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Date: **11 March 2010**

THE APPEALS CHAMBER

Before:

**Judge Daniel David Ntanda Nsereko, Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Joyce Aluoch**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

Public Document

Prosecution response to Katanga's appeal against the "Decision on the Motion for the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"

Source: Office of the Prosecutor

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

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Introduction

On 20 November 2009, the Trial Chamber issued the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” (“Decision”),¹ in which it decided that the Defence Motion for a declaration on unlawful detention and stay of proceedings was filed too late and therefore declined to decide on the merits of the motion. The Defence appealed the Decision asking that the Appeals Chamber overturn the Decision and order the Trial Chamber to consider the merits of the Defence Motion.

None of the arguments advanced by the Defence shows the existence of an error invalidating the Decision. The Trial Chamber did not enter any legal finding that there is a “time limit”, a “provision” or a general principle that would render the Defence Motion inadmissible at a particular stage of the proceedings, as argued on appeal. Rather, in the absence of a specific deadline for the filing of the Defence Motion prescribed by the Statute, the Rules or the Regulations of the Court, the Trial Chamber dealt with it as a matter of trial management pursuant to its discretionary power under Article 64(2) and based on the facts and circumstances of the case.²

Finally, the Defence has the burden of demonstrating that when exercising its discretion and finding that the Defence Motion was filed too late, the Trial Chamber committed a discernible error. This has not been shown: the Decision is based on a correct interpretation of the governing law and it is not vitiated by any error of fact or procedural error.

Procedural background

1. On 30 June 2009, the Defence of Germain Katanga (“the Defence”) filed the “Defence Motion for a declaration on unlawful detention and stay of proceedings” (“Defence Motion”).³ The Prosecution filed a response to the Defence Motion on 24 July 2009.⁴

¹ ICC-01/04-01/07-1666-Conf-Exp.

² See Decision paras. 42 and 63. On the submission that decisions relating to the management of pre-trial and trial proceedings are matters that fall within the discretion of the Trial Chamber, see *Prosecutor v Karadzic*, Case No. IT-9S-S/1S-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 11; *Prosecutor v Karadzic*, Case No. IT 9S-5118-AR73.1, Decision on Appellant Radovan Karadzic's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14; *Prosecutor v Gotovina, Cermak and Markac*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 5.

³ ICC-01/04-01/07-1258-Conf-Exp.

⁴ ICC-01/04-01/07-1335-Conf-Exp.

2. On 20 November 2009, the Trial Chamber issued the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” (“Decision”),⁵ in which it rejected the Defence Motion considering that it “was filed at too advanced a state in the proceedings and therefore [finding it] inadmissible”. As a result, the Trial Chamber did not consider the merits of the Defence Motion.⁶
3. On 30 November 2009, the Defence filed an application for leave to appeal the Decision,⁷ which was granted by the Trial Chamber on 11 February 2010.⁸
4. On 25 February 2010, the Defence filed a first version of the “Document in Support of the Defence Appeal of the *Décision relative à la requête de la Défense de Germain Katanga en illégalité de détention et en suspension de la procédure*” (“Defence Appeal”).⁹ Approximately one hour after notification of this version of the Defence Appeal, the Registrar informed the Prosecution that the Defence would file a corrigendum to the Defence Appeal, which would be notified to the parties during the morning of 26 February 2010. The Registry further informed the Prosecution that for these reasons the prior version of the Defence Appeal was no longer available in TRIM.¹⁰ On 26 February 2010, the Prosecution was notified of a corrected version of the Defence Appeal.¹¹

Statement of Facts

5. At Germain Katanga’s (“Accused”) initial appearance before the Pre-Trial Chamber, the Defence had indicated that it wished to challenge the legality of the detention of the Accused by the DRC authorities. However, regardless of the various opportunities it had before the Pre-Trial and the Trial Chamber to do so, it chose to pursue a different avenue

⁵ ICC-01/04-01/07-1666-Conf-Exp.

⁶ Decision, paras. 66-67.

⁷ ICC-01/04-01/07-1691.

⁸ ICC-01/04-01/07-1859.

⁹ ICC-01/04-01/07-1916. This version of the Defence Appeal was notified to the Prosecution by the Registrar on 25 February 2010, at 16:41 hours.

¹⁰ See notification email sent by the Registry on 25 February 2010, at 17:48 hours.

¹¹ ICC-01/04-01/07-1916-Corr. Considering that the Prosecution did not have access to the original version of the Defence Appeal after 25 February 2010, at 17:48 hours, it has calculated the timeline for filing this response from the date when the corrected version of the Defence Appeal was notified. Should the Appeals Chamber nevertheless consider that the time-limit under Regulation 65(5) started to run from the time when the first version of the Defence Appeal was notified, despite the fact that it was only available to the other participants for approximately one hour, the Prosecution requests for a variation of the time limit pursuant to Regulation 35. The Prosecution submits that the unavailability in TRIM of the original version of the Defence Appeal constitutes good cause to that effect.

and challenged the admissibility of the case in February 2009. When in June 2009 the Trial Chamber found that the case was admissible, the Defence filed the Defence Motion justifying its tardiness by arguing that it had obtained essential information from the DRC authorities only during the hearing of 1 June 2009. This argument lacks any merit: all the information needed to establish the alleged lack of investigations by the DRC authorities against the Accused was in the possession of the Defence at the latest by 28 August 2008,¹² and well before the date by which the Defence was required to inform the Trial Chamber of any “issues and observations which they would deem relevant and on which they would like the Chamber to rule”.¹³ The Defence Motion fails to specify which new information was obtained on 1 June 2009 that was not already in its possession.

