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Date: **2 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

Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/07-01/04-1258-Conf-Exp)

Source: **Defence for Mr Germain Katanga**

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

The Office of the Prosecutor

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Mr David Hooper
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A. INTRODUCTION

1. The Defence for Germain Katanga ('the Defence') submits that Mr Germain Katanga ('the accused') was unlawfully arrested and detained by the authorities of the Democratic Republic of Congo ('the DRC') with a consequent flagrant breach of his human rights in international law and under the Statute of the ICC. It is submitted that these violations must be viewed in the light of the actions and omissions of the Office of the Prosecutor and the Registry, and in the context that this detention was in part at the behest and for the purposes of the International Criminal Court. The accused is entitled to an effective remedy for the violation of those rights.

2. In respect of appropriate relief the Defence submits that these circumstances have such an impact on the integrity of the process that the appropriate remedy is a stay or termination of the proceedings. Alternatively, the Defence submits that the accused is entitled to financial compensation for the breaches and/or alternatively, and only in the event of a conviction, that relief be reflected in a reduction of any sentence imposed.

3. The Defence was persuaded to file this motion having been appraised of all the documents, views of the DRC on the nature and course of the national proceedings as well as those of the Prosecutor on his knowledge of documents and interactions with the DRC, but especially those observations expressed on the 1st of June 2009[1]. The Defence received the written reasons for the Chamber's decision on admissibility, for which the hearing of the 1st June had been set, on 16th June 2009[2] and the unofficial translation of this decision into English on 25th June 2009. The latter was expedited at the request of the Defence.

4. This motion is filed confidential and *ex parte* due to the references to the confidential and *ex parte* Report of the Registrar on the execution of the warrant of arrest for Germain Katanga.[3] The Defence has sought the consent of the Registry with a view to the Chamber reclassifying this document, but has been informed that the Registry wishes to maintain the classification as "confidential - ex parte only available to the

[1] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009.
[2] ICC-01/04-01/07-1213, *Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)*, 16 June 2009.
[3] ICC-01/04-01/07-497-Conf-Exp, Report of the Registrar on the execution of the warrant of arrest for Germain Katanga pursuant to the "Decision on Request of the Defence of Germain Katanga to Issue an Order to the Registrar" issued on 19 May 2008, 22 May 2008 (classified as Confidential Ex parte only available to the Defence for Germain Katanga).

Defence for Germain Katanga". No reasons are provided. It adds that in its view 'it only belongs to the Chamber to decide on a reclassification of a document'. Defence sees no reason for the contents of this document to be concealed, especially from the Office of the Prosecutor, but also from the public. Indeed, it is in the public interest that the issues raised in relation to this document are dealt with transparently. The Defence respectfully requests the Chamber to reclassify it accordingly.

B. FACTUAL BACKGROUND

5. The facts underlying the violations of the rights of the accused can be conveniently divided into three periods:

> First, the initial and subsequent detention of the accused while not yet envisaged as an accused before the ICC.
> Secondly, the detention of the accused from the time he became a principal suspect in the case but before the issuance of an international warrant of arrest;
> Thirdly, from the time of the issuance of an international warrant of arrest on the 2nd July 2007 until the completion of this transfer to The Hague.

The last two phases involved the participation of organs of the ICC, thus giving continuity to the unlawfulness of the detention into the processes of the ICC.

1. First phase: initial arrest and subsequent detention of the accused

26 February 2005 onward.

6. On the 3rd March 2004, President Joseph Kabila referred the situation in the DRC to the International Criminal Court[4], stating that 'les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus […]'. The State thereby manifested its belief that it was not in a position to carry out investigations.

7. There is no evidence of intent on the part of the DRC to pursue the accused until 26th February 2005. On the contrary, arrangements were well advanced for the accused's appointment as a Brigadier General in the DRC armed forces. The accused had accepted the appointment, met with the President and been transferred to Kinshasa for

[4] Cf. ICC-01/04-01/07-196-Conf-AnxA1.

officer training. The only matter outstanding, following his nomination by Presidential decree, was his taking of the formal oath.

8. On 25th February 2005, radio and television broadcasts announced the killing that day of nine MONUC peacekeepers in Kafe. Kafe is north of Bunia and not associated with the accused. Kafe is not even marked on any of the maps annexed to the warrant of arrest for the accused before this court.[5]

9. The director of MONUC in the DRC called for the arrest of leaders of the FNI and FRPI, and in a later emission, the arrest of the leader of the UPC, on radio 'Okapi', the MONUC radio station in DRC. At this time, there were independent groups. The FNI and FRPI had developed separately and the UPC was an opponent.

10. Germain Katanga was among the names mentioned. No basis for the allegation has ever been provided. At the time, the accused was in Kinshasa, about 2000 km away. He had been integrated into the national army as Brigadier General, by virtue of the *Décret Présidentiel* no 04/094 of 11 December 2004,[6] and could not be placed at the leadership of the FRPI after 4th January 2005, since from that date the head of the FRPI was one Muhito Akobi.

11. The killing of the nine MONUC peacekeepers constituted the reason for the initial arrest of the accused. This was further stated to be the case by the representatives of the DRC at the hearing on admissibility of the 1st June 2009.[7]

12. On 26th February 2005, the day after this incident, the accused was arrested by DEMIAP agents (*Détection Militaire des Activitées Anti Patrie*) at the Grand Hotel in Kinshasa and confined by them to the hotel premises. From then, until his arrival in The Hague in October 2007, he had no contact with his wife.[8]

13. The accused was not given any document and his lawyers were never given access to the *dossier*.[9]

[5] ICC-01/04-01/07-11-Anx1.2 till Anx1.7, Anx1-9, dated 19 July 2007.
[6] DRC-OTP-0086-0036.
[7] See ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p 77, l. 20 to p. 78, l. 3.
[8] Annex F: Statement of Denise Katanga.
[9] Annexes B and C, First and Second Statements of Bertin Boki; Annex E, Second Statement of Urbain Mutuale.

14. On the 28th February 2005, the accused was taken to Hotel FLAT LUNTU. He was then forcibly moved to Hotel IMEUBLE-GLODIS and around 9th March 2005 taken to the CACHOT de DEMIAP (a small local prison).

Initiation of official procedures – 10th March 2005

15. It was only on the 10th March 2005 that a warrant was issued for the arrest of the accused following legal procedures.[10]

2. Second phase: Germain Katanga becomes a principal suspect in the case of Ituri

16. It is not clear to the Defence at which point in the prosecution investigations the Prosecutor's attention was drawn to the accused and he became a suspect in the case. It is for the Prosecutor to clarify this matter before the Chamber.

17. However, it seems that at least by November 2005, this must be deemed to be the case, since the Prosecutor announced that he had a new investigation and this turned out to be that of Katanga's involvement in Bogoro.

Written complaint from the accused - 18th January 2006

18. On the 18th January 2006 the accused wrote a letter with his co-accused noting that they had not been informed of the reasons for their arrest and requesting provisional release.[11]

First interview - 20th January 2006

19. The 20th January 2006, 11 months after the accused was first deprived of his liberty, the accused was interviewed by Colonel TSINU PHUKUTA Sébastien, officer of the Public Ministry at the Military High Court.[12] The accused was unrepresented. In the DRC there is no publically funded, legal assistance scheme. The accused was not given the opportunity to make a telephone call. Nor was he informed of the charges, nor told his rights at any stage during this interview. At the end of the interview the

[10] See ICC-01/04-01/07-891-Conf-Exp-AnxA, '*Pro-Justicia Mandat d'arrêt*', dated 10 March 2005.
[11] See ICC-01/04-01/07-891-Conf-Exp-AnxP and ICC-01/04-01/07-891-Conf-Exp-AnxP1, Letters dated 18 January 2006 from Mr Katanga, Floribert NDJABU, Picthu IRIBI, Godas SUPKA, Georges MASUDI, Joël BAHATI, Philémon MANEMO; See also ICC-01/04-01/07-891-Conf-Exp-AnxO, Letters from Mr Germain Katanga and Floribert Ndjabu dated 17 January 2006.
[12] See ICC-01/04-01/07-891-Conf-Exp-AnxQ and ICC-01/04-01/07-891-Conf-Exp-AnxQ1, *'Pro-Justitia P.V. d'audition'* of Mr Germain Katanga dated 20 January 2006.

accused specifically asked why he had been arrested and effectively invited the authorities to inform him of the charges against him: 'Beaucoup de jours que je viens de passer au CPRK sans savoir pourquoi je suis là. Que la justice fasse de son mieux pour statuer sur mon cas. Qu'elle me dise pourquoi je suis là.' The accused received no answer.

