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PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Single judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR *v.* Germain Katanga and Mathieu Ngudjolo Chui**

**URGENT
Public Document**

Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga

The Office of the Prosecutor

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I, Judge Akua Kuenyehia, 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 First Prosecution Submission”) 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, in which the Defence:

- (i) requested Pre-Trial Chamber I to conduct “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 this 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; and
- (ii) argued that the period of detention of Germain Katanga is unreasonable within the meaning of article 60(4) of the Statute;

¹ ICC-01/04-01/07-163.

² ICC-01/04-01/07-174.

³ ICC-01/04-01/07-186.

NOTING the hearing held in closed session on 12 February 2008,⁴ in which the Single Judge received and considered the observations of the Defence as a formal application for interim release and decided to give the Defence until Monday 18 February 2008 to complete the application for interim release pursuant to regulation 51 of the *Regulations of the Court* (“the Regulations”);

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, in which the Defence submitted that it was not in a position to file a complete application for interim release as requested by the Single Judge in the 12 February 2008 hearing;

NOTING the “Decision Concerning Pre-Trial Detention of Germain Katanga”⁶ (“the 21 February 2008 Decision”) issued by the Single Judge on 21 February 2008, in which the Single Judge (i) gave the Prosecution until Monday 3 March 2008 to elaborate on the issues raised in paragraph 41 (a), (c), (d), (e), (f) and (h) of the Defence’s Response; and (ii) invited the relevant authorities of the Netherlands to file by 8 March 2008 observations on the conditions, if any, that would have to be met in order for the State to accept Germain Katanga’s release onto its territory;⁷

NOTING “the Prosecution’s observations on the Pre-Trial Detention of Germain Katanga”⁸ (“the Second Prosecution Submission”) filed by the Prosecution on 3 March 2008, in which the Prosecution:

- (i) submitted that “the language of Article 60(3) of the Statute is clear that without any prior ruling on an application for interim release there is no power, *proprio motu* or otherwise, under Article 60(3) of

⁴ ICC-01/04-01/07-T-18-Conf-ENG ET.

⁵ ICC-01/04-01/07-206-Conf

⁶ ICC-01/04-01/07-222.

⁷ ICC-01/04-01/07-222, pp. 8 and 9.

⁸ ICC-01/04-01/07-245.

the Statute to conduct a full and autonomous review as to whether the grounds justifying detention continue to be met”;

- (ii) acknowledged that the Prosecution bears the burden of proof in relation to (i) the existence of the conditions for pre-trial detention set forth in article 58(1) of the Statute at the time it requests the issuance of an arrest warrant; and (ii) the continuing existence of such conditions during the time the suspect is under pre-trial detention;
- (iii) submitted that, once the Prosecution meets its burden of proof at the time it requests the issuance of a warrant of arrest, it has only to demonstrate that the conditions for pre-trial detention of the suspect continued to be met upon a Defence’s application for *interim* release;
- (iv) stated that, until the moment the Defence for Germain Katanga makes an application for *interim* release, “the Prosecution will refrain from making any observations regarding the terms and requirements of Article 60 (2) of the Statute;⁹ and
- (v) rejected the claim of the Defence for Germain Katanga that the latter had been detained for an unreasonably period within the meaning of article 60(4) of the Statute;

NOTING the “Report of the Registrar on the Execution of the Decision Inviting Observations on the Defence’s Application for Interim release of Germain Katanga”¹⁰ filed by the Registrar on 6 March 2008, in which the Host State makes its observations pursuant to the 21 February 2008 Decision (“the Observations of the Host State”);

NOTING the “Decision on the Designation of a Single Judge”¹¹ issued by the Chamber on 11 March 2008, in which the Chamber “decides to temporarily appoint

⁹ ICC-01/04-01/07-245, paras. 12 to 20.

¹⁰ ICC-01/04-01/07-251, ICC-01/04-01/07-251-Conf-Anx1, ICC-01/04-01/07-251-Conf-Anx2.

