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No.: **ICC-01/04-01/07**
Date: **22 January 2016**

THE PRESIDENCY

Before: **Judge Silvia Fernandez de Gurmendi, President**
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

Public with Public Annexes A and B

Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo

Source: **Defence for Mr Germain Katanga**

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

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INTRODUCTION

1. Mr Germain Katanga remains in custody in Kinshasa despite completing, on 18th January 2016, the sentence imposed by the International Criminal Court (ICC). The authorities of the Democratic Republic of Congo (DRC) have expressed their intention to keep Mr Katanga in custody and to pursue further charges against him. The defence hereby shares its understanding of the facts and expresses its grave concern at the situation in which Mr Katanga is placed.

2. By its referral on 19 April 2004 the DRC authorities placed the prosecutorial conduct of the case against Mr Katanga in the hands of the ICC. It is no more correct for the DRC to pursue further charges at this stage, after lengthy trial and process at the ICC, than it would be for the ICC Prosecutor now to initiate fresh charges against Mr Katanga. The Court would not consent to such a course and nor should it consent to such a course being undertaken by the DRC.

3. The defence emphasises that these are preliminary observations and that it will file further observations when more fully informed and at the Court's request pursuant to Article 108 of the Rome Statute. Defence counsel is currently due to travel to the DRC on 31st January in order to meet with Mr Katanga. In making these preliminary observations, the defence is aware of both the novelty and importance of the issue that arises.

PROCEDURAL BACKGROUND

4. In summary, on 19 April 2004, the President of the DRC, by letter, referred the situation in the DRC to the ICC.[1] The Prosecutor of the ICC opened the investigation on 23 June 2004.[2] 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 against humanity and four war crimes.[3] On 23rd May 2014, he was sentenced to twelve years imprisonment.[4] 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

[1] ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo.
[2] ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.
[3] ICC-01/04-01/07-3436.
[4] ICC-01/04-01/07-3484.

sentence to 18 January 2016.[5] Subsequently, the Presidency nominated the DRC as the state where he was to complete his sentence.[6] Mr Katanga was transferred into that State's jurisdiction on 19th December 2015.[7] 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 received a '*Décision de Renvoi'* (Referring Decision) indicating the intention of the DRC authorities to prosecute him for crimes allegedly committed in 2002-2005.[8] The *Décision de Renvoi*, undated, refers to four crimes (though numbered as 3) punishable, according to the *Décision*, pursuant to the Congolese Military Penal Code and the Rome Statute, and which the defence summarises below at paragraph 21 onward.

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*.[9]

7. On 14th January 2016, the Presidency inquired from the DRC:[10] (i) what are the legal consequences of the *Décision de Renvoi* and the next procedural steps in the proceedings before the *Haute Cour Militaire*; (ii) whether their letter and annexes constituted a request for the approval of the Court for Mr Katanga's prosecution and punishment pursuant to article 108(1) of the Rome Statute and article 6(2) of the "Accord Ad Hoc Entre le Gouvernement de la République Démocratique du Congo et la Cour Pénale Internationale sur l'Exécution de la Peine de M. Germain Katanga, Prononcée par la Cour" (*Ad Hoc* Agreement).[11]

[5] ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Mr Germain Katanga.
[6] ICC-01/04-01/07-3626.
[7] 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.
[8] ICC-01/04-01/07-3631-AnxI.
[9] ICC-01/04-01/07-3631, *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga.*
[10] 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".*
[11] ICC-01/04-01/07-3626-Anx.

8. On the 19th January, the Registrar received a letter from the DRC authorities, in which certain of the questions posed by the Presidency are addressed.[12] As noted in the latest filing by the Presidency, by this letter, "the DRC clarified that the "*Décision de Renvoi*" acts 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 […]."[13] The Presidency, by its Order of 21 January 2016, seeks further details from the DRC.[14]

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

RELEVANT LEGAL PROVISIONS

10. Article 20 of the Statute embodies the principle of 'ne bis in idem'.

11. Article 108 defines the limitation on the prosecution or punishment of other offences. The requirement set out in article 108 of the Rome Statute – the necessity to seek approval from the Presidency in order to prosecute and punish a person sentenced by the Court - is further detailed in Rules 214 and 215 of the ICC RPE and repeated in the *Ad hoc* Agreement made in this case between the ICC and the DRC. Rule 200(5) requires that any such bilateral arrangement... "shall be consistent with the Statute".