First court hearing – 5th, 9th, and 12th May 2006

20. The first court hearing was on the 5th, 9th, and 12th May 2006, 14 months after the initial detention of the accused.[13] This resulted from his now appointed lawyers approaching the *Officier du Ministère Public*.[14] The illegality of continued detention beyond 12 months without court order was brought to the attention of the Auditor General by letter on the 4th April 2006,[15] 13 months and six days after the accused initial detention and 12 months and 25 days after his formal arrest. This notwithstanding, the accused was absent and his lawyers deprived access to the dossier on grounds of '*secret de l'instruction*'.[16] The hearing was adjourned on grounds that the bench was inadequately constituted.[17] Another 7 months elapsed before a hearing took place.

First appearance – 1st December 2006

21. The first time the accused appeared in court was 1st December 2006 - twenty-one months after his initial detention.[18] This hearing was a result of the request of the Auditor General to seek an extension of the detention of the accused. The decision arising out of this hearing, dated 1st December 2006, while asserting the detention ran from 9th March 2005, refers to the accused having been detained for only 12 months,

[13] See ICC-01/04-01/07-891-Conf-Exp-AnxV, Notification on the 4 May 2006 of a hearing in the case of Mr Katanga to be held on 5 May 2006; ICC-01/04-01/07-891-Conf-Exp-AnxW, Notification on the 5 May 2006 of a hearing in the case of Mr Katanga to be held on 9 May 2006; ICC-01/04-01/07-891-Conf-Exp-AnxX, Notification on 10 May 2006 of a hearing in the case of Mr Katanga on 12 May 2006.
[14] See Annex E: Second Statement of Urbain Mutuale, at para. 9
[15] See ICC-01/04-01/07-891-Conf-Exp-AnxT, Letter from Bertin Boki to the Auditeur Général dated 4th April 2006.
[16] See Annex E: Second Statement of Urbain Mutuale, at para. 10 (1°)
[17] See Annex E: Second Statement of Urbain Mutuale, at para. 9. See also ICC-01/04-01/07-891-Conf-Exp-AnxY and ICC-01/04-01/07-891-Conf-Exp-AnxY2, '*Pro-Justitia Arrêt avant dire droit*' dated 12 May 2006.
[18] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006.

as would have been required by article 209(4) of the Judicial Military Code[19] for such detention to be validly extended by court order.[20]

22. At the hearing the accused's lawyers were still denied access to the dossier.[21] Nevertheless they asked for release on the grounds that the detention was illegal.[22] In its decision the Military High Court found that the question of illegality could not be raised for the period running from the initial seizure of the court on 20th April 2005 to the 1st December 2005 because the Public Minister could not be held responsible and the court's jurisdiction was seized.[23]

23. The court held that there were 'serious and grave' indications of guilt, being the fundamental condition for provisional detention (citing CSJ RP No 278, 9 September 1980, RJZ 1984 page 566, with note; quoted by Dibunda Kabuinji in the *répertoire général de jurisprudence de la Cour Suprême de Justice* of 1969 – 1985 page 66).[24] This seems to contradict the statement of the State at the hearing of 1st June 2009 that no significant investigative steps were taken.[25] There is no evidence that any such indications existed in the form of witness Statements or other documentation.[26]

24. The period of detention is taken from the 9th March 2005.[27] The period of detention from the 26th February 2005 to the 9th March 2005 was not considered. The discrepancy between the arrest on 9th March 2005 and the arrest warrant only being secured on the 10th March 2005 is not addressed. The court held that the extensions of detention between the 9th March 2005 and the 9th March 2006 were legitimate by law. However, it does not address the violations of the rights of the accused arising out of, for instance, the failure to be brought promptly before a judicial authority. The period

[19] *Cf.* Annex J, Code Judiciaire Militaire.
[20] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006, page 1, para. 2.
[21] See Annex E: Second Statement of Urbain Mutuale, at para. 10 (1°).
[22] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006, page 2, para. 6.
[23] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006, page 3, para. 2.
[24] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006, page 4, para. 4.
[25] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, pp. 77-81, in particular p. 80, l. 18 - p. 81, l. 7, p. 85, p. 91, l. 22-24, p. 93, l. 14-25, p. 94, l. 9-12, p. 99, l. 3-5.
[26] The Defence has requested full disclosure of all relevant documents and assumes that such full disclosure has been effected.
[27] See ICC-01/04-01/07-891-Conf-Exp-AnxA1 and ICC-01/04-01/07-891-Conf-Exp-AnxA2, Ordonnance Statuant en Matière de Prorogation de la Détention Préventive, 1st December 2006, page 3, para. 1.

from the 9th March 2006 to the 20th April 2006 when the court was seized by motion is not considered and appears to have been ignored.

25. There is no evidence that this written decision was served on the accused.[28]

Second appearance – 10th April 2007

26. On 2nd March 2007, the Auditor General seized the Military High Court to seek an extension of the detention of the accused and his co-accused.[29]

27. A hearing was set for the 5th April 2007,[30] but did not take place. The hearing took place on April 10th, two years and one month after the initial detention. The panel consisted of the same five judges. The accused was present, as were his lawyers. The Auditor General asked for prorogation.

28. In its decision the Military High Court held that the reasons for keeping the accused in detention, given at the prior hearing, remained valid.[31] One of these reasons, according to the court, was that the accused was being pursued for crimes against humanity.[32] At the admissibility hearing on 1st June 2009, it was stated that the accused was only pursued in respect of the murder of the nine MONUC soldiers, but at the same time accepted that the crime of "*atteinte contre la sécurite de l'état*" was transformed into genocide and crimes against humanity.[33]

29. The court did not answer the claim of the accused that the Public Minister demonstrated negligence in maintaining the detention through not exercising due diligence in bringing the case to trial.[34] Since the State claimed at the hearing of the 1st June 2009, that no investigations were ever conducted with respect to the accused for

[28] The Defence requested and assumes that it has received full disclosure from the prosecution.
[29] See ICC-01/04-01/07-891-Conf-Exp-AnxH1, '*Requête aux fins de prorogation de la détention provisoire'*, N°AG/0187/D5/2007, dated 2 March 2007 (reclassified public during the hearing of 1st June 2009).
[30] See ICC-01/04-01/07-891-Conf-Exp-AnxI1, Notification on 29 March 2007 of a hearing in the case of Mr Katanga on 5 April 2007.
[31] See ICC-01/04-01/07-891-Conf-Exp-AnxK1, '*Ordonnance statuant en matière de prorogation de la détention préventive'*, dated 10 April 2007, page 2, para. 4
[32] See ICC-01/04-01/07-891-Conf-Exp-AnxK1, '*Ordonnance statuant en matière de prorogation de la détention préventive'*, dated 10 April 2007, page 2, para. 4
[33] ICC-01/04-01/07-T-65-ENG ET WT, 1st June 2009, pp. 77-81, in particular p. 80, l. 18 - p. 81, l. 7, p. 85, p. 91, p. 93, l. 5-10, 14-25, p. 94, l. 9-12, p. 99, l. 8-17.
[34] See ICC-01/04-01/07-891-Conf-Exp-AnxK1, '*Ordonnance statuant en matière de prorogation de la détention préventive'*, dated 10 April 2007, page 2, para. 2.

any crime, including that of the death of the nine blue helmets, there would appear to be an issue yet to be resolved.

Second letter asking for provisional release – 25 June 2007

30. On the 25 June 2007, the accused wrote a second letter asking for provisional release, noting that he had been detained since 26 February 2005 and that the last prorogation expired on 21 June 2007.[35]

3. Third phase: Official instigation of procedures before the ICC

International warrant of arrest and request for the surrender of the accused to the ICC – 2 July - 18 September 2007

31. An international warrant of arrest was issued on 2nd July 2007[36] and an official request for his arrest and surrender was filed by the Registry on 6th July 2007,[37] as was a request for the freezing and seizure of the accused's assets.[38] [REDACTED at the Registrar's request pending the Trial Chamber's Decision].[39]

32. [REDACTED].[40]

33. In the request for arrest and surrender the State is asked to inform the Court of Article 59 applications or other information relevant to the surrender process. By an admission of the DRC at the admissibility hearing on 1st June 2009, it knew that the ICC was investigating Germain Katanga for Bogoro from the time of its receipt of the request for arrest and warrant, but the case against the accused in the DRC was only officially closed on the day of his surrender to the ICC.[41]

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[35] See ICC-01/04-01/07-891-Conf-Exp-AnxO1, Letter from Germain Katanga to the President of the Military High Court, '*Sollicitation de mise en liberte provisoire'*, dated 25 June 2007.
[36] ICC-01/04-01/07-1.
[37] ICC-01/04-01/07-6-tENG, URGENT Request to the Democratic Republic of the Congo for the arrest and Surrender of Germain Katanga (Pre-Trial Chamber I).
[38] ICC-01/04-01/07-7-tENG, URGENT Request to the Demo Democratic Republic of the Congo for the Purpose of Obtaining the Identification, Tracing, Freezing and Seizure of the Property and Assets of Germain Katanga (Pre-Trial Chamber)
[39] ICC-01/04-01/07-497-Conf-Exp, Report of the Registrar on the execution of the warrant of arrest for Germain Katanga pursuant to the "Decision on Request of the Defence of Germain Katanga to Issue an Order to the Registrar" issued on 19 May 2008, 22 May 2008, page 6, para 2
[40] Ibid, at page 8, para 8
[41] ICC-01/04-01/07-T-65-ENG ET WT, p. 94, l. 16 to p. 95, l. 7.

