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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

Third 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

Mr Luis Moreno-Ocampo, Prosecutor
 Ms Fatou Bensouda, Deputy Prosecutor
 Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
 Mr Andreas O'Shea
 Ms Caroline Buisman

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
 Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu
 Mr Joseph Keta
 Mr Jean-Louis Gilissen
 Mr Hervé Diakiese
 Mr Jean Chrysostome Mulamba
 Nsokoloni
 Mr Fidel Nsita Luvengika
 Mr Vincent Lurquin
 Ms Flora Ambuyu Andjelani

Legal Representatives of the Applicants

The Office of Public Counsel for Victims

Ms Paolina Massidda

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

Mr Anders Backman

Victims Participation and Reparations Section

Other

Trial Chamber II (“the Chamber”) of the International Criminal Court (“the Court”), acting pursuant to articles 21(3), 58, 60, 61 and 64(6) of the Rome Statute (“the Statute”) issues the following decision.

I. Background

1. On 12 December 2008, pursuant to article 60(3) of the Statute and rule 118(2) of the *Rules of Procedure and Evidence* (“the Rules”),¹ the Chamber undertook a second review of the decision on the conditions of detention of Germain Katanga issued by the Single Judge on 21 April 2008 (“Decision of 21 April 2008”).²

2. This decision, which was issued at pre-trial phase, was justified as follows: 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 remained applicable, Germain Katanga’s detention being 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 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* (“the DRC”) at the time of his arrest and transfer to the seat of the Court.

¹ *Second Review of the Decision on the Conditions of Detention of Germain Katanga*, 12 December 2008, ICC-01/01-04/07-794-tENG.

² Pre-Trial Chamber I, *Decision on the conditions of Pre-Trial Detention of Germain Katanga*, 21 April 2008, ICC-01/01-04/07-426.

3. On 5 March 2009,³ for the purpose of the third review of this decision, the Chamber requested observations from the participants who responded on 12 March 2009,⁴ Germain Katanga's Defence having filed its response on 19 March 2009.⁵ On 23 March 2009, in accordance with rule 118(3) of the Rules, the Chamber held a public hearing during which the parties set out their submissions.⁶ At this hearing Germain Katanga's Defence stated, as it had in its written submissions⁷ that it intended to adopt a realistic and pragmatic position.⁸

4. In this regard, it essentially stated that in the absence of any facility enabling release under judicial supervision in the Netherlands or a neighbouring State to be considered, it "sees no practical purpose served in applying for the provisional release of [the accused] at this time".⁹ It therefore requested the Chamber to invite the Registrar to resume any negotiations with the Netherlands and the neighbouring States which might have already been entered into by the Court in order to encourage these States, and the Host State in particular, to cooperate fully in finding a solution in respect of present and future applications for provisional release.¹⁰

³ *Décision aux fins de recueillir les observations des 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.

⁴ Legal Representatives of the Victims, "*Observations des représentants légaux de victimes sur la détention préventive de M. Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve)*", 12 March 2009, ICC-01/04-01/07-950; ⁴ Legal Representatives of Victims a/0333/07 and a/0110/08, "*Observations des victimes a/0333/07 et a/0110/08 sur la détention de Germain Katanga (Règle 118-2 du Règlement de procédure et de preuve)*", 12 March 2009, ICC-01/04-01/07-951; Office of the Prosecutor, "*Prosecution's Observations on the Review of the Pre-Trial Detention of Germain Katanga*" 12 March 2009, ICC-01/04-01/07-952-Conf-Exp and ICC-01/04-01/07-953 (public redacted version); Legal Representatives of Victims a/0330/07 and a/0331/07, "*Observations des représentants légaux des victimes a/0330/07 et a/0331/07 sur la détention de Germain Katanga (Règle 118-2)*", 12 March 2009, ICC-01/04-01/07-955.

⁵ Germain Katanga's Defence Team, "*Defence Observations on the Detention of Mr Germain Katanga*", 19 March 2009, ICC-01/04-01/07-967-Conf-Exp and ICC-01/04-01/07-970 (public redacted version).

⁶ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009.

⁷ ICC-01/04-01/07-967-Conf-Exp, para. 6.

⁸ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 19, lines 13 and 14, p. 19, line 21 and p. 27, line 21.

⁹ ICC-01/04-01/07-967-Conf-Exp, para. 6; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 27, lines 18 and 19.

¹⁰ ICC-01/04-01/07-967-Conf-Exp, paras. 6 and 15; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 19, lines 22 to 25, and p. 20 lines 1 to 11; p. 20, lines 15 to 25 and p. 21 lines 1 to 3, p. 25, lines 15 to 25, p. 26 lines 1 to 25 and p. 27, lines 1 to 10.

5. At the hearing, the Chamber requested that the Registrar's representatives provide it with a report on the ongoing or previous negotiations with the Host State to make facilities available to a person who has been granted interim release to enable him or her to be accommodated outside of a prison facility.¹¹ The Registrar replied¹² on 30 March 2009, stating that in June and July 2008, on the basis of article 87 of the Statute, she had in fact held general discussions with the Dutch authorities as a result of the specific situation arising from the decision to stay proceedings in the Lubanga case.¹³ She stated that these discussions did not enable an agreement to be reached in favour of suitable facilities being made available to the Court for the accommodation of suspects or accused persons released in the Netherlands, as the Dutch authorities do consider themselves bound only by the combined provisions of regulation 51 of the *Regulations of the Court* and article 47 of the Headquarters Agreement between the Court and the Host State. According to the Registrar, the Host State views its role, which is of a diplomatic and logistical nature, confined to liaising with embassies of receiving States in order to facilitate the process for transferring a person who has been granted interim release.