Pre-Trial Phase

6. During the Accused’s initial appearance on 22 October 2007 before the Pre-Trial Chamber, the Defence indicated its intention to raise the issue of unlawful detention of the Accused and elaborated on the underlying facts. The Pre-Trial Chamber invited the Defence to file such a motion in writing.¹⁴ On 7 April 2008, the Defence requested the Pre-Trial Chamber to order the DRC authorities to provide information pertaining, *inter alia*, to the Accused’s right against arbitrary detention.¹⁵ The Defence, however, did not file any motion based on the alleged unlawful detention of the Accused before the confirmation hearing. Neither did the Defence raise the issue at the confirmation hearing,¹⁶ nor in the Defence’s written submissions of 24 June 2008, which were filed in response to the Pre-Trial Chamber’s request for submission of a list of matters pertaining to admissibility, jurisdiction and any other procedural issues including matters under Rule 122(3) and (4).¹⁷ The Defence further failed to address the matter at the written observations on the issues addressed at the confirmation hearing on 28 July 2008,¹⁸ and

¹² See paras. 25-30 below.

¹³ Decision, para. 52.

¹⁴ ICC-01/04-01/07-T-5-ENG, 22 October 2007, pp. 15 to 25. See Appealed Decision, para. 43.

¹⁵ ICC-01/04-01/07-371-Conf-Exp, p. 6. See Decision para. 43.

¹⁶ ICC-01/04-01/07-T--ENG, 2 July 2009. However, the Defence Counsel referred to some alleged irregularities during the DRC detention to challenge the admissibility of some material. See pp. 4 to 14 and 49-52.

¹⁷ ICC-01/04-01/07-641-Conf. The Defence referred to the DRC detention period to challenge the admissibility of some material (see for instance paras. 15-18).

¹⁸ ICC-01/04-01/07-698. However at an ex parte hearing on 11 July 2008 (after the confirmation hearing but before the final observations) Katanga referred again to the need to obtain the information requested to the DRC authorities before it file any challenge to the jurisdiction and the admissibility of the case (ICC-01/04-01/07-T-47-CONF-EXP-ENG, 11 July 2008, p. 3). See also Decision, para. 47.

did not request the Accused's interim release based on the alleged unlawful arrest and detention by the DRC authorities when the current detention was reviewed.¹⁹

Trial Phase

7. Upon its constitution, the Trial Chamber scheduled an initial status conference for 27 and 28 November 2008 during which it invited the parties to raise any "issues and observations which they would deem relevant and on which they would like the Chamber to rule".²⁰ The Defence did not present a single issue concerning the unlawfulness of the Accused's arrest and detention, whether in its written submissions or orally at the hearings on 27 and 28 November 2008.²¹ At the status conference of 28 November it only announced that it intended to submit a challenge to the admissibility of the case against the Accused.²² The Defence also failed to raise the issue of unlawful detention during a second status conference held on 3 February 2009,²³ and during any review of the current detention of the Accused.²⁴
8. On 10 February 2009, the Defence filed the announced motion challenging the admissibility of the case, pursuant to Article 19(2)(a).²⁵ The Prosecution responded to the Admissibility Challenge on 19 March 2009²⁶ and the Defence sought leave to reply to the Chamber, and replied, on 27 and 30 March 2009, respectively.²⁷ A public hearing was convened on 1 June 2009, which was attended by both Defence teams, the Office of the Prosecutor and representatives of the DRC and the victims. It was during the last part of this hearing that the Defence for the first time announced to the Trial Chamber its intention to file a motion regarding the unlawfulness of the detention of the Accused.²⁸

¹⁹ Decision, paras. 54-55.

²⁰ ICC-01/04-01/07-747-tENG.

²¹ ICC-01/04-01/07-T-53-ENG, 28 November 2008.

²² ICC-01/04-01/07-T-53-ENG ET WT, p. 49, lines 19 to 21.

²³ ICC-01/04-01/07-T-56-ENG. The Defence also did not make any reference to the alleged unlawful detention of the Accused in DRC in the written submissions that it filed during the reviews of the conditions of Katanga's detention (ICC-01/04-01/07-780; ICC-01/04-01/07-967-Conf-Exp and ICC-01/04-01/07-970; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009; ICC-01/04-01/07-1298; ICC-01/04-01/07-1612).

²⁴ Decision, paras. 56 and 58.

²⁵ ICC-01/04-01/07-891-Conf-Exp ("Admissibility Challenge").

²⁶ ICC-01/04-01/07-968-Conf-Exp. A public redacted version was filed on 30 March 2009: ICC-01/04-01/07-1007. ("Prosecution Response to the Admissibility Challenge").

²⁷ ICC-01/04-01/07-994-Conf-Exp, and ICC-01/04-01/07-1008-Conf-Exp, respectively.

²⁸ ICC-01/04-01/07-T-65-ENG ET, p. 117, lines 18-21.