12. The Presidency made reference to article 108(3) of the Rome Statute. However, since Mr Katanga is in prison, he cannot be said to stay in DRC on a voluntary basis. Even if he were to be released Mr Katanga remains subject to a UN travel ban.[16]

SUBMISSIONS

13. Until permission is sought and granted by the ICC in compliance with Article 108 Mr Katanga's continued detention is unlawful. Such permission should not be granted.

MR KATANGA'S VIEWS TO BE HEARD

[12] 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.*
[13] 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 en date du 14 janvier 2016",* 21 January 2016.
[14] *Ibid.*
[15] Annex B.
[16] Consolidated United Nations Security Council Sanctions List. CDi.006

14. Once a full and proper request for approval is submitted by the DRC authorities, the Court must hear the views of Mr Katanga pursuant to article 108(2) before rendering any decision.

15. The Defence requests that in the circumstances and given the importance of the matter, the Presidency should exercise its discretion under Rule 214(6) to call for an oral hearing. Such a hearing can involve a video link enabling Mr Katanga to attend and providing him an opportunity to be heard in the strictest sense.

THE DRC'S FAILURE TO SUBMIT THE REQUIRED INFORMATION

16. As noted in the recent correspondence and filings, the DRC authorities have failed to comply with the requirements contained in Rules 214 and 216 of the RPE and articles 4(6) and 6(2)(a) of the ICC-DRC Agreement. The DRC authorities failed to file a formal request to prosecute Mr Katanga. Issuing a *Décision de Renvoi* and only then, indirectly, requesting the support of the ICC, is particularly improper because it presents the Presidency with a *fait accompli*. Furthermore, the DRC authorities have not provided documents required by Rule 214(1) and Article 6(2)(a).

17. The DRC authorities have failed to provide a copy of any applicable legal provisions, including those concerning the statute of limitation and the applicable penalties, required by Rule 214(1)(b) and article 6(2)(ii). They have also failed to provide a copy of any sentence, warrant of arrest or other document having the same force, or of any other legal writ which the State intends to enforce, pursuant to Rule 214(1)(c) and article 6(2)(iii). Indeed, the DRC authorities have not disclosed any legal text to the Presidency.

18. They should disclose to the Presidency, and to the parties, *inter alia*: a copy of the legal provisions quoted by the *Décision de Renvoi*; a copy of the legal provisions defining the applicable penalties; the *Décret-Loi n° 03-001 du 15 avril 2003 sur l'amnistie* (Amnesty*)* together with any other Amnesty provisions claimed to be in effect; the *Loi No. 05/023 du 2005 portant amnistie pour faits de guerre, infractions politiques et d'opinion of 19 December 2005*, which would cover the period from 1996 to 2005, ie the temporal scope of the *Décision de Renvoi*; the law, if any, which has incorporated the dispositions of the Rome Statute within the Congolese law.

19. The DRC authorities have not disclosed a warrant of arrest. The *Décision de Renvoi* does not constitute a lawful mandate for detention.

20. They have failed to provide a sufficiently detailed statement of the facts of the case and of their legal characterisation, required by Rule 214(1)(a) and article 6(2)(i). The scope of the charges against Mr Katanga defined by the *Décision de Renvoi* is too vague and they are insufficiently specific to inform Mr Katanga adequately of the charges against him. It does not abide by the minimum standards set out by the International Human Rights Courts and international criminal tribunals and Court.[17] It is unclear whether the DRC has conducted any investigations into these crimes. On the face of it, it appears that this dossier has not moved at all. In any event, Mr Katanga has not (yet) received any supporting material. The defence notes that, the DRC has requested the OTP to furnish it with material and the OTP appears to have done so, though without the consent or agreement of the Presidency. The defence submits that the DRC authorities should disclose to the Presidency all the documents concerning the national proceedings against Mr Katanga, and not only the *Décision de Renvoi*, which is undated, in order that the Presidency be able to assess whether Mr Katanga could face a fair trial.

21. In respect to four (numbered as three) charges;

(i) *As Commander in Chief, participated in a rebel movement named FNI/FRPI between 2002 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 geographical scope of the charge of *participation à un mouvement insurrectionnel* is also insufficiently specific; it is alleged that Mr Katanga would have occupied a large part of Ituri, but there is insufficient precision as to the villages which would have been occupied by his militia.

(ii) *In the period 2003-2005, as War Crime, as Commander in Chief of the FNI/FRPI militia, co jointly with the President of the movement, namely Floribert NDJABU, incorporated children less than 15 years in the FNI militia and made them participate actively in hostilities.* The *Décision de Renvoi* does not identify any specific attack in which the child soldiers participated.

