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No.: **ICC-01/04-01/07**
Date: **12 December 2008**

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

**Second Review of the Decision on the Conditions of 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

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Other

TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court (“the Court”) issues the following decision under articles 21(3), 58, 60, 61 and 64(6) of the *Rome Statute* (“the Statute”) and rule 118(2) of the *Rules of Procedure and Evidence* (“the Rules”).

I. Procedural Background

1. In its decision of 13 November 2008, the Chamber recalled the need to review the detention of Germain Katanga under article 60(3) of the Statute and rule 118(2) of the Rules.¹ In that decision, the Chamber also referred to the judgment issued on 13 February 2007 (“the Judgment of 13 February 2007”) by the Appeals Chamber, which underscores the obligation to “consider releasing the detainee [...] if the detainee is detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor”.²

2. The Chamber requested the Prosecutor and the Legal Representatives of the anonymous and non-anonymous victims to file, no later than 27 November 2008, their observations on the detention of Germain Katanga at the Court’s detention centre, and requested Germain Katanga’s Defence to file, no later than 4 December 2008, its own observations as well as its observations in response.

3. Pursuant to that decision, the Prosecutor filed his observations on 26 November 2008³ and the Legal Representatives of the victims filed theirs on 24, 25 and 26 November 2008.⁴ The Defence for Germain Katanga filed its observations on

¹ *Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga* (Règle 118-2), 13 November 2008, ICC-01/04-01/07-748, p. 3.

² Appeals Chamber, *Judgment 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 February 2007, ICC-01/04-01/06-824, para. 120.

³ Office of the Prosecutor, “Prosecution’s Observations on the Review of the Pre-Trial Detention of Germain Katanga”, 26 November 2008, ICC-01/04-01/07-775.

⁴ *Observations de la Représentante Légale des Victimes* a/0327/07, a/0329/07, a/0330/07, a/0331/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, a/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08,

4 December 2008,⁵ stating therein that it does not intend to apply for its client's release and that it had no particular observations to make regarding his detention. It added that it intended simply to reiterate the observations submitted at the time of the previous review proceedings.⁶

II. Decisions rendered by Pre-Trial Chamber I concerning the detention of Germain Katanga

1) Decision on the conditions of detention of Germain Katanga

4. On 21 April 2008, the Single Judge issued the first decision on Germain Katanga's detention, and considered that he had to continue to be detained for the following reasons:⁷ 1) the condition set forth in article 58(1)(a) of the Statute continued to be met since there were still reasonable grounds to believe that Germain Katanga had committed crimes within the jurisdiction of the Court; 2) the condition set forth in article 58(1)(b)(ii) of the Statute continued to be fulfilled, since Germain Katanga's detention was necessary to ensure that he would not obstruct the investigation or the court proceedings. Indeed, in the view of the Single Judge, it appeared that Germain Katanga still wields a certain degree of influence over the members of the *Forces de résistance patriotiques en Ituri* (FRPI), that there were

a/0066/08, a/0067/08, a/0070/08, 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 de Germain Katanga (Règle 118-2), 26 November 2008, ICC-01/04-01/07-774; *Observations 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 de la détention de Germain Katanga au Siège de la cour, 24 November 2008, ICC-01/04-01/07-766; *Observation du Représentant Légal des Victimes* a/0015/08; a/0022/08; a/0024/08; a/0025/08; a/0027/08; a/0028/08; a/0029/08; a/0032/08; a/0033/08; a/0034/08; et a/0035/08 sur la détention de Germain Katanga, 24 November 2008, ICC-01/04-01/07-768; *Observations des victimes* a/0333/07 et a/0110/08 sur la détention de Germain Katanga (Règle 118-2), 25 November 2008, ICC-01/04-01/07-773.

⁵ Germain Katanga's Defence team, "Defence observations on the detention of Mr Germain Katanga", 4 December 2008, ICC-01/04-01/07-780, para. 2.

⁶ Germain Katanga's Defence team, "Defence Observations on the Review of Germain Katanga's Pre-Trial Detention (Article 60 (3) of the Statute and the Rule 118 of the Rules of Procedure and Evidence)", 8 August 2008, ICC-01/04-01/07-701, para. 2.

⁷ Pre-Trial Chamber I, *Decision on the Conditions of the Pre-Trial Detention of Germain Katanga*, 21 April 2008, ICC-01/01-04/07-426, p. 8.

reasonable grounds to believe that he was the highest-ranking commander, and that he had signed a document as Brigadier-General of the *Forces Armées de la République Démocratique du Congo* (“FARDC”) at the time of his arrest and transfer to the seat of the Court.

