

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. ICC-01/04-01/07 OA 10

Date: 12 July 2010

THE APPEALS CHAMBER

Before:

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

**IN THE CASE OF THE PROSECUTOR v. GERMAIN KATANGA and
MATHIEU NGUDJOLO CHUI**

Public document

Judgment

**on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20
November 2009 Entitled “Decision on the Motion of the Defence for Germain
Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

Counsel for Mr Katanga

Mr David Hooper
Mr Andreas O'Shea

REGISTRY

Registrar

Ms Silvana Arbia

A handwritten signature in black ink, appearing to be 'J. B.', with a horizontal line extending to the right.

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Germain Katanga against the decision of Trial Chamber II entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp-tENG),

After deliberation,

By majority, Judge Erkki Kourula and Judge Ekaterina Trendafilova dissenting,

Delivers the following

JUDGMENT

The “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” is confirmed.

The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. In the absence of a provision in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court stipulating time limits for the filing of motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings, the Trial Chamber has discretion under article 64 (2) of the Statute to determine the timeliness of such motions.

2. Based on the facts and circumstances of the present case, the Trial Chamber committed no error of law, fact or procedure when it held that the “Defence motion for a declaration on unlawful detention and stay of proceedings”¹ (hereinafter: “Defence Motion”) was filed too late.

¹ ICC-01/04-01/07-1258-Conf-Exp. A public redacted version was filed on 2 July as ICC-01/04-01/07-1263.

3. Motions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings must, as a general rule, be brought before the Pre-Trial Chamber.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

4. On 30 June 2009, Mr Katanga filed the Defence Motion. In the section entitled “Relief sought”, Mr Katanga requested the Trial Chamber to declare that his arrest and detention in the Democratic Republic of the Congo (hereinafter: “DRC”) was unlawful and to terminate the proceedings against him.² Mr Katanga indicated that the declaration of unlawful arrest and detention would also serve as a basis for requesting compensation and, potentially, reduction of his sentence.³ Elsewhere in the Defence Motion, he indicated that the latter relief was sought in the alternative.⁴

5. On 20 November 2009, the Trial Chamber rendered the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings”⁵ (hereinafter: “Impugned Decision”), denying the Defence Motion.

6. On 30 November 2009, Mr Katanga filed 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 la détention et en suspension de la procédure*”⁶ (hereinafter: “Application for Leave to Appeal”), requesting leave to appeal the Impugned Decision. The Prosecutor did not file a response.

7. On 11 February 2010, the Trial Chamber granted the Application for Leave to Appeal in its “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*

² Defence Motion, paras 121-122.

³ Defence Motion, paras 132-138.

⁴ Defence Motion, para. 2.

⁵ ICC-01/04-01/07-1666-Conf-Exp-tENG. The public redacted version, ICC-01/04-01/07-1666-Red-tENG, is dated 3 December 2009.

⁶ ICC-01/04-01/07-1691.

illégalité de la détention et en suspension de la procédure”⁷ (hereinafter: “Decision Granting Leave to Appeal”).

B. Proceedings before the Appeals Chamber

8. On 25 February 2010, Mr Katanga filed the “Document in Support of the Defence Appeal of the *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*”⁸ (hereinafter: “Document in Support of the Appeal”).

9. On 11 March 2010, the Prosecutor filed the “Prosecution Response to Katanga’s appeal against the ‘Decision on the Motion for the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’”⁹ (hereinafter: “Response to the Document in Support of the Appeal”).

III. PRELIMINARY ISSUES

A. Compliance with time limits

10. In this appeal, the Appeals Chamber considers it necessary to determine whether Mr Katanga and the Prosecutor filed their respective documents in compliance with the time limits prescribed by the Regulations of the Court.

1. Filing of the Document in Support of the Appeal

11. Regulation 65 (4) of the Regulations of the Court provides that “the appellant shall file, within ten days of notification of the decision granting leave to appeal, a document in support of the appeal”. In line with this provision, read with regulation 33 (1) and (2) of the Regulations of the Court, Mr Katanga’s document in support of the appeal was due to be filed on 25 February 2010 at 16h00. Mr Katanga filed the Document in Support of the Appeal on 25 February 2010 at 15h55. The Registrar notified the Prosecutor of the Document in Support of the Appeal on the same day. However, the cover page of the Document in Support of the Appeal incorrectly indicated that it was addressed to Trial Chamber II, instead of the Appeals Chamber. Upon noticing the mistake, the Registrar blocked access to the Document in Support of the Appeal in the Court’s electronic record management system. On the same day

⁷ ICC-01/04-01/07-1859.

⁸ ICC-01/04-01/07-1916-Corr.

⁹ ICC-01/04-01/07-1957-Conf-Exp. A redacted version of this document was filed simultaneously as ICC-01/04-01/07-1957-Red.