6. The Registrar explained that she does not plan to resume these discussions because at present there is nothing to indicate that the Host State's position may change.¹⁴ Moreover, she reiterated that she had initiated these discussions, and emphasised that no legal provision provides for or requires her to take such action.¹⁵ She emphasised that only in relation to interim release should observations be sought from the Host State in accordance with the aforementioned regulation 51.

¹¹ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 30, lines 19 to 25, p. 31 lines 1 to 6.

¹² The Registry, "*Rapport du Greffier en réponse à l'ordre oral de la Chambre du 23 mars 2009*", ICC-01/04-01/07-1009-Conf.

¹³ ICC-01/04-01/07-1009-Conf, paras. 1 and 2.

¹⁴ *Ibid.*, para. 8.

¹⁵ *Ibid.*, para. 9.

7. In his oral submission, the Prosecutor argued that the Court could not exceed its mandate and could not oblige the Registrar to resume negotiations on this matter.¹⁶

8. As recalled by the Chamber during the hearing,¹⁷ Germain Katanga's Defence deliberately made a very general request. The Defence made it clear that it was not making an application for interim release,¹⁸ that it had "come relatively empty-handed before the Court"¹⁹ and that its was confining itself to seeking a pragmatic solution to a problem which goes beyond Germain Katanga's case alone and which concerns a large number of persons who could also be brought before the Court.²⁰

9. As interesting as these observations may be, the Chamber does not, however, consider that it can request the Registry to resume negotiations since in this matter, the scope of the suggestions is purely of a general nature and involves the Court as a whole as well as its policy towards the Host State. In the Chamber's opinion, it would be a different matter if discussions had been entered into with a State expressly designated by an accused person as a potential receiving State as part of a clearly formulated application for interim release. However, such discussions could be initiated only if a minimum amount of information was first obtained by the Defence and proving, where appropriate, that the applicant has ties with the relevant country, that he or she can provide guarantees to appear or that the requested State does not object in principle to receiving him or her on its territory, even on a temporary basis.

¹⁶ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 7, lines 7 to 18 and p. 30 lines 3 to 13.

¹⁷ *Ibid.*, p. 22, lines 15 to 25, to p. 25, lines 1-8.

¹⁸ ICC-01/04-01/07-967-Conf-Exp, para. 6; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 27, lines 18 to 19.

¹⁹ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 28, lines 21 to 22.

²⁰ *Ibid.*, p. 27, lines 19 to 23.

II. Third review by the Chamber of the *Decision on the conditions of detention of Germain Katanga*

10. Pursuant to the Appeals Chamber Judgment of 13 February 2007,²¹ 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

11. 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.

12. In the view of Germain Katanga's Defence, the argument in favour of continued detention advanced by the Prosecutor and the Legal Representatives of the Victims is of a general nature,²² is based on unverified allegations²³ and does not refer in sufficient detail to the potential consequences that the provisional release of the accused could have.²⁴ The Defence therefore disputes the influence that the accused is alleged to have retained in Ituri and his ability to mobilise crowds of "fanatics".²⁵ Similarly, it reiterated that the allegation that the accused was involved in the clashes which took place in, *inter alia*, Bogoro in September and October 2008 has not been demonstrated. It further argues that there is no evidence that Germain Katanga has threatened witnesses and victims.²⁶

²¹ ICC-01/04-01/06-824, para. 120.

²² ICC-01/04-01/07-967-Conf-Exp, para. 7.

²³ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 21 lines 14 to 18.

²⁴ ICC-01/04-01/07-967-Conf-Exp, para. 7.

²⁵ *Ibid.*, para. 8.

²⁶ *Ibid.*, paras 10 and 11.

13. 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. The situation in the DRC, and in Ituri in particular, remains unstable and, under such circumstances, releasing the accused would only compromise the safety of the victims and witnesses whose identity has been disclosed, and would thus impede the smooth running of the proceedings. Furthermore, the guarantees that the accused will appear if released, whether in the DRC or the Netherlands, currently remain insufficient, given the seriousness of the crimes for which he will have to answer and the length of the sentences he may incur. In this respect, the Chamber has already indicated that the seriousness of the crimes cannot in itself warrant release being denied, but it must again recall that, although there are other assessment criteria, this is one which cannot be underestimated. Moreover, the proximity to the commencement of the hearings on the merits, scheduled for 24 September 2009,²⁷ makes Germain Katanga's continued detention all the more necessary.

14. [REDACTED].²⁸

15. 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

16. 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

²⁷ *Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve)*, 27 March 2009, ICC-01/04-01/07-999.

²⁸ [REDACTED].

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.

17. 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.²⁹ 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.

18. In this case, Germain Katanga's Defence itself stated that it does not intend to argue that there were inexcusable delays by the Prosecutor in the conduct of the present proceedings.³⁰ This point of view is shared by the Prosecutor³¹ and the Legal Representatives of the Victims.³² In the Chamber's opinion, 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,

²⁹ 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.

³⁰ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 19, lines 19 to 21.

³¹ 01/04-01/07-952-Conf-Exp, para. 19.

³² ICC-01/04-01/07-950, para. 14; ICC-01/04-01/07-951, p. 6; ICC-01/04-01/07-955, para. 9.

The Chamber **REJECTS** Germain Katanga's request and **DECIDES** that he shall remain in detention.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Fumiko Saiga

Dated this 6 April 2009

At The Hague, The Netherlands