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PRE-TRIAL CHAMBER I

Before : Judge Sylvia Steiner, Single Judge

Registrar : Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
*THE PROSECUTOR v. GERMAIN KATANGA***

Public

**Response of the Defence to the Prosecution's Observations on the Pre-Trial
Detention of Mr. Germain KATANGA, pursuant to the Statute and the Rules**

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer
Mrs Florence Darques-Lane, Legal Adviser

Defence

Mr David Hooper
Mr Göran Sluiter
Ms Caroline Buisman

The Defence respectfully presents its response to the observations on the pre-trial detention of Mr. Germain KATANGA (“KATANGA”) at the seat of the International Criminal Court (“Court”), pursuant to the Rome Statute (“Statute”) and the Rules of Procedure and Evidence (“Rules”).

Procedural Background

1. On 24 January 2008, the Single Judge of Pre-Trial Chamber I (“PTC I”) requested observations from the Office of the Prosecutor (“Prosecution”),¹ referring to the considerations that “there is a distinct and independent obligation imposed upon the Pre-Trial Chamber to ensure that a person is not detained for an unreasonable period prior to trial under Article 60(4) of the Statute” and that there is an additional obligation upon the Pre-Trial Chamber to review the overall period of detention of the suspect under Article 60(4) of the Statute.²
2. On 31 January 2008, the Prosecution presented its observations on the pre-trial detention of KATANGA.³ The Defence hereby responds to the Prosecution’s observations.

General observations on pre-trial detention

3. Pre-trial detention should, in light of the presumption of innocence, be considered as highly exceptional and only be ordered and continued with the greatest caution. Articles 58, 59 and 60 of the Statute as well as Rule 118 of the Rules testify to this and represent a clear rupture in relation to the law and practice of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), where detention appeared to be regarded as the rule and release as the exception.⁴

¹ ICC-01/04-01/07-163.

² ICC-01/04-01/07-163, pages 2-3, citing the Appeals Chamber at ICC-01/04-01/06-824, para. 98.

³ ICC-01/04-01/07-174.

⁴ Rule 65 (B) of the ICTY and ICTR Rules of Procedure and Evidence stipulated for a very long period of time (until 1999 for the ICTY and 2002 for the ICTR respectively), in relevant part, as follows:

“(A) Once detained, an accused may not be released except upon an order of a Trial Chamber.

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.”

In *Blaskić* the ICTY Trial Chamber unfortunately held that:

“Both the letter of this text and the spirit of the Statute of the International Tribunal require that the legal principle is detention of the accused and that release is the exception [...]” (*Prosecutor v. Blaskić*, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, 20 December 1996).

4. Should there be any doubt as to the interpretation of the aforementioned provisions, the Defence calls in attention the effect of Article 21 (3) of the Statute, which provides as follows:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

In the *Lubanga* case, the Appeals Chamber of the Court ruled that:

Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.⁵

5. It follows that the assessment of the pre-trial detention law and practice at the ICC has to be in full conformity with internationally protected human rights. In this respect, the Defence refers to relevant provisions in international human rights treaties, where the exceptional nature of pre-trial detention has been clearly set out.⁶
6. Case law by human rights courts has repeatedly emphasised that provisional release is the rule and pre-trial detention the exception; furthermore, the grounds for pre-trial detention are exhaustive and must be interpreted strictly.⁷ It has also been emphasised that the burden of proof in determining whether the conditions for detention are met lies with the Prosecution.⁸

⁵ ICC-01/04-01/06-772, para. 37.

⁶ Article 9(3) of the International Covenant on Civil and Political Rights (“ICCPR”) states that “(i)t shall not be the general rule that persons awaiting trial shall be detained in custody (...)”. The European Convention on Human Rights (“ECHR”) has a similar regime of pre-trial detention, set out in Article 5:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[...]

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[...]

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be [...] entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

⁷ See ECtHR *Smirnova v. Russia*, Judgment, 24 July 2003, paras 58 and 59; and ECtHR *McKay v. the United Kingdom*, Judgment, 3 October 2006, paras 30 and 41.

⁸ See ECtHR *Yankov v. Bulgaria*, Judgment, 11 December 2003, par. 171.

