

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 18 August 2008

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

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

Public Document

**Review of the “Decision on the Conditions of the Pre-Trial Detention of
Germain Katanga”**

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

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Mr Éric Macdonald, Senior Trial Lawyer

**Counsel for the Defence
of Germain Katanga**
Mr David Hooper
Ms Caroline Buisman

**Counsel for the Defence of Mathieu
Ngudjolo Chui**
Mr Jean-Pierre Kilenda Kakengi Basila
Ms Maryse Alié

Legal Representatives of the Victims
Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr J.L. Gilissen
Mr Hervé Diakiese
Mr Jean-Christostome Mulamba
Nsokoloni
Unrepresented Victims

Legal Representatives of the Applicants

**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
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER I of the International Criminal Court (“the Chamber” and “the Court” respectively);

NOTING the Warrant of Arrest for Germain Katanga issued by the Pre-Trial Chamber I on 2 July 2007;¹

NOTING the “Decision on the Evidence and the information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga”² issued by the Chamber on 6 July 2007;

NOTING the arrest and surrender of Germain Katanga to the officials of the Court and transfer to the Detention at the seat of the Court in The Hague on 18 October 2007;³

NOTING the “Decision Concerning Pre-Trial Detention of Germain Katanga” (“the Decision of 21 February 2008”)⁴ issued by Judge Sylvia Steiner, acting as Single Judge, on 21 February 2008;

NOTING the “Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga”⁵ issued by Judge Akua Kuenyehia, acting as Single Judge, on 18 March 2008;

NOTING the “Decision on the Conditions of the Pre-Trial Detention of Germain Katanga” (“the Decision on the Conditions of Germain Katanga’s Pre-Trial Detention”)⁶ issued by the Judge Sylvia Steiner, acting as Single Judge, on 21 April 2008, whereby the Single Judge found that Germain Katanga shall continue to be detained because the conditions set forth in article 58(l)(b)(ii) of the Rome Statute

¹ ICC-01/04-01/07-1

² ICC-01/04-01/07-4

³ ICC-01/04-01/07-40

⁴ ICC-01/04-01/07-222

⁵ ICC-01/04-01/07-330

⁶ ICC-01/04-01/07-426

continue to be fulfilled insofar as the detention of Germain Katanga remains necessary to ensure that he will not obstruct or endanger the investigation or the court proceedings;

NOTING the “Decision concerning observations on the review of the pre-trial detention of Germain Katanga”⁷ issued by the Chamber on 9 July 2008, whereby the Chamber decided to (i) give the Prosecution and the Legal Representatives of Anonymous and Non-Anonymous Victims until Thursday 24 July 2008 at 16h00 to submit their observations on the pre-trial detention of German Katanga at the seat of the Court; and (ii) gave the Defence for Germain Katanga until Friday 8 August 2008 at 16h00 to respond to the observations referred to in (i) above;

NOTING the “*Observations des victimes a/0333/07 et a/0110/08 sur la détention préventive de Monsieur Germain Katanga*”⁸ filed by the Legal Representative of the Victims (Mr Keta and Mr Gilissen), whereby they submitted that Germain Katanga should remain in pre-trial detention;

NOTING the “*Observation de la Représentante Légale des Victimes a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/0/, a/0039/08, a/0043/08, a/0044/08, a/0046/08, a/0049/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0071/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08 et a/0109/08 sur la détention préventive de Monsieur Germain Katanga*”⁹ filed by the Legal Representative of the Victims (Ms Bapita Buyangandu), whereby she submitted that the Chamber should order the continuance of Germain Katanga’s pre-trial detention;

⁷ ICC-01/04-01/07-668

⁸ ICC-01/04-01/07-673

⁹ ICC-01/04-01/07-684

NOTING the “*Observations écrites du Représentant Légal des Victimes a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, a/0016/08 sur l’examen du maintien en détention de Mr Germain Katanga*”¹⁰ filed by the Legal Representative of the Victims (Mr Diakiese) on 24 July 2008, whereby he requested the Chamber to maintain Germain Katanga’s pre-trial detention;

