Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/07**
Date: **11 May 2016**

THE APPEALS CHAMBER

Before: **Judge Sanji Mmasenono Monageng, Presiding Judge**
Judge Silvia Alejandra Fernández De Gurmendi
Judge Christine Van Den Wyngaert
Judge Howard Morrison
Judge Piotr Hofmański

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

PUBLIC REDACTED VERSION

Defence Document in Support of Appeal Against the Presidency Decision pursuant to article 108(1) of the Rome Statute

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
Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

Counsel for the Defence for Germain Katanga
Mr David Hooper Q.C.
Ms Caroline Buisman
Ms Sophie Menegon

Legal Representatives of Victims
Mr Fidel Nsita Luvengika

REGISTRY

Registrar
Mr Herman von Hebel

INTRODUCTION

1. By its decision of April 7th 2016, the Presidency approved, pursuant to article 108(1) of the Rome Statute, the prosecution of Mr Katanga by the Democratic Republic of the Congo ("DRC")[1]. The defence for Mr Katanga ('defence') hereby appeals that decision.

2. The defence submits that the Appeals Chamber has jurisdiction to receive this appeal despite there being no formal structure in place to receive appeals from decisions made by the Presidency. Though the Statute and the Rules of Procedure and Evidence are silent as to the right of appeal from a Presidency decision that is not to say that no appeal lies. There is no express denial of a right of appeal. It is inconceivable that a significant decision by the Presidency would be incapable of appeal no matter how perverse it might be. The Court must possess the ability to review and correct decisions made by one of its organs and, it is submitted, in respect of the Presidency the Appeals Chamber is the most appropriate forum to do so. The impugned decision raises such fundamental and substantive issues, both for Mr Katanga and for the Court, that it cannot be fair or just for there to be no opportunity of appeal. The Presidency's decision, it is submitted, is wrong and needs to be put right.

3. The defence submits this filing as confidential because it refers to some confidential filings; however the defence has no objection to its reclassification as public. The defence will also submit a public redacted version.

PROCEDURAL HISTORY

4. On 19 April 2004, the President of the DRC, by letter, referred the situation in the DRC to the ICC.[2] The Prosecutor of the ICC opened the investigation on 23 June 2004.[3] On 17th October 2007, Mr Katanga was transferred to the ICC. On 7th March 2014, he was convicted as an accessory pursuant to article 25(3)(d) to one crime

[1] Decision pursuant to article 108(1) of the Rome Statute, ICC-01/04-01/07-3679.
[2] ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo.
[3] ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.

against humanity and four war crimes.[4] On 23rd May 2014, he was sentenced to twelve years imprisonment.[5] On 13 November 2015, the Appeals Chamber decided to reduce his sentence by 3 years and 8 months and set the date for the completion of his sentence to 18 January 2016.[6] Subsequently, the Presidency nominated the DRC as the state where he was to complete his sentence.[7] On 8 December 2015, the defence submitted several Observations on Mr Germain Katanga's imminent return to the DRC.[8] Mr Katanga was transferred into the DRC's jurisdiction on 19th December 2015.[9] Since his transfer, Mr Katanga has been detained at Makala prison, in Kinshasa. He was not released on 18th January 2016.

5. On 30th December 2015, Mr Katanga was notified a '*Décision de Renvoi'* (Referral Decision) indicating the intention of the DRC authorities to prosecute him for crimes allegedly committed between 2002 and 2005.[10]

6. On 8th January 2016, the Registrar transmitted a letter from the *Procureur Général de la République* to the President of the ICC, together with a number of annexes, relating to legal proceedings before the *Haute Cour Militaire*, including the *Décision de Renvoi*.[11]

7. On 14 January 2016, the Presidency requested the DRC to explain the legal consequences of the "*Décision de Renvoi*" and to clarify whether or not its letter constituted a request for the approval of the Court for the prosecution and punishment of Mr. Katanga.[12]

---

[4] ICC-01/04-01/07-3436.
[5] ICC-01/04-01/07-3484.
[6] ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Mr Germain Katanga.
[7] ICC-01/04-01/07-3626.
[8] ICC-01/04-01/07-3627-Conf-Exp.
[9] Press Release, "Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment", 19 December 2015, ICC-CPI-20151219-PR1181.
[10] ICC-01/04-01/07-3631-AnxI, annexed to ICC-01/04-01/07-3631, Registry *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*.
[11] ICC-01/04-01/07-3631, *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga.*
[12] ICC-01/04-01/07-3632, Order requesting information in relation to the *"Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga".*

8. On 19 January 2016, the Registry received a letter from the DRC[13] by which the DRC clarified that the "*Décision de Renvoi*" acted to remit a suspect at the disposition of "*une juridiction de jugement aux fins de poursuites*" and re-iterated its intention to conduct domestic criminal proceedings against Mr. Katanga; [REDACTED].

9. By its Order of 21 January 2016, the Presidency sought the DRC's continuing assistance by the provision of the documents required by article 6(2)(a) of the Agreement and rule 214(1) of the Rules, including the protocol containing views of Mr. Katanga, so that the Presidency may make its determination under article 108(1) of the Rome Statute as soon as possible.[14]

10. On 21 January 2016, Mr Katanga applied for his release before the *Haute Cour Militaire*, on the basis of his unlawful detention.[15]

11. On 22 January 2016, the defence filed its *Preliminary Observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo*,[16] by which it asked the Presidency to call for an oral hearing and to request the DRC to provide further material.

12. On 25 January 2016, the Registry filed a *Complément à la réponse des autorités congolaises soumises le 19 janvier 2016*.[17]

13. On 25 January 2016, the defence submitted *Urgent Further matters concerning the* '*Preliminary observations made by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo'*.[18] The defence asked the Presidency: to remind the DRC of its obligations under Article 108 of the Statute; to request the DRC not to act further in the investigation and prosecution unless and until it had received the approval of the Presidency to do so;

[13] ICC-01/04-01/07-3633, '*Réponse des autorités congolaises à l'Ordonnance ICC-01/04-01/07-3632 en date du 14 janvier 2016'*.
[14] ICC-01/04-01/07-3634, Order to the Registrar concerning the communication of information to the Democratic Republic of the Congo in relation to the "*Réponse des autorités congolaises à l'Ordonnance ICC-01/04-01/07-3632'*.
[15] ICC-01/04-01/07-3635-AnxB.
[16] ICC-01/04-01/07-3635.
[17] ICC-01/04-01/07-3637.
[18] ICC-01/04-01/07-3638-Red.

and to request the DRC not to proceed with the hearing on 29th January so far as it concerned Mr Katanga.

14. By its Order of 27 January 2016, the Presidency expressed its concern in light of "the apparent progression of the criminal proceedings against Mr. Katanga even though it has not yet been able to consider whether to approve his prosecution."[19]

15. On 28 January 2016, the Prosecution submitted its *Observations on submissions by the Defence for Germain Katanga (ICC-01/04-01/07-3638-Conf)*.[20]

16. On 2 February 2016, the Registry notified several letters from the DRC prosecutor.[21]

17. On 3 February 2016, the defence attended, as observers, the preliminary hearing attended by Mr Katanga and others at the *Haute Cour Militaire* in Kinshasa.[22]

18. [REDACTED].[23] [REDACTED].

19. On 5 February 2016, the defence filed its *Observations on the document 'Mémoire Unique'*,[24] according to which it would be inappropriate to treat the document *Mémoire Unique* as the protocol required by Rule 214 (1)(d) of the Rules of Procedure and Evidence ("RPE").

20. On 16 February 2016, the Presidency issued an *Order to the Registrar concerning the* "*Second complément d'informations soumis par les autorités congolaises et information sur les procédures nationales*",[25] by which it requested the DRC to provide further information by 11 March 2016.

---

[19] ICC-01/04-01/07-3640, Order to the Registrar concerning the "Further matters concerning the 'Preliminary observations made by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo'".
[20] ICC-01/04-01/07-3642-Conf.
[21] ICC-01/04-01/07-3647, *'Second complément d'informations soumis par les autorités congolaises et information sur les procédures nationales'.*
[22] See ICC-01/04-01/07-3662, Further observations following the defence mission to Kinshasa, para. 5 & seq.
[23] [REDACTED].
[24] ICC-01/04-01/07-3650-Conf.
[25] ICC-01/04-01/07-3654.

21. On 26 February 2016, the defence filed *Further observations following the defence mission to Kinshasa*,[26] by which it submitted that that prosecution for the offences listed in the *Décision de Renvoi* should not be approved by the Presidency.

22. On 9 March 2016, the Registry filed its '*Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome'*,[27] by which it notified several documents emanating from the DRC authorities.

23. On 14 March 2016, the Presidency filed its *Order concerning the "Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome*",[28] by which it ordered the defence to provide any final views of Mr Katanga on the Court's exercise of its functions under Article 108(1) by 21 March 2016.

24. On 18 March 2016, a further hearing of the *Haute Cour Militaire* was held in Kinshasa. The defence understands the case was adjourned generally, to await the decision of the Presidency.[29] A further hearing was held before the *Haute Cour Militaire* on 6 May 2016. The President asked the parties whether they intended to submit further documents. The DRC Prosecution disclosed the ICC Presidency Decision. The case was adjourned and has not progressed further since then.

25. On 21 March 2016, the defence filed its *Observations on the Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome*.[30] The defence reiterated that prosecution for the offences listed in the *Décision de Renvoi* should not be approved.

26. On 7 April 2016, the Presidency issued its Decision pursuant to article 108(1) of the Rome Statute ('Presidency's impugned decision').[31]

[26] ICC-01/04-01/07-3662.
[27] ICC-01/04-01/07-3666.
[28] ICC-01/04-01/07-3667.
[29] See ICC-01/04-01/07-3673-Conf, para. 6.
[30] ICC-01/04-01/07-3673-Conf.
[31] ICC-01/04-01/07-3679.

FUNCTIONS OF THE PRESIDENCY AND REVIEW OF ITS DECISIONS

27. The Presidency is one of the four organs of the Court.[32] It is comprised of the President together with the First and Second Vice-Presidents, and its functions are defined by article 38 as: "*(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) The other functions conferred upon it in accordance with this Statute".*

28. The impugned decision concerns the exercise of the Presidency's powers under article 108. Article 108 is found under Part X of the Statute. Rule 199 reads as follows:

> ***Organ responsible under Part 10***
> *Unless provided otherwise in the Rules, the functions of the Court under Part 10 shall be exercised by the Presidency.*

29. Aside from decisions concerning article 108, the Presidency's other functions are mainly administrative, concerning, under the Statute: proposing an increase in the number of judges (36), excusing judges (41), defining fundamental issues for the purpose of translation (50), constituting the pre-trial and trial chamber (61), appointing alternate judges (74). And, under the Rules of Procedure and Evidence: - assignment of judges (4*bis*), drafting a code for counsel (8), drawing up the list of candidates to be Registrar and Deputy Registrar (12), Consultation regarding internal security (13), Resolving issues regarding assignment of counsel (21), receiving complaints (21), advising of a decision regarding removal from office (29), Decisions to impose a disciplinary measure – reprimand or fine (30), referral to Trial Chamber of issues of jurisdiction/ admissibility, etc. (60), Deciding the place of proceedings (100), extending term of imprisonment where fines unpaid (146),[33] Further sanction in respect of persons not complying with a court order/ misconduct (171), designating a Trial Chamber to consider compensation to an arrested or convicted person (10), exercising the functions of the court under Part 10 'Enforcement of sentences',

---

[32] Article 34: Organs of the Court
The Court shall be composed of the following organs:
1. (a) The Presidency;
. (b) An Appeals Division, a Trial Division and a Pre-Trial Division;
. (c) The Office of the Prosecutor;
. (d) The Registry.

[33] This is plainly a matter of sentence and capable of appeal under Article 81.

designating a State where sentence to be served/ supervision of sentence/ transfer of person (199). The Presidency also has a review or appellate function in respect of detention centre disciplinary and complaint matters.