7. In the assessment of the basis for the continuation of detention of a person at the seat of the ICC, in the application of Article 60 (3) and (4), a three-pronged test must be met:

- there must be sufficient evidence justifying the continuation of detention;
- there must be a valid ground justifying the continuation of detention;
- the continuation of detention must not amount to an unreasonable period prior to trial.

The burden of proof lies with the Prosecutor, to convince the judicial authorities that these conditions continue to be met. At each periodic review, it is a vital element of the presumption of innocence and the right not to be subjected to arbitrary detention that the Prosecution continues to meet its burden in relation to all three prongs of the test.⁹

8. The Defence submits that the Prosecutor has not lived up to his burden of proof in the context of this periodic review. The Prosecutor's observations submitted 31 January are primarily focused on prong No 3 of the test. The Defence takes note of the language in footnote 8 of the Prosecutor's observations:

“The Prosecution submits that all of the conditions of Article 58(1) of the Statute, which was the basis for the issuance of the arrest warrant, continue to be met.”¹⁰

This mere sentence in the footnote falls short of meeting the burden of proof, especially in light of changing circumstances, which will be further addressed below.

9. Since the Prosecutor has not met the burden in relation to the evidentiary basis and the grounds justifying continuing detention of Mr. KATANGA, the Defence already objects on that basis to the continuation of the detention.

10. The Defence contests the submissions by the Prosecutor that:

“there is no automatic obligation for PTC I to review KATANGA's pre-trial detention every 120 days, pursuant to Rule 118, if the person has not made an initial request for interim release.”

Both PTC I and the Appeals Chamber erred in the *Lubanga* case in their interpretation of Article 60 (3) of the Statute and Rule 118.¹¹ The Appeals Chamber, confirming the views of PTC I, ruled that:

The ruling that the Pre-Trial Chamber is required to review pursuant to article 60 (3) of the Statute is the determination that it has made in response to an application for interim release pending trial under article 60 (2). This is clear from the order of the statutory provisions. As the Pre-Trial Chamber correctly pointed out, both article 60 (3) and rule 118 (2), which require

⁹ See ECtHR *Ilijkov v. Bulgaria* (no. 33977/96, 26 July 2001), para. 61.

¹⁰ ICC-01/04-01/07-174, p. 3.

¹¹ See ICC-01/04-01/06-586, p. 4 and ICC-01/04-01/06-824, paras. 94-100.

the Pre-Trial Chamber to review its ruling on release or detention, appear directly after provisions which provide for applications for interim release by person subject to a warrant of arrest. It is therefore logical to interpret the review under article 60 (3) to follow from, and be dependent upon, a ruling on a previous application by the detained person for interim release.¹²

This is problematic from several perspectives.

11. The Appeals Chamber has erred in using methods of interpretation. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, a treaty provision must be interpreted in accordance with its ordinary meaning;¹³ a logical interpretation, as the Appeals Chamber does, can thus not be resorted to in first place, but is subject to interpreting the provision in accordance with its ordinary meaning.
12. In respect of the provision's ordinary meaning -and bearing in mind its object and purpose- the Defence has very little doubt. The ruling on release or detention should be understood in case of detention as the ruling resulting in the legal title underlying the detention. The fact that this provision is positioned after a provision on application for interim release has no effect for its interpretation.
13. In view of the Defence, Article 60 sets out in relation to detention on remand a twofold protection. First, there is a positive obligation for judicial authorities to periodically review an individual's detention, irrespective of the individual's position in this regard. Such a periodic review is indispensable because of the highly invasive nature of detention on the individual's right to liberty, the fact that detained individuals may not always look carefully after their own interests, and the interest of society in reducing the number of detained persons as much as possible -also on account of enormous costs associated with detention-. Second, Article 60 protects each individual's right to lodge at any time an application for a writ of habeas corpus, which is imperative from a human rights perspective.
14. The Defence is convinced that the drafters had this twofold protection in mind when they drew up Article 60 and Rule 118. The drafting history of Rule 118, for example, reveals a debate among negotiating states in relation to determining the exact period for review.¹⁴ Certain states were concerned with the length of this period, but accepted it, because the provision did not preclude reviews to take place more often.¹⁵ This was thus clearly regarded as the absolute minimum, in which the fact that negotiating

¹² ICC-01/04-01/06-824, para. 94.

