



Original: **English**

**No.: ICC-01/04-01/07
Date: 16 February 2016**

THE PRESIDENCY

Before: Judge Silvia Fernández de Gurmendi, President
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

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

Public

Order to the Registrar concerning the “Second complément d’informations soumis par les autorités congolaises et information sur les procédures nationales”

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

to:

Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Defence

Mr David Hooper
Ms Caroline Buisman

State

Democratic Republic of the Congo

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Mr Esteban Peralta Losilla

The Presidency of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Germain Katanga*, notes its “Decision designating a State of enforcement” of 8 December 2015, by which it designated the Democratic Republic of the Congo (“DRC”) as the State in which the remainder of Mr. Katanga’s sentence of imprisonment would be served,¹ noting also that Mr. Katanga was transferred to a prison facility in the DRC on 19 December 2015.² The Presidency notes that the sentence of imprisonment imposed by the Court was completed on 18 January 2016.³

The Presidency notes its “Order requesting information in relation to the ‘Communication des autorités congolaises concernant les poursuites nationales à l’encontre de Germain Katanga’” dated 14 January 2016⁴ by which it sought clarification from the DRC as to: (i) the legal consequences of a “*Décision de renvoi*” dated 30 December 2015⁵ issued by the *Haute Cour Militaire* against Mr. Katanga; and (ii) whether the DRC was seeking the Court’s approval for the prosecution and punishment of Mr. Katanga, pursuant to article 108(1) of the Rome Statute and article 6(2) of the *Accord ad hoc entre le gouvernement de la République Démocratique du Congo et La Cour Pénale Internationale sur l’exécution de la peine de M. Germain Katanga, prononcée par la Cour* (“Agreement”).⁶

On 19 January 2016, the DRC clarified that the “*Décision de renvoi*” acts to remit a suspect at the disposition of “*une juridiction de jugement aux fins de poursuites*”⁷ and re-iterated its intention to conduct domestic criminal proceedings against Mr. Katanga.⁸

The Presidency notes its “Order to the Registrar concerning the communication of information to the Democratic Republic of the Congo in relation to the ‘Réponse des autorités congolaises à l’Ordonnance ICC-01/04-01/07-3632 en date du 14 janvier 2016’” dated 21 January 2016 (“Order of 21 January 2016”)⁹ in which it requested that the DRC promptly provide the documents required by article 6(2)(a) of the Agreement and rule 214(1) of the Rules of Procedure and Evidence (“Rules”), including the protocol containing views of Mr.

¹ ICC-01/04-01/07-3626, p. 5.

² Press Release, “Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment”, 19 December 2015, ICC-CPI-20151219-PR1181.

³ Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615, para. 116.

⁴ ICC-01/04-01/07-3632.

⁵ ICC-01/04-01/07-3631-AnxI, pp. 20-21.

⁶ ICC-01/04-01/07-3626-Anx.

⁷ ICC-01/04-01/07-3633-Conf-Anx, p. 3.

⁸ *Ibid.*, pp. 3-4.

⁹ ICC-01/04-01/07-3634 (“Presidency Order of 21 January 2016”).

Katanga, so that the Presidency could, pursuant to article 6(2)(e) of the Agreement and rule 215(1) of the Rules, make its determination under article 108(1) of the Rome Statute as soon as possible.

The Presidency notes its “Order to the Registrar concerning the ‘Further matters concerning the “Preliminary observations made by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo”” dated 27 January 2016 (“Order of 27 January 2016”) by which it expressed concern at the apparent progression of the criminal proceedings against Mr. Katanga even though it had not yet been able to consider whether to approve his prosecution, as is required by article 108(1) of the Rome Statute and article 6(2)(a) of the Agreement.¹⁰ The Presidency re-iterated its request that the DRC act promptly to provide the documents requested in the Order of 21 January 2016.¹¹

The Presidency has before it the “Second complément d’informations soumis par les autorités congolaise et information sur les procédures nationales”¹² (“Second complément”) dated 2 February 2016 and a confidential document filed by the defence for Mr. Katanga in relation thereto.¹³

The Presidency notes that from all the information before it, it appears that the prosecution of Mr. Katanga before the *Haute Cour Militaire* is proceeding. This has not been disputed by the DRC.