30. These functions provide for the efficient running of the Court. It is to be noted that a broad range of the Rules, not in part X, explicitly state the particular decision of the Presidency to be final, as set out in the footnote below.[34] These rules all concern the Presidency's role as an organ of review in respect to the Registry. In situations where the Presidency serves as overviewing organ in respect to the Registry then the Presidency's decision is final in the sense of no further review. Under article 108 the Presidency is not reviewing another organs decision. No such reference is made to a Presidency decision under article 108 being "final". The defence submits that if it were the drafter's intention for decisions under article 108 not to be capable of appeal

[34] The relevant rules are:
Rule 21(3) of the Rules of Procedure and Evidence, Assignment of legal assistance:
3. A person may seek from the Presidency a review of a decision to refuse a request for assignment of counsel. The decision of the Presidency <u>shall be final</u>. If a request is refused, a further request may be made by a person to the Registrar, upon showing a change in circumstances.
Regulation 72(4) of the Regulations of the Court, Review of decisions of the Registrar:
4. The Presidency may ask the Registrar to provide any additional information necessary to decide on an application. The decision of the Presidency <u>shall be final</u>.
Regulation 85(3) of the Regulations of the Court, Decisions on payment of legal assistance:
Persons as referred to in sub-regulations 1 and 2 may seek review of the decisions described in those provisions by the Presidency within 15 days of notification of the relevant decision. The decision of the Presidency <u>shall be final</u>.
Regulation 56(4) and (11) of the Regulations of the Registry, Experts:
4. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final.</u>
11. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
Regulation 125(6) of the Regulations of the Registry, List of assistants to counsel:
6. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
Regulation 126(5) of the Regulations of the Registry, Removal from the list of assistants to counsel:
5. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
Regulations 137(7) of the Regulations of the Registry, List of professional investigators:
7. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
Regulations 138(5) of the Regulations of the Registry, Removal from the list of professional investigators:
5. The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
Regulation 147(n) of the Regulations of the Registry, Election of the members of the Disciplinary Board
(n) The Presidency may ask the Registrar to provide any additional information necessary to decide on the application. The decision of the Presidency <u>shall be final</u>.
(Emphasis added).

then, given the significant power conferred by that article, such would be expressed in the Statute, Rules or Regulations.

31. Article 108 provides a significant power distinguishable from the other functions allocated to the Presidency which are mainly administrative.[35] It reads as follows:

> **Article 108, Limitation on the prosecution or punishment of other offences**
>
> 1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment(or extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
> 2. The Court shall decide the matter after having heard the views of the sentenced person.
> 3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it

32. Article 108 is far more than a mere administrative function. It provides the only interface between the ICC and a State seeking to prosecute a sentenced person who has already been subject to the jurisdiction of the ICC. It provides the one opportunity for the Court to intervene in that State's decision and to affect the manner in which complementarity is exercised after trial by the ICC. The decision to give or withhold approval for further prosecution will affect the overall fairness of the proceedings conducted against an individual, whether conducted by the ICC, the requesting State or co-jointly. The Court has a duty of fairness to the sentenced person. Where further prosecution is inappropriate or a marked unfairness to the sentenced person, by giving approval the Court initiates the process. Any unfairness is thereby inflicted by the ICC and brings the ICC into ill repute.

33. Such a significant decision should be capable of review on appeal despite the absence of an explicit appeal mechanism in the Statute or Rules.

34. Appeal mechanisms have developed in modern society to address criminal, civil and administrative findings in all manner of circumstances that impinge on the individual or party and are an important feature of developed legal systems and lend integrity to them. They are essential to address error: "Developed legal systems make provision

[35] The one power in any way comparable to the power under article 108 is that arising under Rule 146 which authorises the Presidency to fix, within certain parameters, a term of imprisonment for non payment of a fine. However, such would arguably constitute a 'sentence' capable of review on appeal under Article 81. Alternatively, the right to appeal would lie, as the defence now argue in respect of article 108, on the basis of natural justice and the inferred jurisdiction of the Appeals Chamber.

for correcting error. Error—in the sense of good faith differences of opinion about finding the facts or about formulating or applying rules of law—is expected as a regular occurrence."[36] Appeal mechanisms may provide for review of the merits of the decision – the correctness of the decision – and / or for review of the manner in which a body reaches its decision, regardless of the merits of that decision.

35. Appeal mechanisms help to avoid miscarriages of justice, meet the expectation of equality of treatment, provide consistency in decisions and through appellate oversight encourage better decision making. Such oversight also allows questions of law and procedure to be reviewed and settled. Finally, appeal review provides an important institutional function by lending legitimacy to the system and increasing public confidence in its decision making processes.[37] The more significant the decision, the more important access to appellate review becomes. In the present situation, not only is it a matter of fairness to Mr Katanga, but also to any individuals in the future who find themselves in a similar situation, which further emphasises the importance that the legal concepts are correctly interpreted.

36. There is no appeal structure set out in the Statute, Rules or Regulations of the court to address the question 'who judges the Presidency?' The defence submits that it cannot have been the intention of the drafters of the Rome Statute to leave decisions, as significant as the impugned decision, to be decided by one component of the Court without possibility of appeal.

37. The absence of express authority has not prevented judges from introducing mechanisms to resolve issues of significant importance that have not explicitly been dealt with in the Statute. The Rome Statute is not a perfect instrument and has left many issues unresolved. The judges have been guided by their duty to ensure the fairness of the proceedings under Article 64(2) of the Rome Statute. Accordingly, a lacuna in the Court's legal instruments has not been, nor should it be, interpreted as a prohibition *per se*, unless the Statute or Rules explicitly prohibits the matter.

[36] John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 416 (2009).
[37] See 'A Comparative Analysis of the Right to Appeal'. Peter D. Marshall, Duke Journal of Comparative and International law [Vol 22. 2011].

38. Where a matter is simply not addressed, then, in line with article 31(1) of the Vienna Convention on the Law of Treaties, the object and purpose of the Rome Statute should be considered in addressing the lacuna.[38] The ICC Appeals Chamber expressly considers that, pursuant to article 21(1) of the Statute, recourse to other sources of law is possible when there is a lacuna in the Statute or Rules of Procedure and Evidence.[39]

39. One of the main objectives enshrined in the Rome Statute and the ICC Rules of Procedure and Evidence is to ensure proceedings are fair. Where necessary to guarantee a fair trial, for example, Chambers may invoke inherent jurisdiction to fill in gaps in the legal provisions. They have done so on a number of occasions. The ICC Chambers have been extremely creative with regards to the rights of victims, almost undefined by the Statute, Rules or Regulations. In addition, judges have, for instance, accepted the remedy of 'stay of proceedings' against an abuse of process,[40] as well as the submission of 'no case to answer' motions,[41] whilst neither is provided for in the ICC Statute or Rules. Authority to order a mistrial in the *Ruto & Sang* case was found by relying on Article 64(2) in conjunction with Article 4(1) of the Rome Statute, obliging the Chamber to ensure a fair trial,[42] and on Article 21 to look for legal solutions on the basis of legal instruments other than the Court's own legal texts where the latter 'offered no ready solutions to the problem at hand'.[43]

---

[38] Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p. 331.
[39] ICC-01/09-01/11-1598, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", para. 105.
[40] ICC-01/04-01/06-1401, TCI Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13-06-2008; ICC-01/04-01/06-1486, AC Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21-10-2008; ICC-01/04-01/06-2517-Red, TCI Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 08-07-2010; ICC-01/04-01/06-T-314-ENG ET WT 15-07-2010; ICC-01/04-01/06-T-315-ENG ET WT 08-10-2010.
[41] ICC-01/09-01/11-2027-Red, TCV(A) Public redacted version of: Decision on Defence Applications for Judgments of Acquittal, 05-04-2016 ("Decision on Defence Applications for Judgments of Acquittal").
[42] *Ibid,* para. 190.
[43] *Ibid,* para. 192.

Implied Powers and Inherent Jurisdiction

40. On the issue of powers, which are not express but nonetheless implied, the International Court of Justice (ICJ) stated:[44]

> *The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, knowns as « implied » powers.*

41. Trial Chamber IV, whilst relying on the above ICJ jurisprudence, held it could subpoena unwilling witnesses on the basis of implied powers: "*An international institution – particularly an international court – is deemed to have such implied powers as are essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions.*"[45] And: "*the principle of implied powers, as a general principle of international law, is ample to justify incidental competence in an ICC Trial Chamber to compel the appearance of witnesses. It makes it unnecessary to agonise over the import of any provision of the Rome Statute that does not expressly and clearly exclude the possibility to imply the power".*[46] The majority of Trial Chamber IV also found support in the doctrine of 'implied powers', in addition to a combination of articles 4(1) and 64(2), to order a mistrial.[47]

42. On the issue of subpoenas the Appeals Chamber found that "there is no lacuna in the interpretation of the issues under appeal. Thus, the Appeals Chamber will not address any further the question of "implied powers" and "international criminal procedure". It was therefore unnecessary to rely on the Chamber's inherent powers to issue subpoenas as there was a legal provision which allowed a Chamber to do so.

---

[44] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (1996) ICJ Reports 66 [International Court of Justice], para. 76. *See also* ICC-01/09-01/11-1274, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014 ("Summons Decision"), para. 77.

[45] Summons Decision, para. 81.

[46] Summons Decision, para. 87.

[47] Decision on Defence Applications for Judgments of Acquittal, para. 191.

However, the Appeals Chamber did not reject the notion of 'implied powers' or 'inherent jurisdiction'.[48]

43. From the notion of 'implied powers' follows the notion of 'inherent jurisdiction' allowing the judiciary to make rulings on the basis of legal principles not explicitly codified, but which follow from the objective and intention behind the codified legal principles. Specifically on the issue of inherent jurisdiction, the ICJ held:[49]

> *[I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' …. Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of the States, and is conferred upon it in order that its basic judicial functions may be safeguarded.*

44. The notion of 'inherent jurisdiction' has also been used to authorise review mechanisms of judicial decisions, which were not expressly incorporated into the Rome Statute or Rules. For example, in allowing recourse to reconsideration of a decision the Trial Chamber in *Kenyatta* noted that "it would be incorrect to state that decisions can only be varied 'if permitted by an express provision in the Rome Statute framework."[50] In reaching this conclusion, the Chamber found support in "the jurisprudence of the [ICTY and ICTR] whose statutory provisions are equally silent as to the power of reconsideration".[51]

---

[48] AC – Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598, 9 October 2014, para. 105.

[49] Nuclear Tests Case (New Zealand v France) (Judgment) (1974) ICJ Reports 457 [International Court of Justice], para. 23; Nuclear Tests Case (Australia v France) (Judgment) (1974) ICJ Reports 253 [International Court of Justice], para. 23. See also Summons Decision, para. 78.

[50] *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11. *See* also *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011, para. 12.

[51] ICC-01/09-02/11-863, *ibid*, para. 11.

45. Applying the same concept of 'inherent jurisdiction', the Appeals Chamber can exercise jurisdiction over the Presidency's impugned decision, a position that finds support in the jurisprudence of the international criminal tribunals.

International Criminal Tribunals

46. The international tribunals have concluded that a Chamber has inherent authority to take certain measures which may not be expressly provided for in their Statute or Rules.[52] Trial and Appeal Chambers have exercised inherent jurisdiction where necessary, amongst others, to ensure the fairness of the proceedings or avoid a miscarriage of justice. Such inherent authority has, for instance, been held to exist to stay proceedings which are an abuse of process.[53] A Chamber may rely on such an authority to grant a stay where, in the circumstances of a particular case, proceeding with the trial of the accused would contravene the Court's sense of justice, due to pre-trial impropriety or misconduct;[54] and where the rights of the accused have been egregiously violated.[55] Inherent jurisdiction has similarly been invoked to ensure the equal application of a rule to both parties, even where the rule itself only refers to one of them.[56] Chambers have also invoked inherent jurisdiction to order the Registry to assign counsel where the accused's fair trial rights may be adversely affected;[57] or to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or the need to ensure a fair trial.[58]

---

[52] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuza Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007), para. 5.
[53] *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002), para. 15.
[54] *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009), para. 4.
[55] *Ibid*, para. 4.
[56] *Prosecutor v Haradinaj et al*, No. IT-04-84-T, *Decision on Idriz Balaj's Request for Evidentiary Hearing Regarding Interview of Carla del Ponte* (28 January 2008), para. 5.
[57] *Prosecutor v Nchogoza*, No. ICTR-2007-91-PT, *Order to Assign Counsel* (24 July 2008), para. 14; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Motions Requesting Assignment of Counsel of Choice* (13 October 2008), para. 19.
[58] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006), para. 20; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007), para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007), para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008), para. 9.

47. The International Tribunals' Appeals Chamber has similarly invoked inherent jurisdiction, amongst others, to admit evidence that was available at trial if its exclusion would lead to a miscarriage of justice;[59] or to remit limited issues to a Trial Chamber for determination if necessary to ensure that justice is done.[60]

48. It has also been held that the right to an effective remedy for violations of fundamental human rights is provided in customary international law and is part of the inherent powers possessed by the Trial Chamber.[61] In this regard, the Appeals Chamber held that the authority in the Statute to provide an effective remedy "flows from Article 19(1) of the Statute, which obliges the Trial Chambers to ensure a fair trial and full respect for the accused's rights. The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement."[62]

49. The Appeals Chamber further confirmed that the power to provide an effective remedy to an accused who has suffered a violation of his or her fundamental human rights includes the power to award financial compensation.[63] The Appeals Chamber was not persuaded that "the absence of an explicit provision providing for financial compensation in the Statute for violations of the rights of the accused as well as the Security Council's decision not to amend the Statute to expressly include such a remedy indicate that it is not available."[64] It thereby relied on the International Covenant on Civil and Political Rights ('ICCPR') "as a persuasive authority in determining the Tribunal's powers under international law".[65]

---

[59] *Prosecutor v Jelesic*, No. IT-95-10-A, *Decision on Motion to Admit Additional Evidence* (15 November 2000)
[60] *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, Judgment on Sentence Appeal (8 April 2003), para. 16.
[61] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007), paras. 45, 49.
[62] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007), para 26; *Prosecutor v. Radovan Stankovic*, Decision on Stankovic's Appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, MICT-13-51, 21 May 2014, para. 14.
[63] *Ibid,* para. 26; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007), paras. 58, 62.
[64] Rwamakuba Appeals Chamber decision, *ibid*, para. 24.
[65] *Ibid*, para. 25. *See also Kajelijeli* Appeal Judgement, para. 209. In addition, the Appeals Chamber has previously recognized that the rights of the accused in Article 20 of the Statute track the rights in the ICCPR. *See, e.g., Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 12, fn. 46 ("*Zigiranyirazo* Appeal Decision").