Transfer to ICC - 17-18 October 2007

34. On the morning of the 17th October 2007 the accused was taken to the Auditorat Général. His lawyer was not informed and did not attend.[42] The accused was kept at the Auditorat until the afternoon. In the afternoon the accused was interviewed by Colonel MUTALIZI.[43] The accused was not informed of the charges against him, nor read his rights. He was not informed of his right to silence, nor of his right not to incriminate himself. His lawyer was not present and there is no indication in the documents that the accused consented to this situation. This is demonstrated in the interview on the second page in the first questions asked on that page. It is further confirmed by the lawyer who arrived to assist him later that day,[44] though only contacted at about 13.00 p.m. by a colleague.[45]

35. In his interview with the accused, but in the absence of this lawyer, Colonel Mutalizi asked the accused if he accepted to be transferred to The Hague. The accused said that he did.[46] In the light of this question, and what followed, it is clear that the procedural steps taken were specifically designed to facilitate the transfer of the accused to the ICC in The Hague.

36. The accused was asked about his state of health. He replied that he had finished a course of treatment for malaria two days previously. He explained that he was coughing and had a cold. There was no follow up to these answers and no steps were taken at the Auditorat Général to verify his medical condition or provide medical assistance. The accused was then asked whether he had eaten breakfast. He replied that he had not, but there was no follow up to this answer and, the Defence submit, no food was provided while at the Auditorat Général. The accused was not authorised to use the toilet while at the Auditorat Général.[47]

37. The documents do not indicate whether the accused was asked if he needed to call anyone or if any arrangements needed to be made for his family. His wife in fact had

[42] See Annex C: Second Statement of Bertin Boki, page 1, para. 7
[43] See ICC-01/04-01/07-40-Anx3.5, PV d'audition of Mr Germain Katanga dated 17 October 2007.
[44] See Annex C: Second Statement of Bertin Boki, page 3, l. 1.
[45] See Annex C: Second Statement of Bertin Boki, page 2, first paragraph.
[46] See ICC-01/04-01/07-40-Anx3.5, PV d'audition of Mr Germain Katanga dated 17 October 2007.
[47] See Annex C: Second Statement of Bertin Boki, page 3.

not been in communication with him while in detention and she heard about the situation of his transfer from someone who had heard of it through the media.[48]

38. The accused was not given any food until the plane left very late in the night of 17th October, neither by the DRC nor ICC authorities.[49]

39. The accused was brought a doctor then taken through search procedures. It is not indicated that any specific medical attention was given to the accused. There is no indication that the ICC officials informed the accused of his rights or spoke of them, or that he was informed of his right to silence. As far as the record shows, no arrangements were made with respect to his family. The lawyer for the accused was not present during these procedures.

C. SERIOUS VIOLATIONS OF RIGHTS UNDER INTERNATIONAL LAW

40. The above mentioned facts have been set out according to three distinct phases in the unlawful detention of the accused. The serious violations of his rights under international law run through all three phases in a continuing manner.

1. International Legal Standards on Arrest and Detention

a. The right to personal liberty

41. The right to liberty is a prominent right set out in all major human rights treaties: Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 5 of the European Convention on Human Rights ("ECHR"), Article 7 of the American Convention on Human Rights ("ACHR"). Without any doubt, it is part of internationally recognised human rights, in the sense of Article 21 (3) of the ICC Statute.

42. To summarise the case law in respect of this right, one can say the following. Any exception to the right to liberty must be strictly construed; in case of criminal

[48] See Annex F: Statement of Denise Katanga.
[49] See Annex C: Second Statement of Bertin Boki, page 3, fourth paragraph.

proceedings it must be based on sufficient evidence, must serve a strong and recognised public interest and must be of reasonable duration.[50]

b. The right to be brought promptly before the competent judicial authority

43. This right consist of two elements, namely promptly and a competent judicial authority. It finds protection in Article 59 (2) of the ICC Statute, Article 9 (3) ICCPR, Article 7 (5) ACHR, Article 5 (3) ECHR, and Principle 11 of the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' (UNGA Res. 43/173 of 9 December 1988).

44. As to 'promptly', it follows from relevant case law of international human rights bodies that it is vital that an arrested individual is brought before a judge within days; periods of four and seven days have been held to violate this right.[51]

[50] See, inter alia, ECtHR, *Case of Bak v. Poland*, 16 January 2007, (Application no. 7870/04); ECtHR, *Frommelt v. Liechtenstein*, 15 May 2003; ECtHR, *Case of McKay v. The United Kingdom*, (Application no. 543/03), 3 October 2006; ECtHR, *Case of Nevmerzhitsky v. Ukraine*, (Application no. 54825/00), 5 April 2005; ECtHR, *W. v. Switzerland* and *Labitha v. Italy*(Application no. 26772/95) , judgment, 6 April 2000; ECtHR, *Ilijkov v. Bulgaria*, no. 33977/96, §§ 80-81, 26 July 2001; ECtHR, *Case of Yankov v. Bulgaria, (Application no. 39084/97), 11 December 2003*; ECtHR, *Case of Vayiç v. Turkey, (Application no. 18078/02), 20 June 2006*; ECtHR, *Case of Solmaz v. Turkey*, (Application no. 27561/02), 16 January 2007; ECtHR, *Letellier v. France*, judgment of 26 June 1991, Series A no. 207; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A; and *Demirel v. Turkey*, no. 39324/98, § 59, 28 January 2003; ECtHR, *Case of Kudla v. Poland, (Application no. 30210/96), 26 October 2000*; ECtHR, *Case of Smirnova v. Russia, (Applications nos. 46133/99 and 48183/99), 24 July 2003*; HRC, *case of Rafael Marques de Morais v. Angola, views of 29 March 2005*; HRC, *Margaret Paul on behalf of her brother, Terrence Sahadeo, v. Guyana*, views of 1 November 2001; HRC, c*ase of Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria*, views of 15 March 2006; HRC, C*ase of Salim Abbassi v. Algeria*, views of 28 March 2007; HRC, Communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002; HRC, *Leroy Shalto v. Trinidad and Tobago*, views of 4 April 1995 and *Michael Steadman v. Jamaica*, views of 2 April 1997 and *Harold Elahie v. Trinidad and Tobago*, views of 28 July 1997; HRC, *The case of Nicole Fillastre (victim's wife) on behalf of Andre Fillastre and Pierre Bizouarn v. Bolivia*, views of 5 November 1991; HRC, *The case of Anthony Finn v. Jamaica, views of 31 July 1998*; HRC, *The case of Michael and Brian Hill v. Spain, views of 2 April 1997*; HRC, *The case of Clyde Neptune v. Trinidad and Tobago, views of 16 July 1996*; HRC, *The case of Sandy Sextus v. Trinidad and Tobago, views of 16 July 2001*; HRC, *Famara Kone v. Senegal, views of 21 October 1994*; HRC, *case of Girjadat Siewpersaud, Deolal Sukhram, and Jainarine Persaud v. Trinidad and Tobago, views of 29 July 2004*; HRC, *the case of Clive Smart v. Trinidad and Tobago*, views of 29 July 1998; I-ACtHR, *Case of Acosta-Calderón v. Ecuador*, Judgment of June 24, 2005, *(Merits, Reparations and Costs)*; I-ACtHR, *Case of López-Álvarez v. Honduras, Judgment of February 1, 2006, (Merits, Reparations and Costs)*; I-ACtHR, *Case of Tibi v. Ecuador*, Judgment of September 07, 2004, *(Preliminary Objections, Merits, Reparations and Costs)*; I-ACtHR, *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Judgment of September 2, 2004, *(Preliminary Objections, Merits, Reparations and Costs)*; I-ACtHR, *Case of Lopez-Alvarez v. Honduras*; I-ACtHR, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Judgment of November 21, 2007 *(Preliminary objections, merits, reparations, and costs)*; I-ACtHR, *Case of Suárez-Rosero v. Ecuador*, Judgment of November 12, 1997 *(Merits)*; I-ACtHR, *Case of Acosta Calderon v. Ecuador*; I-ACtHR, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, Judgment of November 21, 2007 (Preliminary objections, merits, reparations, and costs).*

[51] See ECtHR *McKay v. the United Kingdom*, Judgment, 3 October 2006, par. 33; *Brogan and Others v. the United Kingdom*. Judgment of 29 November 1988, Series A no. 145-B, § 62; In *Öcalan v Turkey* it were seven days that resulted in a violation, in *Salov v Ukraine* it were sixteen days that were not in accordance with the requirement of 'promptly'; IACtHR *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador*. Judgment of November 21, 2007, para 81; IACtHR *Case of Tibi v Ecuador*. Judgment of September 07, 2004, para. 114; IACtHR *Case of Castillo Petruzzi* et al. *v Peru*, Judgment of May 30, 1999, para 108; Human Rights Committee

c. The right be informed of the reasons for arrest

45. Every individual is entitled at the time of his arrest to be informed of the reasons thereof and thereafter promptly to be informed of the charges against him. It finds protection in Article 5 (2) ECHR, Article 9 (2) ICCPR and Article 7 (4) ACHR.