NOTING the “Prosecution’s Observations on the Review of the Pre-Trial Detention of Germain KATANGA”¹¹ filed by the Prosecution on 24 July 2008, whereby the Prosecution submitted that, taking into account the need to ensure the appearance of Germain Katanga at trial and the security of victims and witnesses, there are no grounds justifying Germain Katanga’s interim release;

NOTING the “Defence 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)”¹² filed by the Defence for Germain Katanga on 8 August 2008, in which the Defence requested the Chamber to: (i) assess continuing detention on remand in light of its Decision of 20 June 2008 and the Decision ordering the release of Thomas Lubanga Dyilo issued by Trial Chamber I; and (ii) acknowledge that a continuation of the present impasse in disclosure obligations by the Prosecution will eventually leave the Chamber with no alternative but to order the release of Germain Katanga from detention;

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

CONSIDERING that article 60(3) of the Statute provides that “[t]he Pre-trial Chamber shall periodically review its ruling on the release or detention of the person [...]”; and that rule 118 of the Rules provides that “[t]he Pre Trial Chamber shall

¹⁰ ICC-01/04-01/07-695

¹¹ ICC-01/04-01/07-696

¹² ICC-01/04-01/07-701

review its ruling on the release or detention of a person in accordance with article 60 (3) at least every 120 days [...]”;

CONSIDERING that the last time the Chamber ruled on the “release or detention” of Germain Katanga was on 21 April 2008 in the Decision on the Conditions of Germain Katanga’s Pre-Trial Detention, whereby the Single Judge decided that Germain Katanga shall continue to be detained;

CONSIDERING that, in accordance with article 60(3) of the Statute, the Single Judge’s decision to maintain Germain Katanga’s detention was based, *inter alia*, on the basis that the conditions set forth in article 58(1) of the Statute continued to be fulfilled, insofar as there were still reasonable grounds to believe that crimes within the jurisdiction of the Court were committed by Germain Katanga; and that his detention remained necessary to ensure that he will not obstruct or endanger the investigation or the court proceedings;

CONSIDERING that pursuant to article 60(3) of the Statute, upon review of a decision on interim release, the Chamber may modify its ruling if it is satisfied that changed circumstances so require;

CONSIDERING that the Prosecution submitted that there has been no substantial change of circumstances pursuant to article 58(1)(b)(ii) or a change to any related factors since the Decision on the Conditions of Germain Katanga’s Pre-Trial Detention that would warrant a variation or the interruption of the current detention regime;¹³ that the statutory grounds for a decision to allow interim release, pursuant to articles 60(3) or 60(4) of the Statute, are not satisfied;¹⁴ and that therefore, the Chamber should appraise the submissions made by the parties in January, February and March 2008;¹⁵

¹³ ICC-01/04-01/07-696, para 11

¹⁴ ICC-01/04-01/07-174, ICC-01/04-01/07-186, ICC-01/04-01/07-245, ICC-01/04-01/07-341-Conf

¹⁵ ICC-01/04-01/07-696, para 16

CONSIDERING that the Prosecution emphasised that, in light of the evidence presented during the confirmation hearing and therefore Germain Katanga's knowledge of this evidence, there is a substantial risk that he may try to abscond from the jurisdiction of the Court, and that this assessment is also supported by Germain Katanga's decision not to attend the confirmation hearing;¹⁶

CONSIDERING that the Prosecution also submitted that, pursuant to its obligation to do so, it disclosed the identities of Prosecution witnesses to Germain Katanga; and if Germain Katanga was released, he would be in a position to exert pressure on these witnesses and could thereby obstruct the Court's proceedings;¹⁷

CONSIDERING that the Prosecution submitted¹⁸ that Germain Katanga must continue to be detained because (i) the conditions of article 58(1)(a) of the Statute continue to be met in that there are reasonable grounds to believe that Germain Katanga committed the crimes within the jurisdiction of the Court; (ii) the conditions under article 58(1)(b) of the Statute continue to be met because Germain Katanga's detention continues to be necessary to ensure:

(a) his appearance at trial, due to:

