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No.: ICC-01/04-01/07

Date: 21 July 2009

TRIAL CHAMBER II

Before: Judge Bruno Cotte , Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

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

Public

**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**

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 Eric 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
 Prof 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 Mbuyu Anjelani

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparation**

**The Office of Public Counsel for
 Victims**

Ms Paolina Massida

**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 Backmann

**Victims Participation and Reparations
 Section**

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.

BACKGROUND

1. On 2 July 2007, the Pre-Trial Chamber issued the "Warrant of Arrest for Germain Katanga."¹
2. Germain Katanga was arrested by the Congolese authorities and surrendered to the officials of the Court on 17 October 2007. He was transferred to the Detention Centre of the Court in The Hague on the same day. On 18 October 2007 the Pre-Trial Chamber 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 2008³. On 21 April 2008 the Single Judge issued the "Decision on the conditions of Pre-Trial Detention of Germain Katanga,"⁴ in which she considered that Germain Katanga be remanded in custody on the grounds that the condition set forth in article 58(1)(a) of the Rome Statute ("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. The Single Judge further held that the condition set out in article 58(1)(b)(ii) of the Statute continued to be fulfilled; Germain Katanga's detention was necessary in order to ensure that he would not obstruct the investigation or the Court

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

proceedings.⁵ It was also considered that Germain Katanga still maintains a large degree of influence on the members of the *Forces de résistance partriotiques en Ituri* ("FRPI").⁶

4. The decision on the first review of Germain Katanga's pre-trial detention pursuant to rule 118(2) of the Rules was issued on 18 August 2008.⁷ His continued detention was justified by the fact that, in the Chamber's view, there had not been any material change of circumstances in the situation forming the basis of the initial detention of Germain Katanga to justify his release.⁸
5. The Chamber 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.
6. On 5 March 2009¹⁰, mindful of its duty 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 and asked the parties to submit their observations. The parties replied by 12 March 2009¹¹; the Defence for

⁵ "Decision on the Conditions of the Pre-Trial Detention of Germain Katanga", 21 April 2008, ICC-01/01-04/07-426, 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 "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

¹¹ "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; "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; "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); "Observations des représentants légaux des victimes a/0330/07 and a/0331/07 sur la détention de Germain Katanga (Règle 118-2)", 12 March 2009, ICC-01/04-01/07-955

Germain Katanga filed its submissions on 19 March 2009.¹² Pursuant to rule 118(3) of the Rules, the Chamber convened a public hearing on 23 March 2009 during which it heard the parties' oral submissions.¹³ The Defence for Germain Katanga did not seek Mr. Katanga'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 the provisional release of Mr. Katanga by accepting him on its territory.¹⁵

7. The Chamber issued its decision on the third review of Germain Katanga's pre-trial detention on 6 April 2009¹⁶. It held, having regard to the judgment of the Appeals Chamber of 13 February 2007¹⁷, that the circumstances had not changed noticeably from those prevailing at the time of the initial decision on the pre-trial detention of Germain Katanga, so as to justify the interim release of the accused.¹⁸

FOURTH REVIEW OF THE DECISION ON THE CONDITIONS OF DETENTION OF GERMAIN KATANGA

8. On 29 June 2009 the Chamber issued its *Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2)*¹⁹ in which it requested the Office of the Prosecutor ("Prosecution") and

¹² "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)

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

¹⁴ 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 "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

¹⁸ ICC-01/04-01/07-1043, par. 13

¹⁹ "Décision aux fins de recueillir les observations des participants sur la détention de Germain Katanga (Règle 118-2)", 29 June 2009, ICC-01/04-01-07-1252

the legal representatives of the victims to file their observations on the detention of Germain Katanga no later than 4 p.m. on 6 July 2009. In the same decision the Chamber requested the Defence for Germain Katanga to file its submissions on the matter no later than 4 p.m. on 13 July 2009.

9. Pursuant to the Chamber's decision of 29 June 2009, the legal representatives of victims submitted their observations on 6 July 2009.²⁰ The same day, the Prosecution filed its observations on the pre-trial detention of Germain Katanga.²¹ The Defence filed its submissions on 13 July 2009.²²

10. Having regard to the decision of the Appeals Chamber of 13 February 2007²³, the Chamber carries out the fourth review of the pre-trial detention of the accused pursuant to article 60(3) of the Statute and rule 118(2) of the Rules, as well as article 60(4) of the Statute.

11. The Defence for Germain Katanga does not seek the provisional release of the accused.²⁴ The Defence states that "the position of Germain Katanga remains the same as stated in previous filings"²⁵.