(25 February 2010) at 17h22, Mr Katanga filed a corrected version of the Document in Support of the Appeal. The Registrar notified the Prosecutor of the corrected version on 26 February 2010, at 11h07.

12. In the view of the Appeals Chamber, the Document in Support of the Appeal was filed within the applicable time limit, even though the corrigendum to this document was filed after the expiry of the time limit. What is decisive is that the original Document in Support of the Appeal was filed in time.

2. *Filing of the Response to the Document in Support of the Appeal*

13. Regarding the timing of the Prosecutor's response, the Appeals Chamber observes that regulation 65 (5) of the Regulations of the Court provides that "[p]articipants may file a response within ten days of notification of the document in support of the appeal". The Prosecutor filed his Response to the Document in Support of the Appeal on 11 March 2010. The Prosecutor states that he calculated the time limit on the basis of the notification of the corrected version of the Document in Support of the Appeal.¹⁰

14. In the Appeals Chamber's view, the time limit for the submission of the Response to the Document in Support of the Appeal should indeed be calculated on the basis of the notification on 26 February 2010. Although the Prosecutor was notified of the original Document in Support of the Appeal on 25 February 2010, the Registrar removed electronic access to this document shortly after notification. The Prosecutor regained electronic access to the Document in Support of the Appeal only with the notification of the corrigendum on 26 February 2010. In light of these circumstances, the Appeals Chamber considers that the effective date of notification of the Document in Support of the Appeal was 26 February 2010, and not 25 February 2010. Thus, the Prosecutor filed the Response to the Document in Support of the Appeal within the time limit as stipulated under regulation 65 (5), read with regulation 33 (1) and (2) of the Regulations of the Court.

¹⁰ Response to Document in Support of the Appeal, footnote 11.

B. Confidential filing of the Response to the Document in Support of the Appeal

15. The Prosecutor filed the Response to the Document in Support of the Appeal in both a confidential *ex parte* version and a public redacted version.¹¹ The latter document contained only one redaction. The Appeals Chamber notes that the Prosecutor did not indicate on what basis he filed the Response to the Document in Support of the Appeal confidentially and *ex parte*. The Appeals Chamber reminds the Prosecutor of his obligation under regulation 23 *bis* of the Regulations of the Court to state the factual and legal basis for a non-public filing. The purpose of this provision is to clearly inform the relevant Chamber of the reason why the filing as non-public is necessary. The mere filing of a redacted version of a document does not fulfil this purpose.

IV. MERITS

A. Summary of Impugned Decision

16. In the Impugned Decision, the Trial Chamber considered whether the Defence Motion was filed in time. The Chamber stated that it had to satisfy itself whether the legal instruments of the Court permitted the Defence Motion to be filed after the confirmation of the charges and at the stage of the proceedings at which it was filed.¹²

17. The Trial Chamber held that a “challenge to the lawfulness of the arrest and detention of an accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings.”¹³ To buttress its holding, the Trial Chamber explained that it was important that challenges to the lawfulness of arrest and detention be raised “as early as possible during the pre-trial phase” in order to avoid delaying or obstructing the fair conduct of the proceedings.¹⁴ To the Trial Chamber, it was vital that issues that could delay the trial or its fairness be determined at the beginning of the proceedings.¹⁵ To further support its decision, the Trial Chamber referred, by way of example, to article 19 of the Statute, which requires challenges to admissibility and

¹¹ ICC-01/04-01/07-1957-Conf-Exp and ICC-01/04-01/07-1957-Red, respectively.

¹² Impugned Decision, para. 38.

¹³ Impugned Decision, para. 39.

¹⁴ Impugned Decision, para. 40.

¹⁵ Impugned Decision, para. 40.

jurisdiction to be made at the earliest opportunity,¹⁶ and to rules 58 and 122 of the Rules of Procedure and Evidence.¹⁷ The Trial Chamber also referred to article 64 (2) of the Statute, which obliges Trial Chambers to ensure the fair and expeditious conduct of the trial, with full respect of the rights of the accused.¹⁸ The Trial Chamber noted that the co-accused in the case, Mr Mathieu Ngudjolo Chui, also had a right to be tried without undue delay, which the Trial Chamber had to ensure.¹⁹

18. The Trial Chamber then analysed the various opportunities afforded to Mr Katanga during the proceedings before the Pre-Trial Chamber to raise the issue of the alleged unlawfulness of his pre-surrender arrest and detention in the DRC,²⁰ and concluded that “such a motion should have been introduced during the pre-trial phase and addressed at that stage.”²¹ Notwithstanding this conclusion, the Trial Chamber noted certain statements of the Pre-Trial Chamber during the pre-trial phase that “may have led the Defence for the Accused to believe that it was authorised to defer the filings of its motion and postpone it until after the decision on the confirmation of charges”.²² For that reason, the Trial Chamber went on to consider whether the “[Trial] Chamber itself was officially seized of such a motion, and in due time”.²³