The grounds of appeal raised by the Defence

9. The Defence raises two grounds of appeal against the Decision, namely:

- (i) “The Trial Chamber erred in its legal finding at paragraph 66 of its decision to the effect that the lateness of the motion rendered it inadmissible [and] wrongly stated in paragraph 67 of its decision that it did not have to consider the merits of the application”²⁹ (“First Ground of Appeal”); and
- (ii) “the Trial Chamber erred in its factual finding at paragraph 66 of its decision that the Defence motion was too late”³⁰ (“Second Ground of Appeal”).

10. Under the First Ground of Appeal, the Defence argues that the Trial Chamber erred in law by finding that the Defence Motion was inadmissible as a result of its late filing.³¹ It submits that the Trial Chamber imposed a “time limit”³² that was not legitimate or proportional³³ and that impairs the right of the Defence to redress serious violations of human rights.³⁴ The Defence further argues that “there was in fact no provision rendering the motion inadmissible as found by the Chamber”.³⁵

11. The Trial Chamber did not enter any legal finding that there is a “time limit”, a “provision” or a general principle that would render the Defence Motion inadmissible at a particular stage of the proceedings. Rather, in the absence of a specific deadline for the filing of the Defence Motion prescribed by the Statute, the Rules or the Regulations of the Court, the Trial Chamber dealt with it as a matter of trial management pursuant to its discretionary power under Article 64(2) and based on the facts and circumstances of the case.³⁶ The Trial Chamber ruled that the Defence Motion was filed at too advanced a stage in the proceedings and was therefore inadmissible “having regard to all the circumstances

²⁹ Appeal Brief, para. 6(i).

³⁰ Appeal Brief, para. 6(ii).

³¹ Appeal Brief, para. 7.

³² See for instance Appeal Brief, paras. 8, 13, 17, 18, 27 and 30.

³³ Appeal Brief, para. 27.

³⁴ Appeal Brief, paras. 28-30.

³⁵ Appeal Brief, para. 32.

³⁶ See Decision paras. 42 and 63. On the submission that decisions relating to the management of pre-trial and trial proceedings are matters that fall within the discretion of the Trial Chamber, see *Prosecutor v Karadzic*, Case No. IT-9S-S/1S-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 11; *Prosecutor v Karadzic*, Case No. IT 9S-5118-AR73.1, Decision on Appellant Radovan Karadzic's Appeal Concerning Holbrooke Agreement Disclosure, 6 April 2009, para. 14; *Prosecutor v Gotovina, Cermak and Markac*, Case No. IT-06-90-AR73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of Identity of Victims, 26 January 2009, para. 5.

of the case and in the absence of any convincing explanation from the Defence for Germain Katanga”.³⁷

12. Hence, the First Ground of Appeal, as presented by the Defence, does not arise from the Decision.

The Trial Chamber correctly exercised its discretion

13. The arguments advanced by the Defence under the First and Second Grounds of Appeal may be discussed in light of the issue whether the Trial Chamber reasonably exercised its discretion under Article 64(2) when finding that the Defence Motion was filed too late.

14. In order to successfully challenge a discretionary decision, the Defence must demonstrate that the Trial Chamber committed a “discernible error” resulting in prejudice to the Defence.³⁸ The issue in this appeal is not whether the Decision was correct, in the sense that the Appeals Chamber agrees with the decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching the Decision.³⁹ According to the applicable standard of review set by the Appeals Chamber, “the Appeals Chamber will not interfere with the [...] Chamber's exercise of discretion [...], save where it is shown that th[e] determination [by the Chamber] was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means that in effect the Appeals Chamber will interfere with the discretionary decision only under limited conditions.”⁴⁰

³⁷ Decision, para. 66.

³⁸ *Prosecutor v Karadzic*, IT-95-5/18-AR73.3, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Prosecution Motion Seeking Determination that the Accused Understands English, 4 June 2009, para. 5.

³⁹ *Prosecutor v Milosevic*, IT-99-37-AR73 and IT-01-50-AR73 and IT-01-51-AR73, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002, para 4; *Milosevic v Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, paras. 9-10; *Prosecutor v Sainovic and Ojdanic*, IT 99-37-AR65, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, para 22; *Prosecutor v Karemera et al*, ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9.

⁴⁰ ICC-02/04-01/05-408, para. 80.

(a) The Decision is based on a correct interpretation of the governing law

15. The Decision is based on a correct interpretation of the governing law⁴¹ and does not violate the principle of legality as suggested by the Defence.⁴² As stated above, the Trial Chamber did not retroactively enter a legal finding that would render the Defence Motion inadmissible at a particular stage of the proceedings, as suggested by the Defence.⁴³

(i) The Chamber entered a discretionary decision pursuant to its power under Article 64(2)

16. The Trial Chamber, quoting a decision of the Appeals Chamber in the *Lubanga* case concerning a similar application lodged by the defence in that case, found that “the application [...] and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19(2) of the Statute” and that the application’s “true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings acceptance of which would entail the release of [the accused”.⁴⁴ As specified by the Appeals Chamber, “[t]he term ‘*sui generis*’ in this context conveys the notion of a procedural step not envisaged by the Rules of Procedure and Evidence or the Regulations”.⁴⁵

