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TRIAL CHAMBER II

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

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

Public Document

Document in Support of the Defence Appeal of the *Décision relative à la requête de la Défense de Germain Katanga en illégalité de détention et en suspension de la procédure*

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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A. Introduction

1. The Defence hereby files, pursuant to Article 82(1)(d) and Regulation 65 of the Regulations of the Court (RoC), its document in support of its appeal of the Trial Chamber's *Décision relative à la requête de la Défense de Germain Katanga en illégalité de détention et en suspension de la procédure*,[1] a decision dated 20th November 2009 (hereinafter: Impugned Decision). Leave to appeal was granted on 11 February 2010 by the Trial Chamber's *Decision on the "Defence Application for Leave to Appeal the Trial Chamber's Décision relative à la requête de la Défense de Germain Katanga en illégalité de détention et en suspension de la procédure*".[2]

B. Procedural History

2. On the 3rd March 2004, President Joseph Kabila referred the situation in the DRC to the International Criminal Court. On 25th February 2005, radio and television broadcasts announced the killing that day of nine MONUC peacekeepers in Kafe. On 26th February 2005, the accused was arrested by DEMIAP agents (*Détection Militaire des Activitées Anti Patrie*) at the Grand Hotel in Kinshasa and confined by them to the hotel premises. On the 28th February 2005, the accused was taken to Hotel FLAT LUNTU. He was then forcibly moved to Hotel IMEUBLE-GLODIS and around 9th March 2005 taken to the CACHOT de DEMIAP (a small local prison). It was only on the 10th March 2005 that a warrant was issued by the DRC authorities for the arrest of the accused following legal procedures. An international warrant of arrest was issued by the Prosecution of the ICC on 2nd July 2007[3] and an official request for his arrest and surrender was filed by the Registry on 6th July 2007.[4]

3. On the morning of the 17th October 2007 the accused was taken to the Auditorat Général of the DRC in Kinshasa and to the Centre pénitentiaire et de rééducation de Kinshasa. In the night of 17 to 18 October 2007, Germain Katanga left the Centre pénitentiaire et de rééducation de Kinshasa, where he was being

[1] ICC-01/04-01/07-1666-Conf-Exp, Urgent Confidentiel Ex parte, réservé au Bureau du Procureur, Défense de Germain Katanga et au Greffe.
[2] ICC-01/04-01/07-1859. This Decision was received by the Defence on 12 February 2010.
[3] ICC-01/04-01/07-1.
[4] ICC-01/04-01/07-6-tENG, URGENT Request to the Democratic Republic of the Congo for the arrest and Surrender of Germain Katanga (Pre-Trial Chamber I).

detained, to be surrendered to the Court by the authorities of the DRC and transferred on 18 October 2007 to the Court's Detention Centre in The Hague.

4. On 1st June 2009, a hearing was held in presence of the DRC authorities on the issue of the admissibility of the case.[5]

5. On 30th June 2009, the Defence submitted a motion for a declaration on unlawful detention and stay of proceedings,[6] the public redacted version of which was filed on 2 July 2009.[7] The Prosecution responded to the Motion on 24 July 2009.[8] A public redacted version of his response was filed on 17 August 2009.[9] The legal representatives of the victims submitted their observations concerning the Motion on 23 July 2009.[10] On 25 August 2009, the Chamber invited the Registry and the authorities of the DRC to file their observations.[11] The Registry filed its observations on 8 September 2009;[12] the authorities of the DRC did not submit written observations.

C. Grounds of appeal

6. The Defence respectfully submits, by virtue of Regulation 65(4) in conjunction with Regulation 64(2) RoC, the following grounds of appeal:

(i) First ground of appeal

[5] ICC-01/04-01/07-T-65-ENG ET WT 01-06-2009.
[6] ICC-01/04-01/07-1258-Conf-Exp.
[7] ICC-01/04-01/07-1263.
[8] ICC-1/04-01/07-1335-Conf-Exp, Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings, 24 July 2009.
[9] ICC-01/04-01/07-1381, Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings", 17 August 2009.
[10] ICC-01/04-01-07-1331, Observations des représentants légaux des victimes représentées par Me Jean - Louis GILLISEN et Me Joseph KETA sur 'The Defence motion for a declaration on unlawful detention and stay of proceedings' , 24 July 2009.
[11] ICC-01/04-01/07-1425-tENG, Decision Inviting Observations from the Registry on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings, 25 August 2009; ICC-01/04-01/07-1426, Décision aux fins de recueillir des observations de la République démocratique du Congo sur la requête de Germain Katanga demandant la déclaration de l'illégalité de sa détention ou la suspension de la procédure, 25 August 2009.
[12] ICC-01/04-01/07-1462-Conf, Observations from the Registry pursuant to Trial Chamber II's order following the Defence Motion for a declaration on unlawful detention and stay of proceedings, 8 September 2009.

The Trial Chamber erred in its legal finding at paragraph 66 of its decision to the effect that the lateness of the motion rendered it inadmissible;

Accordingly, the Trial Chamber wrongly stated in paragraph 67 of its decision that it did not have to consider the merits of the application and it therefore erred in law in failing to address the merits of the motion before dismissing it.

(ii) Second ground of appeal

Further and / or in the alternative, the Trial Chamber erred in its factual finding at paragraph 66 of its decision that the Defence motion was too late.

D. First ground of appeal

7. In paragraph 66 of its decision the Trial Chamber held that that the Defence motion was too late and that therefore this rendered it inadmissible. It is submitted that this finding was an error of law.

The right of access to court to redress violations

8. An accused must have a right of access to court to redress serious violations of his human rights. This is recognized as an element of the right to a fair trial by the European Court of Human Rights in its *Golder* judgment.[13] It is submitted that, employing the test of the European Court of Human Rights, time limits imposed with respect to fundamental rights must be legitimate and proportionate, as well as not restrict the right of access to court to such an extent that the very essence of the right is impaired: *Stubbings and others v United Kingdom*; European Court of Human Rights; 22 October 1996.[14]

[13] *Golder v. The United Kingdom*, Judgment of 21 February 1975, Application no. 4451/70.
[14] Reports 1996-IV, Application Nos 22083/93 ; 22095/93; also see: *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, Judgment of 12 July 2001, paras. 43-45; *Ashingdane v. United Kingdom*, Application no. 8225/78, Judgment of 28 May 1985, para. 57.

The fundamental importance of the issue to be litigated

9. The issue which the Defence sought to litigate was one of fundamental importance. In the Defence motion for a declaration on unlawful detention and stay of proceedings of 30 June 2009 ("Defence Motion"),[15] the Defence submitted that Mr Germain Katanga was unlawfully arrested and detained by the authorities of the DRC for a substantial period (2 years, 7 months and 20 days) prior to his transfer to The Hague. It was submitted that this illegality had to be viewed in the light of the actions and omissions of the Office of the Prosecutor and the Registry and that in this context the detention was in part at the behest and for the purposes of the International Criminal Court ("ICC"). It was further submitted that these violations and the circumstances in which they took place had such an impact upon the integrity of the proceedings that the appropriate remedy was a stay or termination of the proceedings, as well as compensation and or in the alternative consideration in mitigation of sentence.[16]

10. Legitimacy and proportionality of restrictions on the right of access to court must be viewed with particular care where access is sought to raise violations of fundamental significance, going to the heart of the legitimacy of the process. So, the Inter-American Court of Human Rights has held that the right to challenge the lawfulness of the detention is so fundamental that it cannot be suspended even in cases of emergency.[17]

11. The importance of the right to have access to court to challenge the lawfulness of the detention of the accused was highlighted by Judge Pikis in his separate opinion in the *Lubunga* Appeals Chamber decision on provisional release.[18]

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[15] ICC-01/04-01/07-1258-Conf-Exp. Cf. Its public redacted version ICC-01/04-01/07-1263, Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings,

ICC-01/07-01/04-1258-Conf-Exp), 2 July 2009.

