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**International
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Court**

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TRIAL CHAMBER II

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

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI**

**Confidential, ex parte available only to Mr. Katanga's Defence, the Office of the
Prosecutor and the Registrar**

**Defence Application for Leave to Appeal the Trial Chamber's *Décision relative à
la requête de la Défense de Germain Katanga en illégalité de la détention et en
suspension de la procédure***

Source: Defence for Mr Germain Katanga

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

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REGISTRY

Registrar Ms Silvana Arbia	Defence Support Section
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Introduction

1. The Defence for Mr. Germain Katanga (“Defence”) requests leave to appeal the Trial Chamber’s *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure* (“Impugned Decision”).¹ It files this Defence Application for Leave to Appeal the Impugned Decision pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules, and to regulation 65 of the Regulations of the Court.
2. The Defence submits that the Trial Chamber erred in dismissing, in its entirety, the *Defence Motion for a Declaration on Unlawful Detention and Stay of the Proceedings* (“Defence Motion”),² on the ground of it being filed too late, and without considering the merits the motion. In doing so, the Chamber made the following three identifiable errors:
 - (1) The Defence Motion was not filed out of time. The Statute, Rules and Regulations do not impose a deadline to file an application challenging the lawfulness of the detention of the accused;
 - (2) Imposing a deadline not explicitly provided for in the Statute, Rules or Regulations creates an unfairness to the accused, particularly in respect of the fundamental matters raised, irrespective of the diligence of counsel.
 - (3) The Defence had justifiable grounds for submitting the Defence Motion when it did;

Threshold Criteria for Leave to Appeal

3. The Chambers have repeatedly stated that leave to appeal pursuant to article 82(1)(d) will be granted only if the party submitting the application has identified at least one

¹ ICC-01/04-01/07-1666-Conf-Exp, Urgent Confidential Ex parte, réservé au Bureau du Procureur, Défense de Germain Katanga et au Greffe, filed on 20 November 2009.

² ICC-01/04-01/07-1258, filed on 30 June 2009, confidential ex parte available only to the Defence for Germain Katanga; a public version was filed on 2 July 2009, ICC-01/04-01/07-1263.

issue arising out of the impugned Decision, and that such issue meets the following two cumulative criteria:

- a. it must be an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and
- b. it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³

Issues of Appeal

Issue 1: no deadline in the Statute, Rules or Regulations

- 4. At paragraph 39 of its Decision, the Chamber holds that a challenge to the lawfulness of the arrest of the accused must be submitted in the initial stage of the proceedings, in particular where such a challenge is accompanied by a request to postpone or stay the proceedings.
- 5. The Decision states that it is in the interests of everyone, in particular of the suspect deprived of his liberty, that the question of the unlawfulness of his detention be brought to the attention of the Chamber at the earliest moment possible in the preliminary stages.⁴ The Chamber refers to Article 19 of the Statute which, in the Chamber's view, requires that any challenge to jurisdiction or admissibility of the case be brought at the earliest opportunity to avoid obstructing or delaying the proceedings. The Chamber particularly refers to article 19(4), (5) and (8), and its earlier decision on the Defence's challenge to the admissibility of the case.⁵

³ ICC-01/04-01/07-108, *Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions*, 14 December 2007, p. 3; ICC-01/04-01/07-116, *Decision on the Defence Motion for Leave to Appeal the First Decision on Redactions*, 19 December 2007, p. 4.

⁴ ICC-01/04-01/07-1666-Conf-Exp, para. 40.

⁵ Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut), 16 juin 2009, ICC-01/04-01/07-1213, par. 44.

6. The Chamber makes reference to rule 122(2) of the Rules, which requires the Chamber seized with a challenge to jurisdiction or admissibility to apply the procedure described in rule 58. The Chamber further holds that rule 122(3) and (4) require that any objections or observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be submitted at the beginning of the hearing and cannot be raised again at a later stage.⁶
7. The Chamber also refers to article 64(2) of the Statute pursuant to which it must ensure that the trial is conducted fairly and diligently with full respect of the accused. In the present proceedings, the article requires that the Chamber must also ensure that Mr. Ngudjolo's right to be tried without undue delay is equally respected.⁷
8. It is submitted that none of the provisions invoked by the Trial Chamber imposes a deadline on the Defence for submitting a Motion challenging the lawfulness of Mr. Katanga's arrest in the DRC.
9. The Chamber makes reference to provisions pertaining to a challenge to the jurisdiction of the court or the admissibility of the case. The Defence emphasises that this is not a challenge to jurisdiction or admissibility of the case and can be submitted at any time of the proceedings. Accordingly, these provisions are irrelevant to the present application and cannot be applied by analogy.
10. The Defence Motion does not challenge the jurisdiction of the Court or the admissibility of the case. Rather, it requests the Chamber to exercise jurisdiction to stay the proceedings.