19. The Trial Chamber assessed the overall facts and circumstances of the case and ruled that Mr Katanga had not furnished it with “any convincing reasons to justify the filing of the Motion at such an advanced stage in the proceedings”.²⁴ In reaching this conclusion, the Trial Chamber considered the conduct of Mr Katanga and his counsel during the trial phase. It also considered the various opportunities available to Mr Katanga to raise the issue of alleged unlawful pre-surrender arrest and detention, both in response to the Chamber’s “Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference”²⁵ of 13 November 2008 (hereinafter: “Order of 13 November 2008”) and at status conferences in November 2008 and February 2009, and in relation to the Chamber’s

¹⁶ Impugned Decision, para. 41.

¹⁷ Impugned Decision, para. 41.

¹⁸ Impugned Decision, para. 42.

¹⁹ Impugned Decision, para. 42.

²⁰ Impugned Decision, paras 43-47.

²¹ Impugned Decision, para. 48.

²² Impugned Decision, para. 49.

²³ Impugned Decision, para. 50.

²⁴ Impugned Decision, para. 61.

²⁵ ICC-01/04-01/07-747-tENG.

reviews of Mr Katanga's detention in December 2008, March and April 2009, July 2009 and November 2009.²⁶ The Trial Chamber emphasised that Mr Katanga had failed to raise the matter between the constitution of the Chamber on 24 October 2008 and 1 June 2009, in spite of the numerous opportunities that were available to him to do so.²⁷

20. Furthermore, the Chamber found that although Mr Katanga stated in the Defence Motion that information obtained at the hearing of 1 June 2009 was decisive for the filing of the application, the arguments advanced in that motion were based "for the most part on information which was already available to the Defence at the pre-trial phase"²⁸ and that Mr Katanga had received the requested information from the DRC as far back as 28 August 2008.²⁹ The Trial Chamber emphasised that strategic reasons could not in themselves justify the delay in the filing of the motion³⁰ and concluded that the Defence for Mr Katanga had not met its obligation to act expeditiously, having filed the Defence Motion seven months after he had been called upon to "submit to the Chamber the relevant issues on which it wished the latter to rule".³¹ The Trial Chamber held that the Defence Motion was filed at "too advanced a stage in the proceedings",³² rendering it inadmissible.

B. Arguments of the parties

1. Arguments of Mr Katanga

21. Mr Katanga advances two grounds of appeal. First, he submits that the Trial Chamber erred in law when it held that the Defence Motion was filed too late.³³ Secondly, he argues that the Trial Chamber erred on the facts when it found that the Defence Motion had been filed out of time.

22. The thrust of Mr Katanga's first ground of appeal is that the Trial Chamber imposed a retroactive time limit on the Defence Motion.³⁴ In his view, he was unfairly

²⁶ Impugned Decision, paras 52-57.

²⁷ Impugned Decision, paras 51-59.

²⁸ Impugned Decision, para. 61.

²⁹ Impugned Decision, para. 61.

³⁰ Impugned Decision, para. 64.

³¹ Impugned Decision, para. 65.

³² Impugned Decision, para. 66.

³³ Document in Support of the Appeal, para. 13.

³⁴ Document in Support of the Appeal, para. 18.

denied the right to be heard on a fundamental issue, namely the lawfulness of his arrest and detention in the DRC. Relying on jurisprudence from the European Court of Human Rights (hereinafter: "ECtHR"), Mr Katanga argues that the right of access to a court to redress serious violations of human rights is subject only to limits that are legitimate, proportionate and that do not impair the very essence of that right.³⁵ According to him, the time limit imposed by the Trial Chamber on the Defence Motion fell short of these requirements.

23. Mr Katanga asserts that the time limit imposed on the filing of the Defence Motion was not legitimate because it violated the principle of legality.³⁶ He argues that an accused person must be able to determine with clarity a deadline for the filing of applications seeking redress for human rights violations.³⁷ In this case, there was no time limit in the Statute, the Rules of Procedure and Evidence and the Regulations of the Court that he had to meet.³⁸ He recalls that the Appeals Chamber previously characterised motions such as the Defence Motion as being of a *sui generis* nature, and argues that article 19 of the Statute and rule 122 (3) and (4) of the Rules of Procedure and Evidence were therefore inapplicable to the Defence Motion.³⁹ He observes that the Impugned Decision itself failed to specify a time frame for the filing of the Defence Motion.⁴⁰ He therefore submits that it was unclear to him, both before and after the Impugned Decision, when he was expected to file the Defence Motion.⁴¹

24. Further, Mr Katanga submits that the Impugned Decision was disproportionate, given the importance of the issue he sought to litigate.⁴² In his view, a dismissal of the Defence Motion simply because it was perceived as having been filed late could undermine the fairness of trial⁴³ and result in a gross miscarriage of justice if the application is well founded.⁴⁴ Moreover, he submits that the Trial Chamber could

³⁵ Document in Support of the Appeal, para. 8.