[16] *Ibid.*, Summarised at paragraphs 1 and 2.
[17] Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (Arts 27(2), 25(1) and 7(6) American Convention on Human Rights), Requested by the Inter-American Commission on Human Rights, paras. 33-43.
[18]"Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo", ICC-01/04-01/06-824, 13 February 2007, in particular paras 16 and 23 of his separate opinion.

Legitimacy of time limits

12. The need for legitimacy in the restrictions on the right of access to court, and particularly when viewed in the light of the fundamental nature of the issue, requires that the principle of legality must be strictly respected. This means that the accused must be able to determine with clarity a pre-determined time limit within which he must file any request for redress. Following the logic of the European Court of Human Rights, in order to respect the principle of proportionality and protect the essence of the right of access to court, it would be further necessary to ensure that any time limit is necessary, not unduly onerous and has due regard to the need to collate evidence and address complexities in the law or the facts.

13. In evaluating the time limit imposed by the Trial Chamber, there is a preliminary problem with respect to the principle of legality. The Chamber states that the application is too late but does not specify, other than in general terms, the date by which it was required that a motion challenging the legality of the arrest and detention of the accused in the DRC be filed.[19] More importantly, there is no provision in the Statute, Rules or Regulations which conditions the admissibility of all motions seeking redress for violations of fundamental rights of the accused on such motions being filed by a specific time. There is not even a provision setting a deadline for all such motions.

14. It is only where one is challenging the jurisdiction of the Court or the admissibility of the case that such a time limit is set by Article 19(4) of the Statute. This is set out in a very clear manner, which does not create any ambiguity for the accused.[20]

15. The Defence emphasises that it did not, in its Defence motion, challenge the jurisdiction or the admissibility of the case. It is nonetheless to be noted that this provision imposes a time limit requiring filing prior to the commencement of trial. The

[19] See particularly Impugned Decision, paras. 39, 40, 44.

[20] The Defence, however, notes that there is a disagreement with the Trial Chamber on when the trial commences. The Defence previously lodged an appeal against the Chamber's determination as to when a challenge to the admissibility of the case may be raised (see Document in Support of Appeal of the Defence of Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1279, 8 July 2009, paras. 14-41). The Appeals Chamber did not rule on this issue, given that the Chamber did review the challenge on its merits and, accordingly, the Defence was not prejudiced (Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 36-38).

Defence understood this in good faith, and it is submitted correctly, to mean prior to the trial itself and not at any earlier stage in the proceedings. The Defence only had reason to think differently as a result of the Trial Chamber's decision on the admissibility of the case decided on 16 June 2009.[21] Accordingly, prior to this, there was nothing in the Statute upon which the Defence had clear notice of any time limit for the filing of motions concerning the legality of the proceedings which would expire at a time prior to the commencement of trial, even by analogy. The Trial Chamber's decision only purported to apply to motions under Article 19. In any event, the Defence Motion was only filed 16 days following that decision on admissibility of the case.

16. The provisions in Rules 122(3) and (4) relate to the proceedings before the Pre-Trial Chamber as envisioned in Rule 121. It is submitted that the sense behind these provisions lies in the necessity of rendering closure to questions around proceedings before the Pre-Trial Chamber. These provisions are not intended to close the door on motions which address violations of fundamental rights of the accused committed at another time, whether prior to or post the pre-trial proceedings, which render the proceedings as a whole tainted with illegality. As the Appeals Chamber has noted itself in the *Lubanga* case, such motions are of a *sui generis* nature.[22] They effectively do not fall within the parameters of the motions envisaged by the Statute, Rules and Regulations.

17. While the Trial Chamber refers to Article 19 of the Rome Statute and Rule 122 of the Rules,[23] which in the Defence submission are not applicable, it is not entirely clear from the reasoning of the Trial Chamber what constitutes the jurisprudential foundation of the time limit imposed. Further, the time limit imposed is not clearly identifiable either before the Trial Chamber decision or in that decision other than that the motion must not be filed 'too late'.