(unnumbered) *During 2003, as a Crime against Humanity, in Bunia, conjointly with General Goda Sukpa, committed in the framework of a widespread or systematic attack against a civilian population, the murder of 14 persons, among others Mr*

[17] See Article 67(1)(a) of the Rome Statute.

Dema and Madam Kitura at the home of Mr Bunu Tbamwenda Pelerin. The alleged murder of Mr DEMA and Mme KITURA in 2003, lacks a specific date - information which should be in possession of the DRC authorities.

(iii – as numbered) *In the period between 2002 and January 2005, as a Crime against Humanity, conjointly with his troops, provoked the murder of several persons at the villages of MANDRO, LARGU, TCHOMIA, BLUKWA and LENGABO.* The temporal scope of the charge of murders in Mandro, Largu, Tchomia, Blukwa and Lengabo is imprecise; there is no specific date of attacks against these villages.

22. Mr Katanga is generally prosecuted for crimes committed between 2003 and 2005 in Ituri, whereas it is accepted he left Ituri at the end of 2004 for Kinshasa on his appointment as *Général de Brigade*, and was imprisoned as of 26th February 2005.

23. The defence observes that the DRC seeks to prosecute Mr Katanga, *inter alia*, on the basis of the Rome Statute which is not possible unless directly integrated into domestic law. Even so, the DRC authorities must specify the criminal law applicable at the time of the alleged events in 2003 - 2005, together with the applicable law today. An individual cannot be prosecuted for facts not qualified as crimes at the time of the events. Also, the Rome Statute entered into force itself on 1st July 2002. The *Décision de Renvoi*, fails to exclude offences committed before the 1st July 2002.

24. In addition, Rule 216 of Rules and article 4-6 of the Agreement require the DRC to inform the Presidency of important events concerning Mr Katanga 'without delay'. The DRC authorities failed to observe that requirement, waiting more than a week to notify the Presidency of the *Décision de Renvoi* and not giving prior notice of it.

AMNESTY

25. The position on amnesty in DRC is unclear, with two interpretations advanced. The defence submits that the provisions of a law have authority over its preamble. The preamble can only assist to interpret a law, but is not the law itself. Therefore, pursuant to its article 5, the 2005 amnesty law amnesty should cover the period from 20 August 1996 to 30 June 2005.

LEGAL PRINCIPLES

26. The principle of 'non bis in idem', embodied by Article 20, is a core principle of criminal law. It prevents the prosecution and eventual punishment of a person for

conduct for which he or she has already been prosecuted. The DRC legal provisions incorporate it.

27. In addition to that principle, 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 enforcement." Article 108 offers greater protection to a person sentenced by the ICC than the principle of 'non bis in idem'. 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.

28. Article 108 must be read in light of a number of principles. The Court is obliged to refuse authorization under Article 108 where the accused faces the danger of abuse of its own process, for instance where the prosecution is politically motivated or in breach of the 'ne bis in idem' rule. Further, human rights considerations are to be taken into account, such as the conditions of detention the individual might be subject to or the imposition of the death penalty.[18]

29. In interpreting the applicable legal principles, the discretion to be exercised by the Presidency under Article 108(1) must be based on principles of fairness and, in light of article 21(3), must be consistent with internationally recognised human rights.[19] The duty upon States to take measures to ensure the "effective prosecution" of international crimes (preamble to the Rome Statute) must be balanced with the Court's responsibility to ensure fairness of the proceedings to any person before it. Throughout the Statute, great emphasis is placed on the fairness of the proceedings to the suspect, accused, convicted and sentenced person.

30. It is therefore submitted that, in deciding whether to grant approval for a national prosecution and eventual punishment of a person sentenced by the Court, not only should it consider whether the principle of 'non bis in idem' has been complied with, but also whether it is fair to prosecute the sentenced person for additional offences allegedly committed prior to being tried by the Court.

[18] W. Schabas in Triffterer/Ambos, The Rome Statute of the International Criminal Court: A Commentary, Nomos (2016) p. 2203.
[19] Michael Stiel and Carl-Friedrich Stuckenberg, 'Klamberg Commentary', @ https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-10/#c3606. See also W. Schabas in Triffterer/Ambos, The Rome Statute of the International Criminal Court: A Commentary, Nomos (2016) p. 2203.

31. In considering fairness in combination with the 'non bis in idem' principle, the defence submits that the Court should only allow the prosecution and punishment of a sentenced person where the prosecution concerns offences which did not fall within the temporal and geographical ambit of the ICC investigation – the 'catchment' of the ICC investigation.