50. The Appeals Chamber of the Mechanism for the International Criminal Tribunals ('MICT') in *Stankovic* reviewed a Trial Chamber's decision denying revocation of a referral order - pointing at the fairness of the referred case -, notwithstanding the absence of an appellate normative framework.[66] Stankovic's case had been referred to Bosnia and Herzegovina in 2005,[67] and once referred was found guilty and sentenced initially by the State Court to 16 years, and subsequently on appeal to 20 years of imprisonment.[68] In 2013, Stankovic filed a motion requesting that his case be returned to the ICTY, in order to conduct a new trial.[69] The Referral Bench dismissed the motion and Stankovic filed an appeal before the President of the MICT.[70] In turn, the President assigned the case to the MICT Appeals Chamber.[71] As regards the silence in the Statute or Rules about appellate procedures in respect of referral cases, the Appeals Chamber held:

> Rule 11*bis* of the ICTY Rules and Rule 14 of the MICT Rules are silent on appeals from a decision of a trial chamber concerning revocation of a case. Notwithstanding, decisions on revocation concern, among other things, fundamental questions related to whether the Mechanism should exercise jurisdiction over a case and the <u>fairness</u> of the proceedings of the referred case. In the absence of any provision limiting the right of appeal, the Appeals Chamber considers that a decision on whether or not to revoke a case should be subject to appellate review.[72]

51. As for decisions issued by the President, the legal instruments of the *ad hoc* tribunals similarly do not contain an explicit appeal mechanism for such decisions. Yet, the ICTR Appeals Chamber considered it had jurisdiction to review a decision taken by the President when it related to the Appeal Chamber's statutory duty to ensure the fairness of proceedings on appeal.[73] The Appeals Chamber has similarly declared to have inherent power to review decisions of the President dismissing a request to

[66] *Prosecutor v. Radovan Stankovic*, Decision on Stankovic's Appeal against Decision Denying Revocation of Referral and on the Prosecution's Request for Extension of Time to Respond, MICT-13-51, 21 May 2014, para. 9.
[67] *Ibid*, para. 3.
[68] *Ibid*, para. 4.
[69] *Ibid*, para. 5.
[70] *Ibid*, paras. 5-6.
[71] *Ibid*, para. 6.
[72] *Ibid*, para. 13.
[73] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007), para. 10.

review a Registrar's decision concerning withdrawal of co-counsel, where such decisions are closely related to the fairness of the proceedings on appeal.[74]

52. In addition, it has been held that there is an inherent right to appeal the decisions of the President and Trial Chamber relating to relocation of an acquitted person to give effect to the Appeals Chamber's direction in its judgement that the Registrar take steps to effect the acquittal.[75] With regards to the absence of a prescribed review procedure regarding Ntagerura's request, the Appeals Chamber stated: "While neither the Statute nor the Rules provide for such appeals, the Appeals Chamber has inherent jurisdiction over the enforcement of its orders and any decisions rendered as a consequence thereof."[76] The Appeals Chamber further noted:

> *[T]he Applicant claims that he remains in de facto custody of the Tribunal and that full effect has not yet been given to his acquittal. The Appeals Chamber is concerned by this claim, in particular as to whether it raises an issue regarding the effectiveness of its judgements acquitting an accused. The Appeals Chamber considers this issue to be closely related to the fairness of the proceedings.*[77]

Present Appeal

53. Applying similar reasoning to that adopted both by the ICC and the *ad hoc* international criminal tribunals, the Appeals Chamber may exercise jurisdiction to review an article 108 decision by the Presidency even if this mechanism is not explicitly provided. In light of the importance of article 108 and the significant implications it has on the fundamental rights of the sentenced person, as well as the standing of the Court, such a weighty decision should not be determined by the Presidency alone without the opportunity for review on appeal.

54. This approach is consistent with article 21(3) of the Rome Statute which states that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". In light of this provision, the appeal of

[74] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006), paras. 1, 5, 6, 9.
[75] *In Re Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008* (11 September 2008), para 14.
[76] *Ibid*, para. 12.
[77] *Ibid*, para. 13.

decisions which touch upon the fundamental rights of individuals brought before the Court should be possible.

55. Accordingly, the impugned Presidency decision should be capable of review on appeal. This is not simply an administrative decision, but one which will have profound repercussions on the sentenced person. The Appeals Chamber is directly concerned because the Court has an interest in the sentenced person being dealt with fairly. The issue at hand goes beyond administrative matters, as it involves permission to prosecute an individual still under the Court's jurisdiction for crimes against humanity and war crimes. Also, despite having completed his sentence Mr Katanga remains subject to the jurisdiction of the Court as the Trial Chamber has yet to conclude the reparation phase and any reparation orders will be made directly against him. Additionally, Mr Katanga has been subject to the jurisdiction of the Court for the past nine years and subject to a lengthy process. This included initial issues of the admissibility and submissions on the part of DRC that the ICC retain jurisdiction. His trial, which included the application of Regulation 55, concluded with a detailed judgment, sentencing and a subsequent review of sentence that concluded his early release was merited, nominating 18th January 2016. The decision of the Presidency frustrates the objective of the Appeals Chamber's sentencing review decision.[78] The Appeals Chamber is directly concerned with the impugned decision and should be able to review it.

56. Article 108 refers to "the Court" not "the Presidency". The Presidency's authority arises from the wording of Rule 199 that "the functions of the Court under Part 10 shall be exercised by the Presidency". It is questionable whether it was the intention of the drafters of the Statute to make the Presidency rather than the Appeals Chamber (or a Trial Chamber) the ultimate arbiter under article 108 of the Rome Statute. A proposal to refer to the Presidency rather than the Court in article 108 was considered but rejected.[79] From earlier drafts of the Statute, it appears that there was consensus as

[78] ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Mr Germain Katanga.

[79] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Draft Report of the Working Group on Enforcement, A/CONF.183/C.1/WGE/L.13, 4 July 1998; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Working Group on Enforcement, A/CONF.183/C.1/WGE/L.14 7 July 1998.

to the Presidency's authority to render decisions on matters relating to the financial and administrative functioning of the Court.[80] Anything beyond such authority was a matter of concern to a good number of delegates, and required a statutory basis.[81] Some delegates to the *Ad Hoc* Committee were concerned that the powers of the Presidency, to the extent they went beyond administrative and financial matters, were excessive.[82] In the Preparatory Committee, there were suggestions that the Presidency should have no judicial powers at all, and that his or her authority be limited to ceremonial and administrative functions. Such administrative duties could include supervision of the Registrar, security matters, and enforcement of sentences.[83] In the Statute eventually adopted, the Presidency's responsibilities consisted of 'due administration of the Court', as well as other functions conferred upon it by the Statute, including the designation of States of enforcement, supervision of sentences, and conditions of imprisonment, fines, forfeiture, and reparation orders, in accordance with Part 10 of the Statute.[84]

57. Decisions under article 108 go far beyond administrative and financial matters and include legal considerations, such as the determination of the scope of article 8 and its relation to other legal concepts, such as complementarity, '*ne bis in idem'*, as well as the scope of fair trial rights of persons under the Court's jurisdiction. The latter is an explicit obligation upon Trial Chambers and the Appeals Chamber, but not the Presidency as such. The Presidency has a mixed role, essentially administrative, but at times, such as when reviewing detention matters, judicial and at other times discharging an executive function.

[80] Eleventh Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, A/CN.4/449/Corr.1 16 April 1993; Report of the International Law Commission on the Work of its Forty-Fifth Session (3 May—23 July 1993), Annex – Report of the Working Group on a Draft Statute for an International Criminal Court, 1993, Vol. 2, p. 103-104.
[81] Report of the International Law Commission on the work of its Forty-Sixth Session, Draft Statute for an International Criminal Court with Commentaries, 1994, p. 30-31.
[82] William A. Schabas, The International Criminal Court, A commentary of the Rome Statute, Oxford, p. 540.
[83] Report of the Preparatory Committee on the Establishment of the International Criminal Court: Volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996), UN Doc A/51/22, para. 42; Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II (Compilation of Proposals), UN Doc A/51/22, p.17-20.
[84] William A. Schabas, The International Criminal Court, A commentary of the Rome Statute, Oxford, p. 540.

58. The impugned decision involves similar considerations to those concerning questions of admissibility of a case before the ICC based on complementarity. As with issues of complementarity, issues of authorisation to prosecute should, at a minimum, be reviewed by a judicial organ.

59. The Presidency's role when dealing with State Parties has a political aspect. As with the Registrar, the Presidency may be required to consider wider implications than those for the individual concerned and may be significantly influenced by the Court's relationship with State Parties. In this particular case, the DRC [REDACTED].[85] An organ discharging a quasi-executive function, which is primarily concerned with the smooth operation of the Court, is more likely to be influenced by such considerations than a judicial organ independent of the executive branch, or perceived as being so.

60. The prosecution initiated against Mr Katanga before the DRC can be considered as an extension of the Court's proceedings. Indeed, the DRC proceedings can only take place at this stage if approval is given under article 108. The DRC proceedings have been described as an exercise of complementarity[86], in effect a shared prosecution. It is precisely because a concern may arise in the exercise of complementarity that article 108 provides the Presidency with the authority to approve or disapprove such prosecution, and should similarly, and in light of the above ICTR jurisprudence, provide the Appeals Chamber with the authority to review the Presidency's decision.

61. The defence submits that a right to appeal a decision under article 108 lies as of right. Whilst it is not a decision involving an acquittal, conviction, or sentencing determination, it is a final decision in that it closes the proceedings under article 108. As it is a final decision and the proceedings before the Court have already come to a closure (with the exception of reparations), it is impossible to meet the 'leave to appeal' criteria under article 82(1)(d) as the Appeals Chamber's immediate resolution would not advance the ICC proceedings. It is a separate matter. Article 81 concerns final decisions; and article 82 concerns appeals against "*other decisions*". The impugned decision does not fall within the category of "*other decisions*" covered by Article 82(1)(d) because it is not an "*interlocutory or intermediate*" decision by the

[85] ICC-01/04-01/07-3633, '*Réponse des autorités congolaises à l'Ordonnance ICC-01/04-01/07-3632 en date du 14 janvier 2016'*, and ICC-01/04-01/07-3633-Conf-Anx, p. 4.
[86] Presidency decision, paragraph 7; and ICC-01/04-01/07-3633-Conf-Anx,pp 3-4

Pre-Trial or Trial Chamber.[87] Accordingly, the defence adopts the appeal mechanism to be followed for a final decision, subject to any subsequent direction of the Court.

62. Accordingly, based on the above principles and Mr Katanga's specific circumstances, the defence requests the Appeals Chamber to exercise its inherent jurisdiction to accept this appeal.

GROUNDS OF APPEAL

63. In accordance with the jurisprudence of the Court, an appeal must be founded on one or more identified issues, which emanate from the impugned decision; that is, it must be an 'identifiable subject or topic requiring a decision for its resolution' and 'not merely a question over which there is disagreement or conflicting opinion'; and its resolution must be 'essential for the determination of matters arising in the judicial cause under examination'.[88]

64. The defence requests that the Appeals Chamber receive this appeal of the impugned decision in respect of the following issues:

(i) The Presidency erred in considering that the Court´s approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court, while no such limitation emanates from the Statute, Rules and Regulations (para. 20).

(ii) The Presidency erred in interpreting article 108(1) in conjunction with article 20(2) too narrowly, to the extent that it 'only prohibits trial for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court (paragraph 23).

[87] ICC-01/04-168 OA3, para. 36 ("Article 82(1)(d) of the Statute confers a right of appeal against interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber").
[88] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9; *The Prosecutor v. Laurent Gbagbo*, Decision on the request for leave to appeal the 'Decision on witness preparation and familiarisation', 13 January 2016, ICC-02/11-01/15-388, para. 9.

(iii) The Presidency gave no or insufficient weight to fair trial concerns. In particular, finding that (1) lack of legal aid (2) lack of adequate means to ensure access to defence counsel and (3) absence of a right of appeal, do not undermine "fundamental principles or procedures", or "otherwise affect the integrity of the Court" to such an extent that the Court's approval under article 108 should be denied (paras. 20, 26, 30).