17. In the instant case, the Trial Chamber, in the absence of a specific provision regulating the time within which a motion invoking unlawful arrest and detention must be brought before the Court, correctly dealt with the Defence Motion as a matter of trial management in accordance with general principles under the Statute and the Rules.⁴⁶ The Trial Chamber recalled that “[u]nder article 64(2) of the Statute, the Trial Chamber must ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused”.⁴⁷ Article 64 vests the Trial Chamber with broad powers to give directions and/or make decisions regarding the conduct of the proceedings. These powers must be exercised in accordance with the Statute and the Rules.⁴⁸ Where the Statute and the Rules

⁴¹ The ICTY Appeals Chamber has reviewed the exercise of discretion against standards such as whether “there was a legitimate basis”, and therefore whether “it was within the Trial Chamber’s discretion”: *Milosevic v Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para 15.

⁴² Defence Appeal, paras. 12, 13, 18.

⁴³ See for instance Appeal Brief, paras. 8, 13, 15, 17, 18, 27, 30 and 32.

⁴⁴ Decision, para. 36, referring to ICC-01/04-01/06-772 OA4, para. 24.

⁴⁵ ICC-01/04-01/06-772 OA4, para. 24.

⁴⁶ The *sui generis* nature of a motion for a stay of proceedings does not entail the existence of a lacuna in the regulatory framework of the Court which would allow the Defence to file any such motion at any stage of the proceedings; nor can it mean that the fundamental principles underpinning the Court’s proceedings would not apply to such a motion.

⁴⁷ Decision, para. 42; see also para. 63.

⁴⁸ Article 64(1).

do not provide for a specific deadline for the filing of a motion,⁴⁹ as it is the case for the *sui generis* motion at hand, the Trial Chamber has discretion for the purposes of regulating the filing and consideration of that motion, but must ensure that the proceedings are fair and expeditious and are conducted with full respect of the rights of the accused and due regard for the protection of victims and witnesses.⁵⁰

(ii) *The Chamber rejected the Defence Motion based on the circumstances of the case*

18. The Trial Chamber considered that “a challenge to the lawfulness of the arrest and detention of an accused [...] must be submitted in the initial phase of the proceedings”,⁵¹ and that “[i]t is in the interests of all [...] that the issue of the possible unlawfulness of their detention be raised and addressed as early as possible during the pre-trial phase”.⁵² In this regard, the Trial Chamber noted Article 19 and Rule 122 as examples for the general principle expressed in the Statute that in order to ensure the expeditiousness of the proceedings, certain motions must be filed at its early stage.⁵³

19. However, the Trial Chamber did not reject the Defence Motion on the ground that it had been raised after the confirmation decision or after any other specific deadline, rather based on the specific facts and circumstances of the case.⁵⁴ The Chamber noted that between its constitution on 24 October 2008 and the hearing held on 1 June 2009, the Defence had not raised the issue of the alleged unlawful detention,⁵⁵ although it had many opportunities to do so.⁵⁶ The Trial Chamber also gave consideration to the fact that it had invited the Defence to inform the Chamber during the status conference held on 27 and 28 November 2008 of any “issues and observations which [the Defence] would deem relevant and on which they would like the Chamber to rule”.⁵⁷ Moreover, the Trial Chamber explicitly invoked as reasons for rejecting the Defence Motion “the circumstances of the case” and “the absence of any convincing explanation from the

⁴⁹ The Defence concedes that “there is no provision in the Statute, Rules or Regulations which conditions the admissibility of all motions seeking redress for violations of fundamental rights of the accused on such motions being filed by a specific time. There is not even a provision setting a deadline for all such motions” (Appeal Brief, para. 13).

⁵⁰ Article 64(2).

⁵¹ Decision, para. 39.

⁵² Decision, para. 40.

⁵³ Decision, para. 41.

⁵⁴ Decision, para. 50. Hence, the Chamber did not apply Article 19 and Rule 122 *mutatis mutandis* to the Defence Motion.

⁵⁵ Decision, para. 51.

⁵⁶ Decision, paras. 52-58.

⁵⁷ Decision, para. 52.

Defence” as to the timing of the Motion.⁵⁸ This confirms that the Trial Chamber did not find that a specific cut off date for motions for stay of the proceedings existed, preventing the Chamber from considering a motion filed after such date. Rather, it implicitly concluded that it could entertain such a motion at any stage of the proceedings, if the circumstances of the case so required and if the motion was accompanied by convincing arguments justifying the lateness of the motion.⁵⁹

(iii) The Trial Chamber correctly referred to Rule 122

20. The Prosecution submits that in light of the particular circumstances of this case, reference by the Trial Chamber to Rule 122 as part of the relevant statutory framework⁶⁰ was correct. As already indicated, the issue of the accused’s alleged illegal detention was first raised orally, albeit in general terms by the Defence before the Pre-Trial Chamber. Further, due to the nature of the motion and the allegations contained therein, and in particular the apparent link with Articles 59 and 60 of the Statute, the Pre-Trial Chamber was the natural and proper forum to entertain the Defence Motion. The Pre-Trial Chamber, when notified of the Defence’s position on the legality of the Accused’s detention and its alleged impact on the ICC proceedings, even encouraged the Defence to file the Motion in writing.⁶¹

21. In light of the above, the Prosecution submits that the Defence has failed to demonstrate the existence of any error vitiating this conclusion.⁶²

(iv) Additional arguments advanced by the Defence do not support the Defence Appeal

22. The Prosecution further notes that the examples from other international courts and tribunals cited by the Defence do not assist the Appeals Chamber in the determination of the issue before it.⁶³ First, these courts and tribunals operate on a different legal basis in

⁵⁸ Decision, paras. 61 and 66.