32. An analogous situation arises in respect of challenges to jurisdiction. Pursuant to article 17, to challenge the Court's jurisdiction successfully it suffices to demonstrate that a national jurisdiction conducted a genuine investigation into the same conduct even if such investigation did not lead to prosecution. Similarly, at this stage, having imposed a conviction and sentence upon Mr Katanga, the Court should allow the DRC to prosecute him for further charges only if they fall outside the scope of the investigations conducted by the Prosecution.

33. It should be noted that it was the DRC authorities that took the initiative to call upon the ICC for assistance in investigating and prosecuting the crimes for which Mr Katanga was investigated and tried. In a letter in November 2003, the government of the DRC welcomed the involvement of the ICC. On 19 April 2004, the Prosecutor received a letter signed by the President of the DRC referring to him the situation of crimes within the jurisdiction of the Court, pursuant to article 14.[20] On 23 June 2004, the Chief Prosecutor announced his decision to open the first investigation of the ICC, into the grave crimes allegedly committed on the territory of the DRC since 1 July 2002.[21]

34. In seeking Mr Katanga's arrest and transfer on 17th October 2007, the Prosecutor chose to focus his charges on the attack on Bogoro of 24th February 2003. That was a tactical and 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 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*.

[20] ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo.
[21] ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.

35. 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 has requested the OTP to assist it with material in support of these very charges and that the OTP has replied favourably.[22]

36. The offence concerning the recruitment of child soldiers is the same crime as previously charged before the ICC. The principle of 'ne bis in idem' should apply to prevent prosecution in DRC for the same crime of recruitment of child soldiers.

37. All the other charges defined by the Décision de Renvoi contain significant elements that were referred 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.*

38. For example:

(i) As Commander in Chief, participated in a rebel movement named FNI/FRPI between 2002 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.

39. In the ICC prosecution, Mr Katanga was prosecuted in his capacity as Commander in Chief of the FRPI, which became the armed wing of the FNI, and alleged to have held that role from 2002 to 2005.[23] The ICC Prosecutor had to identify, for instance, the main militia camps within the Walendu Bindi and Bedu-Ezekere.[24] While there is no evidence known to the defence that Mr Katanga was linked or even visited Mungwalu territory (which lies North West of Bunia and not in an area associated with Mr Katanga), reference was made to certain villages along Lake Albert – though these are unspecified in the information currently provided by the DRC.

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[22] ICC-01/04-01/07-3633-Conf-Anx, letter of the DRC of 19 January 2016, referring to a note verbale of November 2014, addressed to ICC Prosecutor, noting that "*cette demande d'assistance vient d'être execute par le Bureau du Procureur et les autorités congolaises ont désormais entre leurs mains une quantité suffisante d'informations sur le sujet. »*

[23] See ICC-01/04-01/07-649-Anx1A, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute ("DCC"), 26 June 2008, paras 1, 7, 32, 33.
See also ICC-01/04-01/07-3251-Conf-Corr, Prosecution *Corrigendum du mémoire final* ("OTP Final Brief"), 16 March 2012, "*7.2. KATANGA CONTROLAIT LA FRPI. »*

[24] DCC, paras 42 & s., 54 & s. ; OTP Final Brief, *"7.1.2.2. Les principaux camps dans Walendu-Bindi lors de l'attaque de Bogoro. » ; « 8.1.2. Structure militaire et organisation de la milice du groupement de Bedu-Ezekere ».*

(ii) In the period 2003-2005, as War Crime, as Commander in Chief of the FNI/FRPI militia, co jointly with the President of the movement, namely Floribert NDJABU, incorporated children less than 15 years in the FNI militia and made them participate actively in hostilities.

40. As noted above, Germain Katanga was charged at the ICC with using child soldiers actively to participate in hostilities under Article 8-2-b-xxvi.[25]

(unnumbered) During 2003, as a Crime against Humanity, in Bunia, conjointly with General Goda Sukpa, committed, in the framework of a widespread or systematic attack against a civilian population, the murder of 14 persons, among others Mr Dema and Madam Kitura at the home of Mr Bunu Tbamwenda Pelerin.

41. The attack on Mr Pelerin's home in Bunia was the subject of both oral and written evidence, together with exhibits, in the course of the Katanga trial. [26]

(iii – as numbered) In the period between 2002 and January 2005, as a Crime against Humanity, conjointly with his troops, provoked the murder of several persons at the villages of MANDRO, LARGU, TCHOMIA, BLUKWA and LENGABO.