- a. the gravity of the crimes levelled against him in the Arrest Warrant, and the possibility that he faces a long prison sentence;
- b. his former senior positions and his status in the DRC as the most senior commander of the FRPI and Brigadier-General of the FARDC;
- c. his established contacts nationally and internationally, which provide him with the connections and means to flee;
- d. his influence and connections that resulted in being included in the list of individuals pursuant to UN Security Council Resolution 1596 (2005) who are subject to a global travel ban and freezing of assets; and/or

¹⁶ ICC-01/04-01/07-696, para 13

¹⁷ ICC-01/04-01/07-696, para 12.

¹⁸ ICC-01/04-01/07-341-Conf, paras 11, 12, 14, 17-25, 28, 30 and 31

(b) that he does not obstruct or endanger the investigation or the court proceedings, as:

- a. he still wields influence within the DRC and has established contacts and access to resources, as indicated above, that would enable him to pressure, threaten or harm witnesses;
- b. his contacts provide him with access to information which would not otherwise be publicly available;
- c. during his detention he maintained the ability to send instructions either through intermediaries or via telephone that would enable him to tamper with evidence;
- d. FRPI members under his control have already threatened witnesses in the past and have previously obstructed investigations into the attack at Bogoro;
- e. he now knows the identity of certain witnesses;

CONSIDERING that the Defence for Germain Katanga argued that (i) the confirmation hearing added little or no weight to the evidence which has been in the hands of the suspect for many months;¹⁹ and (ii) reiterated its earlier oral observations to the Chamber that Germain Katanga's absence was not a matter that arose because of the content of the confirmation hearing, but from his dissatisfaction and distress due to prolonged separation from his family;²⁰ and (iii) submitted that a completely different argument than presented by the Prosecution emerges from this circumstance, namely that if a family visit to the Detention Unit was not possible, then the Chamber may consider other alternatives, including interim release;²¹

CONSIDERING that the Defence for Germain Katanga opposed the Prosecution's submissions by stating that (i) the Prosecution's speculative arguments were unsupported by evidence, as there is no evidence that Germain Katanga has

¹⁹ ICC-01/04-01/07-701, para 6

²⁰ ICC-01/04-01/07-701, para 6

²¹ ICC-01/04-01/07-701, para 6

heretofore sought to influence any witness or would seek to do so interim release was granted;²² and that (ii) disclosure is the obligation and responsibility of the Prosecution, and a right of the suspect or accused person and therefore such disclosure should not be a reason to prevent interim release;²³

CONSIDERING that the Defence for Germain Katanga²⁴

- (i) submitted that:
 - (a) the Prosecutor has not lived up to his burden of proof to provide sufficient and detailed evidence, and applicable grounds justifying continuing detention within the context of the periodic review;
 - (b) the Prosecutor has not submitted information as to which evidence and which legal qualifications justify in his opinion continuation of the detention;
 - (c) no other factual basis was provided for meeting the ground set out in article 58(1)(b)(i);
- (ii) objected to the use of article 58(1)(b)(ii) as a ground justifying detention of Germain Katanga, on both factual and legal grounds; and
- (iii) disagreed with the Prosecutor in the calculation of the detention period of Germain Katanga and asserted that the relevant detention period of Germain Katanga is considerably longer than the period indicated by the Prosecutor, and is therefore unreasonable;

CONSIDERING that, as stated by the Single Judge in the Decision on the Conditions of Germain Katanga's Pre-Trial Detention:

[...] the supporters of Germain Katanga have the capability to interfere with ongoing and future Prosecution investigations and/or Prosecution witnesses, and with victims and members of their families;²⁵ and (ii) that there are several recorded incidents of interference with Prosecution witnesses by FNI and/or FRPI members;²⁶

²² ICC-01/04-01/07-701, para 3

²³ ICC-01/04-01/07-701, para 4

²⁴ ICC-01/04-01/07-186, paras 7, 8, 24, 27, 31 and 38.