⁶ ICC-01/04-01/07-1666-Conf-Exp, para. 41.

⁷ ICC-01/04-01/07-1666-Conf-Exp, para. 42.

11. The Motion alleges that Mr. Katanga's arrest in the DRC and his subsequent provisional detention in the DRC was unlawful. Serious violations of the rights of the accused may result in a stay of the proceedings, which may be requested at any time. It may be the case that such violations occur at a later stage. The accused should then not be precluded from requesting a stay of proceedings, even if the proceedings are far advanced. This is so notwithstanding the Pre-Trial Chamber's suggestion that any allegation of violations of fundamental human rights should be submitted as a challenge to the Court's jurisdiction under article 19 of the Statute.⁸ This suggestion was made in the abstract without being seized with a Defence Motion. The Pre-Trial Chamber was, therefore, not aware of the exact nature of the Defence's challenge when it rendered this Decision.
12. In Lubanga, a similar challenge was raised pursuant to article 19(2). The Appeals Chamber noted that the application was improperly submitted pursuant to article 19(2) as it was not a challenge to the jurisdiction of the Court, but would more appropriately be qualified as a *sui generis* or atypical application requesting a stay of the proceedings, which, if successful, would lead to the liberation of the accused.⁹ This Decision clearly takes the Defence Motion challenging the lawfulness of Mr. Katanga's arrest in DRC outside the scope of article 19(2) of the ICC Statute.
13. It makes perfect sense that there is no deadline for submitting requests to stay the proceedings because the event triggering such request may occur at any time in the course of the proceedings. In this particular case, the Defence not only asks for a stay of the proceedings, but also a declaration from the Court on the illegality of his arrest, as well as financial compensation and/or alternatively, and only in the event of a conviction, that relief be reflected in a reduction of any sentence imposed.¹⁰ Whilst the Defence appreciates that a request for a stay of the proceedings should, where circumstances allow, be submitted as early as possible, this is not the case for the

⁸ Chambre préliminaire I, Décision relative à la demande de la Défense déposée le 7 avril 2008 en vertu de l'article 57-3-b du Statut de Rome visant à obtenir la coopération de la République démocratique du Congo, 25 avril 2008, ICC-01/04-01/07-443-Conf-Exp-tFRA, page 10; cited in the Impugned Decision, para. 44.

⁹ ICC-01/04-01/06-772, para. 24; cited in the Impugned Decision, para. 36.

¹⁰ Defence Motion, paras. 2, 122.

other requests contained in the Defence motion. A request for compensation, for example, can be considered at any time without effecting the process.

14. Even if the Defence Motion was to be treated as a challenge to jurisdiction or admissibility of the case pursuant to article 19 of the Statute, the Defence submits that its request would have been in time.
15. Article 19(4), to which the Chamber refers, states that the admissibility of a case or the jurisdiction of the Court may be challenged “prior to or at the commencement of the trial”. Only in “exceptional circumstances”, a Chamber may grant leave for a challenge to be brought “at a time later than the commencement of the trial”.
16. The Defence submits that the Chamber’s view as to when the trial commences is wrong, for reasons set out in the Defence’s earlier decision on the admissibility of the case pursuant to article 19 of the Statute.¹¹ The Defence lodged an appeal against the Chamber’s determination as to when a challenge to the admissibility of the case may be raised.¹² The Appeals Chamber did not rule on this issue, given that the Chamber did review the challenge on its merits and, accordingly, the Defence was not prejudiced.¹³ Hence, the question of when a challenge to jurisdiction of the Court or the admissibility of the case must be challenged has not yet been finally determined. In this respect, the Defence refers to its Document in Support of Appeal mentioned above and maintains that a challenge to the jurisdiction of the court or the admissibility of the case can be raised until the Prosecution opens its case for the trial. Thereafter, such a challenge can only be brought exceptionally.

¹¹ Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut), 16 juin 2009, ICC-01/04-01/07-1213.

¹² Document in Support of Appeal of the Defence of Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1279, 8 July 2009, paras. 14-41.

¹³ Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 36-38.