42. Tchomia, Mandro and Lengabo were places referred to orally in the evidence. Both Tchomia and Mandro featured extensively in the course of the trial.[27] Mr Katanga was alleged to have conducted attacks on both. In addition, the prosecution disclosed several UN reports, HRW reports and OTP witnesses' statements describing the Mandro, Tchomia, Lengabo, Largu, and Blukwa attacks. Amongst the prosecution disclosure the defence has identified at least 226 documents mentioning Mandro, 182 documents mentioning Tchomia, 22 documents mentioning Largu, 20 documents mentioning Lengabo, 17 documents mentioning Blukwa.

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[25] DCC, Count 5, p. 32, para. 50 & s., para. 88 ; OTP Final Brief, *"9.5.2. Généralité de l'utilisation d'enfants soldats en Ituri ; 9.5.3. Présence d'enfants soldats dans les camps de Walendu-Bindi ; 9.5.4. Le cas de P-28 à Aveba : âge et parcours; 9.5.5. Présence d'enfants soldats dans les camps de Bedu-Ezekere; 9.5.6. Entraînement des kadogos, parades devant les accuses; 9.5.7. Les accusés avaient des kadogos dans leurs escortes; 9.5.8. Les Lendu et Ngiti ont utilisé des enfants soldats de moins de 15 ans dans le cadre de diverses operations; 9.5.9. Démobilisation d'enfants soldats de la FRPI à Aveba de novembre 2004 à juin 2005; 9.5.10. Katanga a joué un rôle clef dans la démobilisation des enfants soldats de la FRPI. »*

[26] See ICC-01/04-01/07-T-196-CONF-ENG ET 30-09-2010, pp. 7, 17-20 : one prosecution witness indicates that he went to see PELERIN's house after the people were killed.

[27] See OTP Final Brief, 7.4.2.6. L'attaque de Mandro et la prétendue cérémonie à Tchey du 3 mars 2003 ; 7.4.2.6.1. Katanga était impliqué dans l'attaque de Mandro ; 7.4.2.6.3. L'APC n'était pas impliqué dans l'attaque de Mandro ; 9.1.7.8. L'APC n'a pas dirigé l'attaque contre Mandro ; 9.3.2.5. Attaques subséquentes: pratique continue et intention permanente ; 9.3.2.5.1. Mandro ; .3.2.5.2.Bunia ; 9.3.2.5.3. Tchomia ; 9.3.2.5.4. Kasenyi ;

43. In short, most of 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. Choices were made.

44. 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.

45. The DRC authorities placed the prosecutorial conduct of the case against Mr Katanga in the hands of the ICC. It is no more correct for the DRC to pursue such charges at this stage, after a full trial and lengthy process, than it would be for the ICC Prosecutor now to initiate fresh charges against Mr Katanga. The Court would not consent to such a course and nor should it consent to such a course being undertaken by the DRC. To do so will bring the ICC process itself into disrepute. 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.

FAIR TRIAL

46. Further, given the history of this matter the Court cannot have sufficient confidence that the DRC is able and willing to provide the constituent parts necessary for a fair trial. The history of Mr Katanga's treatment at the hands of the DRC authorities demonstrates a blatant disregard for his fair trial rights.[28] Also, the systemic failure of the judicial process in DRC is such that fair trial is not possible. Without the guarantee that Mr Katanga will receive a fair trial the Court should not permit it. There is a real risk of unfair trial as defined by Human Rights law.

47. The issue is analogous to that arising when considering extradition in domestic proceedings. Extradition is not granted where there is a real risk that the requesting State will not fulfil its fair trial obligations. Such obligations extend to the whole

[28] See ICC-01/04-01/07-1258-Conf-Exp, Defence motion for a declaration on unlawful detention and stay of proceedings, 30 June 2009, and ICC-01/04-01/07-891-Conf-Exp-Anx A to Z.

course of the proceedings, including investigation. They include issues such as whether he would not have adequate facilities for the preparation of his defence; or would be able to secure the attendance and examination of witnesses under the same conditions as the prosecution.[29]

48. There is no legal aid facility in DRC. Mr Katanga will be left to fend for himself as an indigent accused in a complex case. The case will involve investigations in Ituri – 2000 miles from Kinshasa. The DRC authorities have not explained how these obstacles will be overcome.

49. That there is a real risk that Mr Katanga will not receive a fair trial is amply born out by both (i) the history of the case so far and (ii) the systematic failure of the justice system in DRC – a failure acknowledged by the DRC authorities themselves, as referred to below.

(a) The history of the case so far

50. The history and documents related to the DRC proceedings against Mr Katanga, already filed by the defence of Mr Katanga in the record of the case, show clearly the lack of fairness of the proceedings to which he was subject.