46. The importance of the right is that 'a person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty.'[52] The right includes the individual's entitlement to be informed of any change in the grounds underlying detention.[53] Thus, in case the reasons for arrest no longer (only) lie in national criminal procedure but also in a supervening request for extradition (or surrender) the detained individual must be informed thereof.

47. Human rights case law does not require the information related to reasons for arrest to be very specific, but it must be communicated to the individual promptly (generally within a few hours) and by competent authorities (thus, not by an external or informal source).[54] What matters is that the information enables the detained individual to effectively challenge his arrest, and to inform others thereof, especial counsel.[55]

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held in 2005 in *De Morais v. Angola* (1128/2002) that "the right to be brought 'promptly' before a judicial authority implies that delays must not exceed a few days." (para. 6.3); n 1997, in *Clifford McLawrence v. Jamaica* (702/1996), the Committee held in para. 5.6: ' While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its General Comment on article 9 [Footnote: General Comment 8 [16] of 27 July 1982, para. 2.] and its jurisprudence under the Optional Protocol, pursuant to which delays should not exceed a few days. [Footnote: See Views on communication No. 373/1989 (Lennon Stephens v. Jamaica), adopted 18 October 1995, para. 9.6.]'.

[52] ECtHR, *Van der Leer v. The Netherlands* of 22 January 1990.

[53] ECtHR *Shamayev and others v. Georgia and Russia* of 12 April 2005, para. 415 et seq.

[54] Inter alia, see ECtHR, *Saadi v. The United Kingdom* of 11 July 2006; ECtHR, *Yordanov v. Bulgaria* of 10 August 2006; ECtHR, *Conka v. Belgium* of 5 August 2002; ECtHR, *Murray v. The United Kingdom* of 28 October 1994; ECtHR, *Fox, Campbell and Hartley v. The United Kingdom* of 30 August 1990; HRC, *Michael and Brian Hill v. Spain*, views of 2 April 1997, par. 12.2.

[55] See HRC, *Glenford Campbell v. Jamaica*, views of 30 March 1992, par. 6.3: "one of the most important reasons for the requirement of "prompt" information on a criminal charge is to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority."; I-ACtHR, *Case of the Gómez-Paquiyauri Brothers v. Peru*, Judgment of July 8, 2004, paras. 92 and 93: 'This Court has established that Article 7(4) of the Convention sets forth a mechanism to avoid illegal or arbitrary conduct starting with the very act of deprivation of liberty and guarantees the detainee's defense, for which reason the detainee and those who represent him or are his legal guardians have the right to be informed of the motives and reasons of the detention when it takes place, as well as regarding the rights of the detainee. On the other hand, the detainee also has the right to notify a third party –for example, a relative or an attorney- of what happened. In this regard the Court has pointed out that "[t]he right to contact a relative becomes especially important when detainees are minors". [Note: *Case of Bulacio*, para. 130]. This notification must be carried out immediately by the authorities conducting the detention and, in the case of minors, they must also take the necessary steps for the notification to actually take place.'

d. Right to have access to and assistance of counsel

48. The right to counsel is part of the right to a fair trial, and as such protected in all major human rights instruments. Its importance during trial is paramount, but case law of human rights bodies also unequivocally States that the right must be respected from a very early stage on.[56] The UN Special Rapporteur on torture has recommended that anyone who has been arrested "should be given access to legal counsel no later than 24 hours after the arrest".[57]

2. The Law of the Democratic Republic of Congo.

49. National law is relevant to the determination of compliance with the principle of legality and Article 59, but also assists in measuring the seriousness of the mistreatment. The DRC Constitution sets out principles of due process and civil liberty rights, fully consistent with the human rights conventions.

50. Pursuant to Article 17,[58] individual liberty is guaranteed. It states the principle that liberty is the rule and imprisonment is the exception. This accords with Article 205 of the military legal code[59] and Article 28 paragraph 1 of the Code of Criminal Procedure, which states that provisional detention is an exceptional measure.[60]

51. A person can only be prosecuted, arrested, detained or convicted on the basis of the law and in the manner described therein (Article 17 of the Constitution; Article 28(1) of the Code of Criminal Procedure).[61] Article 17 also affirms that criminal responsibility is individual and nobody can be prosecuted, arrested, detained or condemned for acts of others. In addition, Article 17 underlines the presumption of innocence: Until a final judgment confirms the culpability of a person accused of a crime, such a person is presumed to be innocent.

52. In accordance with Article 18 of the Constitution,[62] a person who is arrested must be

[56] Most recently this was confirmed in ECtHR, *Salduz v. Turkey*, Application No. 36391/02, Judgment (Grand Chamber) of 27 November 2008; see also ECtHR, *Panovits v. Cyprus*, Application No. 4268/04, Judgment of 11 December 2008.
[57] Report of the UN Special Rapporteur on torture, UN Doc. E/CN.4/1990/17, 18 December 1989, para.272; see also UN Doc. E/CN.4/1995/34, 12 January 1995, para. 926.
[58] Cf. Annex I, Constitution de la RDC.
[59] Cf. Annex J, Code Judiciaire Militaire de la RDC.
[60] Cf. Annex K, Code de Procédure Pénale de la RDC.
[61] Cf. Annexes I and K.
[62] Cf. Annex I.

informed immediately of the motives of his arrest and of all charges against him in a language he understands. He must be informed immediately of his rights.

53. Article 18 further provides that person in custody has the right to immediately contact his family or his counsel. The custody cannot exceed 48 hours. When this period expires, a person in custody must either be released or brought to the competent judicial authorities. A person in detention is entitled to a treatment, which preserves his life, physical and mental health and his dignity.

54. Article 19[63] provides that the judge assigned to a person by law cannot be withdrawn or changed against the will of the person. Every person has the right to be heard by a competent judge within a reasonable time. The right to a defence is organized and guaranteed.

55. Any person has the right to defend himself or to be assisted by counsel of his choice at all stages of the criminal proceedings, including the police investigations and the preliminary investigations (Article 19). A person can equally be assisted before the intelligence service.

56. A number of rights are absolute and cannot be departed from in any situation even where the State has invoked an emergency situation in accordance with Articles 85 and 86 of the Constitution. These non-violable rights include the prohibition of torture and cruel, inhuman or degrading treatment or punishment (Article 61-2), the rights of the defence and the right of recourse (Article 61-5).[64]

57. Article 28, paragraph 2 of the Code of Criminal Procedure states that, provided that the conditions for provisional detention are met, the instructing magistrate (officer of the prosecution office) may place a suspect under a provisional arrest warrant after interrogating him, but must bring him before the closest judge competent to rule on his provisional detention as soon as possible.

58. Pursuant to Article 18 of the Constitution and Article 28, paragraph 5 of the Code of Criminal Procedure, the arrest warrant must specify the grounds, which justify the

[63] Cf. Annex I.
[64] Cf. Annex I.

arrest.

59. Consistent with Article 209 of the military legal code, only the military auditor (auditeur militaire) may prolong the provisional detention of a suspect provided that the instructing magistrate considers it necessary to keep the suspect in prison. An order to prolong the provisional detention of a suspect expires after one month after which it must be renewed. The military auditor may renew the order to prolong the provisional detention of a suspect up to 12 months maximum. If after 12 months the instructing magistrate considers that there are still valid grounds to keep the suspect in prison, he must in such situation seek the authorisation of a competent judge (military tribunal, Article 209 of the military legal code).

60. Article 28, paragraph 5 further mandates that the provisional arrest warrant ordered by a military judge specify the length of provisional detention ordered, which cannot exceed 15 days (Article 208 of the military legal code; Article 31 of the Code of Criminal Procedure).[65]

3. Serious violations of the rights of the accused

Violation of the right to liberty

61. It is submitted that the arrest and detention of the accused was unlawful under national as well as international law and, in the context of the length of unlawful detention, amounted to serious mistreatment.

62. It is submitted that the initial arrest was unlawful as it was not supported by reasonable grounds or justification. The reaction of MONUC and pressure from the UN Security Council provoked the DRC to arrest Germain Katanga amongst others, despite a complete absence of incriminating evidence. Katanga was not the only person arrested. There were others, including for example Thomas Lubanga who, as leader of the UPC, was plainly not in collusion with Katanga. Their arrest was plainly a political act done to allay UN criticism and without regard to the civil liberties of those arrested.

