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No.: ICC-01/04-01/07
Date: 19 November 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Christine Van den Wyngaert

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

***IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Public

**Fifth Review of the Pre-Trial Chamber's Decision
Concerning the Pre-Trial Detention of Germain Katanga pursuant to
rule 118(2) of the Rules of Procedure and Evidence**

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

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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Defence**

States Representatives

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Other

Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court"), in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, in accordance with rule 118(2) of the Rules of Procedure and Evidence ("Rules"), issues the following decision.

I. BACKGROUND

1. On 2 July 2007, Pre-Trial Chamber I issued a warrant of arrest for Germain Katanga.¹
2. Pursuant to this warrant, Germain Katanga was arrested by the authorities of the Democratic Republic of the Congo ("DRC") on 17 October 2007. He was surrendered to the officials of the Court that same day. Upon arrival at the Seat of the Court, he was transferred to the Detention Centre of the Court. On 18 October 2009, Pre-Trial Chamber I issued a decision unsealing the warrant of arrest.²
3. The initial decision on Germain Katanga's pre-trial detention was rendered on 21 February 2008.³ On 21 April 2008, the Single Judge issued the "Decision on the conditions of Pre-Trial Detention of Germain Katanga".⁴ Pursuant to this decision, Germain Katanga was remanded in custody, as it was considered that the condition set forth in article 58(1)(a) of the Rome Statute ("Statute") continued to be met. In particular, the Single Judge found that there were still reasonable grounds to believe that Germain Katanga had committed crimes within the jurisdiction of the Court. The Single Judge further considered that it appeared that Germain Katanga, for whom there were reasonable grounds to believe that he was the highest ranking commander of the FRPI at the time

¹ "Mandat d'arrêt à l'encontre de Germain Katanga", 2 July 2007, ICC-01/04-01/07-1

² "Decision to unseal the warrant of arrest against Germain Katanga", 18 October 2007, ICC-01/04-01/07-24

³ "Decision Concerning the Pre-Trial Detention of Germain Katanga", 21 February 2008, ICC-01/04-01/07-222

⁴ "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 21 April 2008, ICC-01/04-01/07-426

the events referred to in the Charging Document allegedly took place, still wielded influence as a powerful figure within the Ituri province, and in particular among current member of the *Forces de Résistance Patriotiques en Ituri* ("FRPI").⁵ She thus found that the condition set out in article 58(1)(b)(ii) continued to be fulfilled. Accordingly, the Single Judge decided that Germain Katanga's continued detention was necessary to ensure that he would not obstruct the investigation or court proceedings.⁶

4. On 18 August 2008, Pre-Trial Chamber I issued the first decision on the review of the pre-trial detention of Germain Katanga pursuant to rule 118(2) of the Rules.⁷ It noted that there had not been any material change in the circumstances that formed the basis of the decision rendered on 21 April 2008. It was therefore held, that the accused's continued detention remained justified for those reasons.⁸
5. This Chamber, in accordance with article 61(11) of the Statute, rendered its decision on the second review of Germain Katanga's pre-trial detention on 12 December 2008.⁹ Pursuant to that decision, Germain Katanga's pre-trial detention was again extended.¹⁰
6. Pursuant to its obligations under article 60(3) of the Statute and rule 118(2) of the Rules, the Chamber proceeded to a third review of Germain Katanga's pre-trial detention on 5 March 2009, requesting the parties to file the respective observations.¹¹ The Chamber equally convened a hearing on

⁵ Ibid., p. 8.

⁶ Idem.

⁷ "Review of the 'Decision on the Conditions of the Pre-Trial Detention of Germain Katanga'", 18 August 2008, ICC-01/04-01/07-702

⁸ Ibid., p.10

⁹ "Deuxième réexamen de la Décision sur les conditions du maintien en détention de Germain Katanga", 12 December 2008, ICC-01/04-01/07-794

¹⁰ Ibid., par. 18

¹¹ "Décision aux fins de recueillir les observations de participants sur la détention de Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve)", 5 March 2009, ICC-01/04-01/07-942