³⁶ Document in Support of the Appeal, para. 13.

³⁷ Document in Support of the Appeal, para. 12.

³⁸ Document in Support of the Appeal, para. 13.

³⁹ Document in Support of the Appeal, paras 16-17.

⁴⁰ Document in Support of the Appeal, para. 13.

⁴¹ Document in Support of the Appeal, para. 17.

⁴² Document in Support of the Appeal, paras 19-21.

⁴³ Document in Support of the Appeal, para. 21.

⁴⁴ Document in Support of the Appeal, para. 22.

have decided his request for compensation and/or mitigation of his sentence in case of a conviction without “effecting the process”.⁴⁵

25. Mr Katanga also contends that he must be allowed a level of discretion to decide when it is appropriate to file a motion for violations of his rights.⁴⁶ He argues that imposing a time limit without taking into account the difficulties faced by an accused in proving a matter of abuse undermines the exercise of the right of access to a court.⁴⁷ He emphasises that he had to ensure that the Defence Motion was properly substantiated before presenting it.⁴⁸ He maintains that he had been unable to gain sufficient information from the DRC before the hearing on 1 June 2009 and that the DRC’s oral submissions on that date were critical to his decision to file the Defence Motion.⁴⁹

26. As his second ground of appeal, Mr Katanga argues that the Trial Chamber erred factually when it decided that the Defence Motion had been filed too late. In his opinion, the Chamber reached its conclusions based on irrelevant factors, while failing to consider relevant factors.

27. Mr Katanga argues that the finding that the motion was too late was irrelevant to the admissibility of the Defence Motion, given the absence of a time limit.⁵⁰ He further takes the view that the availability of earlier opportunities to raise the issue of his unlawful arrest and detention in the DRC was an irrelevant consideration.⁵¹ He submits that asking him to comment on his conditions of detention did not require him to challenge the lawfulness of his arrest and detention in the DRC, as the review of his conditions of detention had a different purpose.⁵² Lastly, he argues that the Trial Chamber should not have considered Mr Ngudjolo Chui’s right to be tried expeditiously because Mr Katanga’s rights should not depend on whether he was being tried separately or jointly.⁵³

⁴⁵ Document in Support of the Appeal, para. 26.

⁴⁶ Document in Support of the Appeal, para. 30.

⁴⁷ Document in Support of the Appeal, para. 30.

⁴⁸ Document in Support of the Appeal, paras 29-30.

⁴⁹ Document in Support of the Appeal, para. 29.

⁵⁰ Document in Support of the Appeal, para. 33.

⁵¹ Document in Support of the Appeal, para. 35.

⁵² Document in Support of the Appeal, para. 40.

⁵³ Document in Support of the Appeal, para. 41.

C. Arguments of the Prosecutor

28. The Prosecutor submits that the first ground of appeal does not arise from the Impugned Decision. He notes that, contrary to Mr Katanga's contentions, the Trial Chamber did not impose a time limit for filing the Defence Motion.⁵⁴ The Prosecutor is of the view that the Impugned Decision was based on article 64 (2) of the Statute, which vests in the Trial Chamber discretionary power to manage the proceedings.⁵⁵ He submits that the Trial Chamber did not commit any legal, factual or procedural errors and that the Appeals Chamber should dismiss the appeal.⁵⁶

29. First, the Prosecutor argues that the Trial Chamber did not err in its interpretation of the law and that the principle of legality was not violated.⁵⁷ He states that given the *sui generis* nature of the Defence Motion, the Trial Chamber correctly exercised its discretion under article 64 of the Statute to control the timing of the motion.⁵⁸ He also submits that although the Trial Chamber referred to article 19 of the Statute and rule 122 of the Rules of Procedure and Evidence as evidence of the general principle that certain motions must be filed at an early stage to expedite the proceedings,⁵⁹ the Defence Motion was ultimately rejected because of the facts and circumstances of the case and not for failing to meet a time limit.⁶⁰ In the Prosecutor's view, the Impugned Decision implied that such a motion could be heard at any stage of the proceedings, provided that the circumstances of the case justified doing so and convincing reasons were given.⁶¹ Regarding the failure of the Trial Chamber to consider the request for compensation and mitigation of sentence, the Prosecutor argues that having dismissed the Defence Motion as having been filed late, any remedies deriving from the Defence Motion were rendered moot.⁶²

30. Secondly, the Prosecutor submits that the Trial Chamber did not err on the facts. On Mr Katanga's assertion that he had been unable to obtain the necessary information from the DRC until the hearing on 1 June 2009, the Prosecutor draws

⁵⁴ Response to the Document in Support of the Appeal, para. 15.