²⁰ "Observations des Représentants légaux sur la détention de Germain Katanga (Règle 118-2)", 6 July 2009, ICC-01/04-01/07-1267; "Observations conjointes des représentants légaux des victimes représentées par Me Jean MULAMBA, Me Carine BAPITA, Me Hervé DIAKIESE sur la détention préventive de Germain KATANGA (règle 118-2)", 6 July 2009, ICC-01/04-01/07-1273

²¹ "Prosecution's Observations on the Review of the Pre-Trial Detention of Germain KATANGA", 6 July 2009, ICC-01/04-01/07-1271-Conf-Exp and ICC-01/04-01/07-1272 (public redacted version)

²² "Defence Observations on the Detention of Mr. Germain Katanga", 13 July 2009, ICC-01/04-01/07-1298

²³ ICC-01/04-01/06-824, par. 120

²⁴ ICC-01/04-01/07-1298, par. 1

²⁵ Idem

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

12. By virtue of article 60(3) of the Statute, the Chamber may, upon reviewing a ruling on the interim release, modify its ruling if it is satisfied that a change in circumstances so requires.
13. The Prosecution submits that there has not been any substantial change in circumstances with respect to any of the conditions set out in article 58(1)²⁶ of the Statute since the Chamber's decision on the third review of Mr. Katanga's pre-trial detention. Further, the Prosecution submits that Germain Katanga's former senior position in the FRPI and the FARDC imply the existence of networks and loyalties that could facilitate his flight from the jurisdiction of the Court.²⁷ According to the Prosecution, the extension of pre-trial detention of Germain Katanga is further required in order to ensure that the accused does not endanger the safety of victims or witnesses or obstruct the court proceedings, especially given the current volatile situation in the DRC²⁸. Supporters of Mr. Katanga have, according to the Prosecution, the capability to interfere with Prosecution witnesses and their families, as has already happened in the past, allegedly pursuant to direct instructions of the accused.²⁹
14. The legal representatives for victims have expressed similar concerns as the Prosecution by submitting that, especially given the declarations of the Congolese delegation at the hearing regarding Mr. Katanga's challenge of the admissibility of the case, in which the DRC declared that

²⁶ ICC-01/04-01/07-1272, par. 7

²⁷ Ibid., par. 8

²⁸ Ibid., par. 9

²⁹ Ibid., par. 12

³¹ ICC-01/04-01/07-1267, par. 9

it was not capable of guaranteeing that Mr. Katanga would return to the Court in case of an eventual interim release.³¹

15. The legal representatives are further concerned that a release of the accused could seriously put the security of witnesses and victims in danger.³² In light of these observations, which were also shared by the other legal representatives of the victims in the case, it was further brought to the Chamber's attention that the imminence of the start of the trial would justify keeping Germain Katanga in detention³³, especially in the absence of any guarantees put forward by the Defence for Germain Katanga that he would appear before the court if he were to be released now.³⁴

16. The Chamber considers that the circumstances of the case, forming the basis of the fourth review of the pre-trial detention of Germain Katanga, have not changed noticeably since the last review of the pre-trial detention of the accused and the Chamber's decision to extend his provisional custody. The Chamber is of the view that the situation in the Ituri district of the DRC remains one of insecurity and instability. Accordingly, an interim release of the accused could pose a potential risk to the security of victims and witnesses whose identities have already been communicated to the Defence and threaten to obstruct and endanger the court proceedings.

17. In light of the gravity of the charges confirmed against the accused, the Chamber is further of the view that, in the absence of sufficient guarantees that he will appear before the Court for the start of the trial,

³² Ibid., par. 10

³³ ICC-01/04-01/07-1273, par. 8

³⁴ Ibid., par. 9

there exists a real risk that the accused may extract himself from the jurisdiction of the Court, if he were to be released.

18. As the Chamber has previously stated³⁵, it considers that the imminence of the start of the trial renders the provisional detention of the accused all the more necessary, given the abovementioned.

19. For these reasons, it is the Chamber's view that the circumstances have not changed within the meaning of article 60(2) and (3) of the Statute.

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

20. 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 inexcusable delay by the Prosecutor". In the Appeals Chamber's judgment of 13 February 2007, 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"³⁶.

21. In order to determine whether the period of Germain Katanga's pre-trial detention is excessive or not, the Chamber has to take into consideration all the circumstances of the case.

22. The Prosecution submits that the duration of the pre-trial detention of Germain Katanga is not unreasonable³⁷, given that Mr. Katanga has to date been detained for approximately 20 months and that the start of the trial is scheduled for 24 September 2009.³⁸

³⁵ ICC-01/04-01/07-1043, par. 13

³⁶ ICC-01/04-01/07-824, par. 122

³⁷ ICC-01/04-01/07-1272, par. 14

³⁸ Ibid., par. 15

23. The legal representatives for victims advance that in their estimation, there has not been any unjustified delay attributable to the Prosecutor in the present case.³⁹

24. In the Trial Chamber's view, Germain Katanga has not been detained for an unreasonable period of time prior to trial. In reaching this conclusion, the Chamber has had due regard to all of the procedural steps thus far involved in the proceedings as well as the fact that none of the parties to the present case allege that Mr. Katanga's pre-trial detention has been of an unreasonable duration. The Chamber further considers that there has not been an inexcusable delay by the Prosecutor in the case against Mr. Katanga within the meaning of article 60(4) of the Statute.

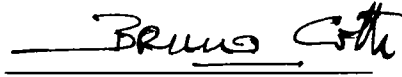
FOR THESE REASONS,

THE CHAMBER

DECIDES that Germain Katanga shall remain in detention.

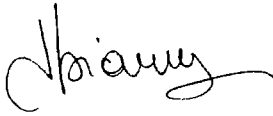
³⁹ ICC-01/04-01/07-1267, par. 14

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



M. le juge Bruno Cotte

Juge président



Mme la juge Fatoumata Dembele Diarra



M. le juge Hans-Peter Kaul

Dated this 21 July 2009

At The Hague, the Netherlands