63. The accused's subsequent provisional detention was irregular and in violation of the Constitution, notably Articles 17-19 of the Constitution, as well as the military legal

[65] Cf. Annexes J and K.

code (Code Judiciaire Militaire), in particular Livre Troisième, Titre I, Chapter III (on provisional detention and provisional release), Articles 205-213, and the code of criminal procedure (Code de Procédure Pénale), in particular Chapter III (on provisional detention and provisional release, Articles 27 – 47bis).

64. It is apparent on review that the accused's detention demonstrates serious violations of human rights. These are not merely technical irregularities. It is submitted that his fundamental right to liberty was violated in a very basic way because the authorities which detained him had no reasonable justification for his arrest on the basis of the murder of the MONUC soldiers nor for his continued detention for such offence. The DRC authorities stated to the Chamber that no steps were taken to investigate the matter. Even if the arrest had been on reasonable grounds, his continued detention for more than two and a half years could not be premised on reasonable grounds or constitute a reasonable duration in the absence of investigations.

65. There was nothing in the immediate circumstances of the killings of the MONUC peacekeepers which pointed to the accused as being responsible for the attack. As asserted in the course of the admissibility hearing, and not disputed by the DRC representatives there present, the DRC authorities have since arrested the alleged leader of the attack in DRC and there was no evidence to connect him with the accused. On the admission of the authorities, no steps were taken to investigate the matter in respect of Germain Katanga. Even if the arrest had been on reasonable grounds continued detention for more than two and a half years is wholly unreasonable in the absence of investigation.

66. International human rights law does not recognise a concept of 'preventive detention' as outlined by the DRC.[66] This could never serve a compelling and recognised public interest for such an unreasonably long duration and without any effort or, according to the DRC, intention, to investigate and prosecute.

67. That the later stages of the accused's unlawful detention actually served the principal purpose of enabling his transfer to the ICC is supported by circumstancial evidence

[66] See ICC-01/04-01/07-T-65-ENG ET WT, 1st June 2009, p. 85, l. 4-7.
(4 initiated or opened two cases against Mr. Katanga. The first case
5 related to the killing of UN soldiers, Bangladeshi UN soldiers, and for
6 that case he was placed in preventive detention, preventive custody with
7 other co-accused who acted together with him. And this morning we said)

which suggests that the state authorities in the DRC have been keeping individuals in detention without charge merely for the benefit of the ICC. Human Rights Watch in its report *D.R. Congo: ICC Arrest First Step to Justice*[67], observed that "Congolese authorities state they have been waiting for the ICC to complete its investigations before taking further action", indicating that the DRC *was in fact* subjecting itself and giving priority to the Office of the Prosecutor.[68]

The Minister of Human Rights indicated in an informal conversation with members of the Defence team in relation to the remaining Iturian prisoners, arrested at the same time and in the same conditions as Germain Katanga, that the DRC authorities had been waiting to hear from the ICC whether they would seek their transfer. According to the Minister, the ICC had recently indicated that they would not seek the transfer of any of them, and they would now have to decide what to do with those prisoners held without a charge.[69]

68. There is some evidence of this nature directly relating to the accused, in that the State had indicated that it was awaiting elements from the ICC.[70] It is argued below that this situation of unlawful detention enabled the transfer of the accused and was effectively taken advantage of by the Prosecutor by his acts or omissions.[71]

Violation of the right to be brought promptly before the judicial authorities

69. For the purpose of determining the extent to which this right has been violated, it is relevant to determine the actual point of time when the accused was deprived of his liberty. It is submitted that from the 26th February 2005, the accused's freedom to move where he wished was placed under restriction such that he could no longer be said to have his liberty. While it was suggested that it was for his protection, from the moment his liberty was restricted without his consent, his right to liberty was prima facie infringed. Keeping him restrained within the premises of one building could not be a proportionate response meeting any recognised and compelling public interest.

70. The first appearance of the accused before a judge was on 1st December 2006, twenty one months after his initial detention. The first hearing in May 2006, fourteen months after initial detention, was in his absence and adjourned without consideration of his

[67] http://hrw.org/english/docs/2006/03/17/congo13026.htm
[68] See also Annex D, First Statement of Urbain Mutuale.
[69] See Annex G: First statement of Jean Logo; Annex A: Statement of Caroline Buisman.
[70] See Annex D : First statement of Urbain Mutuale ; Annex H: Second statement of Jean Logo .
[71] See paragraphs 86 *et seq*, infra.

situation. In the light of the fact that under international practice and jurisprudence anything longer than 48 hours is generally considered unacceptable, it is submitted that this constituted a grossly excessive period of time without the opportunity to challenge the lawfulness of his detention, such that it amounted to a grave violation of the right to be brought promptly before a judicial authority. The law of the DRC is consistent with international practice in this respect, requiring that the accused be brought before the judicial authorities within 48 hours. The right of the accused was violated under national as well as international law.

71. In the event that his first interview on 20th January 2006 were to be considered as amounting to his being brought before a judicial authority, this amounts to a grotesquely unacceptable period of delay of 11 months -- or, of over 10 months if detention ran from March 2005. This is plainly, on any view, a very serious violation.

72. Moreover, all acts of prorogation of the detention of the accused until the 20th January 2006 had no validity in terms of national law as being in violation of Article 28 of the Code of Criminal Procedure and Article 18 of the Constitution.

Violation of the right to be informed of the charges

73. There is no official record indicating the accused was informed of any charges against him at any stage before the reading of the international arrest warrant. Neither the arrest warrant nor any of the orders to prolong his provisional detention indicate in any clear manner the reason for his arrest and provisional detention and what constitute the charges against him. It is the case for the defence that he was not informed of the charges against him.

74. Nor is there any official record that the accused was provided with any official documents on his case. In the DRC the Prosecution refused his counsel access to the dossier on the principle of the 'secretive nature' of investigations. This violates Article 201 of the military legal code.

75. The accused was interviewed on the 20th January 2006, but the content of the interview gives no indication that he was informed of the charges against him. The accused asked what the charges were but received no answer.

76. To be held in detention for more than two and a half years without being informed of the charges is by any standard a serious violation of this right under national and international law and a flagrant violation of human rights.

Violation of the right to assistance of counsel

77. The failure to allow the accused the assistance of his counsel at his first interview of the 20th January 2006, or even at his interview prior to transfer on 17th October 2007, was in violation of Article 19 of the Constitution, which states that a person is entitled to be assisted by counsel at all stages, and a violation of his international right to assistance of counsel. It is submitted that these violations in themselves amounted to serious mistreatment in the light of the significance of these two interviews to his general situation.

D. PARTICIPATION OF THE ORGANS OF THE ICC

78. It is the final two phases of the unlawful detention of the accused, namely, from the time the accused becomes a target for the Prosecutor and from the time of the issuance of a warrant, that the participation of the organs of the ICC are involved in ensuring the persisting nature of the unlawful situation of the accused.

79. In the Defence submission, once it has been established that the international human rights of the accused have been seriously violated in the process, it is irrelevant who is responsible for these violations when determining whether the process has been sufficiently tainted to justify intervention by the Trial Chamber. Thus, in *Bayaragwiza* it was held that:

> Under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights.[72]

Nonetheless, while establishing responsibility is not essential, an analysis of the participation of the organs of the Court reinforces a connection to the ICC and the view that prior violations go directly to the integrity of the process before the ICC.

[72] *Prosecutor v Bayaragwiza*, Decision of 3 November 1999, para 73 (ICTR Appeals Chamber)

80. In the time preceding the issuing of the arrest warrant by the ICC there is an increase in interest in the accused by the ICC. This is not a black and white situation. The successful application for a warrant of arrest would be, submits the Defence, an artificial point to measure the beginning of participation by the ICC in the situation of the accused. At some point during the preceding period of growing interest in the accused, which the Prosecutor himself is a position to indicate to the Chamber, there was the formulation of an intention on the part of his Office to treat the accused as a principal suspect in the case concerning Bogoro. It is at that point, in the submission of the Defence, that the Prosecutor assumes a duty of care towards the accused, whatever his status in the DRC. It is this period which constitutes the second significant phase in the unlawful detention of the accused.

Legal foundation of duty of care to the accused

81. The principles of *complementarity* and cooperation ensure that the national and international processes are closely intertwined in ensuring that perpetrators are brought to justice. These two levels of the legal process, while separate are heavily inter-dependent in this respect, even more so than in other *ad hoc* tribunals. This is acknowledged by Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence.

82. There are several provisions which give the Prosecutor, the Registry and the respective Chambers the powers designed to give effect to the function of the ICC while recognising this interplay. These powers involve an exercise of discretion which in the case of the Prosecutor makes him sovereign over the decision when to request a transfer. Can the organs of the International Criminal Court, in the performance of their functions, work on the premise that whatever goes on before an accused is in The Hague is of no relevance? The starting point to the answer is Article 21(3) of the Statute which requires the provisions of the Statute and Rules to be interpreted consistently with international human rights standards.