⁵⁵ Response to the Document in Support of the Appeal, para. 11.

⁵⁶ Response to the Document in Support of the Appeal, para. 41.

⁵⁷ Response to the Document in Support of the Appeal, para. 15.

⁵⁸ Response to the Document in Support of the Appeal, para. 17.

⁵⁹ Response to the Document in Support of the Appeal, para. 18.

⁶⁰ Response to the Document in Support of the Appeal, para. 19.

⁶¹ Response to the Document in Support of the Appeal, para. 19.

⁶² Response to the Document in Support of the Appeal, para. 23.

attention to the Trial Chamber's finding that the information on which Mr Katanga relied was largely available to him at the pre-trial phase and that he had received the requested information on 28 August 2008.⁶³ The Prosecutor maintains that the Trial Chamber's position was reasonable, given that Mr Katanga had sufficient information by August 2008.⁶⁴ The Prosecutor asserts that by March 2008, he had also disclosed a significant amount of relevant information to Mr Katanga.⁶⁵ He argues that on 1 June 2009, the DRC authorities merely confirmed information that Mr Katanga already possessed prior to the hearing, and that no new information was presented. In this regard, he highlights Mr Katanga's failure to point to information not already in his possession prior to the hearing.⁶⁶ He also observes that the Defence Motion was based on the same information as Mr Katanga's admissibility challenge.⁶⁷

31. Thirdly, the Prosecutor argues that the Trial Chamber did not commit a procedural error as it properly assessed the relevant factors.⁶⁸ The Prosecutor maintains that the Trial Chamber gave the necessary weight to the following factors:⁶⁹ the existence of earlier opportunities as evidence of the fairness of the proceedings;⁷⁰ Mr Katanga's discretion to file the motion at the proper time;⁷¹ the Pre-Trial Chamber's statements on the issue that may have influenced Mr Katanga to file the motion at a later stage;⁷² the information provided by the DRC on 1 June 2009;⁷³ Mr Katanga's strategy;⁷⁴ the hearings on Mr Katanga's conditions of detention;⁷⁵ and the nature of the Defence Motion.⁷⁶ The Prosecutor disagrees with Mr Katanga that the Trial Chamber gave weight to its duty to ensure Mr Ngudjolo Chui's right to a trial without undue delay.

⁶³ Response to the Document in Support of the Appeal, para. 24.

⁶⁴ Response to the Document in Support of the Appeal, para. 25.

⁶⁵ Response to the Document in Support of the Appeal, para. 26.

⁶⁶ Response to the Document in Support of the Appeal, para. 28.

⁶⁷ Response to the Document in Support of the Appeal, para. 29.

⁶⁸ Response to the Document in Support of the Appeal, para. 31.

⁶⁹ Response to the Document in Support of the Appeal, para. 32.

⁷⁰ Response to the Document in Support of the Appeal, para. 33.

⁷¹ Response to the Document in Support of the Appeal, para. 34.

⁷² Response to the Document in Support of the Appeal, para. 35.

⁷³ Response to the Document in Support of the Appeal, para. 36.

⁷⁴ Response to the Document in Support of the Appeal, para. 37.

⁷⁵ Response to the Document in Support of the Appeal, para. 39.

⁷⁶ Response to the Document in Support of the Appeal, para. 40.



D. Determination by the Appeals Chamber

1. Issue on appeal and standard of review

32. As stated above, Mr Katanga's first ground of appeal is that the Trial Chamber erred in finding that the Defence Motion was filed too late. He asserts that by so finding, the Trial Chamber imposed a time limit retroactively as the legal instruments of the Court do not contain an express time limit for filing motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings, and that this violated the principle of legality. As his second ground of appeal, Mr Katanga states that the Trial Chamber erred on the facts by placing undue weight on irrelevant facts while ignoring relevant ones. In the view of the Appeals Chamber, both grounds of appeal are closely connected and will therefore be considered together.

33. The question that arises in this appeal is whether in the absence of an express time limit in the Statute, Rules of Procedure and Evidence and the Regulations of the Court, the Trial Chamber erred when it dismissed the Defence Motion as having been filed too late. The Appeals Chamber notes the Prosecutor's submission that the Impugned Decision was a "matter of trial management pursuant to [the Trial Chamber's] discretionary power under Article 64(2) and based on the facts and circumstances of the case".⁷⁷ The Appeals Chamber agrees with this characterisation of the Trial Chamber's powers. As will be explained later in this judgment, article 64 (2) obliges the Trial Chamber to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. In carrying out its obligation, the Trial Chamber thus has to undertake a judicious balancing of all of these competing interests. The question whether an accused person's rights have been violated depends on how the Trial Chamber weighed these factors in arriving at its conclusions. This turns on the specific facts and circumstances of each case.