(iv) The Presidency erred in finding that, in the context of article 108, the question whether a domestic prosecution undermines 'fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court' does not involve an assessment of whether the domestic legal system concerned is not 'compliant with international standards of human rights' (para. 31).

(v) The Presidency erred in relying on the fact that the DRC provided assurances that Mr Katanga would receive a fair trial, and that it was party to international human rights treaties, in its determination that the Court's approval under article 108 would not undermine 'fundamental principles', thereby ignoring the reality of the DRC's inadequate justice system in general, and Mr Katanga's unfair trial thus far in particular (para. 31).

(vi) The Presidency erred by providing approval for prosecution without first receiving adequate details of the charges the DRC intended to pursue against Mr Katanga.

(vii) The President erred in considering a reference in a Registry's report to a guarantee provided by the DRC a sufficient guarantee that the DRC will not seek the death penalty and that, in any event, such penalty would not be carried out against Mr Katanga (para. 28).

65. Each of these issues is appealable in the sense that they all emanate from the decision (literal quotes from the impugned decision), and they amount to more than a disagreement with the Presidency's opinions. Rather, each of them involves fundamental legal and/or factual questions requiring resolution. They concern both the appropriate criteria for exercising complementarity in such circumstances and basic fair trial issues.

66. Had Mr Katanga not been transferred to the ICC, he would not now be prejudiced by a subsequent trial as he would have been tried only once for the totality of his criminal conduct. Aside from avoiding the rigours of transfer, trial and detention in The Hague, and isolation and separation from family and friends, he would be able to deduct time served. The proceedings in DRC effectively form an extension of the ICC proceedings and concern the same geographical and temporal span as the ICC investigations. Mr Katanga has already been exposed to a lengthy and unfair criminal process in the DRC from the time of his initial detention in February 2005. He is presently deprived of the means to afford an adequate defence. Mr Katanga's fair trial rights are deeply affected by any or all of the issues.

67. The Appeals Chamber's authoritative determination of the issues will 'ensure that the proceedings follow the right course' – that is, that a proper interpretation is given to article 108, and that Mr Katanga's prosecution in the DRC be discontinued. A decision by the Appeals Chamber will also remove doubts about the correctness of the impugned decision.

FIRST GROUND

(i) The Presidency erred in considering that the Court´s approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court, while no such limitation emanates from the Statute, Rules and Regulations.

68. Indeed, in light of the lack of criteria defined in the Statute, Rules and Regulations, and in particular article 108 of the Statute, the Presidency decision on the limitation on the prosecution or punishment of other offences is necessarily discretionary. Therefore, the Presidency may rely on other criteria than the principles defined in the Statute to refuse to approve domestic proceedings against a sentenced person. In particular, the Presidency may consider, among other criteria:

- Whether a new trial would subvert the ends of justice or unduly impair its proper administration;

- Whether the sentenced person would benefit from a fair trial before the national courts, not only in theory but also in practice, etc.

69. In light of the negative wording of Article 108 ("A sentenced person ... shall not be subject to prosecution ... for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution... has been approved by the Court..."), the defence submits that such prosecution should be authorised only in exceptional circumstances, when both the characteristics of the ICC case and of the domestic case justify two different proceedings at different times, for facts which occurred before the person's delivery to the State of enforcement. For instance, such posterior domestic proceedings may be justified if the liability of the sentenced person for different facts committed previous to his delivery was discovered by the ICC Prosecutor only after she had initiated prosecution against him or at the close of the prosecution case.

70. For these reasons, the defence submits that the Presidency erred in limiting its discretionary power pursuant to article 108, and that such error warrants the reversal of its decision by the Appeals Chamber.

SECOND GROUND

(ii) The Presidency erred in interpreting article 108(1) in conjunction with article 20(2) too narrowly, to the extent that it 'only prohibits trial for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court' (paragraph 23).

71. Article 108(1) reads:

> **Limitation on the prosecution or punishment of other offence**
> 1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

72. The President erred in interpreting article 108(1) too narrowly in determining that authorisation for prosecution should be denied only where the principle of '*ne bis in idem*' under article 20(2) of the Rome Statute is engaged.

73. No such restriction can be derived from the text, or purpose and objective of article 108. On the contrary, if the scope of article 108 is limited to the parameters of article 20(2), then article 108 is superfluous as the Court can intervene in prosecutions which offend the '*ne bis in idem*' principle on the basis of article 20(2) alone.

74. '*Non bis in idem'* is a core legal principle of civil law that translates as 'not twice the same' and reflected in the rule against 'double jeopardy' (*autrefois acquit)* in common law systems. It has almost universal application in criminal procedure[89] and is one of the basic human rights.[90] It is specifically referenced in the Rome Statute heading to article 20 and applied in that article in modified form. Article 20 deals in different ways with different applications of the '*ne bis in idem'* principle.

75. Article 108 has a significantly wider ambit than the general application of the principle '*ne bis in idem*' and, in particular article 20(2), as article 108 refers to 'conduct' while 20(2) refers to 'crime'. 'Crime' and 'conduct' plainly have different meanings. In contrast to article 20(2), articles 20(1) and 20(3) refer to 'conduct' and also differ in their application. Clearly, 'conduct' must be given a wider interpretation than the word 'crime'. Had the drafters intended article 108 to have a similar application to that found in article 20(2) they would have used the term 'crime' or referred explicitly to article 20(2).

76. Article 20(1) deals with the situation where a person has been tried at the ICC and prohibits further proceedings at the ICC in respect to '**conduct** which formed the basis of crimes for which the person has been convicted or acquitted by the Court'.

77. Article 20(2) deals with the situation where a person has been convicted or acquitted by the ICC and prohibits the trial of a person "in another court for a **crime** referred to in article 5[91] for which that person has already been convicted or acquitted by the Court".

[89] See United States Institute for Peace ; Model Codes for Post-Conflict Criminal Justice ; Fundamental Principles Jurisdiction, Ne Bis in Idem, Statutory Limitations Time and Place of Commission, Part 1 4 Article 8.
[90] It is an internationally protected human right under the International Covenant on Civil and Political Rights, Article 14(7); Protocol 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4(1); the American Convention on Human Rights, Article 8(4).
[91] **Article 5(1) Crimes within the jurisdiction of the Court**

78. Article 20(3) addresses the situation where someone has already been tried by 'another court' for "**conduct** also proscribed under article 6, 7, or 8 and prohibits prosecution before the ICC of the same conduct. However, by virtue of article 20(3)(b), such prosecution is not prohibited if the proceedings in the other court "were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice" (article 20(3)(b). This is echoed in article 17(1)(c) where the Court shall find a case inadmissible where "(t)he person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3".

79. By its use of the word 'conduct' rather than 'crime', articles 20(1) and 20(3) have a broader scope than article 20(2). Article 20(1) prevents the ICC Prosecutor from charging similar conduct under a different heading. To avoid recurrent trials, the Prosecutor is expected to charge conduct which is part of the same transaction in one, rather than consecutive prosecutions. This accords with some states practice. As stated in the notes to the draft code of United States Institute of Peace ('USIP'):

> "In some states, *ne bis in idem* applies to the historical facts, or a particular set of events. Once a person has been prosecuted for a criminal offense arising from a set of historical facts, he or she cannot be further prosecuted for other criminal offenses arising from the same set of historical facts. This practice accords with the literal meaning of *ne bis in idem*, where *idem* means "circumstances." Of course, a person may be prosecuted for a number of offenses arising from the same historical facts, but this must all be done together and at the same trial and under the same indictment."[92]

This is justified by the need for the proper administration of justice.

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

. (a) The crime of genocide;

. (b) Crimes against humanity;

. (c) War crimes;

. (d) The crime of aggression.

[92] USIP Model Codes for Post-Conflict Criminal Justice Fundamental Principles Jurisdiction, Ne Bis in Idem, Statutory Limitations Time and Place of Commission ...Part 1 4 Article 8: www.**usip**.org/sites/default/files/MC1/MC1-FrontMatter.pdf.

80. Article 20(2) is applicable to the present case where the DRC obtained approval of its prosecution of Mr Katanga.

81. Article 20(2) provides more limited protection to the individual's rights than article 20 (1) or (3) whose use of the word 'conduct' more aptly protects the individual's rights. By referring to "a crime referred to in article 5", article 20(2) would not appear to prevent prosecution for a non-article 5 crime, for example, murder *simpliciter* or other 'ordinary' crimes. Nor does it apply to the breadth of facts that the word 'conduct' encompasses. Indeed, as has been observed by one commentator: "Apparently, an individual is not guaranteed that he will be tried only once. It is possible, as stated before, that the ICC try a person for one crime and the national court for another, although they rest on the same conduct. It appears therefore, that this approach is unable to protect an individual and is also in opposition to the idea of procedural economy and justice, since two courts can try for one conduct and justice can be threatened by the passing of two different decisions. So, when reading paragraph 2 it may be concluded that this concept can not fulfil the main idea of the principle *ne bis in idem*."[93]

82. The reason that article 20(2) prohibits double prosecution in domestic jurisdictions only to the extent that it concerns the same crimes is that the Court, consistent with state sovereignty and the principle of complementarity, is reluctant to interfere in domestic jurisdictions, in particular where they seek to hold individuals accountable for war crimes, crimes against humanity or genocide by conducting domestic prosecutions. Nonetheless, in striking a balance that takes into account the principles of complementarity and fairness the Court must guard against permitting a prosecution regime, shared or otherwise, that is unfair or oppressive. Repeated prosecution of an individual can give rise to unfairness, as the defence submits is the situation in the present case. The principle of *ne bis in idem* seeks to provide some protection, though Article 20(2) provides only limited protection for the individual.

83. Article 108 provides the Court with a discretion to consent or not to consent to prosecution of offences committed "prior to that person's delivery to the State of

[93] European Society of International Law - *Ne bis in idem* in Conjunction with the Principle of Complementarity in the Rome Statute, Tijana Surlan: http://www.esil-sedi.eu/search/node/surlan.

enforcement." Article 108 should be given a broad and not a narrow interpretation. As such, the term 'conduct' encompasses more than merely the crimes for which the individual has been acquitted or convicted. Article 108 offers greater protection to a person sentenced by the ICC than the principle of *non bis in idem*. Article 108 is presented "as an individual right that protects a person, whose sentence is being or has been served, from prosecution within the enforcement State".[94] In this respect "[a]rticle 108(2) underscores the fact that the right set out in the article belongs to the accused".[95]

84. Article 108 and Rules 214 and 215 do not set out criteria for the exercise of the discretion, nor do they impose any limitation on the Court to refuse such approval. Article 108 must be read in light of article 21(3), which requires the application and interpretation of law, and therefore of article 108, to "be consistent with principles of internationally recognised human rights".[96] Logically, in order for that to be put into effect, it requires the Court to refuse authorisation for domestic prosecutions under article 108 where approval will lead to the individual being made subject to the risk of a fundamentally unfair trial, or to other significant unfairness, such as inhumane prison conditions or the death penalty.[97]

85. While the *ne bis in idem* principle applicable to a state's powers to prosecute a person already dealt with by the ICC is defined narrowly in article 20(2), reflective of the principles of sovereignty and complementarity and consequent reluctance to interfere with domestic prosecutions, it should not be applied so as to trump all other principles, and certainly not the principle of fairness. Article 108 serves an important function by providing the court with the authority to intervene so as to avoid prosecutions that are oppressive and unfair, over and above, and in addition to, the *ne bis in idem* principle.

---

[94] Triffterer, The Rome Statute of the International Criminal Court, A Commentary, Third Edition, p. 2199.

[95] William A. Schabas, The International Criminal Court, A Commentary on the Rome Statute, 1st ed. (Oxford University Press 2010), p. 1093.

[96] Michael Stiel and Carl-Friedrich Stuckenberg, 'Klamberg Commentary', at https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-10/#c3606. *See also* William A. Schabas in Triffterer/Ambos, The Rome Statute of the International Criminal Court: A Commentary, Nomos (2016) p. 2203; and ICC-01/04-01/07-3635, 22 January 2016, para. 29.

[97] William A. Schabas in Triffterer/Ambos, The Rome Statute of the International Criminal Court: A Commentary, Nomos (2016) p. 2203.

86. The Presidency placed undue weight on 'the notion of complementarity and the objective of ensuring accountability of crimes' in viewing any departure from the narrow confines of article 20(2) as shielding individuals[98]. The defence submits that fairness to the sentenced person outweighs the Court's fight against impunity. While states must take measures to ensure the "effective prosecution" of international crimes[99] such prosecution should be conducted fairly. As Inazumi states, "the interest of the international community in ending impunity can only be served through a fair and impartial trial."[100] An interpretation of article 108 consistent with human rights principles not only requires the Presidency not to approve a domestic prosecution if it offends the *ne bis in idem* principle, but also requires the Presidency to consider whether it is fair and appropriate to approve further prosecution.[101]

87. The conduct already tried by the ICC and the conduct to be tried domestically may be so intertwined – as is the case here - that it would be unfair to the sentenced person to allow such domestic prosecution even if it does not concern the exact same 'crime' and therefore is not prohibited by article 20(2). For example, if five villages were attacked over the temporal period of a case and an accused charged by the Prosecutor with four of them and acquitted, is it fair or appropriate that he should then be tried in respect of the omitted fifth village? This is not to say that in no circumstances can consecutive processes take place but whether they should is a matter that merits judicial attention.