83. As a result of Article 21(3), and general principles, each organ of the Court has an inherent duty to protect the values underlying the protection of human rights in the exercise of their discretion and refrain from knowingly participating in and/or

facilitating the continued violations of the rights of an accused. This duty is expressly provided for with respect to the Prosecutor's functions in Article 54(1)(c).

84. The Prosecutor ought to have been in possession of sufficient information, in this particular case, to be aware that the accused's detention in the DRC was inconsistent with international human rights standards. The fact that the arrest of the accused was not founded on evidence; that he had not been promptly brought before a judicial authority; that he had been kept in detention for an unreasonable time without any suggestion of a trial; that he was still in detention but with no reasonable prospect of a speedy trial; that he was deprived of the assistance of counsel while interviewed– these were all matters which ought to have been manifest to a Prosecutor acting diligently in his investigations of the accused, the activities of the DRC for admissibility, and on the basis of documents and information received from the DRC with respect to proceedings within the DRC.

85. The Prosecutor appears to have had adequate opportunity to collate basic information about the accused and the activities of the DRC in respect of him. In the month of August 2005, representatives of the ICC prosecution met with the office of the Auditor Général;[73] the Prosecutor subsequently met with the Auditor Général (or his representatives) in September 2005, December 2005, and January 2006.[74] The OTP has also stated that it has met a number of times with "members of the Cabinet of the President of the DRC, members of the DRC Ministry of Justice, and members of both the office of the *Procureur Général de la République* and of the *Auditeur Général Militaire*."[75]

Prosecutor's failure to exercise due diligence

86. In the submission of the Defence, the Prosecutor had a duty to act with speed and diligence in requesting the transfer of the accused once it was determined that there were reasonable grounds to suspect that the accused had committed crimes within the

[73] See ICC-01/04-01/06-39-AnxC, Prosecution's Submission of Further Information and Materials, footnote 18, filed on 25 January 2006 (reclassified public on 23 March 2006).
[74] See ICC-01/04-01/06-39-AnxC, Prosecution's Submission of Further Information and Materials, footnote 18, filed on 25 January 2006.
[75] ICC-01/04-01/06-39-AnxC, Prosecution's Submission of Further Information and Materials, para. 21, filed on 25 January 2006.

jurisdiction of the ICC and that his detention was tainted with illegality. This, it is suggested, necessarily flows from his duty of care to the accused and the right of the accused to be tried without undue delay encapsulated in Article 67(1)(c) of the Statute. As it was held by the ICTR Appeals Chamber in *Prosecutor v Bayaragwiza*:

> Once the Presecutor has set this process in motion, she is under a duty to ensure that, within the scope of her authority, the case proceeds to trial in a way that respects the rights of the accused.[76]

87. The Prosecutor is invested with considerable powers of discretion affecting the investigation of crimes, the timing of requests for warrants of arrest and the facilitating of transfer.

88. The process of moving an accused from a national jurisdiction to that of the ICC involves the exercise of several powers of discretion. These include, *inter alia*, the initial power of the Prosecutor to initiate an investigation under Article 53(1) of the Statute, the power of the Prosecutor to request, and the Pre-Trial Chamber to issue, orders under Article 57(3) of the Statute, and the power of the Prosecutor to request, and the Pre-Trial Chamber to issue, a warrant of arrest under Article 58(1) of the Statute.

89. It is respectfully submitted that in the exercise of these discretions there is an accompanying duty to promote the values underlying international human rights. The Prosecutor has a positive duty to 'fully respect the rights of persons' under Article 54(1)(c) the Statute.

90. In such circumstances, it is submitted that once the accused had become a principal suspect in the case, he became a target of the activities of the Prosecutor and a duty of care arose by virtue of the Prosecutor's duty under Article 54(1)(c) to respect his rights, the right of the accused under Article 67(1)(c) and, under Article 21(3), to perform his functions within the framework of those rights. He thus had a duty to make every endeavour to ensure that these manifest violations came to an end and that he did not take advantage of them.

[76] *Prosecutor v Bayaragwiza*, Decision of 3 November 1999, (ICTR Appeals Chamber), at para 92.

91. In these circumstances, it is submitted that it is quite unacceptable that the alleged crimes, having been committed in 2003, the situation in the DRC having been referred in 2004, the Prosecutor having decided to concentrate on events in Ituri by April 2004, and being probably aware of the general nature of his case by November 2005,[77] that it took until June 2007 to request the transfer of the accused. That was in all likelihood at least one year and seven months after the accused had become a principal suspect in the case. Regardless of who bears direct responsibility for the violations of the rights of the accused, the Prosecutor has thus failed to take reasonable steps to ensure that the accused is transferred diligently so as to be tried without undue delay and fairly within the framework of his rights. A similar conclusion was reached in the *Bayaragwiza* case where it was held that:

> The Prosecutor's contention that the Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion.[78]

92. Instead of diligently seeking the transfer of the accused, the Prosecutor apparently decided to sit back until he was ready. He was thereby knowingly countenancing the continued detention of the accused in the DRC in unlawful circumstances and thereby facilitating and taking advantage of a situation of illegality.

93. There is circumstancial evidence to suggest that the DRC and the Prosecutor acted in tandem in this respect since the DRC was holding accused persons with the specific purpose of their transfer to the ICC before the issuance of warrants of arrest.[79]

Prosecutor's failure to keep the Pre-Trial Chamber properly informed

94. Moreover, the Prosecutor, in exercising his duty of care to promote and protect the human rights of a targeted suspect, as endorsed by Article 54(1)(c), must keep the Pre-

[77] Assembly of States Parties, Fourth session, 28 November to 3 December 2005, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, 28 November 2005: http://www.icc-cpi.
[78] *Prosecutor v Bayaragwiza*, Decision of 3 November 1999 (ICTR Appeals Chamber), at para 98.
[79] See paragraph 67 *supra*

Trial Chamber fully informed of all relevant considerations at all principle stages of the proceedings. Principle stages of the proceedings would include the proceedings for a warrant of arrest, when a request for arrest and transfer is formulated and once such a request has been communicated to the DRC. Relevant considerations would include any matter which may be decisive in the performance of the supervisory duties of the Pre-Trial Chamber, and this necessarily includes information on violations of the rights of a suspect in a case by his national authorities, as well as failures of the state to provide information in compliance with paragraphs 4 and 5 of the Request for Arrest and Surrender.[80] If necessary, and where appropriate, the Prosecutor should have sought orders from the Pre-Trial Chamber.

95. At the time of seeking the issuance of a warrant of arrest, the violation of the rights of the accused in the DRC is relevant to the determination whether the arrest of the person is necessary under Article 58(1)(b) and also to the exercise of subsidiary discretion, necessarily implied in Article 58 by Article 21(3), to refuse to grant a warrant of arrest if to do so might implicate the ICC in the violation of the rights of a suspect. Violations of the rights of the accused must therefore be brought to the attention of the Pre-Trial Chamber at this stage.

96. During the period between July and October 2007, the accused had the right, in terms of Article 59(5), to apply to the custodial state for interim release. The Pre-Trial Chamber had a duty to *consider* the custodial situation of the accused in the custodial State, which was both inherent, based on its overriding duty to protect the values underlying international human rights, and express, based on Article 59(5) of the Statute:

> 'The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State.'

This provision is not limited to issues of security for release but must in terms of Article 21(3) be deemed to include a consideration of the rights of the accused.

[80] See ICC-01/04-01/07-6-tENG, URGENT Request to the Democratic Republic of the Congo for the arrest and Surrender of Germain Katanga (Pre-Trial Chamber I).

97. In the light of this duty for the Pre-Trial Chamber, the Prosecutor must keep the Pre-Trial Chamber properly informed relating to the continuing custodial situation of the accused.

98. The Defence is not in possession of any information indicating that the Pre-Trial Chamber was appraised of the facts which it is here argued reveal serious violations of human rights or the violations of Article 59 and Rule 117, once the provisions of that Article and Rule became applicable.

99. In the event that the Prosecutor did provide relevant information to the Pre-Trial Chamber sufficient to put the Pre-Trial Chamber on notice of the violations of the accused rights including that prescribed under Article 59(3), then in the absence of any reaction on the part of the Pre-Trial Chamber, the Pre-Trial Chamber would become a knowing participant in the irregularities in the detention of the accused.

100. The failure of the Prosecutor to keep the Pre-Trial Chamber properly informed or to seek appropriate orders to ensure that this right was respected makes the ICC a participant in the violations being the subject of this motion.

Constructive custody

101. The period from the 2nd July 2007 until the 18th October 2007 corresponds to the third phase in the custodial situation of the accused. During this time the ICC is effectively authorising and sanctioning his continued detention for the purpose of proceedings before the ICC. Once the warrant of arrest was issued on 2nd July 2007, it is submitted that the accused fell under the constructive custody of the ICC until his transfer in October of the same year. From the time that the accused can be said to be under the constructive custody of the Court, it is no longer necessary, in the Defence submission, to inquire into issues of knowledge and duty of care. At this point any continuing illegality becomes the shared fruit and responsibility of the DRC and the ICC by virtue of this constructive custody.