34. As the Appeals Chamber has held previously, it will not interfere with a discretionary decision of another Chamber unless that decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the

⁷⁷ Response to the Document in Support of the Appeal, para. 11.



decision.⁷⁸ This may require the Appeals Chamber to determine whether the Chamber that rendered the decision under review erred in law, gave undue weight to extraneous factors or failed to consider relevant factors. Under this standard of review, the Appeals Chamber will not reverse the Impugned Decision simply because it would have decided differently. It can only do so when it finds that the Trial Chamber exercised its discretion incorrectly. This standard of review will guide the analysis of the merits of this case.

2. *No legal error as to timing of motions alleging illegal pre-surrender arrest and detention and seeking a stay of proceedings*

35. The Appeals Chamber notes Mr Katanga's argument that in the absence of any specific provision in the Statute and Rules of Procedure and Evidence, motions alleging unlawful pre-surrender detention and seeking a stay of proceedings may be brought at any time.⁷⁹

36. In contrast, at paragraph 39 of the Impugned Decision, the Trial Chamber stated:

[A] challenge to the lawfulness of the arrest and detention of an accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings.

37. The Trial Chamber further stated that "it is in the interests of all, and primarily of the suspects who have been deprived of their liberty, that the issue of the possible unlawfulness of their detention be raised and addressed as early as possible during the pre-trial phase",⁸⁰ referring to the proceedings before the Pre-Trial Chamber.⁸¹ Nevertheless, in light of the Pre-Trial Chamber's statements on the timing of such motions, the Trial Chamber decided to consider the opportunities afforded to Mr Katanga to bring the Defence Motion after the confirmation of charges decision;⁸² in so doing, it recognised the need for flexibility in the application of the principle it had identified.

⁷⁸ See *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3), para. 80.

⁷⁹ Document in Support of the Appeal, para. 24.

⁸⁰ Impugned Decision, para. 40.

⁸¹ Impugned Decision, para. 48.

⁸² See Impugned Decision, paras 48 *et seq.*

38. The Appeals Chamber must thus determine whether the principle that the Trial Chamber identified was correct, or whether it reveals a legal error. Only if a legal error is shown to exist, will the Appeals Chamber have to determine whether such error vitiated the Impugned Decision.

39. The Appeals Chamber notes that none of the time limits stipulated in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court directly apply to motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings. This is due to the fact that such motions are not provided for in the Court's legal instruments; they are therefore of a *sui generis* character.⁸³ In the absence of an express statutory time limit, the question then arises whether there are any limitations as to when motions alleging unlawful pre-surrender detention and seeking a stay of the proceedings may be brought.

40. The Appeals Chamber finds that the approach adopted by the Trial Chamber on the timing of motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings was correct. The Appeals Chamber considers that the principle identified by the Trial Chamber is based, firstly, on considerations of efficiency and judicial economy within the procedural framework of the Court. The Statute has established a confirmation procedure, which takes place before a Pre-Trial Chamber.⁸⁴ One of the purposes of this procedure is to prepare the case for trial and to filter out cases that should not go to trial.⁸⁵ A case will only be referred to a Trial Chamber if there are "substantial grounds to believe" that the person in question has committed the crimes charged.⁸⁶ In addition, the Pre-Trial Chamber has the primary responsibility of ensuring the protection of the rights of suspects during the investigation stage of the proceedings.⁸⁷

⁸³ *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on Appeal of Mr. Thomas Lubanga 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", 14 December 2006 (OA 4), ICC-01/04-01/06-772, para. 24 (hereinafter: "Lubanga OA 4")

⁸⁴ See article 61 of the Statute.

⁸⁵ M. Marchesiello, "Proceedings before the Pre-Trial Chambers", in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol II, (Oxford University Press, 2002), pp. 1231-1239.

⁸⁶ See article 61 (7) of the Statute.

⁸⁷ M. Marchesiello, "Proceedings before the Pre-Trial Chambers", in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol II, (Oxford University Press, 2002), pp. 1235-1238, K. Khan, "Initial proceedings before the Court", in O. Triffterer (ed.), *Commentary on*



41. It is consistent with the role of the Pre-Trial Chamber and the purpose of the confirmation proceedings that, in the absence of any provision to the contrary, motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings should be brought during the pre-trial phase of the proceedings. If such motions are made at an unduly late stage of the proceedings, it would turn the Court's attention away from the trial proper and delay the hearing of the substantive case.

42. To accept Mr Katanga's view on the timing of motions seeking a stay based on alleged unlawful pre-surrender arrest and detention would be to defeat the purpose of the Statute to ensure fair and expeditious trials. Such an approach could lead to unnecessary disruptions to the trial, result in delays and thus create uncertainty for the conduct of the trial.