⁵⁹ See Defence Appeal, para. 26.

⁶⁰ This also included Articles 64 and 67 of the Statute and Article 24 of the Code of Professional Conduct for Counsel. See Decision, p. 3.

⁶¹ See para. 6 above.

⁶² It must be emphasized that the Defence logic creates a procedural anomaly - a motion aimed at terminating proceedings not subject to any time limits or conditions - , which in turn leads to unfair results: a defence counsel in possession of all necessary information who, erroneously but in good faith raises belatedly matters dealing with the legality of the arrest and detention would be precluded from doing so both at the confirmation hearing and at trial by virtue of Rule 122(4); a counsel in the same position can however for strategic reasons sit on the information for as long as he or she deems fit and file a motion for stay at any time during the proceedings without fearing any adverse consequences.

⁶³ See Defence Appeal, para 20 (reference to the *Semanza* case before the ICTR) ; para 22 (reference to the *Todorovic* case before the ICTY); para. 22 (reference to the *Kajelijeli* case before the ICTR) and para. 25 (reference to the ECCC).

relation to the filing of preliminary motions;⁶⁴ and second, the facts of the cases are not comparable or they are taken out of their context.⁶⁵

23. Finally, the Defence claims that in addition to a stay of the proceedings, it also requested the Trial Chamber to declare the illegality of the accused's arrest and alternatively to grant financial compensation and a redaction of the sentence in the event of a conviction.⁶⁶ According to the Defence, the alleged error in the Decision is further evidenced by the fact that, "a request for compensation can be considered at any time without effecting the process".⁶⁷ The Prosecution submits that any remedy requested by the Defence depends on a prior finding on the merits of the Defence Motion that *there has been* an abuse of the Accused's rights. Since the Trial Chamber rejected the Defence Motion based on the fact that it was filed too late, no finding of abuse was made, and accordingly any request for remedies deriving from the Defence Motion was moot.

(b) The Decision is not vitiated by any error of fact

24. The Defence alleges that "the DRC provided information on 1 June 2009 which was decisive to the Defence decision to file the motion: i.e. that it had not carried out investigations against the accused".⁶⁸ The Defence also submits that "only the DRC authorities could clarify the status of the detention of the accused while in the DRC"⁶⁹ and that it "had previously been unsuccessful in obtaining adequate information from the DRC

⁶⁴ In contrast to the Statute and Rules of the ICC the procedural framework of the UN ad hoc Tribunals and the ECCC specifically regulate the matter by way of setting specific deadlines for the filing of preliminary motions (see Rule 72 of the Rules of Procedure and Evidence of the ICTY and the ICTR, as well as Rule 89 of the Internal Rules for the ECCC).

⁶⁵ In the cases referred to, the motions were filed at an earlier stage of the proceedings, which further demonstrates that it cannot be reasonably argued that such a filing can be made at any time. (See *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Judgment of 31 May 2000; *Prosecutor v. Kaing Guek Eav*, 001/18-17-2007-ECCC-OCIJ (PTC01), Decision on Appeal against the Provisional Detention Order of Kaing Guek Eav, 3 December 2007; *Prosecutor v. Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, 'Decision on Request for Release' 15 June 2009; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44 A-T Decision (Appeal Against the Decision of 13 March 2001 Dismissing "Defence Motion Objecting to the Jurisdiction of the Tribunal), 18 September 2001; *Prosecutor v. Simić et al.*, IT-95-9, Decision and Scheduling Order, 18 May 1999). The issue at stake is whether the Trial Chamber has correctly exercised its discretion and not if there is a possibility to extend the time limit (see *Prosecutor v. Simić et al.*, IT-95-9, Decision and Scheduling Order, 18 May 1999; *Prosecutor v. Simić et al.*, IT-95-9, Decision on Application by Stevan Todorovic for Leave to Appeal against the Oral Decision of Trial Chamber III of 4 March 1999, 1 July 1999.), if the Appeals Chamber *proprio motu* may consider an alternative remedy (see *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Appeals Judgment, 25 May 2005) or if a right to challenge the lawfulness of detention exists as such (see *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Judgment of 31 May 2000).

⁶⁶ Defence Appeal, para. 26.

⁶⁷ Defence Appeal, para. 26.

⁶⁸ Defence Appeal, para. 26.

