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TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

*IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI*

Public Document

**Prosecution's Observations on the Review of the Pre-Trial Detention of Germain
KATANGA**

Source: Office of the Prosecutor

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

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On 13 November 2008, Trial Chamber II requested the Prosecution to submit its observations concerning the continued detention of Germain KATANGA. The Prosecution herewith makes its observations on the matter.

Background

1. On 2 July 2007, a warrant of arrest was issued against Germain KATANGA ("Arrest Warrant"),¹ in which Pre-Trial Chamber I ("PTC I") found reasonable grounds to believe that Germain KATANGA had committed crimes within the jurisdiction of the International Criminal Court ("ICC" or "Court").²
2. On 18 October 2007, Germain KATANGA was transferred to the seat of the Court.³
3. On 31 January 2008, the Prosecution submitted its observations on Germain KATANGA's pre-trial detention.⁴
4. On 7 February 2008, the Defence filed its "Response of the Defence to the Prosecution's Observations on the Pre-Trial Detention of Mr. Germain Katanga, pursuant to the Statute and Rules".⁵
5. On 21 February 2008, the Single Judge issued its "Decision Concerning Pre-Trial Detention of Germain Katanga". The Single Judge requested that the Prosecution file observations on issues raised by the Defence.⁶
6. On 3 March 2008, the Prosecution filed observations on the pre-trial detention of Germain KATANGA.⁷

¹ ICC-01/04-01/07-1.

² *Ibid.*

³ ICC-01/04-01/07-40.

⁴ ICC-01/04-01/07-174.

⁵ ICC-01/04-01/07-186.

⁶ ICC-01/04-01/07-222.

7. On 26 March 2008, the Prosecution filed its “Observations on whether the conditions justifying the pre-trial detention of Germain KATANGA pursuant to Article 58(1) of the Statute continue to be met”.⁸
8. On 1 April 2008, the Defence filed its “Observations relative to Germain Katanga’s pre-trial detention”.⁹
9. On 21 April 2008, the Single Judge issued its “Decision on the conditions of the Pre-Trial Detention of Germain Katanga” (“Decision”) whereby the Single Judge found that Germain KATANGA shall “remain in pre-trial detention because the condition set forth in article 58(l)(b)(ii) of the Rome Statute continues 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”.¹⁰
10. From 27 June to 16 July 2008, the Confirmation Hearing was held before PTC I.¹¹
11. On 24 July 2008, the Prosecution filed its “...Observations on the review of the Pre-Trial Detention of Germain Katanga”.¹²
12. On 18 August 2008, the Pre-Trial Chamber refused to grant interim release to Germain Katanga on the basis that “... [T]here had not been any material change of circumstance to justify the release of Germain Katanga...”¹³ Furthermore, on the matter regarding Article 60(4) of the Rome Statute, the Chamber concluded

⁷ ICC-01/04-01/07-245.

⁸ ICC-01/04-01/07-341-Conf. See public version at ICC-01/04-01/07-342.

⁹ ICC-01/04-01/07-352.

¹⁰ ICC-01/04-01/07-426, at p. 8.

¹¹ ICC-01/04-01/07-T-50-ENG ET, at p. 8.

¹² ICC-01/04-01/07-696.

¹³ ICC-01/04-01/07-702, at p. 10.

that “...in light of the circumstances of the case, the length of Germain Katanga’s detention of nine months cannot be considered unreasonable;”.¹⁴

13. On 26 September 2008, PTC I issued its “Decision on the confirmation of charges” (“Confirmation Decision”), in which it confirmed that there was sufficient evidence to establish substantial grounds to believe that:

- a. Germain Katanga was the *de jure* supreme commander of the *Force de Résistance Patriotique en Ituri* “the FRPI” and had *de facto* ultimate control over the FRPI commanders at the relevant periods;¹⁵
- b. Katanga, (“The accused”) was responsible under Article 25 (3) (a) for the following crimes: The crimes against humanity of murder, sexual slavery and rape; and the war crimes of wilful killing, sexual slavery and rape, using children to participate actively in hostilities, intentionally directing attacks against the civilian population of Bogoro village, pillaging and destruction of property.¹⁶

14. On 6 October 2008, the Defence for Germain KATANGA filed an Application for leave to appeal concerning the Confirmation Decision.¹⁷

¹⁴ ICC-01/04-01/07-702, at p. 13.

