation of article 60 (3) of the Statute and rule 118 of the Rules and that the Single Judge should depart from such interpretation because she is not bound by them as “the ICC Statute has clearly rejected a binding rule of *stare decisis*”¹⁴:

- (i) even 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

¹¹ In the view of the Single Judge, the comprehensive manner in which this request has been drafted encompasses the specific requests made by the Defence at para. 41 (c), (d), (e) and (f) of the Defence’s Response.

¹² ICC-01/04-01/06-586, pp. 4 and 5.

¹³ ICC-01/04-01/06-824.

¹⁴ ICC-01/04-01/07-186, para. 20.

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, that is to say, eight days before the 120th day of detention of Germain Katanga at the Detention Center at the seat of the Court; 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";

CONSIDERING further that Defence Counsel has stated that he is unable to specify at this stage to which State Germain Katanga would seek to be released in the event that interim release is granted; and that, therefore, the invitation to submit observations at this stage, pursuant to regulation 51 of the Regulations, shall be limited to those of the Host State;

CONSIDERING that, in the Prosecution's Observations, the Prosecution does not address any matter related to the issue of whether the conditions for the pre-trial detention of Germain Katanga continue to be met;

CONSIDERING, in relation to the Defence Second Request, that the Defence raises the following issues:

- (i) whether the conduct of the Prosecution is relevant for assessing the reasonable nature of the pre-trial detention period; and

- (ii) whether, for the purpose of analysing the reasonableness of the arrested person's detention period pursuant to article 60(4) of the Statute, the detention period to be taken into consideration is only that spent at the Detention Center at the seat of the Court, or must also include the detention period prior to the transfer of the arrested person to the Court;

CONSIDERING that, in the Prosecution's Observations, the Prosecution does not address the matters raised by the Defence in relation to the Defence's Second Request;

CONSIDERING that, in the view of the Single Judge, the Prosecution must be given the opportunity to elaborate on the issues raised in paragraph 41 (a), (c), (d), (e), (f), (g) and (h) of the Defence's Response;

FOR THESE REASONS

ORDER the Defence to file its list of authorities relied upon in the Defence's Response by 22 February 2008 at 16h00;

DECIDE that the Prosecution has until Monday 3 March 2008 at 16h00 to elaborate on the issues raised in paragraph 41 (a), (c), (d), (e), (f), (g) and (h) of the Defence's Response;

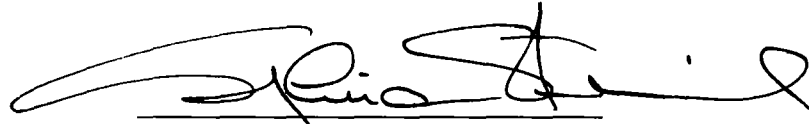
ORDER the Registrar to notify the relevant authorities of the Netherlands of the following documents in addition to the present decision:

- 1) Warrant of Arrest for Germain Katanga;

- 2) Decision on the evidence and information provided by the Prosecution for the issuance of an arrest warrant against Germain Katanga;
- 3) The Decision;
- 4) The Prosecution's Observations;
- 5) The Defence's Response; and
- 6) The Defence's Observations;

DECIDE to invite the relevant authorities of the Netherlands to make their observations by no later than Friday 8 March 2008 on the conditions, if any, that would have to be met in order for the State to accept Germain Katanga's release on to its territory.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner
Single Judge

Dated this Thursday 21 February 2008

At The Hague,

The Netherlands