17. Hence, even if the Defence Motion challenging the lawfulness of Mr. Katanga's arrest and detention in DRC is treated in a similar fashion as jurisdiction or admissibility challenges, the Defence has submitted its Defence Motion in time.
18. The other provisions the Chamber relies on do not impose a deadline. Rules 122(3) and (4) ensure that an objection or observation concerning an issue related to the proper conduct of the proceedings prior to the confirmation be raised once. These rules, however, do not impose a deadline to submit an application challenging the jurisdiction of the Court or the admissibility of the case, as was also pointed out by the Pre-Trial Chamber.¹⁴ Nothing in rule 122 prevents a party from raising such an objection before the Trial Chamber as long as it has not yet raised a similar objection before the Pre-Trial Chamber.
19. Article 19(5) refers to States, not individuals. Article 19(8), rule 122(2) and rule 58 refer to time-consuming proceedings but do not impose a deadline. In accordance with these provisions, it may be preferable that an application challenging the lawfulness of the arrest and detention of an accused be submitted at the earliest opportunity but this is not tantamount to imposing a deadline for doing so. The Defence submits that so long as there is no explicit deadline provided in the Statute, Rules or Regulations, the Defence cannot be precluded from submitting such an application at any time during the proceedings.
20. The fact that the Chamber has an obligation to respect the fairness of the proceedings both in respect of Mr. Ngudjolo and Mr. Katanga cannot lead to the Chamber imposing a deadline which is not foreseen in the Rome Statute, Rules or Regulations on one of the accused to submit an application challenging the lawfulness of his arrest and detention to avoid delay of the proceedings against his co-accused. Such imposition of an artificial deadline would undermine the fairness of Mr. Katanga's trial.

¹⁴ Chambre préliminaire I, Décision relative à la demande de la Défense déposée le 7 avril 2008 en vertu de l'article 57-3-b du Statut de Rome visant à obtenir la coopération de la République démocratique du Congo, 25 avril 2008, ICC-01/04-01/07-443-Conf-Exp-tFRA, page 10; cited in the Impugned Decision, para. 44.

21. Accordingly, the Defence submits that the Trial Chamber erred in imposing a deadline which was not foreseen in the Statute, Rules and Regulations.

Issue 2: Good cause for delay

22. The Chamber finds that the Defence has shown no good cause for its delay because, in the Chamber's view, it had ample opportunity to raise its submission on the lawfulness of Mr. Katanga's arrest and detention in the DRC earlier, but failed to do so. The Chamber points out that, already on 22 October 2007, the Defence made reference to the unlawfulness of Mr. Katanga's arrest but waited until 30 June 2009 to submit its application.¹⁵

23. As aforementioned, the Defence submits that it is wholly unnecessary to show good cause because it can submit such an application at any time of the proceedings. However, even if the Defence must show good cause, it submits that it has done so.

24. The Chamber concedes that the expressed views of the Pre-Trial Chamber may have led the accused to believe that he could submit his submission challenging issues pertaining to his arrest and detention in the DRC after the confirmation decision was rendered.¹⁶ Accordingly, if the Defence has misread the Statute and Rules as to when such matters should be raised, this is not a blameworthy error, given that the Pre-Trial Chamber appeared to be of the same view. In any event, if in error, it is not a matter that should burden the accused himself.

25. In addition, the Defence does not agree that it had a duty to raise such matters in its observations on Mr. Katanga's detention as they relate to the unlawfulness of Mr.

¹⁵ Impugned Decision, paras. 43-59 and 64. The Decision makes reference to, *inter alia*, ICC-01/04-01/07-T-5-FRA, 22 octobre 2007, pages 15 à 23; and Defence Application Pursuant to Article 57-3(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC), 7 avril 2008, ICC-01/04-01/07-371-Conf-Exp, pages 6 & 15.

¹⁶ Impugned Decision, para. 49.

Katanga's detention prior to his transfer to The Hague.¹⁷ Those proceedings relate solely to detention in the Hague pending trial. The context of such interlocutory applications relating to detention at the ICC in the Hague was not the moment to make an application relating to a challenge of the lawfulness of Mr. Katanga's arrest in the DRC.

26. The Defence was not in possession of the relevant information prior to the decision confirming the charges despite its best efforts to obtain it. The Defence submits that it had good grounds to wait until it had all relevant information. The Defence submits that it would be unprofessional to submit such an application unless it is fully informed of all circumstances surrounding the arrest of the accused. For this, it was perceived necessary to hear the views from the DRC. The Defence made efforts to contact DRC authorities and to get documents from them, but to no avail. Therefore, the Defence submits that it was entirely appropriate to wait until after 1 June 2009, when the DRC authorities made their submissions. The Defence submits that, in the circumstances of this case, it had no obligation to raise the issue of unlawfulness of Mr. Katanga's arrest in DRC until such time as it considered it appropriate to make the submission. The submissions of the DRC authorities on 1st June made it clear that the arrest was indeed unlawful.