Germain Katanga's detention review pursuant to rule 118(3) of the Rules.¹²

The public hearing was held on 23 March 2009.¹³

7. The Defence for Germain Katanga did not seek the accused's release, arguing that it "saw no practical purpose served in applying for the interim release of Mr. Katanga",¹⁴ given the refusal of the host state to offer assistance in guaranteeing his provisional release by accepting him on its territory.¹⁵
8. In its subsequent decision on the third review of Germain Katanga's pre-trial detention,¹⁶ the Chamber held that the detention of Germain Katanga remained necessary.¹⁷ Having had regard to the Appeals Chamber judgment of 13 February 2007,¹⁸ the Chamber considered that there had not been a noticeable change in circumstances from those prevailing at the time of the initial decision on the pre-trial detention of Germain Katanga.¹⁹
9. A decision on the fourth review of the Pre-Trial Chamber's decision on Germain Katanga's pre-trial detention was rendered on 21 July 2009.²⁰ In its observations submitted on the matter, the Defence for Germain Katanga again indicated that it did not seek his provisional release.²¹ After considering argument of all parties, the Chamber concluded that there had not been a noticeable change in circumstances since the preceding, third review of the

¹² Ibid., p. 4

¹³ ICC-01/04-01/07-T-63-ENG WT 23-03-2009

¹⁴ "Defence Observations on the Detention of Mr. Germain Katanga", 19 March 2009, ICC-01/04-01/07-970, par. 6

¹⁵ Idem.

¹⁶ "Troisième examen de la décision sur les conditions du maintien en détention de Germain Katanga", 6 April 2009, ICC-01/04-01/07-1027-Conf-Exp and ICC-01/04-01/07-1043 (public redacted version)

¹⁷ ICC-01/04-01/07-1043, par. 13

¹⁸ "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'", 13 February 2007, ICC-01/04-01/06-824, par. 120

¹⁹ ICC-01/04-01/07-1043, par. 13

²⁰ "Fourth review of the Pre-Trial Chamber's Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to rule 118(2) of the Rules of Procedure and Evidence", 21 July 2009, ICC-01/04-01/07-1325

²¹ "Defence Observations on the Detention of Germain Katanga", 13 July 2009, ICC-01/04-01/07-1298, par. 1

accused's pre-trial detention.²² It, moreover, observed that the imminence of the start of the hearings on the merits rendered the provisional detention of the accused all the more necessary.²³

II. FIFTH REVIEW OF THE DECISION ON THE CONDITIONS OF DETENTION OF GERMAIN KATANGA

10. Proceeding to its current, fifth review of the Pre-Trial Chamber's decision on Germain Katanga's pre-trial detention, the Chamber, on 16 October 2009, requested the parties to file their respective observations on the matter.²⁴ It decided that the Prosecution and the Legal Representatives for Victims file their observations by 4 p.m. on 2 November 2009. The Defence for Germain Katanga was asked to submit its own observations and response to the other parties' observations by 4 p.m. on 9 November 2009.²⁵
11. Confidential Prosecution observations were submitted to the Chamber on 23 October 2009.²⁶ A redacted version of these observations was made available to the Defence of Germain Katanga²⁷ and the Legal Representatives for Victims on 26 October 2009.²⁸ The Legal Representative for Victims representing former child soldiers filed his observations on 30 October 2009.²⁹ The Legal Representative for Victims representing the principal group of victims in the case did not file observations on the matter.

²² ICC-01/04-01/07-1325, par. 16

²³ Ibid., par. 18

²⁴ "Decision requesting the parties' observations regarding the review of the detention of Germain Katanga pursuant to rule 118(2) of the Rules of Procedure and Evidence", 16 October 2009, ICC-01/04-01/07-1535

²⁵ Ibid., p. 5

²⁶ "Prosecution's Observations on the Review of the Pre-Trial Detention of Germain Katanga", 23 October 2009, ICC-01/04-01/07-1559-Conf-Exp

²⁷ ICC-01/04-01/07-1559-Conf-Exp-Red

²⁸ ICC-01/04-01/07-1559-Conf-Exp-Red2

²⁹ "Observation du Représentant légal des victimes a/0333/07, a/0110/08, a/0111/08, a/0112/08, a/0114/08, a/0136/08, a/0314/09, a/0315/09, a/0316/09 et a/0390/09 concernant le réexamen de la décision sur les conditions du maintien en détention de Monsieur Germain Katanga en application de l'article 60(3) du Statut de la Cour, de la règle 118(2) du Règlement de procédure et de preuve et de l'article 60(4) du Statut", 30 October 2009, ICC-01/04-01/07-1583