102. In the submission of the Defence, custody may be said to be constructive once it serves the interests of, enables, and is in fact being taken advantage of by the ICC for the purpose of his eventual transfer to the ICC. Having issued a warrant of arrest

against the accused, the ICC had taken a definite and official step with a view to his prosecution before the ICC. His continued detention served the direct interests of the ICC and the ICC was aware of that detention. In principle, a request for the transfer of the accused should have directly followed the issuance of a warrant of arrest. If it did not, for whatever reason, this cannot affect the constructive nature of his custody because his continued custody served the direct and immediate interests of the ICC, and any delay in the request for his transfer must be deemed to be taking advantage of his existing detention.

103. [REDACTED].

104. By delaying the communication of a request for transfer, this delayed the effective implementation of the rights of the accused in terms of Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence. It is submitted it becomes therefore irrelevant when the ICC decided to request his transfer officially. As long as a warrant of arrest has been issued and the ICC is taking advantage of a persisting state of detention of the accused, he can be said to be under the constructive custody of the Court. This is supported by Articles 55 and 59 read in conjunction. Article 55(1)(d) is designed to ensure that suspects in an investigation are not subjected to arbitrary arrest and detention. Article 59 is designed to ensure that the rights of the accused are respected by the custodial state while the accused's imminent transfer is envisaged by the ICC. Article 59 is drafted on the assumption that a person has not yet been arrested, but must be deemed to apply equally to those already in detention. Article 55, and the object of Articles 55 and 59, do not permit an interpretation of these articles which would allow the ICC to avoid their implementation through delayed requests in the case of a person already in detention in the custodial state.

105. This places the present case within the principle in the *Bayaragwiza* decision. In that case it was said:

> Rule 40bis requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is, when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40bis are entitled, at a bare

minimum, to the protections afforded under these international instruments, as well as under the rule itself.[81]

106. It is submitted that during the period running from the issuance of a warrant of arrest in July 2007 until the transfer of the accused in October 2007, the Court became necessarily associated with the continuing violations of the rights of the accused. It follows in the defence submission that the Court is now obligated to review and supervise such violations and to provide an appropriate remedy, without the need to establish impropriety, or knowing participation in the impropriety of others, on the part of the organs of the Court.

107. In any event, as submitted above, it can be deemed in the circumstances that the Prosecutor, having made appropriate enquiries, must have known of the manifest violations of the rights of the accused in the DRC given the particular circumstances of the case, and therefore was knowingly participating in such impropriety from July 2007, if not before.

108. Alternatively, the accused must have come within the constructive custody of the Court between [REDACTED],[82] and the 17th October when constructive custody became the actual custody of the ICC. During that period the rights of the accused continued to be violated and he was not even informed promptly of the new charges against him under the Statute, let alone those that formed the original basis of his detention in the DRC.

The Registry's participation

109. In this alternative scenario, the period prior to [REDACTED] becomes associated with the ICC with respect to violations from the 2nd July. This is so, due to the Registry participating in this delay in the effective date of constructive custody and the protection of the rights of the accused through Article 59 of the Statute.

[81] *Prosecutor v Bayaragwiza*, Decision of 3 November 1999 (ICTR Appeals Chamber),, at para 79.
[82] *Cf.* ICC-01/04-01/07-497-Conf-Exp, page 8, para. 8.

110. On 2nd July 2007, the Prosecutor obtained the issuing of a warrant of arrest. This warrant was [REDACTED] nor executed until three and a half months later, when finally read to the accused on the 17th or 18th October 2007. Transfer was not achieved until then. The Defence submits that the circumstances show an intent not to put into effect the warrant of arrest. [REDACTED] By doing so the accused was deprived of the protection of Article 59 of the Statute and Rule 117 of the Rules of Procedure and Evidence. By virtue of Article 59 the accused should have been brought 'promptly before the competent judicial authority'. That authority has a duty to determine that, *inter alia*, the accused had 'been arrested in accordance with the proper process' and 'the persons rights have been respected'. Instead, for three months, [REDACTED] the accused remained in continued unlawful detention in a prison in Kinshasa. This, in the submission of the Defence, amounts to a grave breach of his statutory rights.

111. In terms of Rule 117(1) the accused would additionally be entitled to a copy of the warrant of arrest from the time of a request. Under Rule 117(2) he would have been entitled to request the Pre-Trial Chamber for the appointment of a lawyer to assist with the proceedings before the Court. The implementation of these significant rights was thereby deferred for a period of two and a half months.

112. [REDACTED] the warrant was sent to the DRC. The DRC failed to comply with the requirements of Article 59, nor is there any indication that the Prosecutor or Registry requested that they do so. The accused was not served with the warrant of arrest at this time and no service was not ensured by the Court as required by Rule 117. Nor was the accused brought promptly before the competent judicial authority, nor was there any inquiry into whether his rights had been respected.

113. The transfer took place on October 17th 2007. Transfer did not comply with the requirements of the Statute. There was no adequate inquiry as to whether the accused had been arrested in accordance with the proper process, nor was there any effective inquiry into whether the accused's rights had been respected. The accused's rights were breached in a significant manner, as amply demonstrated by the factual review of events provided above. On the day of his transfe**r** there was continued mistreatment,

with the participation of the Registry, as evidenced in the affidavit of Bertin Boki, his lawyer at the time.[83]

E. THE POWERS AND DUTY OF THE TRIAL CHAMBER

114. The Appeal Chamber in the Lubanga case referred with approval to the decision of the English Court of Appeal in *Huang v. Secretary of State* that it is the duty of a court "to see to the protection of individual fundamental rights which is the particular territory of the courts"[84]. Whatever may be the precise status at the ICC of the common law doctrine of 'abuse of process' there is no doubt that the principles the doctrine is aimed at upholding and give effect to are principles equally valued by the ICC. As Lord Bridge said in the case of Bennett[85] "there is no principle more basic to any proper system of law than the maintenance of the rule of law itself". The doctrine of abuse of process, which aims at preserving the integrity of the criminal process, was extensively reviewed by the Appeal Chamber in the Lubanga case.[86] Though those observations were *obiter* the Appeal Chamber plainly recognised, at very least, the existence of a similar inherent power, arising from the emphasis afforded to human rights in the Statute, and the power of the Court to suspend proceedings if that was necessary to preserve the integrity of the process.

115. The power of the International Criminal Court to review the integrity of its process is implied in the provisions of the Statute protecting the human rights of those put on trial. By virtue of Article 21(3) of the Statute the interpretation and application of the law under the statute is subject to internationally recognised human rights standards. In particular, the right to a fair trial requires that the process of the court is used with integrity and not abused in a manner which is inconsistent with the fair administration of justice.

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[83] *Cf.* Annex C, Second Statement of Bertin Boki.
[84] [2005] 3 All ER 435, cited with approval by the Appeals Chamber in its Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 December 2006, at para. 39.
[85] *R v Horseferry Road Magistrate's Court ,ex p.Bennett* [1994] 1 A.C. 42.HL.
[86] *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, para 23 et seq.

116. In the International Criminal Court those mandated to execute the procedural steps leading to a person's arrest, detention and eventual transfer to the Court include not only the organs of the Court, but also state authorities and potentially other international organisations. While these are separate entities with their own legal personalities, it has been accepted that international criminal tribunals may review the actions of such separate entities prior to the transfer of an accused to the tribunal. It is submitted that this principle applies equally before the International Criminal Court.

117. The Statute must be applied consistently with international human rights. Accordingly, it is submitted that in addition to a situation of constructive custody, participation in the impropriety of others by an organ of the Court is sufficient to impose a responsibility on the judiciary of the ICC to review *and* supervise these actions in so far as they violate the international human rights of the accused. In the case of *R. v Horseferry Road Magistrates' Court, Ex parte Bennett*, the English House of Lords upheld a similar principle with regard to the action of foreign State authorities with the knowing participation of the British police.[87] A man wanted on charges relating to the purchase of a helicopter in the UK was allegedly forcibly put on a plane in South Africa by the South African police without following proper extradition procedures. When he arrived in Heathrow he was arrested by the British police. According to Lord Griffiths:

> "…the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."[88]

While the British police took no direct part in the adduction itself, this responsibility is invoked once it is established that 'our own police, prosecuting or other executive authorities have been a knowing party'.[89]

118. The Appeal Chamber in *Lubanga* stated, in respect of the Statute, that "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

[87] [1994] 1 AC 42 (HL)
[88] Ibid at page 62-A
[89] Ibid at page 62-G

fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".[90]

119. Accordingly, it is submitted that the Trial Chamber has power and responsibility to review and supervise the persisting situation of unlawfulness of the detention of the accused. It has the inherent power, in the Defence submission, to ensure that its process is not undermined by serious human rights violations of a continuing nature which pierce to the heart the Court's integrity and standing in the international community as an instrument of justice.