27. Accordingly, the Defence submits that the Chamber erred in finding that the Defence failed to offer convincing reasons for its late submission.¹⁸

Issue 3: unfairness to the accused

28. It is submitted that, even if the Chamber is not persuaded by any of those grounds, the accused should not suffer from any possible mistake made by his counsel. There is no way that the accused could have known that there was a deadline to submit his application challenging the lawfulness of his arrest and detention in the DRC. Given that the Statute, Rules and Regulations do not explicitly impose a deadline, it would

¹⁷ Impugned Decision, para. 58.

¹⁸ Impugned Decision, para. 66.

be wholly unfair to the accused if he is precluded from raising issues pertaining to the lawfulness of his arrest simply because his counsel have misunderstood the provisions of the Statute, Rules and Regulations.

29. In this regard, it should be noted that, if Defence counsel has misread the applicable provisions or made a mistake by raising its submissions so late, this was by no means purposeful. Even the Pre-Trial Chamber has indicated that the Defence could submit challenges pursuant to Article 19 after the confirmation decision was issued. The Defence appreciates the Chamber's preference for such submissions to be made as early as possible. However, the accused is still entitled to a fair trial even if such a submission has been made late. The issues at stake are so fundamental that the accused should never be deprived of an opportunity to raise such matters.
30. The Chamber has an obligation to ensure that the trial is fair. This obligation is independent of the parties. Accordingly, lack of diligence on the part of counsel, if any, cannot form an obstacle to the Chamber carrying out its duty to ensure the fairness of the proceedings. If an accused is precluded from raising issues in respect of the lawfulness of his arrest, which led him to be detained for over two years prior to his transfer to The Hague, the trial can no longer be said to be fair. If the Defence is correct in stating that Mr. Katanga was unlawfully detained for such a lengthy period of time, the accused should be able to raise the issue, in one form or another, at any time.
31. Even if the Chamber considers that an application for stay of the proceedings is too late, it should still consider the other requests, that is, for a determination of the illegality of Mr. Katanga's arrest and detention in the DRC, for financial compensation and/or for his sentence, if any, to be mitigated. The Defence Motion cannot be considered to have been submitted too late for those latter purposes.

32. Accordingly, the Defence submits that, in light of its obligation to ensure that the trial was fair, the Chamber erred in declining to consider the merits of Mr. Katanga's complaints about the unlawfulness of his detention.

Impact on the Fairness of the Proceedings

33. The Impugned Decision directly impacts on the fairness of the proceedings. This is apparent from appeal issue 3. The matters raised are so fundamental, and the consequences so severe, that it goes without saying that the question whether the accused is unfairly deprived of an opportunity to challenge the lawfulness of his arrest impacts the fairness of the proceedings. As indicated, the accused requests not only a stay of the proceedings, but also a determination of the illegality of his arrest and detention in the DRC, for financial compensation and, if applicable, for mitigation of his sentence. It would be unfair for the accused to be deprived of an opportunity to have those matters considered.

34. In addition, if the accused must wait until there is an appeal against his conviction or acquittal before raising these matters before the Appeals Chamber, the trial may have gone on when it should have been stayed and the accused spent time in prison unnecessarily. Damage would have been done to the accused, which at this stage can be avoided by granting leave to appeal the Chamber's impugned decision. Accordingly, the fairness of the proceedings are clearly impacted.

Impact on the Outcome of the Trial

35. The Defence submits that, if the request for stay of the proceedings is accepted, the outcome of the trial would undoubtedly be impacted. The accused could be released.

An Immediate Resolution may materially advance the Proceedings

36. It is evident that an immediate resolution of the Appeals Chamber would materially advance the proceedings. If the Appeals Chamber is not given the opportunity to review this matter until an eventual appeal against the Chamber's final judgment, avoidable damage would have been done.

Conclusion

37. On the basis of the foregoing, the Defence requests the Trial Chamber to grant leave to appeal the Trial Chamber's *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure* pursuant to article 82(1)(d) of the Rome Statute, rule 155 of the Rules of Procedure and Evidence, and to regulation 65 of the Regulations of the Court.

Respectfully submitted,



David HOOPER
Lead Counsel for Germain Katanga

Dated this 30th November 2009

At The Hague