18. It is respectfully submitted that it follows that the principle of legality has not been respected by the Trial Chamber both in terms of the existence of an applicable provision and also, in terms of clarifying the exact nature of the time limit which it

[21] Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut), ICC-01/04-01/07-1213.
[22] ICC-01/04-01/06-772, para. 24; cited in the Impugned Decision, para. 36.
[23] Impugned Decision, para. 41.

purported to impose. Moreover, when the Defence raised the issue for the first time, the Pre-Trial Chamber had clearly given the accused the impression that under the rules, the issue could be raised before the Trial Chamber.[24] In these circumstances, it is submitted that the retrospective imposition of an unclear time limit undermines the legitimacy of the restriction imposed on the right to seek redress for serious violations of human rights undermining the integrity of the proceedings.

Proportionality of time limits

19. While legitimacy of restrictions on the right of access to court to redress violations of fundamental rights requires clear stipulations, the proportionality of such measures requires the significance of the violations to be measured against the necessity of restrictive procedural time limits.

20. The significance of this right of challenge in the context of unlawful detention has also been stressed by other international criminal courts and tribunals. For instance, the Appeals Chamber held in the ICTR case of *Semanza* that the right to challenge the lawfulness of detention "is a fundamental right and is enshrined in international human rights law".[25] Such challenges "must be heard", failure of which will result in an Appeals Chamber's finding that "a fundamental right of the accused has been violated".[26]

21. While fairness naturally must be measured to some extent in relation to opportunities provided to the parties, it is submitted that the Chamber has an obligation to ensure that the proceedings are fair, independently of the parties. Given the fundamental nature of the issues raised, the fairness of the proceedings may be seriously undermined where a challenge to the integrity of the proceedings arising out of unlawful arrest and detention is not heard simply on the ground that it is perceived to have been filed later than was necessary in the circumstances.

[24] ICC-01/04-01/07-T-24-CONF-EXP-ENG ET 17-04-2008 1-29 NB PT, pages 25-26.
[25] *Prosecutor v. Semanza*, Appeals Judgement of 31 May 2000, paras 112-113; also see also see: *Prosecutor v. Kajelijeli*, Appeals Judgement 25 May 2005, para 208; *Prosecutor v. Todorovic*, Decision on Application for Leave to Appeal Against Trial Chamber Decision of 7 March 2000.
[26] *Prosecutor v. Semanza*, Appeals Judgement of 31 May 2000, paras 112-113; with reference to *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, "Decision", Appeals Chamber, 3 November 1999, para. 88.

22. If the merits of the Defence Motion are well founded, then it may no longer be possible for the Chamber to convene a fair trial. On this issue, the Appeals Chamber in the case against *Lubanga* held that "[w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."[27] If such finding were to be made on the merits of the Defence Motion, it would be a grave miscarriage of justice to proceed with the case simply because the Defence application was untimely.

23. This is in line with the approach taken by other international criminal courts and tribunals, even where specific provisions provide for time limits. In the ICTY case against *Todorovic*, the Appeals Chamber granted the Defence an extension of time to file his request for appeal in respect of the lawfulness of detention after the Defence had missed the deadline due to the fact that it had incorrectly filed its request under the wrong legal provision.[28] Similarly, in the ICTR case against *Kajelijeli*, the Appeals Chamber held that an oversight by the Defence to seek any remedy for unlawful detention other than release does not bar the Appeals Chamber from *proprio motu* considering whether the defendant was entitled to an alternative remedy.[29] These decisions underscore the duty of the Chamber to ensure that the defendant's right to a remedy for unlawful detention should not be frustrated due to the fact that the Defence may have made a good faith misinterpretation of the applicable legal provisions.

24. In other international criminal courts and tribunals, a clear distinction is made between challenges to jurisdiction, for which a deadline is imposed, and other motions in respect of which no deadline is imposed. Such other motions include challenges to the lawfulness of detention and allegations of abuse of process.[30] It is submitted that while the provisions are differently drafted the effect is the same in the ICC.

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[27] "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", ICC-01/04-01/06-772 14 December 2006, at para. 37.

[28] *Prosecutor v. Todorovic*, 'Decision and Scheduling Order',18 May 1999; Decision on Application by Stevan Todorovic for Leave to Appeal Against the Oral Decision of Trial Chamber III of 4 March 1999', 1 July 1999

[29] *Prosecutor v. Kalejijeli*, Appeal Hearing, T. 7 March 2005 p. 15; cited in: *Prosecutor v. Kajelijeli* Appeals Judgement at footnote 426.