¹⁵ ICC-01/04-01/07-716, at paragraph 540.

¹⁶ ICC-01/07-01/07-716, at pp. 211-213. The Chamber unanimously confirmed the following charges : murder at Bogoro village constituting a crime against humanity by virtue of Articles 7(1)(a) and 25(3)(a) or (b) of the Rome Statute; murder or wilful killing at Bogoro constituting a war crime by virtue of Article 8(2)(c)(i) or Article 8(2)(a) or (b) and Article 25(3)(a) of the Rome Statute; using children to participate actively in hostilities, as a war crime by virtue of Article 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute; international attack against the civilian population of Bogoro village constituting a war crime by virtue of Article 8(2)(e)(i) or Article 8(2)(b)(i) and Article 25(3)(a) or (b) of the Rome Statute; pillaging at Bogoro constituting a war crime by virtue of Articles 8(2)(b)(xvi) and 25(3)(a) of the Rome Statute; destruction of property in Bogoro village and surrounding areas constituting a war crime by virtue of Article 8(2)(e)(xii) or Article 8(2)(b)(xiii) and Article 25(3)(a) or (b) of the Rome Statute; The chamber, by a majority, judge *Ušacka* dissenting, confirmed the following charges: sexual slavery as a crime against humanity by virtue of Articles (7)(1)(g) and 25(3)(a) of the Rome Statute; sexual slavery as a war crime by virtue of Articles 8(2)(b)(xxii) and 25(3)(a) of the Rome Statute; rape as a crime against humanity by virtue of Articles 7(1)(g) and 25(3)(a) of the Rome Statute; rape as a war crime by virtue of Articles 8(2)(b)(xxii) and 25(3)(a) of the Rome Statute.

¹⁷ ICC-01/04-01/07-721.

15. On 24 October 2008, PTC I rejected the request for leave to appeal the Confirmation Decision filed by the Defence for Germain KATANGA.¹⁸

Prosecution's Observations

16. As the Appeals Chamber has reiterated, where the conditions under Article 58(1) of the Statute continue to be met, Article 60(2) requires that the detained person must continue to be detained.¹⁹

17. The Prosecution submits that there has been no material change of circumstances of these conditions or any related factors, since the last review, to warrant a variation of the current detention regime.

18. Furthermore, the Prosecution asserts that the conditions set forth in Article 58(1) of the Rome Statute continue to be met for the following reasons: (1) PTC I confirmed that there were substantial grounds to believe that Germain Katanga had committed crimes within the jurisdiction of the court; (2) Germain Katanga's detention is necessary to secure his appearance at court and (3) to ensure that he will not obstruct or endanger the investigation or court proceedings.

19. The Prosecution asserts that Germain KATANGA's detention is necessary in order to ensure his appearance at trial because:

- a) The gravity of the crimes for which he has been committed to trial might make him likely to abscond;²⁰

¹⁸ ICC-01/04-01/07-727.

¹⁹ ICC-01/04-01/06-824, at paragraph 134.

²⁰ In *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-824, at paragraph 136, the Appeals Chamber states that "If a person is charged with grave crimes, the person might face a lengthy prison sentence, which may make the person more likely to abscond." See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-750, at paragraph 13, in which Trial Chamber II states that the risk of flight of Mathieu Ngudjolo Chui has increased in light of his committal to trial and that consequently his detention is all the more necessary in order to guarantee his appearance at court.