51. Until the '*Décision de Renvoi'* was provided, the defence had no notice that it was the intention of the DRC authorities to pursue further charges. The defence was aware of the possibility of a charge relating to the murder of MONUC soldiers in 2005. That allegation does not appear in the *Décision de Renvoi* but the defence notes that it was specifically referred to by the Minister of Justice, as demonstrated by Annex A. It is not known if in fact the DRC will seek to prosecute Mr Katanga for the MONUC offence. The defence requests the Presidency to request the DRC authorities to clarify their position concerning this 'MONUC' matter.

52. The history of the MONUC allegation is relevant to the present situation, not least given the violation of fair trial rights involved. The Defence has already submitted observations relating to the gross abuse of process inflicted on Mr Katanga – both in its request for a stay and for a reduction of sentence for violations of his rights.[30]

The former proceedings

[29] See, *inter alia, Govt of the Republic of Rwanda v. Brown et al,* Westminster Magistrates' Court London, 22 December, 2015, paras. 147-631.
[30] ICC-01/04-01/07-1258-Conf-Exp, Defence motion for a declaration on unlawful detention and stay of proceedings, 30 June 2009.

53. Mr Katanga was first arrested on 26th February 2005 by the *Détection militaire des activités anti patrie* (DEMIAP), a day 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.[31] There has been no evidence produced in the past eleven years linking Mr Katanga with that crime. It is accepted that he was in Kinshasa, 2000 kilometres away, having gone there in December 2004 following his integration into the national army as a Brigadier General.[32] He was no longer commander of the FRPI. His arrest was for reasons other than a well founded suspicion of guilt.

54. The first arrest warrant was served on Mr Katanga on 10th March 2005, more than 15 days after his arrest. It gave as the sole reason for arrest *'Atteinte à la sûreté de l'Etat'*[33], but provided no information as to the basis of his arrest, later stated to have been for participating in the killing of the UN soldiers. In eleven years, no evidence has been produced in support. It was widely regarded as a device to detain him and others regarded as 'persona non grata' by the authorities. Amongst the others arrested was Thomas Lubanga, who was plainly opposed to Mr Katanga at that time. It is not known if Mr Lubanga will also face charges in the future but his status remains that of a serving prisoner.

55. The absence of an arrest warrant was contrary to a clear guarantee under the DRC Constitution to be informed within 48 hours of an arrest of the grounds for the arrest and any charges.[34] Over the following few months Mr Katanga received a document merely authorizing his pre-trial detention, but then received nothing for nearly two years.[35]

56. During the two and a half years Mr Katanga spent in prison in DRC before he was transferred to the ICC on 17th October 2007, Mr Katanga was never fully informed of the charges. No effort was made to progress the investigations. The defence

[31] 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 Anx1.7, Anx1-9, dated 19 July 2007.
[32] DCC, para. 7.
[33] ICC-01/04-01/07-891-Conf-Exp-AnxA = EVD-OTP-00227 (DRC-OTP-0138-0780); ICC-01/04-01/07-708-Conf-Exp-Anx2.
[34] Article 20, paragraph 1 states: "[TRANSLATION] Any person who is arrested must be informed directly, within 48 hours at the latest, in a language that they understand, of the grounds for their arrest and of any charges against them."
[35] See ICC-01/04-01/07-891-Conf-Exp-AnxA & s.

understands that the dossier on that crime, so far as Mr Katanga is concerned, remains empty. Defence lawyers never gained access to it.

57. A similar fate befell all the others who were arrested with him. Only now are charges proposed to be laid, albeit different to the one that persisted for the past eleven years.

58. Mr Katanga remained in prison for nearly a year before being interviewed, unrepresented, on 20 January 2006, by an officer of the Public Ministry at the Military High Court. Even then, no reasons for his arrest were disclosed.

59. Mr Katanga's first appearance before a judge was not until 1st December 2006, twenty-one months after his initial arrest. This is an excessive period of time not to be fully informed of charges and without the opportunity to challenge the lawfulness of detention. It was in violation of the DRC constitution and minimum standards of international law.[36]

The new proceedings

60. The defence was aware of the possibility of the 'MONUC' charge being used against Mr Katanga upon his transfer to the DRC. On July 7th 2015, the Defence met with Colonel Muntazini, the *Auditeur Général près la Haute Cour Militaire*, in The Hague. On that occasion, Colonel Muntazini spoke of the outstanding case relating to the killing of the UN soldiers. No mention was made of other new or further charges. The view was expressed to the defence that the dossier, as to Mr Katanga, was an 'empty dossier'. Certainly Mr Katanga was aware of the outstanding MONUC charge and knew full well that there was no case against him in respect of those killings. He expressed no anxiety or concern in regard to a future prosecution in respect of the charges, subject of course to any hearing being uncontrived and fair.

