

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Redacted Version

**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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Procedural 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 21 April 2008, in the "Decision on the conditions of the Pre-Trial Detention of Germain Katanga" 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".⁴
4. From 27 June to 16 July 2008, the PTC I conducted the Confirmation Hearing.⁵
5. On 18 August 2008, the Pre-Trial Chamber maintained the detention of Germain Katanga, finding that "... there had not been any material change of circumstance to justify the release of Germain Katanga..."⁶ It also concluded that "...in light of the circumstances of the case, the length of Germain Katanga's detention of nine months cannot be considered unreasonable;".⁷

¹ ICC-01/04-01/07-1.

² *Ibid.*

³ ICC-01/04-01/07-40.

⁴ ICC-01/04-01/07-426, at p. 8.

⁵ ICC-01/04-01/07-T-50-ENG ET, at p. 8.

⁶ ICC-01/04-01/07-702, at p. 10.

⁷ ICC-01/04-01/07-702, at p. 13.

6. On 26 September 2008, PTC I confirmed the charges.⁸

7. On 12 December 2008, Trial Chamber II ("the Chamber") issued its "Second Review of the Decision on the Conditions of Detention of Germain KATANGA" ("the Decision").⁹ It held that, pursuant to Article 60(3) of the Statute, there has been no notable change in circumstances warranting the release of Germain KATANGA.¹⁰ Considering the condition set forth in article 58(1)(b)(i) of the Statute, the Chamber found that "the risk of absconding has increased as a result of the confirmation of charges against Germain Katanga and that, accordingly, his continued detention is even more necessary to ensure his appearance."¹¹ Furthermore, the Chamber noted that "given the volatile situation in the Democratic Republic of the Congo, and the fact that the identities of many witnesses were disclosed to the Defence during the confirmation hearing, the interim release of Germain Katanga would lead to the grave endangerment of the safety of the victims and witnesses and would obstruct court proceedings".¹² The Chamber did not find any inexcusable delay on the part of the Prosecutor within the meaning of article 60(4) of the Statute. Accordingly, the Chamber ordered the continued detention of Germain KATANGA.

8. On 5 March 2009, Trial Chamber II requested the Prosecution to submit its observations concerning the continued detention of Germain KATANGA.¹³

⁸ICC-01/07-01/07-717. The Decision 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 period; and b. Germain KATANGA, 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 (pp. 211-213).

⁹ICC-01/04-01/07-794.

¹⁰ICC-01/04-01/07-794, para. 9.

¹¹ICC-01/04-01/07-794-tENG, para. 10.

¹²ICC-01/04-01/07-794-tENG, para. 13.

¹³ICC-01/04-01/07-942.

Prosecution's Observations

9. 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.¹⁴

Article 58(1)

10. The Prosecution submits that there has been no substantial change with respect to any of the conditions set out in Article 58(1) or any related factors since the last Decision. Thus, variation of the current detention regime is unwarranted.
11. The condition set forth in Article 58(1)(a) of the Statute continues to be fulfilled.¹⁵
12. The Prosecution submits that Germain KATANGA's detention remains necessary in order to ensure his appearance at trial.¹⁶ In its latest Decision, the Chamber found that the seriousness of the pending charges might prompt the Accused, if released, to flee.¹⁷ Furthermore, the Prosecution asserts that Germain KATANGA's 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 as a Brigadier-General of the national army, the *Forces Armées de la République Démocratique du Congo* ("FARDC"),¹⁸ implies the existence of networks and former loyalties that could facilitate his flight from the Court's jurisdiction.¹⁹

¹⁴ ICC-01/04-01/06-824, at para. 134.

¹⁵ ICC-01/04-01/07-794-tENG, para. 9.

¹⁶ Article 58(1)(b)(i).

¹⁷ ICC-01/04-01/07-794-tENG, para. 10.

¹⁸ ICC-01/04-01/07-196-Conf-AnxA, at paras. 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).

¹⁹ See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-824, at para. 137. In this matter the Appeals Chamber recognized that the appellant's international contacts were relevant even absent evidence that he would actually make use of these to abscond. As it explained, "...any determination by a Pre-Trial Chamber of whether or not a suspect is likely to abscond necessarily involves an element of prediction". Thus, this Court can and

13. In addition, continuation in custody is required to ensure that the Accused does not cause “grave endangerment [to] the safety of the victims and witnesses and would obstruct the court proceedings”.²⁰ This is particularly so given the volatile situation in the DRC²¹ and the disclosure of Prosecution witnesses’ identity to the Defence.