88. The DRC authorities placed the prosecutorial conduct of the case against Mr Katanga in the hands of the ICC.[102] The ICC Prosecutor chose to focus his charges on the attack on Bogoro of 24th February 2003. That was a tactical, discretionary choice. The prosecution investigations had a wider scope, as demonstrated by the extent of the Rule 77, Article 62 and incriminating material disclosed to the defence, referring to events committed in the entire district of Ituri between 2002 and 2005, in particular

[98] Presidency decision, para. 23.
[99] Preamble to the Rome Statute.
[100] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (1st ed. Intersentia 2005), p. 187.
[101] *See also* ICC-01/04-01/07-3635, paras. 26-45; ICC-01/04-01/07-3662, para. 17.
[102] ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo. ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.

the 2003 Bunia, Mandro and Tchomia attacks. The Prosecutor could equally have focused his investigations on the other incidents that now comprise the offences alleged in the *Décision de Renvoi*, being the document containing the charges for which the DRC sought the Presidency's approval under article 108.

89. The allegations contained in the *Décision de Renvoi* fall within both the temporal and geographical ambit of the ICC investigation. All four charges concern events in Ituri. All have a starting date of either 2002 or 2003. Indeed, the defence notes that the DRC [REDACTED].[103] The offence concerning the recruitment of child soldiers has previously been charged before the ICC. Accordingly, the principle of *ne bis in idem* should apply to prevent prosecution in DRC for the similar crime of recruitment of child soldiers. All the other charges referred to by the *Décision de Renvoi* contain significant elements that were referred to and relied upon by the prosecution in the ICC trial and were investigated by it. The prosecution made specific references to places mentioned in the *Décision de Renvoi.*

90. In short, the material relating to places, incidents or crimes named in the *Décision de Renvoi* charges was obtained and available to the ICC Prosecutor. The prosecution sought to have the crimes committed there taken into account in support of the main case as either similar fact and/or to prove chapeau elements. The Prosecutor made a decision not to proceed with specific charges relating to those places, though he could arguably have done so had he wished. Mr Katanga was subject to the choices made by the ICC Prosecutor. He had no say in the matter. He has undergone years of process. It is grossly unfair if the Prosecutor's decision as to what to charge or not to charge exposes Mr Katanga now to a risk of further prosecution.

91. The Prosecutor, having chosen to focus on particular crimes and not on others, such as those contained in the *Décision de Renvoi* would surely be prevented from prosecuting Mr Katanga in respect of those other matters, whether by reason of article 20(1) or by intervention due to abuse of process. The reason for preventing further prosecution would be essentially one of fairness to the person. The Court would not consent to such a course and nor should it consent to such a course being undertaken

[103] ICC-01/04-01/07-3633-Conf-Anx, letter of the DRC of 19 January 2016, [REDACTED].

by the DRC. To do so will bring the ICC process itself into disrepute.[104] There needs to be a degree of finality in the criminal process. This is not to say that there may never be circumstances where a further prosecution would be appropriate but it is clearly inappropriate in the present case.

92. That the Prosecutor's investigation did not lead to prosecution of all aspects of Mr Katanga's alleged criminal conduct should not matter. Provided it was a genuine investigation, prosecution of allegations which fall within the scope of the investigation should not be allowed, be it by a domestic jurisdiction or the Court. Article 17 of the Rome Statute presents a similar situation: to the extent that an individual's conduct has been investigated genuinely by a State, the Court cannot allow prosecution before the Court of the same individual for that same conduct, even if the investigation on a domestic level did not lead to prosecution.

93. In this regard, the defence reiterates that it would be unfair for the sentenced individual to face further prosecution of allegations already investigated by the Court over the course of many years, albeit not all charged. Having undergone years of process before the ICC, it would be unfair for Mr Katanga to face further prosecution and trial in DRC concerning the same time span and investigations covered by the Court.[105] Charging Mr Katanga afresh before the ICC for offences committed in the same temporal and geographical area already investigated would not be tolerated and violates article 20(1), which prohibits the prosecution before the Court of any 'conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'. It is no more correct for the DRC than it is for the Court to pursue such charges at this stage, after a full trial and lengthy process. This particularly holds true because the DRC authorities placed Mr Katanga's prosecution in the hands of the ICC Prosecutor, claiming that they were unable to prosecute him.[106]

[104] *See* Patryk Labuda, Complementarity Compromised? The ICC Gives Congo the Green Light to Re-Try Katanga: « In addition to fair trial concerns, this decision raises a number of questions about the ICC's raison d'être, in particular the relationship of international criminal justice to human rights law and the future of complementarity." @ http://opiniojuris.org/2016/04/11/complementarity-compromised-the-icc-gives-congo-the-green-light-to-re-try-katanga/.
[105] *See also* ICC-01/04-01/07-3635, para. 44.
[106] *Ibid*, para. 45; ICC-01/04-01/07-1189-Anx, OBSERVATIONS DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO PAR RAPPORT A l'EXCEPTION D'IRRECEVABILITE SOULEVEE PAR LA DEFENSE DE GERMAIN KATANGA DANS L'AFFAIRE LE PROCUREUR

94. The defence proffers the suggestion that a balance can be struck by the Court not approving prosecution of conduct under article 108 where, absent compelling or exceptional circumstances, the prosecution concerns alleged offences which fall within the temporal and geographical ambit of the ICC Prosecutor's investigation – the 'catchment area' of the ICC investigation of crimes. This would not necessarily shield a person inappropriately. It may not extend, for example, to conduct that could not reasonably have come to light in the course of such investigation.

95. In conclusion, the defence submits that the Presidency did not correctly interpret the terminology contained in article 108 and requests the Appeals Chamber to review it.

CONTRE GERMAIN KATANGA ET MATHIEU NGUDJOLO CHUI (ICC-01/04-01/07), 01/06/2009 :
« II. CADRE JURIDIQUE
b. Le Statut de Rome ratifié le 30 703/2002. Par cet acte, la RDC s'est engagée à se soumettre au régime juridique de la CPI par le respect du principe de la complémentarité et de l'obligation de coopérer la CPI. Le principe de la complémentarité suppose la primauté de la compétence des juridictions nationales en matière de crimes internationaux, la CPI ne s'y substituant que lorsque l'Etat concerné n'a pas la volonté ou est dans l'incapacité de mener véritablement à bien les enquêtes ou les poursuites (article 17, point 1, a du Statut de Rome).
Et l'incapacité de l'Etat peut être déduite de l'effondrement de la totalité ou d'une partie substantielle de son appareil judiciaire ou de l'indisponibilité de celui-ci notamment à réunir les éléments et les témoignages nécessaires ou à mener autrement à bien la procédure (article 17, point 3). (...)
c. La requête en renvoi du 03/03/2004 se situe dans la logique de ces dispositions du Statut de Rome. Par cet acte en effet, le Président de la RDC déférait à la CPI la situation prévalant en RDC depuis l'entrée en vigueur du Statut de Rome. Il justifiait cette décision par le fait que les autorités congolaises n'étaient pas en mesure de mener les enquêtes sur les crimes de la compétence de la CPI ni d'engager les poursuites nécessaires sans la participation de celle-ci.
III. QUESTIONS POSEES PAR L'EXCEPTION
a. La RDC a-t-elle véritablement mené à bien les enquêtes contre Germain Katanga? Si oui, sur quels faits ont porté ces enquêtes ?
A cet effet, il convient de signaler qu'un dossier RMP n° 0121/0122/NBT/05 avait été ouvert à charge de Germain Katanga, Goda Sukpa, Ndjabu Ngabo, Mbodina Iribi Pitchou, Masudi bin Kapinda, Lema Bahat Pelo, Manono Philemon et Bede Djokaba Lambi, à la suite de l'assassinat de 9 casques bleus de la MONUC ressortissants du Bengla Desh. Les enquêtes sur ces faits sont difficilement menées car plus d'une année après l'arrestation des personnes susnommées, le dossier n'est toujours pas en mesure d'être renvoyé devant la juridiction de jugement. (...)
b. La RDC avait-elle la capacité de mener véritablement à bien des enquêtes sur ces allégations ?
Lorsqu'on considère les circonstances des faits (Février 2003) qui décrivent un pays écartelé entre rébellions et bandes armées, une insécurité généralisée dans l'Ituri entrainant l'inaccessibilité des victimes et des témoins, ceux-ci craignant légitimement pour leur sécurité et ce, dans un pays où il n'existe pas un système de protection de ces personnes, l'indisponibilité des structures judiciaires aggravées par l'insuffisance de ses capacités opérationnelles ; les aléas du processus de paix avec les différents accords politico-militaires entre ex-belligérants, le manque d'expertise dans le traitement des crimes de masse, la collecte et la conservation de leurs éléments de preuve, tous ces facteurs réunis indiquent que la RDC ne disposait pas de la capacité de mener véritablement à bien les enquêtes sur les crimes de Bogoro. La situation malheureusement ne s'est guère améliorée depuis. »
See also ICC-01/04-01/07-T-65-ENG ET WT 01-06-2009.

THIRD GROUND

(iii) The Presidency gave no or insufficient weight to fair trial concerns. In particular, finding that (1) lack of legal aid, (2) lack of adequate means to ensure access to defence counsel and (3) absence of a right of appeal, do not undermine "fundamental principles or procedures", or "otherwise affect the integrity of the Court" to such an extent that the Court's approval under article 108 should be denied (paras. 20, 26, 30).

96. The Presidency found that "under article 108 (1) of the Rome Statute, the approval of the prosecution, punishment or extradition of a sentenced person should only be denied when it undermines fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court"[107]

97. The defence submits that the Presidency erred in underestimating the fair trial concerns raised by the defence. These can be summarised as follows: excessive delay; lack of legal aid; lack of adequate facilities for the preparation of the defence; inability to secure the attendance and examination of witnesses under the same conditions as the prosecution; absence of appeal from the *Haute Cour Militaire* on the merits of the case; continued availability of the death penalty; systemic failures of the DRC justice system; political or executive interference; and lack of impartiality.[108] The defence refers in particular to Mr Katanga's indigence and inability to fund adequate representation, the absence of legal aid, and the absence of an appeal mechanism from the *Haute Cour militaire.*

98. In reaching its decision the Presidency effectively turned a blind eye to the realities of the situation. The reality is that there is no legal aid available to the indigent sentenced person who will be unable to defend the case against him effectively, and there is no effective appeal from the *Haute Cour Militaire*. The DRC justice system is inadequate. Instead of confronting those realities the Presidency placed undue weight on statements and actions by the DRC authorities and undue weight on the contents of the constitution, despite such matters not being given effect.

---

[107] Presidency's impugned Decision, para. 31.
[108] ICC-01/04-01/07-3662, para. 29.

99. The Presidency dealt with the defence submissions as to the absence of legal aid and right to appeal in the following manner:

> *Nonetheless, the Presidency notes that the DRC has emphasised in this regard that the prosecution of Mr. Katanga will occur consistently with the rights of the defence recognised in the Constitution of the DRC. The Presidency further notes that the DRC is party to relevant international instruments recognising minimum guarantees in relation to the right to a fair trial, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. The former guarantees both the right to have legal assistance assigned without payment in the event of a lack of sufficient means and the right to review of a conviction and sentence by a higher tribunal according to law. In addition, article 153 of the Constitution of the DRC provides, inter alia, that "[l]es cours et Tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés" and article 215 thereof provides, inter alia, that "[l]es traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois."*[109]

100. No reasonable tribunal, given submissions to the contrary, should place such undue reliance on the theoretical position. This is not a case where the Court has to speculate about future proceedings, as it would have to do in transfer cases. Since Mr Katanga has been transferred to the DRC, and the proceedings against him have been initiated, the Court should consider the actual facts rather than the assurances given in determining whether Mr Katanga risks receiving an unfair trial. It is not sufficient to 'note' that the DRC has signed and ratified a number of human rights treaties and given assurances that it will offer Mr Katanga a fair trial when there are grounds to be concerned that in reality the sentenced person is not so protected.

101. The fact remains that no legal aid is provided. Mr Katanga receives no legal aid, nor has he ever received legal aid in the DRC, nor is there any realistic perspective that he will receive legal aid at any stage during the proceedings in the DRC. Indeed, the fact that the DRC has ratified human rights conventions which guarantee such legal aid but does not in fact provide it, and has no system in place to do so, strengthens rather than weakens the defence argument that the DRC is not in a position to offer a fair trial to Mr Katanga.