²⁵ ICC-01/04-01/07-426, p 7

²⁶ ICC-01/04-01/07-426, p 7

[...] it appears that Germain Katanga - for whom there are still reasonable grounds to believe that he was the highest ranking commander of the FRPI at the time the events referred to in the Charging Document allegedly took place, and who signed a document as a Brigadier-General in the national army of the Forces Armées de la République Démocratique du Congo ("FARDC") in the DRC during the procedure of his surrender and transfer to the seat of the Court; - still wields influence as a powerful figure within the Ituri province, and in particular among current member of the FRPI;²⁷

CONSIDERING therefore that the Single Judge decided that the conditions set forth in article 58(1)(a) of the Statute continued to be fulfilled insofar as there are still reasonable grounds to believe that Germain Katanga committed crimes within the jurisdiction of the Court; and that the conditions set forth in article 58(1)(b)(ii) continue to be fulfilled insofar as the detention of Germain Katanga remains necessary to ensure that he will not obstruct or endanger the investigation or Court proceedings;²⁸

CONSIDERING that, in the view of the Chamber, there has not been any material change of circumstance to justify the release of Germain Katanga, since the Decision on the Conditions of Germain Katanga's Pre-Trial Detention and since the Single Judge decided that:

[...] that there were reasonable grounds to believe that crimes within the jurisdiction of the court were committed by Germain Katanga;²⁹

[a]lthough the Chamber must be satisfied of only one of the conditions set forth in article 58(1)(b) of the Statute, the Chamber further notes that according to the Prosecution Application, Germain Katanga also has the means to obstruct or endanger the investigation within the meaning of article 58(1)(b)(ii) of the Statute.³⁰

[a]ccordingly, in the view of the Chamber, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to any subsequent determination under article 60 of the Statute and rule 119 of the Rules of Procedure and Evidence, the arrest of Germain Katanga appears necessary pursuant to article 58(1)(b)(i) and (h) of the Statute, both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.³¹

[...] there are still reasonable grounds to believe that he was the highest ranking commander of the FRPI at the time the events referred to in the Document Containing the Charges allegedly

²⁷ ICC-01/04-01/07-426, p. 8.

²⁸ ICC-01/04-01/07-426, pp. 6 and 8.

²⁹ ICC-01/04-01/07-4, para. 60.

³⁰ ICC-01/04-01/07-4, para. 63.

³¹ ICC-01/04-01/07-4, para. 64.

took place,³² and who signed a document as a Brigadier-General in the national army of the Forces Armées de la République Démocratique du Congo in the DRC during the procedure of his surrender and transfer to the seat of the Court;³³

CONSIDERING further that, for the purposes of the confirmation hearing, the identities of many witnesses, and the whereabouts of some of them, have been disclosed to the suspect; that the situation in the DRC continues to appear volatile;³⁴ which may thus lead to the grave endangerment of the security of victims and witnesses and that therefore continued detention is necessary to ensure that the suspect does not obstruct or endanger the court proceedings;

CONSIDERING that pursuant to article 60(4) of the Statute, the Chamber “shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor” and that the Appeals Chamber in its Judgment has confirmed that “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”;³⁵

CONSIDERING therefore that in assessing whether the period of pre-trial detention of Germain Katanga is reasonable, the Chamber shall take into account all the circumstances in the present case;

CONSIDERING that the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo* held 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” and the confirmation hearing of Germain Katanga

³² ICC-01/04-01/07-4, para. 55

³³ ICC-01/04-01/07-1, ICC-01/04-01/07-40-Anx3 3 See also ICC-01/04-01/07-40-Anx3 5, ICC01/04-01/07-T-1-ENG ET. p 41, line 17 to p 42, line 5

³⁴ Twenty-fifth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2008/218, 2 April 2008, paras 27 and 29

³⁵ ICC-01/04-01/06-824, para. 122

has taken place in an expeditious manner and in accordance with the Court's legal regime;³⁶

CONSIDERING further that in assessing the reasonableness of the period of the pre-trial detention the Chamber shall weigh the genuine requirement of public interest against the principle of respect for individual liberty;³⁷ and that the circumstances outlined above fulfil the requirement of public interest, in particular in relation to the need to ensure the appearance of the suspect at trial and the security and protection of victims and witnesses;