⁶⁹ Defence Appeal, para. 38.

on this point”.⁷⁰ The Trial Chamber found in this respect that “it appears that the arguments set out in the [Defence Motion] rely for the most part on information which was already available to the Defence at the pre-trial phase” and that “as of 28 August 2008, the Defence had received the requested information from the DRC authorities”.⁷¹

25. The Prosecution submits that the conclusions of the Trial Chamber are reasonable, in particular considering that the Defence was in possession of sufficient information to establish the inaction of the DRC authorities at the latest by 28 August 2008.⁷²

26. Up until March 2008, the Prosecution disclosed a significant amount of relevant information to the Accused.⁷³ This includes a) information relevant to the referral of the situation of DRC to the Prosecutor on 3 March 2004, which was accompanied by a letter from the President of the DRC indicating the inability of the DRC authorities at that time to carry out the necessary activities;⁷⁴ b) the Accused’s application for provisional release on 18 January 2006 on the basis that, after approximately 10 months of detention, he had not been notified of the grounds for his arrest;⁷⁵ c) the Accused’s request to be tried before the ICC on 31 January 2007;⁷⁶ and information regarding the closing of the judicial proceeding by the *Auditeur Général* in respect of the Accused on 17 October 2007.⁷⁷

⁷⁰ Defence Appeal, para. 29.

⁷¹ Decision, para. 61. As noted by the Trial Chamber, “[o]n 7 April 2008, the Defence submitted to the Chamber an application pursuant to article 57(3) of the Statute seeking the DRC’s cooperation. In that application, the Defence requested the Pre-Trial Chamber to direct the Congolese authorities to provide it with the information and documentation necessary for the preparation of its case, including in particular material pertaining to Germain Katanga’s right against arbitrary arrest.” (Decision, para. 43).

⁷² As the Appeals Chamber did in its Appeals Judgment on the Admissibility (ICC-01/04-01/07-1497 OA8, para. 80.

⁷³ See Prosecution Response to the Admissibility Challenge, paras. 10-14.

⁷⁴ This document was disclosed to the Defence in the following filings: ICC-01/04-01/07-11-Anx1.1 and Anx2.1 (reclassified as public and notified on 25 February 2008); ICC-01/04-01/07-32-Anx1 (reclassified as public and notified on 25 February 2008); ICC-01/04-01/07-129-Anx1 (24 December 2007 to Defence Germain Katanga) (reclassified as public and notified on 25 February 2008); ICC-01/04-01/07-196-Conf-AnxA1 (14 February 2008 to Defence Germain Katanga); ICC-01/04-01/07-283-Conf-AnxA1 (was 01/04-02/07-24-Conf-AnxA1) (14 February 2008 to Defence Mathieu Ngudjolo Chui).

⁷⁵ DRC-OTP-0155-0485, pre-confirmation package #5. See Motion, para.11 (p), Annex p2.

⁷⁶ *Memorandum a la bienveillante attention de son excellence Monsieur le Ministre de la Justice et Garde des Sceaux*, DRC-OTP-1010-0033 or DRC-OTP-0172-0005 and DRC-OTP-0172-0007. DRC-OTP-1010-0033 was disclosed as Rule 77 on 27 January 2008. Pre-confirmation hearing package #4; see also Motion, para. 11, ee, Annex ee2. See also *La prospérité, Les Détenus Floribert Ndjabu et Consorts exigent leur comparution devant la CPI*, 16 February 2007, at Congo Forum:

<http://www.congoforum.be/fr/nieuwsdetail.asp?subitem=1&newsid=24472&Actualiteit=selected>

⁷⁷ Admissibility Challenge, para. 11 (vv), referring to ICC-01/04-01/07-40-Anx3, 22 October 2007, and relied upon by the Appeals Chamber to establish the inactivity of the DRC authorities in its Appeals Judgment on the Admissibility Challenge, para. 80.

27. Further, on 28 August 2008, the Defence received the information from the DRC authorities, for which it had requested the assistance of the Pre-Trial Chamber.⁷⁸ The request expressly included material pertaining to the Accused's "right against arbitrary arrest".⁷⁹ [REDACTED].⁸⁰ However, in the Defence Motion, the Defence alleges that before 1 June 2009 it had "been unsuccessful in obtaining adequate information from the DRC on this point".⁸¹
28. During the hearing of 1 June 2009, the DRC authorities merely confirmed what the documents disclosed to the Defence during 2008 already indicated, namely that the DRC authorities were not investigating the case against the Accused. The scarce reference in the Defence Motion to the hearing of 1 June 2009 confirms that on that date the DRC did not provide any new information which would justify the delay of the filing of the Defence Motion.⁸² In fact, the Defence Motion does not identify which information provided on 1 June 2009 was not already in the possession of the Defence prior to that date. The Defence only refers to extracts of the 1 June 2009 transcript on five occasions (four of them within the procedural background).⁸³
29. It is worth noting that the Defence Motion relies almost entirely on the same information that the Defence listed in support of its Admissibility Challenge and obtained "as a result of the Prosecution's disclosure, the Registry's communications and Defence investigations", which the Defence considered "relevant evidence regarding Mr. Katanga's arrest and detention in DRC and proceedings there against him".⁸⁴ For instance, in the Admissibility Challenge the Defence listed the initial warrant of arrest dated 10 March 2005 and the Accused's complaint to the DRC authorities of the fact that he had not been informed of the charges despite being in detention for over a year, and that the first hearing had taken place after 14 months of his initial detention, *inter alia*.⁸⁵ However, in spite of this information, the Defence argued in its Admissibility Challenge that "having regard to both documents from the DRC related to proceedings against Mr Katanga in the DRC and the Pre-Trial Chamber's decision confirming the charges, there is

⁷⁸ ICC-01/04-01/07-708-Conf-Exp. See also Decision, para. 61.