¹¹ ICC-01/04-01/07-309

Judge Akua Kuenyehia as single judge of Pre-Trial Chamber I responsible for the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* from 14 March 2008 to 28 March 2008;”

NOTING the “Request from the relevant authorities of the Host State to reclassify as Public their observations on the interim release of Germain Katanga (ICC-01/04-01/07-251-Conf-Anx1)” filed by the Registrar on 14 March 2008 informing the Single Judge that the relevant authorities of the Netherlands requests that the document ICC-01/04-01/07-251-Conf-Anx1 be reclassified as public;

NOTING articles 21, 55, 57, 58, 60, 61 and 67 of the *Rome Statute* (“the Statute”) and rules 118 and 122 of the *Rules of Procedure and Evidence* (“the Rules”);

CONSIDERING that the Prosecution and the Defence for Germain Katanga agree that the Prosecution has the burden of proof in relation to the initial existence of the conditions set forth in article 58 (1) of the Statute for the pre-trial detention of a person;

CONSIDERING that, in the Second Prosecution Observations, the Prosecution seems to agree with the Defence for Germain Katanga in that the Prosecution has the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention;¹² and that therefore the Prosecution seems to have changed its position as put forward in the “Prosecution’s Observations on the Defence’s Application for Interim Release”¹³ filed on 22 February 2008;¹⁴

¹² In this regard, the Prosecution expressly states at paragraph 19 of the Second Prosecution Observations that:

The Prosecution submits that when it filed the Application for an Arrest Warrant against KATANGA, the Prosecution met its burden of proof pursuant to Article 58 (1) of the Statute. Once the Defence makes an application for interim release, the Prosecution will demonstrate that the conditions under Article 58 (1) of the Statute continue to be met. Until such time, the Prosecution will refrain from making any observations regarding the terms and requirements of Article 60 (2) of the Statute (ICC-01/04-01/07-245, para. 19).

¹³ ICC-01/04-02/07-38-Conf.

¹⁴ At paragraph 12 of this filing, the Prosecution affirmed that “[i]n his Application for Interim Release, NGUDJOLO failed to meet his burden of proving that he will appear for trial and will not endanger the witnesses.” Moreover, at footnote 13 at

CONSIDERING that Pre-Trial Chamber I has repeatedly stated that:

the Chamber in determining the contours of the statutory framework provided for in the Statute, the Rules and the Regulations, must, in addition to applying the general principle of interpretation set out in article 21(3) of the Statute, give due regard to the general principles of interpretation as set out in article 31(1) of the *Vienna Convention on the Law of Treaties*, according to which “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose;”¹⁵

CONSIDERING that, according to article 60 (2) of the Statute, a person subject to a warrant of arrest, shall continue to be detained only if “the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met;” and that therefore, the Single Judge is of the view that, according to the ordinary meaning of article 60(2) of the Statute, the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention lies with the Prosecution;

CONSIDERING that this is also consistent with the interpretation of article 60 (2) of the Statute in light of articles 55 (1)(d), 58 (1), 59 and 67 (1), according to which, and unlike the situation at the *ad hoc* Tribunals,¹⁶ pre-trial detention is not the general

the end of paragraph 12, the Prosecution, citing certain decisions from the International Criminal Tribunal for the former Yugoslavia and the Special Court for Sierra Leone, further submitted that:

The Statute does not explicitly state that this burden rests with the person applying for interim release. However, contrary to the Defence’s arguments, the jurisprudence of the *ad hoc* tribunals supports that for applications for interim release before international criminal courts, the burden remains with the applicant and not the Prosecution (ICC-01/04-02/07-38-Conf, para. 12, footnote 13) .

¹⁵ ICC-01/04-01/07-257, page 7.

¹⁶ Until 17 November 1999, Rule 65 (b) of the ICTY Rules of Procedure and Evidence established that: “Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.” In the 17th Revision of the Rule, the reference to “exceptional circumstances” in rule 65 (b) of the ICTY Rules of Procedure and Evidence was removed, and after the subsequent 13 December 2001 amendment the text of the said rule reads as follows: “Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.” The meaning of the removal of the reference to “exceptional circumstances” in rule 65 (b) of the ICTY Rules of Procedure and Evidence has been interpreted in the *Prosecutor v Jokic*, Order on Miodrag Jokic’s Motion for Provisional Release, Case No.IT-01-42-T, 20 February 2002, para. 17, in the following manner:

The amendment of Rule 65 left one matter of procedure and two expressed pre-conditions that must be met before a Trial Chamber will order provisional release. Rule 65 previously stipulated that notwithstanding satisfaction of these two criteria, provisional release was only to be granted in ‘exceptional circumstances’ Detention was therefore in reality the rule. This Trial Chamber believes that removal of this requirement has had the following effect. It has neither made detention the exception and release the rule, nor resulted in the situation that despite amendment, detention remains the rule and the release the exception. On the contrary, this Trial Chamber believes that the focus must be on the particular circumstances of each individual case, without considering that the outcome it will reach is either the rule or the exception.

rule, but it is the exception, and shall only be resorted to when the Pre-Trial Chamber is satisfied that the conditions set forth in article 58 (1) of the Statute are met;

CONSIDERING that the conclusion that the Prosecution has the burden of proof in relation to the continuing existence of the conditions set forth in article 58(1) of the Statute during the time a person is under pre-trial detention is also consistent with the interpretation of article 60 (2) of the Statute in light of its object and purpose insofar as this provision aims at making sure that a person is subject to pre-trial detention only for the period of time during which the conditions set forth in article 58 (1) of the Statute continue to be met;

CONSIDERING that, in the view of the Single Judge, this interpretation of article 60(2) of the Statute is consistent with the case law of the Human Rights Committee;¹⁷ the Inter-American Court of Human Rights¹⁸ and the European Court of Human Rights;¹⁹

CONSIDERING that, in the view of the Single Judge, the main issue of disagreement between the Prosecution and the Defence for Germain Katanga in relation to the application of article 60(3) of the Statute and rule 118 of the Rules, is whether the Single Judge can carry out a *proprio motu* review to determine whether the conditions for the pre-trial detention of a person continue to be met in the absence of an application for *interim* release by the Defence;

Until the revision undertaken on 27 May 2003, Rule 65 (b) of the ICTR Rules of Procedure also established that "Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person." At this revision, a number of amendments were made, including the removal of the reference to "exceptional circumstances" As a result, rule 65 (b) of the ICTR Rules of Procedure and Evidence, which has not been subject to any subsequent amendment, currently reads as follows: "Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person."

¹⁷ HRC, *Hiber Conteris v Uruguay*, No. 139/1983, 17 July 1985, para.7.2.

¹⁸ IACtHR, *Velásquez-Rodríguez v Honduras (Merits)*, Judgment of 29 July 1988, para.123; and *Bámaca Velásquez*, Judgment of 25 November 2000, para.153, citing Communication *Hiber Conteris v. Uruguay*, No. 139/1983, 17 July 1985

¹⁹ ECtHR, *Neumeister v Austria*, Application no. 1936/63, Judgment of 27 June 1968, p.37, para.5; *Ilykov v. Bulgaria*, Application no. 33977/96, Judgment of 26 July 2001, paras.77, 84 and 85; also referred to in *Yankov v Bulgaria*, Application no. 39084/97, Judgment of 11 December 2003, para 171; *Hutchinson Reid v. United Kingdom*, Application no. 50272/99, Judgment of 20 May 2003, paras.71 and 74; *Labita v Italy*, Application no. 26772/95, Judgment of 6 April 2000, para.152, citing *Contrada v Italy*, Application no. 92/1997/876/1088, Judgment of 24 August 1998, para.54.

CONSIDERING that, in the view of the Single Judge, this issue significantly differs from the issue of whether article 60(3) of the Statute and rule 118 of the Rules impose upon the Single Judge an *obligation* to conduct a periodic review of the conditions for the pre-trial detention of a person absent a request for *interim* release by the Defence; and that with regard to this last issue, the Single Judge takes note of 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*'",²⁰ in which the Appeals Chamber stated that the Chamber has no obligation for the periodic review of the conditions for the pre-trial detention of a person unless a request for interim release is made by the Defence;

CONSIDERING that article 60(3) of the Statute and rule 118 of the Rules do not expressly provide for the power of the Chamber to conduct a *proprio motu* review to determine whether the conditions for the pre-trial detention of a person continue to be met in the absence of an application for *interim* release by the Defence;

CONSIDERING nevertheless that, according to articles 55, 57 and 67, one of the functions of the Chamber is to be the ultimate guarantor of the rights of the Defence, including the right "not to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in the Statute"; that the power to carry out a *proprio motu* review of the conditions for the pre-trial detention of a person when the circumstances so warrant is a necessary tool to properly perform its functions as the ultimate guarantor of the rights of the Defence; and that, therefore, the contextual interpretation of article 60(3) of the Statute and rule 118 of the Rules in light of articles 55, 57 and 67 of the Statute lead to the conclusion that:

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

²⁰ ICC-01/04-01/06-824, paras. 98-99.

require, a *proprio motu* review to determine whether the conditions for pre-trial detention continue to be met.²¹

CONSIDERING that this conclusion is also supported by the interpretation of article 60(3) of the Statute and rule 118 of the Rules in accordance with its object and purpose insofar as these provisions aim at making sure that a person is subject to pre-trial detention (i) only if the conditions for pre-trial detention provided for in article 58 (1) of the Statute are met; and (ii) only for that period of time during which such conditions continue to be met; and that if, as the Prosecution submits, the Single Judge would not have the power to *proprio motu* review whether the conditions for the pre-trial detention of a person continue to be met, one could face a situation in which, absent an application for *interim* release by the Defence (regardless of the reasons for this absence), a person could remain in pre-trial detention indefinitely without any review to determine whether the conditions for his or her pre-trial detention continue to be met because the Single Judge would not have the power to *proprio motu* undertake such a review;

CONSIDERING that, in the view of the Single Judge, this interpretation of article 60(3) of the Statute and rule 118 of the Rules is consistent with internationally recognized human rights standards;²²

CONSIDERING further that, as Judge Sylvia Steiner acting as Single Judge, has already stated in her 21 February 2008 Decision, a *proprio motu* review to determine whether the conditions for the pre-trial detention of Germain Katanga continue to be met is warranted in the present case because:

²¹ ICC-01/04-01/07-222.

²² According to the Single Judge, this interpretation not only meets the *minimum guarantees* provided for by the case law of the Inter-American Court of Human Rights and the European Court of Human Rights in relation to the review of the conditions of the pre-trial detention of a person, but establishes a higher standard. See *inter alia* IACtHR, *Juan Humberto Sánchez vs Honduras* - Series C No. 99 [2003] 7 June 2003; ECtHR, *Yankov v Bulgaria*, Application no. 39084/97, Judgment of 11 December 2003, para. 184; *Hutchinson Reid v. United Kingdom*, Application no. 50272/99, Judgment of 20 May 2003, paras 65 and 66.

The circumstances in the present case are such that, in order to avoid any prejudice to Germain Katanga, a *proprio motu* review of whether the conditions for pre-trial detention continue to be met is warranted due to the fact (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.”²³

CONSIDERING that, in relation to the Defence’s claim pursuant to article 60(4) of the Statute, the Defence for Germain Katanga submits that the detention period from the surrender of Germain Katanga to the Court on 18 October 2007 until today is not “an ‘unreasonable period’ of detention in the sense of Article 60 (4)”;²⁴

CONSIDERING nevertheless that the Defence for Germain Katanga disagrees with the calculation of the detention period by the Prosecution in that, according to the Defence, “detention prior to transfer is of relevance and must be taken into account when it has been of benefit for subsequent proceedings;”²⁵ and that, therefore, in the view of the Defence:

Mr KATANGA has been detained since March 2005. This is a period of almost three years, and is normally the period in which a person must have been tried. Clearly, this amounts to an unreasonable period of detention, triggering the application of article 60 (4) of the Statute.²⁶

CONSIDERING further that, according to the Defence for Germain Katanga: (i) “the gist of Article 60 (4) is that it does only protect from unduly long detention, when this is due to inexcusable delay by the Prosecutor”; (ii) that this has been acknowledged by doctrine as being “unsatisfactory”; and that (iii) this is “inconsistent with internationally protected human rights law and, pursuant to article 21 (3) of the Statute, should remain without effect”;²⁷

²³ ICC-01/04-01/07-222, pages 6-7.

²⁴ ICC-01/04-01/07-186, para. 38.

²⁵ ICC-01/04-01/07-186, paras. 38 and 39.

²⁶ ICC-01/04-01/07-186, para. 40.

²⁷ ICC-01/04-01/07-186, paras. 35 and 36.