14. [REDACTED].²²

15. The Prosecution would like to recall that in September and October 2008, members of the *Force de Résistance Patriotique en Ituri* (“FRPI”) and other forces now in the *Front Populaire pour la Justice au Congo* (“FPJC”), tried to re-take Bogoro and neighbouring villages, leading to mass displacement of civilians.²³

16. The Prosecution reiterates that supporters of the Accused have the capability to interfere with Prosecution witnesses and their families.²⁴ FNI and/or FRPI members have already interfered with Prosecution witnesses, allegedly directly under the Accused’s instructions.²⁵ If the Accused were to be released, he would be in a position to exert more direct pressure on these witnesses.

should consider that witnesses describe Germain 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; witness statement of W-160, DRC-OTP-0153-0006, at paras 23-58 and at paras 64-65. See also ICC-01/04-01/07-196-Conf-AnxA, at para. 224.

²⁰ ICC-01/04-01/07-794-tENG, para. 13.

²¹ ICC-01/04-01/07-794-tENG, para. 13. See also ICC-01/04-01/07-889-Conf, par. 9.

²² ICC-01/04-01/07-889-Conf, para. 9 (Prosecution’s translation).

²³ See “Ituri: reprise des combats entre FARDC et la milice FRPI à Bogoro”, *Radio Okapi*, 30 September 2008 (available at <http://www.radiookapi.net/index.php?i=53&a=20494> (last accessed 24 February 2009)).

²⁴ PTC I found that Germain KATANGA still wields influence as a powerful figure within Ituri province and in particular among current members of the *Forces de résistance patriotiques en Ituri* (FRPI) and that there were reasonable grounds to believe that he was the highest-ranking commander of the FRPI; indeed, he signed a document as Brigadier-General of the *Forces Armées de la République Démocratique de Congo* (FARDC) at the time of his transfer to the seat of the Court. See ICC-01/04-01/07-426, p. 8. See also ICC-01/04-01/07-224-Anx, para. 16: A number of former FNI and FRPI commanders have joined the FARDC and are currently in Kinshasa, Kisangani or Bunia, or their whereabouts remain unknown. See also *supra* note 31.

²⁵ FRPI members under Germain KATANGA’s control have threatened witnesses in the past, see ICC-01/04-01/07-88-Conf, at para. 18. See also list of evidence ICC-01/04-01/07-170-Conf-Anx1D, Document DRC-OTP-0155-0106, at 0109, at para. 18; ICC-01/04-01/07-224-Anx, at para. 17. The FRPI members under Germain KATANGA’s control have also obstructed investigations into the attack at Bogoro, See ICC-01/04-01/07-4, para. 63; see also list of evidence ICC-01/04-01/07-170-Conf-Anx1D, Document DRC-OTP-0129-0267, at para. 66. See also ICC-01/04-01/07-224-Anx, para. 17: An OTP witness has explained that individuals were trying to identify persons close to the FNI and/or FRPI, who may have cooperated or might cooperate with the OTP in relation to investigation of crimes allegedly committed by members of FNI and/or FRPI.

Article 60(4)

17. The Prosecution further submits that the duration of Germain KATANGA's detention is not unreasonable.

18. As held by the Appeals Chamber in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, "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."²⁶

19. Germain KATANGA has been in detention at the seat of the Court for just over 16 months. Within this time period, the Confirmation Hearing was held in an expeditious manner,²⁷ the Confirmation decision was issued by PTC I,²⁸ Trial Chamber II was constituted²⁹ and the trial date is soon to be set. There have been no inexcusable delays; to the contrary, given the complexity of the case and the evidence, the case has been proceeding at a fair and reasonable pace.

20. In light of the foregoing, the Prosecution asserts that Germain KATANGA's detention cannot be qualified as unreasonable by virtue of Article 60(4) of the Rome Statute.³⁰

²⁶ ICC-01/04-01/06-824, at para. 122.

²⁷ ICC-01/04-01/07-T-50-ENG ET.

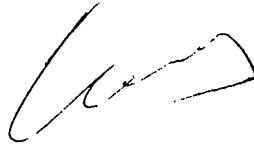
²⁸ ICC-01/04-01/07-702.

²⁹ ICC-01/04-01/07-729.

³⁰ 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.

Conclusion

In light of the above mentioned submissions, the Prosecution submits that there are no grounds justifying the interim release of Germain KATANGA.



Luis Moreno-Ocampo, Prosecutor

Dated this 12th day of March 2009

At The Hague, The Netherlands