¹³ Vienna Convention on the Law of Treaties (1969) (Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, page 331).

¹⁴ H. FRIMAN, 'Restriction and Deprivation of Liberty', in Roy S. Lee and others (eds.), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers 2001), pages. 517 - 518.

¹⁵ *Id.*, page 518.

States did not wish to burden the Court with procedures more than absolutely necessary played a significant role. Had it been the intention to make the review dependent upon an application for interim release, a) the drafters would have provided so explicitly, and b) this would have in all likelihood resulted in a more frequent periodic review than is currently the case.

15. More concretely, during the drafting history of Article 60 and Rule 118 there has never been mention of a periodic review dependent upon an application for review. What was discussed, for example, in the drafting of Rule 118 was the 'issue of deprivation of liberty' in a broad sense.¹⁶
16. Support for this twofold supervisory role of the PTC in relation to detention on remand *-proprio motu* periodically and at the request of the defendant- can furthermore be found in international human rights law. In very concrete terms, Principle 39 of the 'United Nations Body of Principles for the Protection of all persons under any form of detention or imprisonment' obliges authorities to keep the necessity of detention under review.¹⁷ This can only be effectuated by a different interpretation of Article 60 (3) than the one offered by the Appeals Chamber.
17. Further support for autonomous period review can be found in relevant provisions of national jurisdictions. In The Netherlands, for example, autonomous periodic review of detention is prescribed by law, alongside the possibility for each individual to challenge at all times his or her detention.¹⁸ Similarly, in France there are both a right to review and the obligation for courts to periodically review the basis for continuing detention, as provided for in Articles 145-2 and 147 of the French Code of Criminal Procedure.
18. The Appeals Chamber interpretation of Article 60 (3) is furthermore inconsistent with Article 67 (1) (i) of the Statute, prohibiting a reversal of the burden of proof:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(...)

(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

¹⁶ Ibid.

¹⁷ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment Adopted by General Assembly Resolution 43/173 of 9 December 1988.

¹⁸ See Articles 66, 69 and 80 of the Dutch Code of Criminal Procedure. The Defence observes that pursuant to these provisions, the detained person has to be heard at each periodic review, which is not provided for in the ICC context. In this regard, the ICC procedure is already less burdensome.

As was already mentioned,¹⁹ it is consistent jurisprudence of international human rights courts that detention is exceptional and the burden of proof lies with the Prosecution. When review of detention is made dependent upon an application for early release, the burden of proof in relation to pre-trial detention is *de facto* put upon the defendant, because he bears the initial –and possibly also continuing– burden of proving –via an application for interim release– that detention may not be continued. This violates Article 67 (1) (i) of the Statute.

19. The Defence also expresses the concern that the approach adopted by the Appeals Chamber fails to take into account the fact that circumstances may change and that this in itself requires an independent and full review of detention. An ICTY Trial Chamber in this regard ruled as follows:

Whether there is reasonable suspicion and whether the detention could reasonably be deemed necessary should, according to the European Commission of Human Rights, be judged by the circumstances at the moment the decision was taken to detain the person in question, and not by the facts that are known at the moment the complaint is examined. *Stögmüller v. Austria*, Y.B. VII, 168, 188 (1964), citing *Nielsen v. Denmark*, unpublished partial decision 343/5 at 22. However, "the necessity also has to exist subsequently, and will then have to be judged by the circumstances and facts at the moment of the judicial review in order to permit a decision on whether . . . the person is to be provisionally released". P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 263 (1990). As the Court stated, "the persistence of such [reasonable] suspicions is a condition *sine qua non* for the validity of the continued detention of the person concerned" *Stögmüller v. Austria*, at 40; see also *Fox, Campbell and Hartley v. U.K.*, 182 Eur. Ct. H.R. (ser. A) at 16 (1990). Thus, the review of the continued necessity to detain should be judged according to the circumstances and facts as known at the time of review.²⁰

The Defence sees no other possibility for an ICC Chamber to adequately supervise whether circumstances may have changed in relation to detention than by conducting autonomous and full periodic reviews.

20. The Defence is seriously disturbed by the interpretation offered by the Appeals Chamber of Article 60 (3). It is reminiscent of the law and practice which have long time plagued the ICTY and ICTR, according to which detention is the rule and release the exception. The Appeals Chamber seems to have taken an avenue leading in that direction, on grounds which cannot support it and are in direct violation of the ICC's

¹⁹ Supra footnotes 7 and 8.