[30] *Prosecutor v. Rwamakuba*, Decision (Appeal Against Dismissal Of Motion Concerning Illegal Arrest And Detention) 11 June 2001, *Prosecutor v. Kajelijeli*, Arret (Appel de la Decision du 13 mars 2001 rejetant la "Defence Motion Objecting to the Jurisdiction of the Tribunal"), 16 November 2001; *Prosecutor v. Todorovic* 'Decision on Application for Leave to Appeal Against Trial Chamber Decision of 7 March 2000; Prosecutor v.

25. In the Extraordinary Chambers in the Courts of Cambodia ("ECCC") case against Duch, where there is as here a Pre-Trial Chamber, it was deemed appropriate to allow such motions before the Trial Chamber, even when already raised before the Pre-Trial Chamber. In that case, the accused was authorised to challenge the lawfulness of his detention both before the Pre-Trial Chamber and the Trial Chamber.[31] The Trial Chamber ruled on the merits of the defence submissions, observing that "[e]ven if a violation of the Accused's right cannot be attributed to the ECCC, international jurisprudence indicates that an international criminal tribunal has both the authority and the obligation to consider the legality of his prior detention."[32] It is notable that the Trial Chamber cited *inter alia*, the ICC Lubanga Appeals Chamber judgment of 14 December 2006.[33]

26. It makes perfect sense that there is no deadline for submitting motions addressing violations of fundamental rights of the accused, because the event triggering such motions may occur at any time in the course of the proceedings. In this particular case, the DRC provided information on 1st June 2009 which was decisive to the Defence decision to file the motion: i.e. that it had not carried out investigations against the accused. Further, the Defence not only asks for a stay of the proceedings, but also, a declaration from the Court on the illegality of his arrest, as well as financial compensation and/or alternatively, and only in the event of a conviction, that relief be reflected in a reduction of any sentence imposed.[34] In particular, a request for compensation can be considered at any time without effecting the process.

27. It is consequently submitted that there is neither legitimacy nor proportionality in the time limit imposed by the Trial Chamber.

Restrictions on the right of access to court should not impair the essence of the right

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Karadzic, Appeals Chamber's Decision on Karadzic's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement, 12 October 1999, paras. 28-30.

[31] Decision on Appeal Against the Provisional Detention Order of Kaing Guek Eav, 3 December 2007; 'Decision on Request for Release' 15 June 2009.

[32] 'Decision on Request for Release' 15 June 2009, para 16.

[33] *Ibid*, para 16, footnote 36.

[34] Defence Motion, paras. 2, 122.

28. Applying the test of the European Court of Human Rights as outlined above, any restriction on access to court to redress serious violations of human rights should not impair the essence of that right.

29. The Defence was cautious in its treatment of the issue of stay of proceedings given the radical nature of this remedy. The Defence was concerned to ensure that such a motion should be filed on a proper foundation and with a proper legal and evidential basis. It considered the matter one of complexity. It also had to consider carefully the appropriate moment for seeking a declaration for the purposes of mitigation and compensation, matters which may properly arise at a later stage in the proceedings. The final decision to file its motion was deferred until it had gathered all the relevant elements. This appeared wise also in the light of the correlation between this issue and the issue of the admissibility of the case. Both depended in different ways on the intentions of the DRC in detaining the accused. The Defence had previously been unsuccessful in obtaining adequate information from the DRC on this point.[35] The Defence's final decision to file the motion was partly based upon information provided by the DRC on the 1st June 2009 in open court in its submissions with respect to the admissibility.[36] This was a significant factor in its final decision to file the motion. This information was to the effect that it had not carried out any investigations.