⁷⁹ Decision, para. 43.

⁸⁰ Admissibility Challenge, para. 10 (m), at page 6.

⁸¹ Defence Appeal, para. 29.

⁸² See Motion, para. 11, fn. 7; para. 23, fn. 25; para. 28, fn. 33; para.33, fn. 41; paras. 65-66, fn. 66.

⁸³ See Motion, para. 11, fn. 7; para. 23, fn. 25; para. 28, fn. 33; para.33, fn. 41; para. 66, fn. 66.

⁸⁴ Admissibility Challenge, para. 11 (emphasis added). See documents listed and described in paras. 11 and 12.

⁸⁵ See Admissibility Challenge para. 11 (a) and para. 12 (a) in pages 6 and 21, respectively; para. 11 (p) in p. 8; and para. 11 (v) in p. 9. These documents are mentioned in the Motion, paras. 15, 18 and 20, respectively.

a significant and almost complete overlap. The intention in the DRC was clearly to prosecute for crimes against humanity and the factual charges include the alleged attack on Bogoro”.⁸⁶ Now the same documents are used to ask for a declaration of unlawful detention of the Accused, based on the complete lack of progress of the domestic proceedings against him.

30. For the above reasons, the Defence’s reliance on the information obtained during the hearing of 1 June 2009 as a justification for the lateness of the filing of the Defence Motion is misplaced.

(c) The Decision is not vitiated by any procedural error

31. The Decision is not unfair or unreasonable so as to constitute an abuse of the Trial Chamber’s discretion.⁸⁷ In particular, when deciding that the Defence Motion was filed too late and that it was therefore inadmissible, the Trial Chamber did not give weight to irrelevant considerations or failed to give sufficient weight to relevant considerations as argued by the Defence under its Second Ground of Appeal.⁸⁸

32. The Defence argues that the Chamber’s finding that the Defence Motion was filed too late is an irrelevant consideration for the question of admissibility, as the Defence did not violate any time limit.⁸⁹ As already advanced this argument is misconceived.⁹⁰ In addition, the Trial Chamber expressly took note of the defence concerns, which indicates that the Chamber did consider the arguments advanced in the Motion.⁹¹

⁸⁶ Admissibility Challenge, para. 15.

⁸⁷ *Prosecutor v Karadzic*, IT-95-5/18-AR73.3, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on Prosecution Motion Seeking Determination that the Accused Understands English, 4 June 2009, para. 5. One manner in which a Chamber can fail to properly exercise its discretion is where it “given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations” (*Prosecutor v Milosevic*, IT-99-37-AR73 and IT-01-50-AR73 and IT-01-51-AR73, Reasons For Decision on Prosecution Interlocutory Appeal From Refusal To Order Joinder, 18 April 2002, para. 5).

⁸⁸ Defence Appeal, para. 32. Under this heading, the Prosecution will also address some of the arguments presented by the Defence under its First Ground of Appeal that relate to the proper exercise of the Trial Chamber’s discretion.

⁸⁹ Defence Appeal, paras. 33-34.

⁹⁰ The Trial Chamber did not refrain from considering the merits of the Defence Motion because it was filed after a specific time limit. Rather it concluded that, based on the facts of the case and in the absence of any convincing explanation for the lateness of the Defence Motion, it was filed too late and that it therefore does not consider it necessary to rule on the merits.

⁹¹ See para. 40 below.

33. Contrary to the contention of the Defence, the existence of earlier opportunities by the Defence to file its Motion is not an irrelevant consideration.⁹² Quite the opposite, it is a key factor for the Chamber to determine whether in the circumstances of this case the Defence Motion was filed too late. The Chamber must ensure that the proceedings are fair and expeditious. If the Chamber is convinced that the Defence has had sufficient opportunity to submit its Motion it can properly conclude that the fairness of the proceedings is guaranteed. Moreover, the Trial Chamber did not assume that “a motion must be filed at the earliest opportunity”.⁹³ The Trial Chamber noted that they must be submitted “in the initial phase of the proceedings”,⁹⁴ and “in a timely manner”.⁹⁵ The Prosecution submits that this reasoning is beyond reproach and the Defence has failed to demonstrate any error.
34. The Defence further argues that the Trial Chamber failed to consider that the timing for filing motions must lie within the parties’ discretion, subject to statutory restrictions.⁹⁶ The Prosecution recognizes that a party should be afforded some degree of discretion in respect to the timing of the filing of a motion. However, where the applicable law does not prescribe a concrete deadline for the filing of a motion, this discretion is necessarily subject to the control of the Trial Chamber, which must ensure that proceedings are conducted fairly and expeditiously. In the instant case, the Trial Chamber did not fail to consider any discretion of the Defence, but rather determined that the Defence had abundant opportunities to file the Motion and failed to do so without providing any convincing explanation for not filing earlier.
35. The Defence further alleges that the Trial Chamber failed to properly consider that “the Pre-Trial Chamber gave the impression to the Defence that it was not obliged to [submit the Defence Motion] before it”.⁹⁷ This submission is unfounded. The Trial Chamber expressly stated that it was “mindful that the position adopted by the Pre-Trial Chamber may have led the Defence of the Accused to believe that it was authorised to defer the filing of its motion and postpone it until after the decision on the confirmation of charges”.⁹⁸ The Trial Chamber considered that between its constitution on 24 October

⁹² Defence Appeal, para. 35.