- b) His former senior positions and his status in the Democratic Republic of the Congo (“DRC”) as the most senior commander of the *Force de Résistance Patriotique en Ituri* (“FRPI”) and the Brigadier-General of the national army, the *Forces Armées de la République Démocratique du Congo* (“FARDC”),²¹ provide him with the connections as well as the means to flee;²²
- c) His influence and connections that resulted in him 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, could also be used to help him escape the jurisdiction of the court.²³

²¹ ICC-01/04-01/07-196-Conf-AnxA, at paragraphs 24 and 26. See also ICC-01/04-01/07-170-Conf-Anx1D, at p. 4. Refers to DRC-OTP-0086-0036 (Décret No. 04/094 du 11 décembre 2004 portant nomination dans la catégorie des officiers généraux des Forces armées de la République Démocratique du Congo) at 0037 ; and DRC-OTP- 0107-0701 (Décret No. 04/095 du 11 décembre 2004 portant nomination dans la catégorie des officiers supérieurs des Forces armées de la République Démocratique du Congo). See also *supra* note 16.

²² See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-824, at paragraph 137. In this matter the Appeals Chamber stated that it was not persuaded by the appellant’s argument that the PTC I should not have taken into account the international contacts of the appellant because there was no evidence before the chamber that the appellant would actually make use of these to abscond. The Appeals Chamber decided “...that any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction”. Regarding the contacts of Germain KATANGA: witnesses describe KATANGA’s various international contacts with the Ugandan authorities directly and through designated intermediaries. See witness statement of W-12, DRC-OTP-0105-0085, at paragraphs 336-339, 390-391. See witness statement of W-160, DRC-OTP-0153-0006, at paragraphs 23-58 and at paragraphs 64-65. See also ICC-01/04-01/07-196-Conf-AnxA, at paragraph 224.

²³ See UNSC Resolution 1596 (2005) updating UNSC Resolution 1493 (2003) (available at http://www.un.org/Docs/sc/unscl_resolutions05.htm) (follow link The situation concerning the Democratic Republic of the Congo); See the UNSC list at http://www.un.org/sc/committees/1533/pdf/1533_list.pdf). The UNSC list last updated on 24 April 2008 refers to KATANGA’s positions as “FRPI chief” and “General in the FARDC” and states that KATANGA was under house arrest in Kinshasa from March 2005 for “FRPI involvement in human rights abuses”. It states further that KATANGA was “involved in weapons transfers, in violation of the arms embargo”. The list notes that KATANGA has been “[s]urrendered by the Government of the DRC to the International Criminal Court on 18 October 2007”. Hence it is clear that, currently, the UNSC Sanctions Committee believes that restrictions should continue to be imposed on KATANGA notwithstanding his surrender to the Court. The UNSC extended until 31 December 2008 these measures imposed by Res. 1596 and 1493 (2003) by UNSC Res. 1799 (2008), 15 February 2008 and UNSC Res. 1807, 31 March 2008 (http://www.un.org/Docs/sc/unscl_resolutions08.htm). See further the annex to European Council Common Position 2005/440/CFSP of 13 June 2005 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:152:0022:0024:EN:PDF>) as amended by European Council Decision 2005/846/CFSP of 29 November 2005 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:314:0035:0040:EN:PDF>). The Council of the European Union similarly imposed restrictions based on UNSC Res. 1596. The latest Council Common Positions regarding restrictive measures against the DRC: 2006/624/CFSP – 15 September 2006 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:253:0034:0035:EN:PDF>), 2007/654/CFSP (October 2007) (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:264:0011:0012:EN:PDF>) and Common Position 2008/179/CFSP – 29 February 2008 (<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:057:0037:0037:EN:PDF>), have made no change to the presence of KATANGA on the list of persons subject to the measures. Common Position 2008/179/CFSP notes that on 15 February 2008, the United Nations Security Council adopted UNSCR 1799 (2008) extending the measures against the DRC until 31 March 2008. It accordingly extends Common Position 2005/440/CFSP and amends it so that the Common Position “...shall be reviewed, amended or repealed as appropriate, in light of determinations made by the United Nations Security Council”.