43. The Appeals Chamber observes that expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court,⁸⁸ the parties and participants.⁸⁹ As regards the accused person, where he or she is represented by counsel, the Code of Professional Conduct for counsel enjoins counsel to represent him or her "expeditiously with the purpose of avoiding unnecessary delay in the conduct of the proceedings".⁹⁰

44. In addition to the above, the Appeals Chamber notes that the Trial Chamber referred to article 19 of the Statute and rules 122 (2), (3) and (4) of the Rules of Procedure and Evidence to illustrate the view that motions such as the Defence Motion must, in principle, be filed as early as possible, preferably during the pre-trial phase of the proceedings. Given that the Trial Chamber refers to these provisions by

the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, 2nd ed., (Beck et al., 2008), p. 1161.

⁸⁸ For the Trial Chamber, this duty arises from articles 64 (2) and 67 (1) (c) of the Statute, rules 132 (2) and 84 of the Rules of Procedure and Evidence; in respect of the Appeals Chamber, *see*, for example, articles 18 (4), 56 (3) (b) and 82 (2) of the Statute and rule 156 (4) of the Rules of Procedure and Evidence; in respect of the Pre-Trial Chamber, *see*, for example, articles 57, 61 (1) and (3) of the Statute; related to the Court generally, *see*, for example, articles 17 (2), 20 (3) (b), 58 (2), 82 (1) (d), 90 (3) of the Statute and rules 91 (3) and 101 of the Rules of Procedure and Evidence.

⁸⁹ In respect of the Prosecutor, *see*, for example, articles 61 (3) and 67 (1) (c) of the Statute and rule 52 (2) of the Rules of Procedure and Evidence; in respect of the Registrar, *see*, for example, rule 16 (2) (b) and 92 (5) of the Rules of Procedure and Evidence; in respect of States, *see*, for example articles 18 (5) and 19 (5) of the Statute.

⁹⁰ Article 24 (5) of the Code of Professional Conduct for counsel.

way of example only, the Appeals Chamber sees no need to consider any further in the context of this appeal the correctness or otherwise of the Trial Chamber's approach to these provisions.⁹¹

45. The need to act expeditiously must also be viewed in the context in which the Court operates. The crimes under the Court's jurisdiction are by their nature complex and their adjudication takes time. It is vital for cases to be properly managed from the start to forestall unnecessary delays.⁹² Undoubtedly, delays in proceedings are inimical to the proper administration of justice.⁹³ For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminatory and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced.

46. An expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalising a trial may also diminish public interest and public support for, and cooperation with, the Court. Without such support

⁹¹ To support its position further, the Trial Chamber, at footnote 59 of the Impugned Decision, referred to article 19 (4), (5) and (8) of the Statute and its decision entitled "Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)", 16 June 2009, ICC-01/04-01/07-1213, para 44, in which it held that challenges to admissibility must be brought at the pre-trial phase. The Appeals Chamber notes that its reference to this decision does not indicate its endorsement of the interpretation given therein.

⁹² It has been observed that the experience at the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") shows that there are advantages in terms of expeditiousness when trials are streamlined at the commencement of the proceedings. See O. Fourmy, "Powers of the Pre-Trial Chambers" in A. Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), p. 1211 and 1228-9.

⁹³ ECtHR, *Bottazzi v Italy*, "Judgement", 28 July 1999, application no. 34884/97, para. 22, when in relation to 'reasonable time', the Court reaffirmed 'the importance of administering justice without delays which might jeopardise its effectiveness and credibility'. See also South Africa, Constitutional Court, *Leach Mokela Mohlomi v Minister of Defence*, (1997) 2 *Legal Resources Centre* 274, para 11, where the South African Constitutional Court opined that time-limits could be justified in light of the fact that "delays were detrimental to the interests of justice and prolonged the uncertainty of the relevant parties as regards their affairs. Further, adjudication after a long period of time had elapsed could be difficult in terms of obtaining reliable testimony and documentary evidence". See also S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 136 ("it is quite clear that the right to be tried by a court can only be effectively enforced if a decision is reached within a reasonable time. The alternative would be postponement of *ad calendas graecas* – a denial of justice. The importance of the right to be tried within a reasonable time becomes even more evident if one keeps in mind that access to court is one of the fundamental elements of the rule of law").



and cooperation the Court would find it difficult to have its decisions and orders respected or enforced.

47. Expeditionousness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused.⁹⁴ For this reason, article 64 (2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious.