30. What is in issue here is a right, not an obligation, to access court for the redress of violations of fundamental rights. Depriving the accused of the ability to file a motion on violations of his rights at the time his defence deems appropriate: when in possession of all relevant elements, undermines the very essence of that right. The Defence must be afforded a degree of discretion in this respect as to the timing of the exercise of the right. Filing a motion prematurely can have the effect of both ensuring its failure for not having provided sufficient elements, and it could attract criticism from the Trial Chamber for filing a motion without proper foundation, in ignorance of the actual merits. It is submitted that it is both in the interests of justice and the serenity of proceedings to allow this measure of discretion. Imposing a time limit without regard to the difficulties of an accused proving a matter of abuse giving rise to a radical remedy therefore impairs the essence of the right to address such abuse.

[35] See, *inter alia*, ICC-01/04-01/07-371-Conf-Exp.
[36] Defence Motion paras 65, 66

E. Second ground of appeal

31. At paragraph 66 of the decision of the Trial Chamber, it concluded that the Defence motion was filed too late.

32. In its first ground of appeal the Defence argued that irrespective of the issues of earlier opportunities and justifiability of delay, there was in fact no provision rendering the motion inadmissible as found by the Chamber, such that it could avoid addressing the merits. In this second ground of appeal, it is argued that the Trial Chamber's finding that the motion was too late was misplaced in that it was irrelevant to the determination of the admissibility of the application and that it was further founded upon irrelevant considerations and disregarded relevant considerations.

33. The Defence submits that the Trial Chamber erred in its analysis. The finding that the application was too late was an error firstly because it was irrelevant to the question of admissibility of the motion. It was irrelevant because the Defence was not in violation of any time limit. The Trial Chamber's opinion as to the lateness of the application should not therefore have prevented it from determining the merits of the application.

34. Further, this finding was reached having regard to matters which ought not to have been taken into account, while failing to take into account matters which ought to have been weighed in the balance. In considering that matters which can or should be taken into account in order to fairly evaluate the lateness of an application, it is submitted that matters should not be taken into account which would imply the imposition of a time limit well before the commencement of the trial of the accused as this would not be proportionate and would be so onerous as to significantly undermine the right of access to a court for the violation of fundamental rights. The Defence submits that this is properly reflected in the time limit for motions on jurisdiction and admissibility, which is set by article 19(4) of the Statute as being prior to or at the commencement of

trial.[37] Any perceived deadline for motions of a *sui generis* nature, while certainly not measured by, cannot reasonably be more restrictive than that for motions on admissibility and jurisdiction.

35. First, this finding was partly based upon the fact that the Defence had had a number of opportunities to raise the issue but had not done so and that it had no justification for this delay.[38] This raises two errors on the part of the Trial Chamber. The first of these errors lies in having regard to a matter which is irrelevant to the issue of whether the motion was late. The existence of earlier opportunities to submit a motion cannot, it is submitted, in itself constitute a relevant consideration.

36. The second of these errors arises because the Trial Chamber assumes that a motion must be filed at the earliest opportunity, regardless of whether it is the most appropriate or right time taking into account the interests of the client. In doing so it does not take into account or give sufficient weight to the discretion which must necessarily be left in the hands of a party and therefore the reasons for the delay.

37. The time for the submission of a motion must lie within the discretion of a party, subject to restrictions imposed by the Statute, Rules and Regulations of the Court. Counsel's duty of diligence does not mean that motions must be done without regard to ensuring the quality of the motion and a proper evidential foundation for its submission. The notion of diligence necessarily implies the necessity of acting in the best interests of one's client. Acting precipitously can in itself amount to negligence. Counsel must address issues with the degree of urgency commensurate to the elements required for a motion to be done only if determined to be appropriate and only to the extent that it is done professionally. Whether it is appropriate to submit a motion and what is required to be done before it is ready for submission must be a matter primarily for counsel, who acts with instructions and within limitations some of which the Trial Chamber will not be privy. This is always subject to restrictions imposed by

[37] As noted *supra*, the Defence notes that there is a disagreement with the Trial Chamber on when the trial commences. The Defence previously lodged an appeal against the Chamber's determination as to when a challenge to the admissibility of the case may be raised (see Document in Support of Appeal of the Defence of Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1279, 8 July 2009, paras. 14-41). The Appeals Chamber did not rule on this issue, given that the Chamber did review the challenge on its merits and, accordingly, the Defence was not prejudiced (Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, paras. 36-38).