120. Finally, with respect to the powers and duty of the Trial Chamber in these circumstances, the Defence requests the Prosecutor to consider if it is prepared to accept the contents of the affidavits annexed to this motion and the Chamber to consider whether it would be appropriate to order an evidentiary hearing in the determination of this matter.

H. APPROPRIATE REMEDY

1. Declaration of illegality

121. The Defence submits that the Court has a power and duty to review irregularities in prior detention even if the violations of human rights cannot be attributed to the ICC. This principle was recently acknowledged by the Trial Chamber of the Extraordinary Chambers in the Courts in Cambodia, in the case of "*Duch*".[91] The Trial Chamber should, it is respectfully submitted, make a finding on the legality of the detention of the accused, and then pursuant to his right to a remedy, decide on the appropriate remedy which may be awarded or left to a later decision following the appropriate procedure.

2. Stay of proceedings

[90] ICC-01/04-01/06-772, para. 37.
[91] *Kaing Guek Eav alias "Duch"*, Case N° 001/18-07-2007/ECCC/TC, Decision on Request for Release of 15 June 2009, at page 8, para 16

122. The accused seeks relief for the catalogue of unlawful abuse. The Defence submits that given the length and extent of the unlawful detention the accused has been subjected to serious mistreatment and the appropriate remedy is a stay or termination of the proceedings against him.

(a) general principles on stay of proceedings

123. It has been accepted by the ad hoc tribunals, and in particular the cases of *Bayaragwiza* before the ICTR[92] and *Nicolic* before the ICTY[93] that, as is the case in common law jurisdictions, an abuse of the process of the court may lead to the remedy of a stay of the proceedings and the unconditional release of the accused. This has been accepted in different terms by the Appeals Chamber of the ICC in the case of *Lubanga*.[94] According to the Appeals Chamber:

> Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. [95]

124. The Appeals Chamber has cited as instances of stay of proceedings in the context of its discussion of abuse of process (a) delay in bringing the accused to justice; (b) broken promises to the accused with regard to prosecution and (c) bringing the accused to justice by illegal or devious means.[96] Whether viewed as 'abuse of process' or more simply as the violation of human rights which undermine the fairness and integrity of the trial, this case is concerned with (a) and (c), but not (b).

(b) feasibility of a fair trial

125. In holding in the *Lubanga* case, that it must be impossible for the accused to make his defence *within the framework of his rights* before a stay of proceedings would be appropriate, the Appeals Chamber endorses that in such situations there can be no fair trial. It gives the example of a case of entrapment. Entrapment is perhaps the most

[92] *Jean Bosco Baraayagwiza v The Prosecutor*, Decision of 3 November 1999.
[93] *Prosecutor v Dragon Nicolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest of 5 June 2003.
[94] *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772 , Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006.
[95] See *Luganga* Judgement ibid, para 39.
[96] See *Luganga* Judgement, ibid., para. 29.

obvious instance where a fair trial is no longer possible because the crime is itself invoked by the conduct which constitutes an irregularity in the proceedings.

126. Does this mean that a fair trial is always possible as long as there is fairness in the trial itself, regardless of previous violations of international law in bringing the accused to trial? This is a question which faced the South African courts in the case of *S v Ebrahim*.[97] In that case members of the ANC had been unlawfully abducted from Swaziland in order to stand trial in South Africa. In a bold step for courts operating within the context of an apartheid regime determined to squash the ANC by any means, the South African Court of Appeal overturned the decision of Daniels J that the fact that the accused was captured in violation of international law would not impair the court's jurisdiction, and held, *inter alia*, that '[...] the legal process must be fair to those affected and abuse of law must be avoided in order to protect and promote the integrity of the administration of justice.'

127. In this case it is submitted that the following factors which have been elaborated above bring these legal proceedings in such disrepute, that a fair trial within the framework of the rights of the accused is no longer possible:

1. the flagrant disregard for the human rights of the accused in a politically motivated arrest;
2. a complete disregard for the fundamental right to liberty and the rights associated with it;
3. the failure to disclose and disassociate from this conduct by the Office of the Prosecutor, thus not making a clean break from but creating continuity in the illegality of the detention post transfer and beyond;
4. such continuity of the unlawful nature of the detention consolidated by the participation of the organs of the ICC in the impropriety of the United Nations, as manifested through MONUC, and the DRC authorities – that is: knowing participation of the Prosecutor as from the point when it realised that the accused was a leading suspect, probably by late 2005; and constructive custody of the accused from the issuance of a warrant of arrest by the ICC from July 2007 to 17 October 2007.

[97] *State v Ebrahim*, Decision of 26 February 1991 [1991] 2 SA 553

128. It is important to note that when the Appeals Chamber speaks of a fair trial not being possible it takes the view that this occurs when an accused cannot make his defence within the framework of his rights. If an unlawful detention in flagrant violation of human rights not only continues but effectively enables his attendance at the trial, then the trial cannot take place within the framework of his rights and the whole trial is vitiated.

129. This gives true expression to the object of the doctrine of abuse of process, which according to the Appeals Chamber, is 'to see that the stream of justice flows unpolluted'.[98] A stay of proceedings is justified if 'the illegal conduct [..] make[s] it otiose, repugnant to the rule of law to put the accused on trial'.[99]

130. It is submitted that a stay in the proceedings is justified, in the words of the English Court of Appeal in *Huang v Secretary of State*,[100] where the unfairness in the treatment of the suspect makes it is impossible to piece together the constituent elements of a fair trial. One of these constituent elements is lawfully instituted detention for the purposes of the trial. In this case, there has been no clean break from the initial and continuing illegality of the detention. It will continue throughout the trial under conditions where the total disregard for the basic rights of the accused in arresting and detaining him and the use of this to enable his transfer to the Court cloud the legitimacy of his presence in the courtroom every additional day the accused is kept in detention.

131. It is therefore submitted that the trial will remain unfair as long as the continued detention formerly based on a total disregard for the rights of the accused persists, and the justice administered by the court has been brought into such serious disrepute that a fair trial has in fact become an impossibility, regardless of the impartiality of the judges in the assessment of the evidence.

3. Compensation

132. By virtue of Article 85(1) of the Statute:

[98] See *Luganga* Judgement, ICC-01/04-01/06-772, para 28
[99] See *Luganga* Judgement, ICC-01/04-01/06-772, para 30
[100] [2005] 3 All ER 435, cited with approval by the Appeals Chamber in the *Lubanga* Judgement, ICC-01/04-01/06-772, para. 39.

> Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

133. This provision does not limit the circumstances in which such right to compensation exists. Since there has been no break in the detention of the accused from the time of his initial deprivation of freedom on the 26th February 2005, it is submitted that the right under the Statute is applicable to the accused.

134. The procedure for requesting compensation under Article 85 is set out in Rules 173 to 175. Rule 173 requires that such a request be made in writing to the Presidency, and that such request be made no later than six months from the notification of the decision of the Court on the unlawfulness of the arrest or the detention. It is also provided that the judges shall not have participated in any judgment regarding the person making the request.

135. It follows from these rules that the accused must await the decision of the Chamber on the unlawfulness of his arrest and detention before filing its request for compensation.

4. Mitigation of sentence

136. While the question of sentencing will be addressed at the end of the trial, and only in the event of a conviction on one or more charges, there is limited opportunity to address, in a full manner, questions of unlawful arrest and detention at the time of sentencing. In addition, the relevant evidence will be less fresh and reliable through the passage of time. The Defence further notes that it has requested a stay of proceedings and that it is in the interests of the expeditiousness of the trial to ensure that the merits are addressed only once during the course of the proceedings, even if the consideration of different remedies fall to be considered at different moments. Accordingly, the Defence argues that it is appropriate to argue the merits of this issue at the pre-trial stage, even if the remedy in terms of a more lenient determination of sentence is more appropriately addressed at a much latter stage.

137. Article 76 requires the Chamber to consider the appropriate sentence upon conviction. Rule 146 sets out a variety of factors to be taking into account in the determination of

sentence, but these are not exhaustive. It is submitted that the accused's unlawful arrest and detention are matters which can and should be legitimately taken into account at the appropriate time. Rule 145 (c), for example, invites the Chamber to consider *inter alia* the social and economic condition of the convicted person. This indicates that factors related to the suffering of the accused are relevant to sentencing, and mistreatment by state authorities must, it is submitted be a relevant factor.

138. The Defence therefore requests that the matter of the accused unlawful arrest and detention be taken into account at the relevant time, in the event that he is convicted of any offence within the jurisdiction of the court. This submission is without prejudice to the presumption of innocence and the accused case that he is not guilty on all counts.

RELIEF SOUGHT:

Accordingly, it is hereby requested that the Chamber:

(1) FIND violations of the rights of the accused relating to his prior detention; thus enabling the Defence to make an application for compensation and submissions on sentence at the appropriate time;

(2) ORDER a stay in the proceedings against Germain Katanga or termination thereof.

Respectfully submitted,

David HOOPER

Dated this 30 June 2008
At The Hague