12. On 30 October 2009, the Defence for Germain Katanga seized the Chamber with an urgent request for the disclosure of redacted information contained within the Prosecution Observations.³⁰ The Defence for Germain Katanga submitted that it needed the said information "[i]n order to be able to respond to the Prosecution allegations and to submit its own observations."³¹
13. The Defence for Germain Katanga filed its observations on the fifth review of the accused's pre-trial detention on 9 November 2009.³² In its observations, the Defence stated, that its position remained the same as stated in previous filings. However, the Defence stated that without having access to the said information, it was unable to respond to the Prosecution's allegations.
14. On 11 November 2009, The Chamber issued a decision on the urgent Defence request.³³ It decided that access to the said information could not be granted to the Defence. It, however, also held that the Prosecution should not have used this information in its observations on Germain Katanga's detention review. The Chamber therefore found that it could not take the said information into consideration in its present decision on the pre-trial detention of the accused.³⁴ Given the Defence's submissions of 9 November 2009³⁵, the Chamber granted the Defence a supplementary deadline until 4 p.m. on 13 November 2009 to file additional observations on the pre-trial detention of Germain Katanga, if it so wished.³⁶
15. The Defence for Germain Katanga did not file any supplementary observations.

³⁰ "Defence Request following the *Prosecution's Observations on the Review of the Pre-Trial Detention of Germain Katanga* (ICC-01/04-01/07-1559-Conf-Exp-Red)", 30 October 2009, ICC-01/04-01/07-1577-Conf-Exp

³¹ *Ibid.*, par. 4

³² "Defence Observations on the Detention of Mr. Germain Katanga", 9 November 2009, ICC-01/04-01/07-1612; pursuant to the Chamber's instructions dated 11 November 2009, this document was reclassified as confidential *ex parte* Office of the Prosecutor and Defence only.

³³ "Decision on the Urgent Defence Requests ICC-01/04-01/07-1577-Conf-Exp-Red and ICC-01/04-01/07-1584-Conf-Exp", 10 November 2009, ICC-01/04-01/07-1626-Conf-Exp

³⁴ *Ibid.*, par. 9

³⁵ ICC-01/04-01/07-1612

³⁶ ICC-01/04-01/07-1626-Conf-Exp, par. 10

16. Pursuant to article 60(3) and (4) of the Statute, as well as regulation 118(2) of the Rules, the Chamber is hereby carrying out its fifth review of the pre-trial detention of Germain Katanga. In doing so, the Chamber observes the decision of the Appeals Chamber of 13 February 2007.³⁷

*a. Review under article 60(3) of the Statute and
rule 118(2) of the Rules*

17. By virtue of article 60(3) of the Statute, the Chamber, may, upon reviewing a ruling on the detention of a detained person, modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.

18. In considering whether the circumstances leading to the previous decisions to detain Germain Katanga have changed within the sense of article 60(3) of the Statute, the Chamber will have regard to the observations submitted by the parties.³⁸

19. The Prosecution requests that the Chamber maintain Germain Katanga in detention.³⁹ In its observations,⁴⁰ the Prosecution avers that there “has been no substantial change in the circumstances listed pursuant to Article 58(1) of the Statute since the last review of the pre-trial detention of Germain Katanga”,⁴¹ and refers to its previous filings on the matter.⁴² In particular, the Prosecution states that the detention of Germain Katanga “remains necessary to ensure that the accused does not cause ‘grave endangerment [to] the safety of the

³⁷ ICC-01/04-01/06-824, par. 120

³⁸ As the Chamber has had occasion to state in its “Decision on the Urgent Defence Requests ICC-01/04-01/07-1577-Conf-Exp-Red and ICC-01/04-01/07-1584-Conf-Exp” of 10 November 2009, ICC-01/04-01/07-1626-Conf-Exp, it will disregard certain information provided to it by the Prosecution in its confidential observations on the matter.

³⁹ ICC-01/04-01/07-1559-Red2

⁴⁰ Ibid., par. 12

⁴¹ Ibid., par. 5

⁴² Idem.

victims and witnesses' and does not 'obstruct the court proceedings', pursuant to Article 58(1)(b)(ii)."⁴³ In this respect, the Prosecution refers to the volatile situation in the DRC and the disclosure of Prosecution witnesses' identities to the Defence.⁴⁴

20. The Prosecution further submits, reiterating its previous filings on the detention review of Germain Katanga, that supporters of Germain Katanga have the capability to interfere with Prosecution witnesses and families. It states that members of the *Front des Nationalistes et Intégrationnistes* ("FNI") and/or FRPI have, according to the Prosecution, already done so in the past, allegedly under the instructions of Germain Katanga.⁴⁵
21. Referring to the serious nature of the charges against the accused, the Prosecution maintains that Germain Katanga's continued detention is further justified pursuant to article 58(1)(b)(i) of the Statute.⁴⁶ Furthermore, it is contended that, given the "impending commencement of the trial, there is a more pressing need to keep the accused detained in order to secure his appearance in Court."⁴⁷ In conclusion, the Prosecution submits the detention of the accused is not unreasonable in the context of article 60(4).⁴⁸
22. The Legal Representative for Victims equally submits that there has not been a substantial change in circumstances since the last detention review of Germain Katanga.⁴⁹ It is argued that the security situation in Ituri has, to the contrary, even deteriorated since the last detention review. In this regard, the Legal Representative for Victims refers to a recent security incident concerning one of his team members working in Bunia.⁵⁰ The Legal Representative for Victims further submits that, given that the hearings on the

⁴³ Ibid., par. 6

⁴⁴ Idem.