20. The Prosecution asserts that Germain KATANGA's detention is also necessary in order to ensure that he does not obstruct or endanger the investigation or the pending court proceedings:

- a) The Confirmation Hearing has supplied Germain KATANGA with the identities of many of the witnesses, and the whereabouts of some of them;²⁴
- b) Germain KATANGA still wields influence within the DRC and has established contacts and access to resources, as indicated above,²⁵ that would enable him to pressure, threaten or harm said witnesses if released;²⁶
- c) FRPI members under his control have already threatened witnesses in the past²⁷ and have previously obstructed investigations into the attack at Bogoro;²⁸
- d) A number of former FNI and FRPI commanders, who worked closely with KATANGA and/or NGUDJOLO, have joined the FARDC and are currently in Kinshasa, Kisangani or Bunia, or their whereabouts remain unknown.²⁹
- e) The volatility of the situation in DRC provides an ideal context for Germain KATANGA to interfere with the potential witnesses and/or the ongoing investigation;³⁰

²⁴ This factor was taken into consideration by PTC I in its Review of the "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", ICC-01/04-01/07-702, at p. 11. The Chamber stated that this factor combined with the volatile situation in DRC could lead to the "... [G]rave endangerment of the security of the victims and the witnesses..."

²⁵ *Supra* note 21.

²⁶ See ICC-01/04-01/07-750, at paragraph 15, in which Trial Chamber II comments on the risk of releasing *Mathieu Ngudjolo Chui* in the DRC in light of the fact that the identity of many witnesses has been communicated to the accused during the Confirmation Hearing and the situation in the DRC still remains unstable.

²⁷ See ICC-01/04-01/07-88-Conf, at paragraph 18. See also list of evidence ICC-01/04-01/07-170-Conf-Anx1D, Document DRC-OTP-0155-0106, at 0109, at paragraph 18.; See also ICC-01/04-01/07-224-Anx, at paragraph 17.

²⁸ See ICC-01/04-01/07-4, paragraph 63. See also list of evidence ICC-01/04-01/07-170-Conf-Anx1D, Document DRC-OTP-0129-0267, at paragraph 66.

²⁹ ICC-01/04-01/07-224-Anx, at paragraph 16.

21. The Prosecution submits that Germain KATANGA's detention is not unreasonable when considering the duration of his detention.
22. In accordance with internationally recognised human rights standards, everyone arrested or detained is entitled to trial within a reasonable time or to release pending trial.³¹
23. 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."³²
24. Just over 13 months have elapsed since Germain KATANGA was first transferred to the seat of this court. Within this time period, the cases of Ngudjolo and Katanga were joined,³³ the Confirmation Hearing was held,³⁴ the Confirmation decision was issued by PTC I,³⁵ Trial Chamber II was constituted to proceed with the case³⁶ and a status conference has been scheduled.³⁷
25. In light of the foregoing and of the ICC case law regarding the reasonableness of a detention period, the Prosecution asserts that Germain KATANGA's detention

³⁰ See "Ituri: reprise des combats entre FARDC et la malice FRPI à Bogoro", *Radio Okapi*, 30 September 2008 (available at <http://www.radiookapi.net/index.php?i=53&a=20494> (last accessed 5 November 2008)).

³¹ See Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (European Treaty Series 5); Article 7(5) of the American Convention on Human Rights, (O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978).

³² ICC-01/04-01/06-824, at paragraph 122.

³³ ICC-01/04-01/07-257 (Concerning Germain Katanga); ICC-01/04-01/07-48 (Concerning Mathieu Ngudjolo Chui); ICC-01/04-01/07-307.

³⁴ ICC-01/04-01/07-T-50-ENG ET.

³⁵ ICC-01/04-01/07-702.

³⁶ ICC-01/04-01/07-729.

³⁷ ICC-01/04-01/07-739.

cannot be qualified as unreasonable by virtue of Article 60(4) of the Rome Statute.³⁸

Conclusion

In light of the preceding reasons and taking into account the need to ensure the appearance of the Accused at trial and the security of victims and witnesses, the Prosecution affirms that there are no grounds justifying the interim release of Germain KATANGA.



Luis Moreno-Ocampo, Prosecutor

Dated this 26th day of November 2008

At The Hague, The Netherlands

³⁸ In the case of *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-1359, at p. 8, Trial Chamber I decided that a pre-trial detention of over 2 years did not contravene Article 60(4) of the Rome Statute.