²⁰ *Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on Motion for Provisional Release Filed by the Accused Zejnir Delalic, 25 September 1996, para. 24.

applicable law. Since the ICC Statute has clearly rejected a binding rule of *stare decisis*,²¹ the PTC is requested to depart from that ruling.

21. The Defence therefore requests the Pre-Trial Chamber to conduct the review of Article 60 (3) in accordance with its ordinary meaning, its object and purpose as intended by the drafters, in full conformity with international human rights law and taking into account the obligation set out in Article 67 (1) (i) and the possibility of changing circumstances.
22. In the alternative, it is requested that these observations are considered as an application resulting in a decision as meant by the Appeals Chamber in para. 98 of its decision in the *Lubanga* case, thus an application of interim release.²² As a result, the Defence expects, in this alternative, full and independent review with burden of proof on the Prosecutor, to be conducted each 120 days after the issuance of the Trial Chamber's decision on this matter.

Evidentiary Basis

23. The evidentiary standard justifying continuation of detention remains the one set out in Article 58 (1) (a):

“there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.

This standard is consistent with the one applied by international human rights courts, namely the suspicion of having committed a concrete offence.²³

24. The Prosecutor has not submitted information as to which evidence and which legal qualifications justify in his opinion *continuation* of the detention. Both the presumption of innocence and considerations of legal certainty require that the Defence is informed in sufficient detail of the evidence justifying continuation of detention, even if that evidence would to a large degree be identical to the evidence underlying the arrest warrant. In the present circumstances, the Defence considers itself not in a position to offer observations on the first prong of the aforementioned test.

Grounds justifying detention

²¹ See Article 21 (2) of the ICC Statute and Commentary thereto by Margaret McAuliffe deGuzman, in Otto Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft 1999), page 445.

²² ICC-01/04-01/06-824.

²³ ECtHR, *Guzzardi v. Italy*, Judgement of 6 November 1980, para. 102.

25. In the Warrant of arrest for Germain KATANGA, issued 2 July 2007, PTC I held:

“CONSIDERING that there are reasonable grounds to believe that the arrest of Germain Katanga appears necessary at this stage to ensure his appearance before the Court within the meaning of articles 58(1)(b)(i) and (ii) of the Statute”,²⁴

In the Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, made public 5 November 2007, PTC I ruled in relation to the grounds justifying arrest and detention as follows:

“62. According to the Prosecution Application, Germain Katanga is currently in custody in the Centre Pénitentiaire et de Rééducation de Kinshasa ("CPRK"). As the Chamber has previously indicated, detention "prevents [an individual] from willingly and voluntarily appearing before the Court." Therefore, the arrest of Germain Katanga appears necessary at this stage to ensure his appearance at trial pursuant to article 58(1)(b)(i) of the Statute.

63. Although the Chamber must be satisfied of only one of the conditions set forth in article 58(1)(b) of the Statute, the Chamber further notes that according to the Prosecution Application, Germain Katanga also has the means to obstruct or endanger the investigation within the meaning of article 58(1)(b)(ii) of the Statute. In this regard, the Prosecution indicates, and the Registry has confirmed, that the conditions in the CPRK do not prevent detainees from speaking with outsiders, including by means of unmonitored phone calls. This, according to the Prosecution, provides Germain Katanga with the opportunity to, inter alia, influence potential witnesses or to arrange false testimonies with potential witnesses who are former members of the FRPI. Furthermore, according to the Prosecution, investigations by MONUC on the crimes allegedly committed in Bogoro have already been obstructed by members of the FRPI who were under the command of Germain Katanga.

64. Accordingly, in the view of the Chamber, on the basis of the evidence and information contained in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, and without prejudice to any subsequent determination under article 60 of the Statute and rule 119 of the Rules of Procedure and Evidence, the arrest of Germain Katanga appears necessary pursuant to article 58(1)(b)(i) and (ii) of the Statute, both to ensure his appearance at trial and to ensure that he does not obstruct or endanger the investigation or the court proceedings.”²⁵

26. The arrest and detention of Mr. KATANGA is thus currently based on the grounds set out in Article 58 (1) (b) (i) and (ii). Both grounds are acceptable from a human rights perspective and tend to be referred to as the risk that the accused will fail to appear for trial²⁶ and the risk that the accused, if released, would take action to prejudice the administration of justice²⁷. Although the Prosecutor has not lived up to his burden of

²⁴ ICC-01/04-01/07-1-US-tENG, page 6.