⁹³ Defence Appeal, para. 36.

⁹⁴ Decision, para. 39.

⁹⁵ Decision, para. 62.

⁹⁶ Defence Appeal, para. 37.

⁹⁷ Defence Appeal, para. 28.

⁹⁸ Decision, para. 49.

2008 and the hearing held on 1 June 2009 the issue of unlawful detention was not raised by the Defence.⁹⁹ In this context, the Trial Chamber noted in particular that the Defence failed to raise the issue during the status conference held on 27 and 28 November 2008, prior to which the Trial Chamber expressly invited the Defence to inform it of any “issues and observations which they would deem relevant and on which they would like the Chamber to rule”.¹⁰⁰

36. The Defence’s additional contention that the Trial Chamber failed to properly consider that “only the DRC could clarify the status of the detention of the accused while in the DRC” and provide sufficient evidence in support of the Defence Motion¹⁰¹ (thereby referring to the information provided by the DRC on 1 June 2009), is based on an incorrect representation by the Defence of the relevant facts.¹⁰² First, and as found by the Trial Chamber, the arguments set out in the Defence Motion relied “for the most part on information which was already available to the Defence at the pre-trial phase”; further, “as of 28 August 2008, the Defence had received the requested information from the DRC authorities”.¹⁰³ Second, in this case not only was the Defence Motion filed too late; the Defence also failed to give any notice to the Trial Chamber that any motion was forthcoming, despite having raised the issue for the first time during the initial appearance of the accused and having possessed most part of the relevant evidence well in advance of filing the Motion. Even if the Defence was under the impression that it could obtain further evidence, the Defence should have informed the Chamber of its intention to file a motion in the future at the latest during the status conference held in late November 2008.
37. The Prosecution submits that the Trial Chamber correctly found that “any strategic reasons which could account for the filing of submissions at specific times in the proceedings cannot in themselves justify the late filing of motions such as the one currently at issue”.¹⁰⁴ The Chamber’s duty is to ensure that proceedings are fair and expeditious. Strategic considerations by the Defence are not relevant in this respect.¹⁰⁵

⁹⁹ Decision, para. 51.

¹⁰⁰ Decision, para. 52.

¹⁰¹ Defence Appeal, para. 38.

¹⁰² See paras. 25-29 above.

¹⁰³ Decision, para. 61.

¹⁰⁴ Decision, para. 64. See Defence argument to the contrary in Defence Appeal, para. 39.

¹⁰⁵ Strategic considerations must be distinguished from the Defence’s readiness to file a motion that is supported by evidence. The latter issue is dealt with under paragraph 36 above.

38. Further, the Chamber's consideration of Pre-Trial and Trial Chamber hearings reviewing the Accused's current detention was not irrelevant.¹⁰⁶ The Trial Chamber noted that during those hearings, the defence did not raise the issue of the alleged illegality of the Accused's prior detention by the DRC or give notice of its intention to file such motion, although it would have had an opportunity to do so. The Prosecution further notes that the hearing that the Trial Chamber considered to be the most relevant one, namely that of 27-28 November 2008, was the initial status conference before the Trial Chamber and not a hearing scheduled to discuss the review of the Accused's detention.¹⁰⁷
39. The Defence also contends that the Trial Chamber erred in considering the rights of the co-accused to an expeditious trial for the purposes of its finding that the Defence Motion was filed too late.¹⁰⁸ Although the Trial Chamber noted its general duty to "ensure that Mathieu Ngudjolo's right to be tried without undue delay is also respected",¹⁰⁹ in its final assessment it did not give any weight to this particular factor. Therefore, the Trial Chamber's finding in relation to the co-accused did not materially affect the determination.
40. Finally, by arguing that "the significance of the violations [must] be measured against the necessity of restrictive procedural time limits",¹¹⁰ the Defence implicitly argues that the Trial Chamber failed to give appropriate weight to the nature of the challenge when determining that the Defence Motion was filed too late. The Prosecution notes that although the Trial Chamber did not rule on the merits of the Defence Motion, it did take note of the Defence submissions on the arbitrary arrest and detention of the accused by the DRC authorities and on the existence of irregularities in the implementation of the request for arrest and surrender of the accused.¹¹¹ Therefore, the Decision was made against the specific factual allegations advanced by the Defence.

¹⁰⁶ Defence Appeal, para. 40.

¹⁰⁷ In this context it needs to be stressed that not all the hearings referred to by the Defence related to the review of the accused's current detention. While the Defence refers to paragraphs 46-47 and 52-57 of the Decision (see Defence Appeal, para. 40), only paragraphs 54-57 relate the hearings regarding the review of the accused's current detention.

¹⁰⁸ Defence Appeal, para. 41.

¹⁰⁹ Decision, para. 42.

¹¹⁰ Defence Appeal, para. 19.

¹¹¹ Decision, para. 34; see also paras. 16-22.

Conclusion

41. For the above reasons, the Prosecution request that the Defence Appeal be dismissed in its entirety.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 11th day of March 2010

At The Hague, The Netherlands