61. In its submissions of 8 December 2015,[37] the defence made plain the position:

> 6. [...] According to all the information provided to the defence the charge, still outstanding, has never been pursued against Mr Katanga and the dossier is 'empty'. Nor have any of the others detained at the time, who remained in DRC, been tried for the offence.

[36] Articles 18-20 of the DRC Constitution, as well as the military legal code (Code Judiciaire Militaire), in particular Livre Troisième, Titre I, Chapter III (on provisional detention and provisional release), Articles 205-213, and the code of criminal procedure (Code de Procédure Pénale), in particular Chapter III (on provisional detention and provisional release, Articles 27 – 47bis).
[37] ICC-01/04-01/07-3627-Conf-Exp, Defence Observations on Mr Germain KATANGA's imminent return to the Democratic Republic of Congo, 8 December 2015.

> 7. However, the Registry has been informed, and the defence has similarly been informed, that upon his return to DRC, Mr Katanga will be subject to a court or trial process concerning those [MONUC] charges. ….
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> 8. The upshot is that Mr Katanga will return to DRC without any indication of what the future may hold for him. The defence is concerned that the authorities may, fearing that Mr Katanga's release could be received negatively in Ituri and thus affect President Kabila's popularity, cause him to be detained at least until the Presidential elections in October 2016, or even beyond. In other words, there is a possibility that, for some ulterior, political motive, Mr Katanga may be subjected to arbitrary and unlawful detention through manipulation of the criminal justice system by or on behalf of the DRC executive.
>
> 9. The defence is therefore concerned, and doubtless the Presidency will share in that concern, that Mr Katanga, could be unfairly detained well beyond the 18th January release date. The defence feels compelled to draw that matter to the Presidency's attention in the realistic hope that the Presidency is in position to take effective steps to avoid such a situation.

62. It is to be noted that in these submissions, the defence made no reference to any other possible charges as the authorities had not made any mention of them. Indeed, statements made by the DRC in relation to 'other charges' were to the effect that there were none.

'*Décision de Renvoi' Charges*

63. No mention of the new charges contained in the *Décision de Renvoi* was made until 30 December 2015, when Mr Katanga was provided a copy of the *Décision*. The DRC authorities did not mention any further charges in discussions with the defence. It is not known whether this was previously raised by them with the Registry but no such indication was given to the defence.

64. The previous history and statements made on behalf of the DRC in the case support the defence submission that the charges are only recently being pursued. In response to an admissibility challenge submitted by the Defence on the basis of the complementarity principle, the DRC insisted that the only case against Mr Katanga "was opened after nine Blue Helmets from Bangladesh were killed",[38] a case in which they stated the investigations "encountered many difficulties" [39] having lasted for years without any progress.[40] The DRC representatives repeated numerous times that Mr Katanga was only subject to investigation in respect of the killing of the UN soldiers, which was a "totally different" procedure from the procedure initiated by the ICC.[41] The DRC representatives further stated: "There is no longer any warrant or any

[38] ICC-01/04-01/07-T-65-ENG, 01-06-2009, 77 lines 24-25 (per Colonel Muntazini).
[39] Ibid, 78, lines 1-2.
[40] Ibid, 85, lines 4-14.
[41] Ibid, 80, line 24; 81, lines 4-7; 86 lines 1-5; 93 lines 14-25;

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."[42]

65. In their 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. Therefore, 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.[43]

66. The DRC has consistently stated that Mr Katanga was not subject to any outstanding investigation, other than the reference to the MONUC charge. The defence notes that the DRC submitted at the revision hearing that Mr Katanga merited a longer sentence and should not be granted early release.[44] Only after the Appeals Chamber decided that Mr Katanga was to be released in January, and after Mr Katanga was surrendered to their jurisdiction, did the DRC authorities come up with these new charges. The DRC cannot seek to punish Mr Katanga simply because it disagrees with the ICC charging and sentencing policy.