CONSIDERING that the Defence for Germain Katanga contested previous postponements of the confirmation hearing, and the current duration of pre-trial detention before Court, in addition to noting that Germain Katanga was previously in pre-trial detention in the DRC since March 2005;³⁸

CONSIDERING that, as stated by the Chamber previously,³⁹ and as confirmed by the Appeals Chamber in the *Lubanga* case,⁴⁰ the time spent in detention in the Democratic Republic of the Congo does not form part of the period of detention that has to be considered by the Chamber under article 60 of the Statute;

CONSIDERING that the Appeals Chamber confirmed the conclusion of the Chamber, in which the Chamber stated that:

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;⁴¹

CONSIDERING that, in the view of the Chamber (i) Germain Katanga has been detained at the seat of the Court since 18 October 2007; (ii) the confirmation hearing

³⁶ ICC-01/04-01/07-696, paras 15-16

³⁷ See European Court of Human Rights, *W v Switzerland*, Judgment of 27 June 1993, Application No. 14379/88, para 30, and *Ilykov v Bulgaria*, Judgment 26 July 2001, Application no 33977/96, para 84

³⁸ ICC-01/04-01/07-701, para 12

³⁹ ICC-01/04-01/06-586, p 7

⁴⁰ ICC-01/04-01/06-824, para 121, quoting ICC-01/04-01/06-772, para 44

⁴¹ ICC-01/04-01/06-824, para 122, referring to ICC-01/04-01/06-586-tEN, p 7

of Germain Katanga has taken place in an expeditious manner and in accordance with the time regime set out in the Statute, the Rules and the Regulations of the Court; and that therefore, in light of the circumstances of the case, the length of Germain Katanga's detention of nine months cannot be considered unreasonable;

CONSIDERING further that since the Chamber determined that the period of detention is not unreasonable⁴², the issue of inexcusable delay of the Prosecution need not be addressed;

CONSIDERING that the Defence for Germain Katanga argued that (i) the Pre-Trial Chamber, in exercising its duty to review its ruling on detention, can and should take into account the current and possible future position of the Prosecution in respect of disclosure obligations; and that (ii) these types of interventions can be exercised in the context of reviewing pre-trial detention, not only with the direct aim of sanctioning unlawful Prosecutorial conduct, but also for ensuring that a person is not deprived of his liberty when it is highly uncertain whether the case can in fact be brought to trial;⁴³

CONSIDERING that Judge Sylvia Steiner, acting as Single Judge for the Chamber, has found previously that:

the Prosecution, for the purposes of the confirmation hearing in the present case, has disclosed the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence, and therefore, has not violated its disclosure obligations under article 67(2) of the Statute or rule 77 of the Rules;⁴⁴

CONSIDERING that the Chamber maintains this finding that the Prosecution has complied with its disclosure obligation as far as possible;⁴⁵ therefore, at this time, the Chamber will not entertain the Defence submissions in this regard;

⁴² See the Appeal Chamber's ruling in ICC-01/04-01/06-824 to the effect that "having determined that the period of detention was not unreasonable, the question of the inexcusable delay has become moot "

⁴³ ICC-01/04-01/07-701, para 12

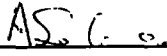
⁴⁴ ICC-01/04-01/07-621, para 124 and p 52

⁴⁵ For the latest Prosecution update on the disclosure of Article 54(3)(e) materials see ICC-01/04-01/07-700

FOR THESE REASONS

DECIDE, pursuant to article 60(3) of the Statute, that Germain Katanga shall continue to be detained.

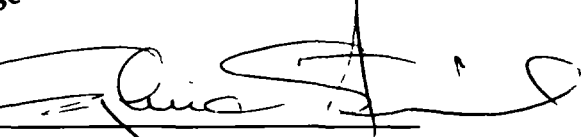
Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge



Judge Anita Ušacka
Judge



Judge Sylvia Steiner
Judge

Dated this Monday 18 August 2008

At The Hague, The Netherlands