²⁵ ICC-01/04-01/07-55.

²⁶ See ECtHR, *Stögmüller v. Austria*, Judgment of 10 November 1969, Series A no. 9, para. 15.

²⁷ See ECtHR, *Wemhoff*, Judgment of 26 June 1968, para. 14).

proof in respect of continuing applicability of both grounds, they warrant the following observations from the Defence at this stage.

Article 58 (1) (b) (ii)

27. The Defence objects to the use of Article 58 (1) (b) (ii) as a ground justifying detention of Mr. KATANGA, on both factual and legal grounds.
28. In its initial decision the PTC erred in using the situation in a Congolese prison as a factual ground in favour of the applicability of Article 58 (1) (b) (ii) of the Statute. The very purpose of the ICC arrest warrant was to remove him from Congolese detention to detention at the seat of the ICC. Hence, the conditions within Congolese detention facilities have no relevance at the time of issuing the warrant and certainly now, when Mr. KATANGA is detained in an entirely different environment.
29. The PTC also erred in adopting an evidentiary standard of ‘opportunity’, instead of ‘risk’, in the application of Article 58 (1) (b) (ii). As grounds justifying detention must be interpreted strictly,²⁸ the *opportunity* to contact witnesses clearly falls short of a *risk* to interfere unduly with the administration of justice.
30. The Defence also has great difficulty with using the opportunity to contact witnesses against Mr. KATANGA, in light of his right to prepare his defence. Clearly, the Defence should be in a position to contact potential witnesses and seeing its ability to do so construed in some way as a ground justifying detention of Mr. KATANGA is puzzling.

Article 58 (1) (b) (i)

31. The Defence submits the question whether continuing detention of Mr. KATANGA is still necessary for ensuring his appearance at trial. In its Decision in respect of the application for the arrest warrant, PTC I held that:

According to the Prosecution Application, Germain Katanga is currently in custody in the Centre Pénitentiaire et de Rééducation de Kinshasa ("CPRK"). As the Chamber has previously indicated, detention "prevents [an individual] from willingly and voluntarily appearing before the Court." Therefore, the arrest of Germain Katanga appears necessary at this stage to ensure his appearance at trial pursuant to article 58(l)(b)(i) of the Statute.²⁹

²⁸ See supra note 7.

²⁹ ICC-01/04-01/07-55., para. 62.

No other factual basis was provided for meeting the ground set out in Article 58 (1) (b) (i). In his observations, the Prosecutor has –in a footnote- submitted that all conditions of Article 58 (1) at the time of the arrest warrant continue to be met.³⁰ He, apparently, has submitted this in the understanding that circumstances remain unchanged. But this is not the case, again underlining the need for autonomous periodic review of the detention.

32. Mr. KATANGA is no longer in detention in Congo, which indeed prevented him from willingly and voluntarily appearing before the Court. As things stand now, the Defence has no information as to what is at present the factual basis for meeting Article 58 (1) (b) (i). Mr. KATANGA –when released- is no longer prevented from willingly and voluntarily appearing before the Court. He is fully prepared to do so and also willing to meet any of the conditions set out in Rule 119, or any other condition the PTC deems fit to impose.
33. Bearing in mind the exceptional nature of pre-trial detention and the principles of subsidiarity and proportionality, the Defence proposes that alternatives are explored which would equally satisfy the objective of Article 58 (1) (b) (i).

Observations pursuant to Article 60 (4) of the Statute

34. The Defence wishes -again- to voice its fundamental objections to the interpretation of Article 60 (3) by the Appeals Chamber. It results here in the isolated application of Article 60 (4), which is incompatible with international human rights law. In *Smirnova v. Russia*, the ECtHR explicitly ruled that the three pronged test of evidence, grounds and duration form an integral, comprehensive and inseparable test.³¹ Separating the question of duration is in this light inappropriate. In fact, courts, when dealing with periodic review of detention, should be able to make informed decisions in relation to ‘evidence, grounds, and duration’ and may only do so in assessing these matters jointly.
35. The Defence also wishes to indicate its objections against the test set out in Article 60 (4) of the Statute, which is not an issue at this stage, but may become so later on. The gist of Article 60 (4) is that it does only protect from unduly long detention, when this

³⁰ ICC-01/04-01/07-174, page 3.