[38] See, in particular, paragraphs 57, 59, 61, 64 of the Impugned Decision.

the rules and of which counsel must make himself aware. It is not simply because a motion could theoretically be put in at an earlier stage that it is in the best interests of one's client to do so.

38. In paragraph 48 of the Impugned Decision, the Trial Chamber recognises that the issue was first raised by the Defence prior to the confirmation decision. In paragraph 49, it is further recognised that the Pre-Trial Chamber gave the impression to the Defence that it was not obliged to finalise that question before it. The issue was one of great complexity, factually and legally. The Defence being aware of the fact that it did not have to be raised prior to the confirmation decision focused its energies on the admissibility of the case. Only the DRC could clarify the status of the detention of the accused while in the DRC: that is why he was being held and when the justification for his continued detention ceased. It was therefore in the interests of the accused to have clarity on these issues from the DRC prior to submitting a motion requesting the release of the accused. If such a motion were submitted in the light of insufficient evidence it would have been rejected on that very basis.

39. In paragraph 64 of the Impugned Decision, the Trial Chamber asserts that the accused cannot rely on questions of strategy, but where the submission of a motion has not violated any time limit the Defence cannot be reasonably criticised for placing the accused in the best possible position to succeed in the motion before submitting it by ensuring that its evidential basis for submission of the motion is sound. The Defence also cannot be criticised in taking care to ensure that a motion had a reasonable likelihood of success before submitting it. This being a complex issue, without all the necessary elements, the decision whether the motion should be submitted at all remained open. The information provided by the DRC at the hearing on admissibility was of such a compelling nature as to give final force to the importance of submitting the motion.

40. Thirdly, the Trial Chamber has regard to an irrelevant consideration to the validity of the motion when, in paragraphs 46 - 47, and 52 - 57 of the Impugned Decision, it defines certain of these opportunities and the observations of the Defence. In

paragraph 52 of the Impugned Decision, the Chamber refers to the requests for observations on the detention of the accused and the accused's observations. It is not because the accused is invited to address issues relating to his current detention that he must forcibly present a challenge to the legality of his prior detention and its impact on the integrity of the proceedings for the purpose of requesting a stay or claiming compensation. The provisions requiring such a periodic review of the detention of the accused is designed to consider whether the accused's continued detention is justified, and in particular whether he should not be released on bail. It is incorrect for the Trial Chamber, in paragraph 55 of the Impugned Decision, to place relevance on the comment that the Defence wished to be realistic since such comments were directed specifically at the question of bail.

41. Finally, in paragraph 42 of the Impugned Decision, the Trial Chamber has wrongly had regard to the necessity of not delaying the trial of the co-accused. It is submitted that this was a factor which should not be taken into account in determining the lateness of the application. The accused's basic rights should not depend on whether he is in a joint or separate trial. When accused are joined as a result of a decision of the Prosecutor or as a result of a Trial Chamber decision, this must in all fairness rest on the principle that his rights would not vary or be prejudiced by such joinder. This follows from the right to a fair hearing in full equality and the right to adequate time and facilities in full equality, as enshrined in article 67(1) of the Statute. Possible delays due to applications by a co-accused is a factor which must be taken into account in the decision on joinder,[39] but is not a matter which should lead to an accused having time limits for the exercise of his rights which vary from those of accused in other single trials.

42. It is therefore submitted that the Trial Chamber had regard to matters which were not reasonably determinative of the issue before it, and failed to give sufficient weight to the exigencies of the situation for the Defence. It therefore wrongly failed to determine the merits of the application.

[39] See *Prosecutor v Delic et al*, Decision on motions for separate trials filed by the Accused Zejnil Delalic and the accused Zdravko Mucic, 25 September 1996, at para. 8.

F. Relief sought

On these grounds, the Defence prays the Appeals Chamber :

(i) to grant this appeal ; and

(ii) to rule that the Trial Chamber must consider the Defence Motion on its merits.

Respectfully submitted,

David HOOPER

Dated this 25 February 2010

At The Hague