⁴⁵ Ibid., par. 7

⁴⁶ Ibid., par. 10

⁴⁷ Idem.

⁴⁸ Ibid., par. 11

⁴⁹ ICC-01/04-01/07-1583, p. 7

⁵⁰ Idem.

merits of the case start on 24 November 2009, releasing Germain Katanga would obstruct the fair and expeditious conduct of the proceedings.⁵¹ It is further argued that there are no sufficient guarantees for the appearance of the accused before the Court on and after the 24 November 2009.⁵²

23. As has been noted in paragraph 13 above, the Defence for Germain Katanga is not seeking the release of the accused. It submits that its position in relation to Germain Katanga's detention remains unchanged and refers to its previous submissions on the matter.
24. The Chamber considers that the circumstances relevant to its determination of whether the conditions for the continued detention of Germain Katanga remain fulfilled have not changed significantly since its fourth review of 21 July 2009.
25. It cannot disregard the gravity of the charges confirmed against the accused. Accordingly, and as has previously been held by both the Pre-Trial Chamber and this Chamber, in the absence of sufficient guarantees that he will appear before the Court for the start of the hearings on the merits of the case, the Chamber considers that there exists a real risk that Germain Katanga may extract himself from the jurisdiction of the Court, were he to be released.
26. In particular, the Chamber recalls that the trial on the merits of the case against Germain Katanga will begin on 24 November 2009. Given this proximity of the start of the hearings, the Chamber considers that the detention of the accused remains all the more necessary.

b. Review under article 60(4) of the Statute

27. 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

⁵¹ Ibid., p. 8

⁵² Idem.

inexcusable delay by the Prosecutor". In the Appeals Chamber's judgment of 13 February 2007⁵³, it was 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."⁵⁴

28. The Chamber has considered argument by both the Prosecution and the Legal Representative for Victims. The Prosecution contends that "Germain Katanga's detention is not unreasonable in the context of Article 60(4)."⁵⁵ It argues that since the Chamber's decision on the fourth review of Germain Katanga's pre-trial detention, the commencement of trial has been postponed by two months to 24 November 2009. The Prosecution thus maintains that the "limited extent of this delay does not have incidence on the reasonableness of Germain Katanga's pre-trial detention."⁵⁶

29. The Legal Representative for Victims equally submits that the detention of the accused has not been for an unreasonable period. He, to the contrary, submits that the proceedings have so far been conducted diligently at all stages.⁵⁷

30. The Defence for Germain Katanga has not specifically addressed the issue of an unreasonable delay attributable to the Prosecution within the meaning of article 60(4) of the Statute in either its current or previous observations on the accused's detention review.

31. The Chamber considers that Germain Katanga has not been detained for an unreasonable period of time prior to trial, within the meaning of article 60(4) of the Statute. Having had due regard to the procedural steps thus far involved in the proceedings, the Chamber is satisfied that these have not been flawed by inexcusable delay by the Prosecution. This finding is supported by

⁵³ "Judgement on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", 13 February 2007, ICC-01/04-01/06-824

⁵⁴ ICC-01/04-01/07-824, par. 122

⁵⁵ ICC-01/04-01/07-1559-Red2, par. 11

⁵⁶ Idem.

⁵⁷ ICC-01/04-01/07-1583, p. 9

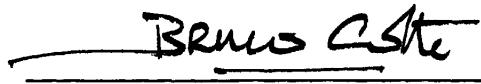
the fact that none of the parties express the view that the accused's detention has been of an unreasonable duration.

FOR THESE REASONS,

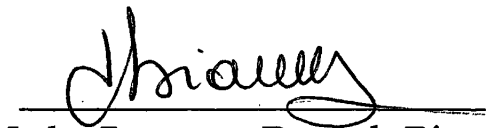
THE CHAMBER,

DECIDES that Germain Katanga shall remain in detention.

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



Judge Bruno Cotte
Presiding Judge



Judge Fatoumata Dembele Diarra



Judge Christine Van den Wyngaert

Dated this 19 November 2009

At The Hague, the Netherlands