(b) the systematic failure of the justice system

67. In their response to the defence's challenge to jurisdiction[45] the DRC authorities stated they were unable to conduct their own investigations, saying "the Congo wasn't in a position to carry out investigations into crimes that the ICC could be in charge of".[46] Indeed, in writing the DRC stressed that they had solicited the expertise of the ICC to investigate the allegations against Mr Katanga, given the insufficiency of their own operational capacities.[47] In support of this submission, the DRC highlighted their

[42] Ibid, 95 lines 4-7; see also lines 8-11.
[43] ICC-01/04-01/07-968-Conf-Exp-AnxJ (19-03-2009), para. 5. "Par ailleurs, depuis sa remise à la CPI en 2007, Germain KATANGA n'est plus concerné par les procédures mises en œuvre en RDC à ('encontre de ses anciens co-inculpés. De sorte qu'à l'issue de l'instruction préparatoire actuellement en cours, les actes d'accusation à libeller éventuellement ne le viseront pas, même si la suite de cette instruction impliquait certains dirigeants du FNI-FRPI pour les crimes commis lors de l'attaque de BOGORO."
[44] ICC-01/04-01/07-3602, Observations from the Democratic Republic of the Congo on the criteria set out in rule 223 of the Rules of Procedure and Evidence.
[45] 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.
[46] ICC-01/04-01/07-T-65-ENG, 01-06-2009, 76 lines 18-19 (per Colonel Muntazini).
[47] ICC-01/04-01/07-968-Conf-Exp-AnxJ (19-03-2009), Conclusion: "La competence pour enqueter actuellement sur les faits reproches a Germain Katanga, singulierement sur ceux commis a Bogoro, revient a la CPI dont l'expertise avait clairement ete sollicitee par les autorites judiciaires congolaises du fait de l'insuffisance de leurs capacities operationnelles. L'Auditorat General n'ayant pose aucun

difficulties in conducting such investigations: no access to victims, inadequate protection system for victims and witnesses, ongoing 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. As a result of these factors, "the 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." [48] Indeed, although State authority had been restored in Iture, "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."[49] Very specifically referring to the inability to provide fair proceedings involving mass crimes, it was stated: [50]

> I'd say in 2004 the situation was worse. Today 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.

68. Accordingly, at least until 2009, the DRC considered itself incompetent to deal with criminal proceedings relating to allegations of mass crime. Most importantly, it acknowledged its difficulties in guaranteeing a fair trial. There is no suggestion that this position has changed over the years or that the judicial system has managed in the intervening period to change significantly. There is a reasonable presumption of it not having done so. Indeed, further investigations in the Katanga case could not be conducted as recently as 2014 because of the unstable nature of Ituri. Even last year, the instability of the region was attested to in the course of the sentence review hearing.

69. This acknowledgment of lack of competence is unsurprising, given the particular complexity of cases involving mass crime. Though the Court's jurisdiction is based on the complementarity principle, there must be a minimum scrutiny test once a person has come within the Court's jurisdiction. The Court should examine carefully whether a domestic State has the capacity to deal with allegations of mass crimes effectively and without political intervention. In this particular case, it is noteworthy

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acte d'instruction sur lesdits evenements, ni formule la moindre question a ce sujet, aucune consequence ne peut en etre tiree par la Defense de Germain Katanga."
[48] ICC-01/04-01/07-T-65-ENG, 78 line 20 - 79 lines 4-14; 87 lines 3-5.
[49] Ibid, 87, lines 16-22.
[50] Ibid, 99-102.

that the Court considered that the DRC was unable to deal effectively with the crimes charged against Mr Katanga.[51] There is no apparent reason for the Court to reach a different conclusion now in relation to allegations of similar or even greater complexity.

70. The current failure to observe the clear requirements of Article 108 and its subordinate Rules is testimony to the inefficiencies and failures of the judicial system in place. The reasoning adopted by the DRC authorities in their letter of 19 January 2015 to the Presidency, to try to justify the current detention of Mr Katanga, is unconvincing

71. In this regard, the defence notes that the decision of the *Haute Cour Militaire* issued against Mr GODA SUKPA Emery on 30 December 2015, a few days ago, does not respect the minimum standards of fair trial, having considered that his detention was lawful despite the fact that he had remained in jail for more than 10 years, without a trial, because *"…l'existence d'un cas de force majeure »* -- that is, no Judge! Such decisions emanating from the Congolese Haute Cour Militaire, before which the DRC intends to prosecute Mr Katanga, further confirms the fact that he faces a serious risk of not receiving a fair and expeditious trial before the Congolese courts, in violation of his rights. The defence adds that the 'detained witnesses', who were arrested at the same time as Mr Katanga in 2005, are still in jail and have not yet been tried.

CONCLUSION

72. In light of these preliminary observations, the Defence requests the Presidency to call for an oral hearing at which Mr Katanga can attend by video link and to request the provision of necessary further material including to request the DRC to provide sight of the dossier relating to the proposed charges.

Respectfully submitted,

David Hooper Q.C.

Dated this 22 January 2016, London

[51] 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.