102. Mr Katanga faces a complex case with severe consequences. The lack of legal aid is problematic for a number of reasons. Firstly, Mr Katanga is indigent and will be unable to afford legal representation. Secondly, an effective defence is dependent on

[109] Presidency's Impugned Decision, para. 31.

an effective investigation. The case will involve investigations in Ituri, 2000 kilometres from the seat of the DRC court. Without funding, Mr Katanga will be unable to participate in the case effectively, nor will he be able to call witnesses on the same terms as the prosecution.

103. Human Rights Courts have stressed the importance of the right to legal aid and effective representation.[110] The right to adequate representation is considered as one of the most fundamental aspects of a fair trial.[111] M. Cherif Bassiouni referred to it as "paramount to the concept of due process" both of interest to the accused and the integrity of the judicial process.[112] As noted in the Decision the DRC is itself a signatory to the International Covenant on Civil and Political Rights which expressly allows for the provision of legal aid in such circumstances,[113] though in practice does not provide it. Without adequate means Mr Katanga will be left with no means to defend himself which will plainly render any trial unfair.

104. The importance of effective representation, where necessary to be funded by the state, is further highlighted in extradition cases, a subject further discussed below.[114] In two recent extradition requests concerning genocide cases, courts in both common and civil law jurisdictions have refused to order extradition to Rwanda following findings of potential unfair trial there due to inadequate legal aid and ineffective legal assistance.[115] It is to be noted that Rwanda, unlike DRC, does provide some legal aid funding, albeit the extradition courts found their legal aid

---

[110] *See, inter alia*, ECrtHR, *Artico v. Italy*, 13 May 1980; *Daud v. Portugal*, 21 April 1998; *Czekalla v. Portugal*, 10 October 2002, *Bogumil v. Portugal*, 7 October 2008; *Falcao dos Santos v. Portugal*, 3 July 2012.

[111] Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 Duke J. Comp. & Int'L [1997] 519, 522 (http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1007&context=djcil); Wolfgang Schomburg, '*The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*', 8 NJIHR [2009] 1, para. 61 (http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1091&context=njihr).

[112] M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (2003), 615, 619.

[113] International Covenant on Civil and Political Rights - article 14(3) " … to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

[114] At paragraph 115.

[115] Decision of Hague Court, 27 November 2015 in cases of Iyamuremye and Mugimba (number C/09/494083/KG ZA 15/1205), para 4.13; *The Government of the Republic of Rwanda v. Brown et al*, Judgment, Westminster Magistrates' Court, 22 December 2015, paras 630-631.

scheme inadequate to meet the complexity of the cases concerned. In order to object effectively to extradition on the basis of anticipated breach of fair trial rights, the persons had to meet the high standard of demonstrating a flagrant breach of fair trial rights and were able to do so on those grounds alone and defeat the extradition requests

105. As for the lack of a right to appeal the decision of the *Haute Cour Militaire*, the Presidency paid scant regard, noting the DRC has ratified the International Covenant on Civil and Political Rights ('ICCPR') which provides for the right to appeal, but ignoring the reality that there is no appeal venue.[116] It is a fundamental aspect of fair trial proceedings that an individual has a venue to review a decision of acquittal or conviction both at the national and international levels.[117] Human rights courts have emphasized the importance of the right to appeal in criminal matters both as part of the right of access to a court,[118] and as an independent right. The Presidency itself cited the ICCPR as referring to such right. Also Protocol 7 to the European Convention on Human Rights incorporates the right to an appeal a verdict in criminal proceedings. The right to appeal must be respected without imposing too many administrative hurdles so as to make the right to appeal ineffective.[119] The lack of an appeal from the *Haute Cour Militaire* is clear violation of Mr Katanga's right to a fair trial.

106. In sum, the Presidency failed to give due consideration to these significant failures already identified in the proceedings. These principles have a fundamental nature, as recognised by human rights courts and domestic jurisdictions. Their violation clearly affects the integrity of the Court. In light of the certainty that these

[116] ICC-01/04-01/07-3662, para. 7.
[117] *See e.g* Coral Fanego 'The Right to a Double Degree of Jurisdiction in Criminal Offences' in Javier Garcia Roca and Pablo Santolaya: *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff Publishers 2012).
[118] For instance, *Guerin v. France*, ECrtHR Judgment of 29 July 1998, (51/1997/835/1041), at http://hudoc.echr.coe.int/eng?i=001-58204#{"itemid":["001-58204"]}. See also article 2 of Protocol 7 to the European Convention on Human Rights, providing a right of appeal in criminal matters, at www.echr.coe.int/Documents/Convention_ENG.pdf.
[119] *Walchli v. France*, ECrtHR Judgment of 26 July 2007 (definite on 26 October 2007), Appl nr 35787/03, at http://hudoc.echr.coe.int/eng?i=001-81920#{"itemid":["001-81920"]}, para. 29; *Labergere v. France*, ECrtHR Judgment of 26 September 2006 (definite on 26 December 2006), Appl nr 16846/02, at http://hudoc.echr.coe.int/eng?i=001-77010#{"itemid":["001-77010"]}, para. 20; *Davran v. Turkey*, ECrtHR Judgment of 3 November 2009 (definite on 3 February 2010), Appl nr 18342/03, at http://hudoc.echr.coe.int/eng?i=001-95568#{"itemid":["001-95568"]}, paras. 40-47.

principles will be violated (given that they are already being violated), the Presidency was wrong in deciding that these principles were not so fundamental that the Court's approval under article 108 should be denied.

FOURTH GROUND

(iv) The Presidency erred in finding that, in the context of article 108, the question whether a domestic prosecution undermines 'fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court' does not involve an assessment of whether the domestic legal system concerned is not 'compliant with international standards of human rights' (para. 31).

107. The Presidency found that the evaluation whether the intended domestic proceedings will undermine 'fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court' does not involve any general consideration as to whether the domestic jurisdiction is 'compliant with international standards of human rights' (para. 31). In stating this, the Presidency cited the Appeals Chamber's finding in its Judgment on Al-Senussi's appeal that "the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights".[120]

108. In citing this phrase from the Appeals Chamber's Judgment, the Presidency failed to appreciate the fundamental distinction between the circumstances in the case of Al-Senussi and those in the case of Germain Katanga. In the Al-Senussi appeal, the Appeals Chamber had to consider whether the Trial Chamber had appropriately declared the case inadmissible because the territorial state was involved in a genuine investigation into the same case. Mr Al-Senussi had not yet been surrendered to the Court and, accordingly, the Court did not yet have a duty of care towards him. Mr Katanga, on the other hand, has been surrendered to the jurisdiction of the Court over eight years prior to the commencement of the article 108 proceedings. Unlike Libya, which genuinely intends to prosecute Mr Al-Senussi, the DRC has consistently stated

[120] Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", 24 July 2014, ICC-01/11-01/11-565, para. 219.

it was unwilling and unable to prosecute Mr Katanga.[121] That position changed, in respect of the proposed charges, only in December 2015 when Mr Katanga, though still under the Court's jurisdiction, had been transferred and was present in the DRC.

109. It was the DRC that called upon the Court for assistance in investigating and prosecuting war crimes and crimes against humanity committed on its territory. It considered itself incompetent to deal with mass crime. The government of the DRC first welcomed the Court's involvement in November 2003, and subsequently on 19 April 2004 referred the situation of the DRC to the Prosecutor pursuant to article 14 of the Rome Statute, requesting the Prosecutor to investigate the situation for the purpose of determining whether crimes within the jurisdiction of the Court had been committed for which one or more specific individuals should be charged.[122] On 23 June 2004, the Prosecutor announced his decision to open an investigation into the grave crimes committed on the territory of the DRC since 1 July 2002.[123]

110. The Court accepted jurisdiction in this case, having considered the principle of complementarity and made a *proprio motu* determination that the DRC was unable or unwilling to try Mr Katanga.[124] When the defence challenged that position in 2009 and requested that Mr Katanga be returned to the DRC for trial on the basis of the principle of complementarity,[125] the DRC opposed the request and the Court rejected it on the ground, amongst others, that the DRC was at least unwilling, if at all able, to try Mr Katanga.[126]

[121] *See* ICC-01/04-01/07-1189-Anx, OBSERVATIONS DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO PAR RAPPORT A l'EXCEPTION D'IRRECEVABILITE SOULEVEE PAR LA DEFENSE DE GERMAIN KATANGA DANS L'AFFAIRE LE PROCUREUR CONTRE GERMAIN KATANGA ET MATHIEU NGUDJOLO CHUI (ICC-01/04-01/07), 01/06/2009 ; See also ICC-01/04-01/07-T-65-ENG ET WT 01-06-2009.
[122] ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo.
[123] ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.
[124] ICC-01/04-01/07-1, MANDAT D'ARRÊT À L'ENCONTRE DE GERMAIN KATANGA, p. 3.
[125] ICC-01/04-01/07-891-Conf-Exp. Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute, 10 February 2009.
[126] ICC-01/04-01/07-T-67-ENG, Oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case; ICC-01/04-01/07-1497, Judgment 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, 25 September 2009, paras 80 & seq.

111. The DRC was indeed unwilling to try Mr Katanga. In opposing Mr Katanga's request, DRC judicial authorities repeatedly stated that they were not able "to carry out investigations into crimes that the ICC could be in charge of".[127] The DRC judicial authorities stressed that their own operational capacities were insufficient to conduct such investigations and mentioned as particular difficulties: no access to victims, inadequate protection system for victims and witnesses, on-going conflict and insecurity in the region, destruction of the judicial structure, time lapse between the commission of the crimes and the investigation, lack of expertise in dealing with mass crime, collecting and preserving evidence.[128]

112. The judicial authorities went so far as to acknowledge that it was unable to offer Mr Katanga a fair trial, stating:

> I'd say in 2004 the situation was worse. Today [*2009]* the situation is bad. We can't say the situation is good. We cannot say that. So, there has been an effort, there is a positive tendency, but a threshold has not yet been reached which would allow one to meet international criteria, a criteria that is supposed to be met by the ICC.[129]

113. These submissions were made in 2009, but nothing suggests that the DRC judicial system has improved. The DRC authorities, in their recent submissions before the Presidency, have not argued that their judicial system has improved, nor submitted any element in support of such a contention. The lack of competence of the DRC was the reason that the ICC found it had jurisdiction to try DRC cases, including that of Mr Katanga, notwithstanding the complementarity principle. There is no apparent reason for the Court to reach a different conclusion now in relation to allegations of similar or even greater complexity. Nonetheless, the Presidency reached a different conclusion without giving reasons for doing so. To make such a determination, while previously the DRC itself submitted that its system was inadequate in respecting fair trial rights, the Presidency should have made an assessment whether today's DRC judicial system is capable of complying with international standards of human rights.

[127] ICC-01/04-01/07-T-65-ENG, 01-06-2009, 76 lines 18-19 (per Colonel Muntazini). See also ICC-01/04-01/07-T-65-ENG, 78 line 20 - 79 lines 4-14; 87 lines 3-5: "[T]he DRC did not have the capacity of successfully carrying out investigations into the crimes that were committed in Bogoro. Unfortunately, the situation has not improved since then."
[128] ICC-01/04-01/07-968-Conf-Exp-AnxJ (19-03-2009), [REDACTED]. *See also* ICC-01/04-01/07-T-65-ENG, 01-06-2009, 87, lines 16-22: "the insecurity in the region, the difficulty to reach out to victims and the difficulty in collecting evidence continues to be things that hamper this exercise."
[129] ICC-01/04-01/07-T-65-ENG, 01-06-2009, 99-102.

114. In any event, having accepted jurisdiction to try and impose a sentence on Mr Katanga, the Court cannot now abandon him to a jurisdiction which is by its own finding incapable of offering Mr Katanga a fair trial. Being under the Court's jurisdiction, Mr Katanga falls within the ambit of the Court's responsibilities. It is therefore the Court's duty to ensure that the DRC is 'compliant with international standards of human rights' before approving the submission of Mr Katanga to its judicial system. Failing to determine the DRC's compliance with international human rights standards amounts to wilful blindness as to the risks to which the Court exposes him in approving the prosecution. In this regard, the defence refers to the view expressed by Kress and Sluiter that article 21(3) should "be read more broadly so as to prevent the Presidency from contributing to the violation of internationally recognized human rights by granting the request". The "integrity of the court"[130] is engaged as contributing to such violations caused the Court to become complicit.