2) First review of the Decision on the conditions of detention of Germain Katanga

5. On 9 July 2008, Pre-Trial Chamber I recalled the need, pursuant to rule 118(2) of the Rules,⁸ to review the pre-trial detention of Germain Katanga, and requested the observations of the participants. On 18 August 2008, it issued its decision.⁹

6. In that decision, it held that there had been no change in circumstances since its decision of 21 April 2008 to warrant the release of Germain Katanga. Furthermore, Pre-Trial Chamber I stated that the identities of many witnesses had been disclosed to the Defence for the purpose of the confirmation hearing, that the release of the accused would multiply the risks faced by victims and witnesses on account of the situation in the Democratic Republic of the Congo, which remained volatile, and that Germain Katanga’s continued pre-trial detention was necessary to ensure that he would not obstruct the Prosecutor’s investigation or endanger the court proceedings.¹⁰

⁸ Pre-Trial Chamber I, *Decision concerning observations on the review of the pre-trial detention of Germain Katanga*, 9 July 2008, ICC-01/04-01/07-668.

⁹ ICC-01/04-01/07-426.

¹⁰ Pre-Trial Chamber I, *Review of the “Decision on the Conditions of the Pre-Trial Detention of Germain Katanga”*, 18 August 2008, ICC-01/04-01/07-702, p. 11.

III. Second review by the Chamber of the Decision on the conditions of detention of Germain Katanga

7. Pursuant to the Judgment of 13 February 2007,¹¹ the Chamber conducted the review provided for under article 60(3) of the Statute and rule 118(2) of the Rules as well as that provided for under article 60(4) of the Statute.

1) Review under article 60(3) of the Statute and rule 118(2) of the Rules

8. Under article 60(3) of the Statute, upon reviewing a ruling on interim release, the Chamber may modify its ruling if it is satisfied that changed circumstances so require.

9. The Chamber is of the opinion that there has been no notable change in circumstances such as to warrant the release of Germain Katanga in this case. Furthermore, it notes that the charges brought against him have been confirmed by Pre-Trial Chamber I, which, moreover, dismissed the applications for leave to appeal the *Decision on the Confirmation of Charges*.¹² The Chamber therefore shares the view of the Prosecutor¹³ and the Legal Representatives of the victims¹⁴ that the condition set forth in article 58(1)(a) of the Statute, under which there must be “reasonable grounds to believe that the person [concerned] has committed a crime within the jurisdiction of the Court”, is fulfilled.

10. Furthermore, considering the condition set forth in article 58(1)(b)(i) of the Statute, the Chamber is of the opinion that the risk of absconding has increased as a result of the confirmation of the charges against Germain Katanga and that, accordingly, his continued detention is even more necessary to ensure his

¹¹ ICC-01/04-01/06-824, para. 120.

¹² Pre-Trial Chamber I, *Decision on the Applications for leave to Appeal the Decision on the Admission of the evidence of witnesses 132 and 287 and on the leave to Appeal on the Decision on the Confirmation of Charges*, 24 October 2008, ICC-01/04-01/07-727.

¹³ ICC-01/04-01/07-775.

¹⁴ ICC-01/04-01/07-766; ICC-01/04-01/07-768; ICC-01/04-01/07-773.

appearance. It recalls that the accused faces serious charges, a situation which might prompt him not to appear were he to be released.

11. According to two Legal Representatives of the victims,¹⁵ Germain Katanga's decision not to appear at certain hearings relating to the confirmation of charges militates against his release, as that absence was a sign of his unwillingness to cooperate with the Court. The Defence disputes those arguments and argues that, by being absent from the hearings, for reasons linked to prolonged separation from his family, Germain Katanga was simply exercising "[...] his right not to be present".¹⁶ The Chamber notes that, in this case, his absence from certain hearings, for the reasons set out above, cannot constitute an argument to be taken into account in determining the likelihood of the accused's appearance.

12. Furthermore, the Defence for Germain Katanga¹⁷ refutes the claims of the Legal Representatives of the victims¹⁸ that there is a connection between Germain Katanga and the recent appearance of rebel groups in Ituri. The Defence stresses that the said allegations are essentially based on rumours reported by the media and that Germain Katanga's detention under security conditions would not allow him to maintain relations with rebels in Ituri.¹⁹

13. Although the conditions set forth in articles 58(1)(b)(i) to (iii) of the Statute are in the alternative,²⁰ the Chamber considers it necessary to determine whether the release of Germain Katanga would not be likely to obstruct or endanger the proceedings. In this respect, the Chamber notes that the information submitted to it is not enough to enable Germain Katanga's involvement in the events currently taking

¹⁵ ICC-01/04-01/07-768, para. 10; ICC-01/04-01/07-774, para. 5.