CONSIDERING that in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Judge Claude Jorda, acting as Single Judge of this Chamber,²⁸ as well as the Appeals Chamber, have already dealt with the issue of whether detention prior to transfer to the Court is of relevance for the purpose of calculating the detention period for the purpose of article 60(4) of the Statute; and that according to the Appeals Chamber:

The Appeals Chamber also sees no merit in the argument of the Appellant that the Pre-Trial Chamber in its consideration of article 60 (4) of the Statute should have taken into account the periods that the Appellant had spent in detention and house arrest in the Democratic Republic of the Congo. The Appeals Chamber has already noted in paragraph 42 of the "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006" of 14 December 2006 (ICC-01/04-01/06-772; hereinafter: "Judgment on the Challenge to Jurisdiction") that the alleged crimes for which the Appellant had been held in detention in the Democratic Republic of the Congo prior to his surrender to the Court were separate and distinct from the alleged crimes that led to the issuance of the warrant for his arrest. There is no reason to depart from this finding in the present appeal. As noted by the Appeals Chamber in paragraph 44 of the Judgment on the Challenge to Jurisdiction, issues regarding prior detention are relevant where they are part of the "process of bringing the Appellant to justice for the crimes that form the subject-matter of the proceedings before the Court." As the Appellant's prior detention was not part of that process and was thus not part of the detention pursuant to the Warrant of Arrest issued by the Pre-Trial Chamber, there is no reason to take that period into account for the purpose of article 60 (4) of the Statute.²⁹

CONSIDERING that the reasons given by the Appeals Chamber in support of its conclusion are also applicable to the case at hand; and that, in the view of the Single Judge, the Defence for Germain Katanga has not put forward any argument that would justify departing from the previous case law of this Chamber and the Appeals Chamber;

CONSIDERING, therefore, that in the view of the Single Judge, the calculation by the Prosecution of the period of detention of Germain Katanga for the purpose of article 60(4) of the Statute is correct; and that, in relation to this period of time, even the Defence for Germain Katanga has acknowledged that this is not "an 'unreasonable period' of detention in the sense of Article 60 (4)";³⁰

²⁸ ICC-01/04-01/06-586.

²⁹ ICC-01/04-01/06-824, para. 121.

³⁰ ICC-01/04-01/07-186, para. 38.

CONSIDERING that, under these circumstances, the question raised by the Defence for Germain Katanga as to whether, for the purpose of article 60 (4) of the Statute, the conduct of the Prosecutor has any relevance for assessing the reasonable nature of the detention period is moot;³¹

CONSIDERING further that the relevant authorities of the Netherlands requests that their observations pursuant to the 21 February 2008 Decision be reclassified as public; that regulation 8(c) of the Regulations of the Court requires publication on the website of the Court of all "decisions and orders of the Court and other particulars of each case brought before the Court as described in rule 15"; and that, in the view of the Single Judge, there is no reason to maintain the Observations of the Host State confidential;

FOR THESE REASONS

DECIDE that the Single Judge, acting on behalf of the Chamber, has the power to undertake a *proprio motu* review to determine whether the conditions for the pre-trial detention of Germain Katanga continue to be met;

DECIDE that the circumstances in the present case warrant that the Single Judge carries out a *proprio motu* review to determine whether the conditions for the pre-trial detention of Germain Katanga continue to be met;

GIVE the Prosecution until Wednesday 26 March 2008 at 16h00 to file its submissions on whether the conditions for the pre-trial detention of Germain Katanga continue to be met in light of the fact that the Prosecution bears the burden of proof on this matter;

³¹ The same conclusion has been reached by the Appeals Chamber in the ICC-01/04-01/06-824, para. 124, where it stated that: "Thus, it appears to be the proper reading of the Impugned Decision that the question of inexcusable delay was not addressed at all. This approach by the Pre-Trial Chamber is acceptable in the present case because after having determined that the period of detention was not unreasonable, the question of the inexcusable delay had become moot."

GIVE the Defence for Germain Katanga until Wednesday 2 April 2008 at 16h00 to respond to the submissions of the Prosecution pursuant to the present decision;

REJECT the request of the Defence for Germain Katanga pursuant to article 60(4) of the Statute insofar as the period of detention of Germain Katanga to date cannot be considered as unreasonable within the meaning of this provision;

DECIDE to reclassify document ICC-01/04-01/07-251-Conf-Anx1 as public.

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



Judge Akua Kuenyehia
Single judge

Dated this Tuesday 18 March 2008

At The Hague,

The Netherlands