115. Analogies between article 108 and extradition law have been drawn. Extradition decisions must take account of potential breaches of human rights. The United Kingdom legislation, for example, emphatically states in this respect:

> *Section 87. Human rights*
> *(1) If the judge is required to proceed… he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.*
> *(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge*.[131]

A state is not permitted to extradite a person who faces a genuine risk of being ill-treated through death, torture, inhumane or degrading treatment, or a flagrant violation of fair trial rights. If it does so the state is liable under any human rights

[130] Presidency's Impugned Decision, para. 31.
[131] Similarly, in France, pursuant to article 696-4 of the Code of Criminal procedure, extradition is not granted, *inter alia*:
"2° where the felony or misdemeanour has a political flavour, or where the circumstances reveal that the extradition is requested for political reasons; (...)
6° where the offence for which the extradition has been requested is punished by the law of the requesting state which imposes a penalty or a safety measure contrary to French public policy;
7° where the requested person would be tried in the requesting state by a court which does not provide fundamental procedural guarantees and protection for the rights of the defence; (...)."

treaty to which it is a party.[132] The Court's responsibility for individuals under its jurisdiction can be compared to the responsibility of a state to which an extradition request has been addressed. The Court will be liable for surrender of an individual under its jurisdiction to a state where the individual faces risks of human rights violations. This liability follows both from the Statute, emphasising the Court's obligation to ensure a fair trial, and international human rights treaties by virtue of article 21(3) of the Rome Statute.

116. Accordingly, the defence requests for the Appeals Chamber to review, and overturn the Presidency's impugned decision on this ground.

FIFTH GROUND

(v) The Presidency erred in relying on the fact that the DRC provided assurances that Mr Katanga would receive a fair trial, and that it was party to international human rights treaties, in its determination that the Court's approval under article 108 would not undermine 'fundamental principles', thereby ignoring the reality of the DRC's inadequate justice system in general, and Mr Katanga's unfair trial thus far in particular (para. 31).

117. As previously related,[133] the Presidency relies on undertakings provided by the DRC authorities and its constitution together with its declared adherence to human rights principles (para 31) and that, by virtue of articles 153 and 215 of the Constitution of the DRC, these human rights treaties are directly applicable in both military and civilian courts. The ICCPR guarantees both the right to have subsidised legal assistance in the event of insufficient means and the right to review a conviction and sentence by a higher tribunal according to law.

118. The defence reiterates that no reasonable tribunal can place undue reliance on theoretical principles in the face of persistent failure by the DRC to give them effect. The DRC has not given effect in this regard to the Constitution and the human rights

[132] *See, inter alia,* ECrtHR, *Soering v. the United Kingdom*, 7 July 1989. See also Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, 1st ed. (Intersentia 2005), p. 187.
[133] See para. 99 above.

treaties of which it is a member. The Presidency is amiss to ignore that reality. In light of the long history of disregard for fair trial guarantees, and given the systemic failures and irregularities which occurred in this case, the Presidency erred in having confidence in the DRC observing fundamental fair trial principles.

119. In the course of the proceedings, the defence submitted observations relating to the gross abuse of process inflicted on Mr Katanga when detained from 2005 to 2007 in the DRC – both in its request for a stay and for a reduction of sentence for violations of his rights.[134]

120. These observations related to the criminal proceedings initiated against Mr Katanga in the DRC in 2005. He was first arrested on 26th February 2005 immediately after nine UN soldiers were murdered in the localité of Kafé in Ituri. Kafé is north of Bunia and not an area over which Mr Katanga exercised any command or control, or visited.[135] It an undisputed fact he was in Kinshasa, 2000 kilometres away, having gone there in following his integration into the national army as a Brigadier General in December 2004.[136] He was no longer commander of the FRPI. His arrest was for ulterior reasons. In the eleven years since his arrest there has been no evidence linking Mr Katanga with that crime.

121. The first arrest warrant was served on Mr Katanga on 10th March 2005,[137] more than 15 days after his arrest, notwithstanding a guarantee under the DRC Constitution to be informed of reasons for arrest within 48 hours. It gave as the sole reason '*Atteinte à la sûreté de l'Etat'*,[138] but provided no information as to the basis, later stated to have been for participating in the killing of the UN soldiers. It was widely regarded as a device to detain him and others (including Thomas Lubanga, his then opponent) regarded as '*persona non grata*' by the authorities. Even the DRC

[134] ICC-01/04-01/07-1258-Conf-Exp, Defence motion for a declaration on unlawful detention and stay of proceedings, 30 June 2009; ICC-01/04-01/07-3456-Conf, Defence Observations on Sentencing, 7 April 2014, paras 77-88; ICC-01/04-01/07-3594, Defence Observations on the reduction of sentence of Mr Germain Katanga, 11 September 2015.
[135] Kafe is not even marked on any of the maps annexed to the warrant of arrest for the accused before this court, ICC-01/04-01/07-11-Anx1.2 till Anx 1.7, Anx 1-9, dated 19 July 2007.
[136] DCC, para. 7.
[137] ICC-01/04-01/07-891-Conf-Exp-AnxA, '*Pro-Justicia Mandat d'arrêt',* dated 10 March 2005. See also ICC-01/04-01/07-1258-Conf-Exp, paras 15 & seq.
[138] ICC-01/04-01/07-891-Conf-Exp-AnxA ; ICC-01/04-01/07-708-Conf-Exp-Anx 2.

authorities have admitted that this arrest was motivated by political considerations and that there is no evidence.[139]

122. On 20 January 2006, nearly a year after being arrested, Mr Katanga was interviewed for the first time by an officer of the Public Ministry at the Military High Court.[140] He was unrepresented on the occasion and not disclosed the reasons for his arrest. His first appearance before a judge was not until 1st December 2006, twenty-one months after his initial arrest.[141] By any standards, including those set out in the DRC Constitution, this is an excessive period of time not to have been given the opportunity to challenge the lawfulness of detention.[142] Moreover, during the two and a half years Mr Katanga spent in prison in DRC before he was transferred to the ICC on 17 October 2007, he was never fully informed of the charges. No effort was made to progress the investigations and the 'dossier' is understood to have remained empty. A similar fate befell all the other persons arrested at the time, including two who testified in Mr Katanga's case. Only now are charges being laid and they are different to the one that persisted for the past eleven years.[143]

123. An example of the continuing inability to provide fair trial or to address issues of unfairness in an appropriate manner may be found in the case of Mr Goda Sukpa. It is particularly relevant as he is detained on similar matters as Mr Katanga and indeed they appear together at the military court hearings. In the decision of the *Haute Cour*

---

[139] See, *inter alia,* ICC-01/04-01/07-1189-Anx, OBSERVATIONS DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO PAR RAPPORT A l'EXCEPTION D'IRRECEVABILITE SOULEVEE PAR LA DEFENSE DE GERMAIN KATANGA DANS L'AFFAIRE LE PROCUREUR CONTRE GERMAIN KATANGA ET MATHIEU NGUDJOLO CHUI (ICC-01/04-01/07), 01/06/2009 : « *A cet effet, il convient de signaler qu'un dossier RMP n° 0121/0122/NBT/05 avait été ouvert à charge de Germain Katanga, Goda Sukpa, Ndjabu Ngabo, Mbodina Iribi Pitchou, Masudi bin Kapinda, Lema Bahat Pelo, Manono Philemon et Bede Djokaba Lambi, à la suite de l'assassinat de 9 casques bleus de la MONUC ressortissants du Bengla Desh. <u>Les enquêtes sur ces faits sont difficilement menées car plus d'une année après l'arrestation des personnes susnommées, le dossier n'est toujours pas en mesure d'être renvoyé devant la juridiction de jugement</u>. (…)* ». Further, during an informal meeting with the defence in The Hague on 7 July 2015, Colonel Muntazini, the Auditeur Général près la Haute Cour Militaire, informed the defence that Katanga and the others were arrested under pressure of the UN. He also was admitted that the dossier concerning the killing of the UN soldiers, as to Mr Katanga, was a 'dossier vide' and that it had been opened for political considerations.
[140] 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.
[141] 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.
[142] *See* articles 18-20 of the DRC Constitution, as well as articles 205-213 of the military legal code (Code Judiciaire Militaire), and articles 27-47bis of the DRC code of criminal procedure.
[143] See ICC-01/04-01/07-3666-AnxII, RESUME DES FAITS A CHARGE DE GERMAIN KATANGA.

Militaire issued in the case of Mr Goda Sukpa on 30 December 2015, the Court decided that his detention was lawful despite the fact he had been detained without trial or process since 2005. The reason stated for the decision was: "*...l'existence d'un cas de force majeure*" namely, that there was no judge of adequate rank to deal with the case.[144]

124. No reasonable tribunal could find that eleven years of detention without trial or process was justified and lawful due to there being no judge available to deal with the case. It plainly constitutes an inordinate and unreasonable delay and a flagrant violation of the right to a fair trial. Indeed, even in complex cases, the European Court of Human Rights has stated that lengthy periods of unexplained activity cannot be viewed as "reasonable" and amount to fair trial violations.[145] Similarly, the *ad hoc* tribunals and domestic courts have held that a delay, which is inordinate and unreasonable, may be the cause of such an unfairness that the proceedings should be stayed.[146] Aside from the issues of unreasonable delay, the *Goda Sukpa* decision is a striking example of systemic unfairness within the DRC justice system.

125. Mr Katanga is currently unlawfully detained. The *Décision de Renvoi* does not of itself constitute a lawful mandate for detention, contrary to what the Presidency seems to imply,[147] and no detention order has been issued, without which Mr Katanga's detention is unlawful.[148] Such detention order should be renewed periodically, and subject to challenge by the defence. This has not occurred.

126. Given this background, the Presidency noting that "the DRC has emphasised in this regard that the prosecution of Mr Katanga will occur consistently with the rights of the defence recognised in the Constitution" and that "the DRC is party to

[144] See ICC-01/04-01/07-3666-AnxIV, *Arrêt avant-dire droit* dated 24 December 2015, p. 25: « *Quant a l'irrégularité de la détention jugée trop longue par la Défense, le Ministère Public indique que celle-ci est à situer à partir du 20 juin 2007, date à laquelle la dernière prolongation avait atteint son terme. En réalité, la juridiction militaire s'est trouvée devant un cas de force majeure à savoir l'absence d 'un juge Magistrat de carrière porteur du grade de général des Forces Armées devant connaître de cette affaire. (...). »*
[145] *Zimmerman and Steiner v Switzerland* (1983) 6 EHRR 17 at para 29; *Abdoella v The Netherlands, Application no. 12728/87).*
[146] *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, ICTR-97-19-AR72, 3 November 1999, paras. 75, 76, 77, 85, 100.
[147] Presidency's Impugned Decision, footnote 30.
[148] ICC-01/04-01/07-3635, paras 17, 19.

relevant international instruments…" is an exercise of hope over experience and ignores the reality of the situation. Further, the lack of legal aid and an appeal venue, as discussed above (paras 102 *& seq.*) constitute violations of the constitution and/or international instruments.

Failure to keep assurances - The DRC only complied (in part though still insufficient) after various orders and after the Registry assisted.

127. The DRC has previously stated that the proceedings against Mr Katanga were closed.[149] In response to the admissibility challenge submitted by the defence on the basis of the complementarity principle, the DRC representative stated: "There is no longer any warrant or any order to detain Mr. Germain Katanga in the DRC. When he was surrendered to the ICC, that automatically put an end to his detention in the DRC."[150] Further, in written submissions, the DRC authorities similarly stated that, since his surrender to the ICC in 2007, Mr Katanga was no longer concerned in the proceedings put in place in the DRC against his former co-accused and that at the end of that judicial investigation any resulting charges would not concern him, even if the course of the judicial investigation would involve certain leaders of the FNI-FRPI for crimes committed during the attack on Bogoro.[151]

128. Despite these statements, the DRC changed its position in its observations made to the Court of Appeal Review Panel in September 2015 in respect of Mr Katanga's sentence review.[152] The DRC opposed Mr Katanga's early release and indicated that Mr Katanga may be tried for the murder of nine UN soldiers (referred at paragraph 121). Given the information that had been previously provided to the defence by the DRC authorities concerning that matter,[153] Mr Katanga was

[149] ICC-01/04-01/07-3662, paras 24-25, referring to transcript ICC-01/07-01/04-T-65-TENG, pages 90 et seq.
[150] ICC-01/07-01/04-T-65-TENG, p. 95 lines 4-7; see also lines 8-11.
[151] ICC-01/04-01/07-968-Conf-Exp-AnxJ (19-03-2009), para. 5. [REDACTED].
[152] Annex 2 - Observations from the Democratic Republic of the Congo on the criteria set out in rule 223 of the Rules of Procedure and Evidence. ICC-01/04-01/07 -3602-Conf- 29-09-2015 at page 4.
[153] During an informal meeting with the defence in The Hague on 7 July 2015, Colonel Muntazini, the *Auditeur Général près la Haute Cour Militaire*, had similarly put the defence on notice that the 'MONUC' charge might be resurrected, in particular if Mr Katanga's sentence imposed by the ICC would be reduced. The Colonel admitted that the dossier, as to Mr Katanga, was a 'dossier vide' and that it had been opened for political considerations.

unconcerned and undeterred from his intention to return to DRC as soon as he was able to do so.