³¹ Supra note 7, para. 56

is due to inexcusable delay by the Prosecutor. As has been acknowledged in doctrine, this is unsatisfactory.³²

36. The Defence submits in this respect, that this element, severely reducing the protection of Article 60 (4) of the Statute, is inconsistent with internationally protected human rights law and, pursuant to Article 21 (3) of the Statute, should remain without effect. There is no support in, for example, Article 5 (3) ECHR and relevant jurisprudence, for the proposition that the protection against unreasonable long detention is only offered when this is the fault of the prosecuting authorities.

37. On the contrary, when dealing with the right to a remedy in respect of human rights violations, there is relevant ICTR jurisprudence indicating that the attribution of fault is from the human rights perspective irrelevant. In *Barayagwiza*, the ICTR Appeals Chamber ruled, in relation to human rights violations suffered by the accused, that:

“First and foremost, this analysis focuses on the alleged violations of the Appellant’s rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant’s rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.”³³

38. The Defence disagrees with the Prosecutor in the calculation of the detention period of Mr. KATANGA. The Prosecutor appears to take as starting point the date of transfer of Mr. KATANGA from Congo to The Hague -18 October 2007.³⁴ The Defence does not deny that in this calculation we are not faced with an ‘unreasonable period’ of detention, in the sense of Article 60 (4).

39. However, the Defence submits that detention prior to transfer is of relevance and must be taken into account when it has been of benefit for subsequent proceedings. In this respect it must be noted that Article 60 (4) refers to ‘an unreasonable period prior to trial’, and does not qualify this in any way, as meaning detention at the seat of the Court.

³² Karim Khan, ‘Article 60’, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft 1999), page 780.

³³ ICTR, Decision, *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-I, A. Ch., 3 November 1999, para. 73.

³⁴ In footnote 9, the Prosecutor submits that to date KATANGA has been held for 106 days (ICC-01/04-01/07-174, page 3).

40. On the contrary, when dealing with the right to a remedy in respect of human rights violations, there is relevant ICTR jurisprudence indicating that the attribution of fault is from the human rights perspective irrelevant. In *Barayagwiza*, the ICTR Appeals Chamber ruled, in relation to human rights violations suffered by the accused, that:

The Defence submits that Mr. KATANGA has been detained since March 2005. This is a period of almost three years, and is normally the period in which a person must have been tried. Clearly, this amounts to an unreasonable period of detention, triggering the application of Article 60 (4) of the Statute.

Conclusion

41. The Defence respectfully submits:

in respect of Article 60 (3)

- a. that the PTC conducts a full and autonomous review of Mr. KATANGA's detention, with burden of proof on the Prosecutor in respect of evidence, grounds and duration justifying continuing detention,
- b. in the alternative that this response is considered as an application for interim release, triggering the protection of Article 60 (3) of the Statute, to which Mr. KATANGA is fully entitled,

in respect of the burden of proof

- c. that the Prosecutor has in this procedure failed to meet the burden of proof in relation to sufficient and detailed evidence and applicable grounds justifying continuing detention

in respect of grounds justifying detention

- d. that there is no proof for the applicability of the ground set out in Article 58 (1) (b) (ii) of the Statute
- e. that the ground set out in Article 58 (1) (b) (i) underlying the arrest warrant and detention of Mr. KATANGA until this day is no longer valid
- f. that the PTC seriously explores less intrusive alternatives ensuring Mr. KATANGA's appearance at trial

in respect of Article 60 (4)

- g. that the conduct of the Prosecutor has no relevance for assessing the reasonable nature of the pre-trial detention period
- h. that the relevant detention period of Mr. KATANGA's period is considerably longer than the period indicated by the Prosecutor, and is unreasonable.

42. The Defence requests an extension of time with a view to enabling it to fulfil its obligations pursuant to Regulation 23 (3).



Mr David Hooper, Defence Counsel

The 7th February 2008

At Den Haag, The Netherlands