¹⁶ ICC-01/04-01/07-780, para. 2.

¹⁷ ICC-01/04-01/07-780, para. 3.

¹⁸ ICC-01/04-01/07-780, para. 3; ICC-01/04-01/07-774, paras. 15 and 16; ICC-01/01-04/07-768, para. 15; ICC-01/04-01/07-766, para. 12.

¹⁹ ICC-01/04-01/07-780, para. 3.

²⁰ ICC-01/04-01/06-824, para. 139.

place in Ituri to be established. The Chamber considers that, even conceding that he were actually involved, the part he might be playing in the events is neither stated nor substantiated.²¹ Nevertheless, it does not appear possible in the current situation to envisage releasing Germain Katanga. As the Prosecutor²² and the Legal Representatives of the victims²³ have noted, the identities of many witnesses were indeed disclosed to the Defence during the confirmation hearing, and the situation in the Democratic Republic of the Congo remains volatile. The Chamber considers that, under these conditions, the interim release of Germain Katanga would lead to the grave endangerment of the safety of the victims and witnesses and would obstruct the court proceedings.

14. For all these reasons, the Chamber finds that the circumstances have not changed within the meaning of articles 60(2) and 60(3) of the Statute.

2) Review pursuant to article 60(4) of the Statute

15. Under 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”. In the aforementioned Judgment of 13 February 2007, the Appeals Chamber confirmed 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”. In order to determine whether the length of Germain Katanga’s pre-trial detention is unreasonable or not, the Chamber must therefore take all the circumstances of the present case into account.

²¹ ICC-01/04-01/07-774, p. 4; ICC-01/01-04/07-768, p. 4; ICC-01/04-01/07-773, p. 4; ICC-01/04-01/07-766, p. 6.

²² ICC-01/04-01/07-775, p. 8.

²³ ICC-01/04-01/07-774, p. 5; ICC-01/04-01/07-766, p. 6; ICC-01/04-01/07-768, p. 4; ICC-01/04-01/07-773, p. 4.

16. As Pre-Trial Chamber I recalled in *The Prosecutor v. Thomas Lubanga Dyilo*, in order to assess the unreasonableness of the detention, it should be determined whether the public interest requirement outweighs the principle of respect for individual liberty.²⁴ As outlined above, the Chamber considers that, in the present case, the overall interest requires the continued detention of Germain Katanga, given the absolute necessity to ensure his appearance at trial and to ensure the protection of the victims and witnesses.

17. In the present case, the proceedings for the confirmation of the charges brought against Germain Katanga were conducted particularly expeditiously, within the time limits prescribed by the Statute, the Rules and the *Regulations of the Court*. The Chamber recalls, as did the victims' representatives, that no delays occurred after 26 September 2008, the date of the confirmation of the charges. The Presidency constituted Trial Chamber II on 24 October 2008, as soon as Pre-Trial Chamber I had informed it that it had dismissed the applications for leave to appeal. After electing its presiding judge,²⁵ the Chamber convened the first status conference, which was held on 27 and 28 November 2008.²⁶

18. In the Chamber's view, Germain Katanga's detention was in no way extended unreasonably and there was no inexcusable delay by the Prosecutor within the meaning of article 60(4) of the Statute.

FOR THESE REASONS,

The Chamber **DECIDES** to maintain Germain Katanga in detention.

²⁴ Pre-Trial Chamber I, *Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo"*, 11 June 2007, ICC-01/04-01/06-924.

²⁵ *Décision notifiant l'élection du juge président dans l'affaire Le Procureur c. Germain Katanga et Mathieu Ngudjolo Chui*, 29 October 2008, ICC-01/04-01/07-731.

²⁶ *Ordonnance fixant la date d'une conférence de mise en état (règle 132 du Règlement de procédure et de preuve)*, 6 November 2008, ICC-01/04-01/07-739.

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

[signed]
Judge Bruno Cotte,
Presiding Judge

[signed]
Judge Fatoumata Dembele Diarra

[signed]
Judge Fumiko Saiga

Dated this 12 December 2008

At The Hague, The Netherlands