The Presidency recalls that article 108(1) provides that Mr. Katanga:

“shall not be subject to prosecution or punishment ... for any conduct engaged in prior to [his] delivery to the [DRC] ... unless such prosecution [or] punishment ... has been approved by the Court at the request of the [DRC]”.

This is re-iterated in article 6(2) of the Agreement which provides that:

“[l]a personne condamnée détenue par la RDC ne peut être poursuivie [ou] condamnée ... pour un comportement antérieur à son transfèrement en RDC, à moins que la Présidence n’ait approuvé ces poursuites [ou] cette condamnation ... à la demande de la RDC”.

¹⁰ ICC-01/04-01/07-3626-Anx.

¹¹ ICC-01/04-01/07-3640.

¹² ICC-01/04-01/07-3647 and the confidential annexes thereto.

¹³ ICC-01/04-01/07-3650-Conf.

The Presidency recalls that it has already issued three Orders highlighting the need for the Court to approve any prosecution, in accordance with article 108(1), unless the circumstances by which that provision would cease to apply are satisfied.¹⁴ In two of these Orders the Presidency has expressly requested that the DRC promptly provide the information required to enable the Presidency to act under article 108(1) of the Rome Statute. To date, the DRC has not requested approval of the prosecution as foreseen by Article 108(3) nor has it provided the necessary supporting information in accordance with the requirements of rule 214(1) of the Rules and article 6(2) of the Agreement.

The Presidency reiterates its request that the DRC seek the approval of the Court as envisaged by Article 108 and provide the outstanding information in support. Noting that the relevant legal writs as required by rule 214(1)(c) have been provided,¹⁵ the following specific information still needs to be provided:

- A statement of the facts of the case and their legal characterisation (rule 214(1)(a)) of the Rules; article 6(2)(a)(i) of the Agreement) which is sufficiently detailed to enable the Presidency to properly consider the matter, including the question as to whether the current prosecution of Mr. Katanga complies with the *ne bis in idem* rule enshrined in article 20(2) of the Rome Statute.
- A copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties (rule 214(1)(b) of the Rules; article 6(2)(a)(ii) of the Agreement). At minimum, this should include copies of all legal provisions cited in the *Décision de renvoi*. The Presidency also requests that the DRC authorities provide it with copies of the legal provisions which govern the rights of an accused in proceedings of this nature before the *Haute Cour Militaire*.
- A protocol containing the views of Mr. Katanga, obtained after he has been informed sufficiently about the proceedings (rule 214(1)(d) of the Rules and article 6(2)(a)(iv) of the Agreement).¹⁶ The purpose of such protocol is to ensure that, pursuant to article 108(2) of the Rome Statute, the Court only decides on whether to approve a prosecution after having heard the views of the sentenced person (who may be assisted by his legal counsel). These views should address whether the current

¹⁴ Article 108(3) of the Rome Statute provides that “[p]aragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it”.

¹⁵ If there are any further documents or legal writs, as defined in rule 214(1)(c), in respect of Mr. Katanga, the DRC should continue to transmit these to the Court, as it has done to date.

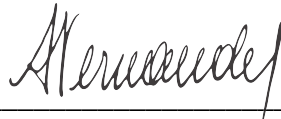
¹⁶ The Presidency notes that the DRC has already commenced a procedure to obtain these views, see ICC-01/04-01/07-3647-Conf-AnxI.

prosecution against Mr. Katanga should be approved by the Court and should elucidate the factors which Mr. Katanga submits should be taken into account by the Court when considering whether to grant such approval.

The Presidency requests that the DRC provide the above requested information by 11 March 2016.

The Presidency *hereby orders* the Registrar to urgently communicate the present to the DRC, as well as to the other participants indicated on the notification page.

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



Judge Silvia Fernández de Gurmendi
President

Dated this 16 February 2016

At The Hague, The Netherlands