129. It is wrong to say, as stated by the Presidency, that "Mr Katanga was informed of the possibility that he would face domestic criminal proceedings relating to his alleged conduct in the DRC prior to his transfer to the Court in 2007, although he does not seem to have been forewarned of the precise charges in the Décision de renvoi."[154] No reference to any further charges was made to the Court or to the defence, nor were further or other charges mentioned by the DRC authorities in their submissions to the Appeals Chamber Panel in September 2015[155] or at the time of the signature of ICC-DRC agreement relative to the enforcement of the sentence of Mr Katanga in November 2015.[156] Had it been the DRC's intention to charge Mr Katanga with further offences it is remarkable that it was not mentioned at that time to the Appeals Chamber. Indeed, the failure to mention that other charges (other than the unfounded charge relating to the MONUC killing for which it is believed no evidence exists) would be pursued was a significant prejudice to Mr Katanga as, had he known of such intention, his decision to be returned to the DRC to complete his sentence may well have been different. If the DRC deliberately withheld its intention to prosecute further offences then it not only misled Mr Katanga but also the Appeals Chamber and the Presidency.

130. On 24 November 2015, the DRC signed an *ad hoc* agreement with the ICC concerning the enforcement of Mr Katanga's sentence and detention in the DRC.[157] Articles 4(6) and 6(2)(a) of this agreement required the DRC to seek and obtain the Presidency's approval under article 108 of the Rome Statute for any intended prosecution in relation to Mr Katanga's conduct allegedly engaged in prior to his delivery to the DRC. The DRC failed to do so and thereby infringed this agreement, as well as its obligations under the Rome Statute and Rules 214 and 216 of the ICC Rules of Procedure and Evidence. The DRC issued a *Décision de Renvoi* containing four new charges and started the procedure without seeking the Presidency's approval

[154] Presidency decision, para. 27.
[155] Annex 2 - Observations from the Democratic Republic of the Congo on the criteria set out in rule 223 of the Rules of Procedure and Evidence. ICC-01/04-01/07 -3602-Conf- 29-09-2015.
[156] ICC-01/04-01/07-3626-Anx, *Accord Ad Hoc* dated 24 November 2015, notified on 8 December 2015.
[157] ICC-01/04-01/07-3636-Anx.

and without providing the information required under Rules 214 and 216. This was improper as it forced the issue by presenting the Presidency with a *fait accompli*. It took several urgent requests from the Presidency, and the direct assistance from the Registry during a mission to the DRC, for the DRC to comply, in part, with the requirements under Rules 214 and 216 and the *ad hoc* agreement with the ICC. Even so, many details were lacking (see issue 5). The Presidency expressed regret at this failure but accepted the DRC *post facto* request without attaching any significance to its delay.

131. Given the history of the case, the history of unlawful detention and the conduct of the DRC, there is little reason to place faith in the DRC authorities meeting their responsibilities to provide fair trial, whatever their assurances to the contrary may be.

SIXTH GROUND

(vi) The Presidency erred by providing approval for prosecution without first receiving adequate details of the charges the DRC intended to pursue against Mr Katanga.

132. The defence submits that the charges contained in the *Décision de Renvoi*[158] and the *Résumé des faits*[159] lack sufficient detail as to the facts of the case and their legal characterisation, as required by Rule 214(1)(a) and article 6(2)(i)[160] and fail to satisfy international minimum standards by which an accused should receive adequate notice of the material facts underlying the charges.[161] Also, they were and remain insufficient to provide the Presidency with the information necessary for it to make an informed decision under article 108.

133. At the ICC, as well as the *ad hoc* international criminal tribunals, a document containing the charges or an indictment which does not provide details as to the method of participation, the acts and conduct of the accused and his co-accused, the victim groups, the casualties, as well as sufficiently precise dates and locations, is

[158] ICC-01/04-01/07-3631-AnxI, p. 20.
[159] ICC-01/04-01/07-3666-Conf-AnxII.
[160] ICC-01/04-01/07-3635, para. 20.
[161] Article 6(3)(a) of the European Convention on Human Rights; Article 14(3)(a) of the International Covenant on Civil and Political Rights.

defective and does not put the accused on adequate notice of the charges.[162] The *Décision de Renvoi* and the *Résumé des faits* clearly fall short of these standards. These documents are inconsistent and do not provide any precise dates, nor do they indicate in what manner Mr Katanga is alleged to have participated. It is also unclear on which domestic legal instrument the charges rely.

134. The *Décision de Renvoi* is incomplete since it does not mention all relevant provisions in the *Code pénal Militaire* defining the crimes for which the DRC intends to prosecute Mr Katanga. For some of the charges, the *Décision de Renvoi* refers only to the Rome Statute. The DRC does, however, not justify the basis upon which the *Haute Cour Militaire* could apply the Rome Statute directly. Therefore, the DRC authorities have failed to justify the legal basis of their *Décision de Renvoi.* This is usually a cause of nullity of the prosecution, for lack of specificity.

135. The *Décision de Renvoi* and the *Résumé des faits* are furthermore inconsistent since they refer to the period of 2003 to 2005 as the temporal range for the charges, during which Mr Katanga would have been the commander in chief of the FRPI, while the murder charge numbered 3 refers to the period of 2002 to January 2005. This is inconsistent as it would suggest that Mr Katanga participated in attacks even prior to his participation in the FRPI as described in the introduction of the *Résumé des faits*. In addition, the *Résumé des faits* refers to 'Nyakunde' and 'Kilo' as places attacked while they do not feature in the *Décision de Renvoi*. Therefore, the scope of the charges against Mr Katanga is unclear.

136. No dates of the attacks are provided, but it can be assumed that, as far as Nyakunde is concerned, the *Résumé des faits* refers to the attack in September 2002. To the knowledge of the defence, Nyakunde was only attacked once, which was in

[162] *Prosecutor v. Lubanga*, Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction (1 December 2014) at paras. 123 ; *Prosecutor v. Katanga and Ngudjolo*, Decision on the Three Defences' Requests Regarding the Prosecution's Amended Charging Document, ICC-01/04-01/07-648, paras. 33-34 ; *Prosecutor v. Ntaganda*, Decision on the Updated Document Containing the Charges (6 February 2015) paras. 55, 72 ; *Prosecutor v. Stanisic & Simatovic*, Decision on Defence Motions Regarding Defects in The Form of The Second Amended Indictment, April 12 2006, para. 10 ; *Prosecutor v. Delic*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, December 13 2005, para. 7 ; *Prosectutor v. Dordevic*, Decision on Form of Indictment, April 3, 2008, para. 8 ; *Prosecutor v. Ntagerura et al*., Judgment and Sentence, February 25, 2004, para. 32; *Prosecutor v Karemera et al*, Decision on Defects in the Form of the Indictment, August 5, 2005, para. 19.

September 2002. This date falls outside the temporal period in respect of which the DRC seeks approval to prosecute Mr Katanga according to the introduction of its *"Résumé des faits à charge"*.

137. The temporal scope of the charge of murders in Mandro, Largu, Tchomia, Blukwa, Lengabo and Kilo are also imprecise as it simply refers to the period between 2002 and 2005. The specific dates of each of these attacks should be provided.

138. Also no date has been mentioned in relation to the murder charge of 14 persons including Mr Dema and Madam Kitura at the home of Mr Bunu Tbamwenda Pelerin, nor the names of the other victims. This information should be available to the DRC and should therefore be provided to Mr Katanga.

139. Further, the geographical scope of the charge of *participation à un mouvement insurrectionnel* is insufficiently specific. This charge states that Mr Katanga, as Commander in Chief, participated in a rebel movement named FNI/FRPI between 2003 and 2005 …., led the FRPI militia and occupied by armed force a large *part of the District of Ituri, notably Mungwalu territory, as well as the villages situated along Lake Albert*. The villages which would have been occupied by the FRPI are not mentioned. Therefore, this charge requires more specifics.

140. As for the charge relating to the recruitment of children into the militia and using them for active participation in hostilities, there is no mention in either the *Décision de Renvoi* or the *Résumé des faits* of any specific attack in which the children participated.

141. Mr Katanga has not received any supporting material. It appears that the DRC [REDACTED].[163] Mr Katanga should receive the material in support of the domestic prosecution against him, if in fact such material exists. The Presidency should not have authorised the DRC to proceed with domestic proceedings without Mr Katanga having received any such information. If there is no, or insufficient evidence to support any of the charges laid against Mr Katanga, the DRC should not be allowed to

[163] ICC-01/04-01/07-3633-Conf-Anx, 20-01-2016, p. 3.

go ahead. To be allowed to issue charges, the DRC must have a reasonable ground to believe that Mr Katanga was involved in the crimes alleged. Such reasonable ground must follow from the supporting documents. It appears that the DRC laid charges first and then sought to find the evidence. This is wholly improper and a reason for the Presidency to deny authorisation to prosecute Mr Katanga for such charges.

142. The lack of detail should also have led the Presidency to deny authorisation for his prosecution in the DRC. Without the specifics underlying the charges, as well as the supporting material, Mr Katanga is unable to prepare a defence. He can, for instance, not demonstrate he was elsewhere without knowing the dates and precise locations of the attacks in which he is alleged to have participated. Nor can he challenge the mode of participation, or the existence of any of the ingredients of the crimes, if such information is not provided.

143. Details of the charges are also necessary to enable the Presidency to make a fully informed decision as to whether to approve or not approve the further prosecution. Without knowing the details of the charges it is not in a position to know the extent that the further charges concern conduct in respect of which Mr Katanga was convicted or acquitted.

144. Accordingly, the defence requests for the Appeals Chamber to review, and overturn the Presidency's impugned decision on this ground.

SEVENTH GROUND

(vii) The President erred in considering a reference in a Registry's report to a guarantee provided by the DRC a sufficient guarantee that the DRC will not seek the death penalty and that, in any event, such penalty would not be carried out (para. 28).

145. The Presidency erroneously assumes that the death penalty will not be sought and carried out against Mr Katanga on the basis of hearsay – that is, a reference to a guarantee provided by the DRC in a Registry report[164]. No such guarantee has been

[164] Paragraph 8 of the Registry report ICC-01/04-01/07-3666 states the following:*"8. Les autorités congolaises ont rappelé au Greffe que les garanties procédurales accordées aux témoins détenus lors de leur retour en RDC sont applicables également à Germain Katanga et que la RDC a garanti que la peine de mort ne sera donc pas appliquée à Germain Katanga."*

filed in the case, insofar as the defence is aware, nor has Mr Katanga been provided with such a guarantee. Nor has an undertaking to that effect been referred to in the proceedings that have taken place in the DRC before the military tribunal.

146. Furthermore, there is no apparent reason to assume that the death penalty will in any event not be carried out. The Presidency should not have relied on any undertaking by the DRC. The examples above demonstrate that undertakings given by the DRC may be breached. The Congolese Parliament continues to refuse to abolish the death penalty and on the day that the Presidency issued its impugned decision, a military court in eastern DRC sentenced six accused persons to death.[165] In addition, the DRC recently adopted the ICC implementation law, which will soon enter into force, which broadens the applicability of the death penalty to ICC crimes.[166]

147. The risk that the death penalty will be imposed should have led the Presidency to deny authorisation for Mr Katanga's prosecution in the DRC. Such risk is the first and foremost reason requiring European states, which are bound by the European Convention on Human Rights abolishing the death penalty, to refuse extradition.[167] This should be the same for the ICC, which has similarly abolished the death penalty. Indeed, as has been commented, at a minimum, article 108 requires the Court to refuse authorisation for domestic prosecutions if the individual concerned faces a risk of being subjected to inhumane prison conditions or the death penalty.[168]

148. Accordingly, the defence requests for the Appeals Chamber to review, and overturn the Presidency's impugned decision on this ground.

CONCLUSION

[165] *RDC: 6 condamnés à mort pour l'assassinat du chef du quartier Mugunga*, 8 April 2016, @ http://www.radiookapi.net/2016/04/08/actualite/justice/rdc-6-condamnes-mort-pour-lassassinat-du-chef-du-quartier-mugunga.
See also *Nord-Kivu: « le kidnappeur de Rutshuru » condamné à la peine de mort*, 9 January 2016 @ http://www.radiookapi.net/2016/01/09/actualite/justice/nord-kivu-le-kidnappeur-de-rutshuru-condamne-la-peine-de-mort.

[166] Patryk Labuda, *Complementarity Compromised? The ICC Gives Congo the Green Light to Re-Try Katanga*, @ http://opiniojuris.org/2016/04/11/complementarity-compromised-the-icc-gives-congo-the-green-light-to-re-try-katanga/.

[167] ECrtHR, *Soering v. the United Kingdom*, 7 July 1989.

[168] William A. Schabas in Triffterer/Ambos, The Rome Statute of the International Criminal Court: A Commentary, Nomos (2016) p. 2203.

149. The defence requests the Appeals Chamber to reverse the Presidency's Decision on the grounds of appeals discussed above and to declare that the Court does not approve the prosecution of Mr Katanga by the DRC on the basis of the charges defined in the *Décision de Renvoi* and the *Résumé des faits*.

Respectfully submitted,

David Hooper Q.C

Dated this 11 May 2016

London