48. As the Appeals Chamber has previously held, the Court's legal instruments do not bar an accused person from bringing a motion challenging his or her alleged unlawful pre-surrender arrest and detention with a view to seeking a stay of proceedings.⁹⁵ However, the principle correctly identified by the Trial Chamber requires the accused person to bring such motions in the pre-trial stage of the proceedings. In the view of the Appeals Chamber, this does not lead to unfairness *vis-à-vis* the accused person. The Appeals Chamber notes in particular that the principle allows for flexibility. An accused person's right to raise the matter of allegedly unlawful pre-surrender arrest and detention and to seek a stay on that basis is not denied, but is given prominence before the Pre-Trial Chamber.⁹⁶ Only in

⁹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, "Judgement 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'", Separate Opinion of Judge Georgios M. Pikis, 21 October 2008, ICC-01/04-01/06-1486 (OA 13), para. 31; *see also*, *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the release of Thomas Lubanga Dyilo'", Dissenting Opinion of Judge Georgios M. Pikis, ICC-01/04-01/06-1487, 21 October 2008 (OA 12), para. 15, where he states "[a]rticle 64 (2) of the Statute binds the Court to hold, not only a fair, but an expeditious trial too. Expeditionousness denotes the speedy doing or transaction of something. The standard introduced by article 64 (2) of the Statute is more stringent than the one imported by the requirement of trial being held without undue delay, which is incorporated in the notion of a fair trial; a standard that the Court is duty bound to uphold".

⁹⁵ Lubanga OA 4, paras 36-39.

⁹⁶ *See* International Criminal Tribunal for Rwanda (hereinafter: "ICTR"), Trial Chamber, *Prosecutor v. Pauline Nyiramasuhuko*, "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 20 February 2004, ICTR-97-21-T, paras 19 – 20, where in relation to a similar application the Trial Chamber stated: "Before examining its merit, the Chamber notes the belatedness of this submission, contained in a Motion filed on 25 June 2003, on an alleged violation that occurred in July 1997. In particular, the Chamber emphasizes that such issue should have been raised during the Applicant's initial appearance. In this connection, the Chamber notes that the lead Defence Counsel on this Motion was Defence Counsel at the initial appearance and has been Defence Counsel throughout the proceedings against the Accused Nyiramasuhuko. Pursuant to Article 19(3) of the Statute, during the initial appearance of the Accused: 'The Trial Chamber shall [. . .] satisfy itself that the rights of the accused are respected'. It is the view of the Trial Chamber that one of the main purposes of the initial appearance of an Accused is to verify the legality of his or her arrest and the respect of his or her rights before the commencement of trial proceedings".

circumstances where the accused person could not reasonably be expected to raise the matter at that stage will he or she be permitted to raise it at the trial stage. The principle thus strikes a fair balance between the rights of the accused person and the requirement of expeditiousness.

49. The Appeals Chamber is not persuaded by Mr Katanga's argument that "it makes perfect sense that there is no deadline for submitting motions addressing violations of [the] fundamental rights of the accused, because the event triggering such motions may occur at any time of the proceedings".⁹⁷ The Appeals Chamber notes that in light of what it has stated earlier under paragraph 33, it cannot be correct, as Mr Katanga argues, that such a motion may be brought at any time of the proceedings, regardless of the facts and circumstances of the case, fairness to the other parties and participants and the statutory requirement for expeditiousness. Furthermore, while it is correct that there may be instances where events arising after the pre-trial phase may justifiably lead to a motion seeking a stay of the proceedings, the present case concerns a motion for stay of proceedings based on alleged human rights violations that occurred before Mr Katanga's surrender to the Court. The Appeals Chamber notes that in any event, and as stated above, the principle identified by the Trial Chamber provides for flexibility. Whether in the specific circumstances of the case, it might have been impossible for Mr Katanga to bring the Defence Motion earlier is an issue that will be addressed below. It does not call into question the correctness of the principle as such.

3. *No retroactive application of a time limit*

50. Mr Katanga contends that in the absence of an express time limit in the legal instruments of the Court, it was unclear what time limit he had to observe.⁹⁸ He maintains that with the Impugned Decision, the Trial Chamber imposed a retroactive time limit.⁹⁹

51. The Appeals Chamber notes that this is the first case before this Court where the question of the timing for motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings arises. The Appeals Chamber also notes

⁹⁷ Document in Support of the Appeal, para. 26.

⁹⁸ Document in Support of the Appeal, para. 15.

⁹⁹ Document in Support of the Appeal, para. 18.

that when Mr Katanga raised before the Pre-Trial Chamber, the issue of the lawfulness of his arrest and detention in the DRC, that Chamber gave him the impression that he could file a motion in this regard during the trial phase of the proceedings.¹⁰⁰ The Appeals Chamber observes that in light of the Pre-Trial Chamber's statements, the Trial Chamber excused Mr Katanga's failure to file an application on the issue during the pre-trial phase of the proceedings – the period it had held to be the most appropriate – and correctly extended its analysis to the trial phase when determining whether the Defence Motion was filed in time. Therefore, the Trial Chamber did not retroactively apply the principle that motions alleging pre-surrender unlawful arrest and detention and seeking a stay of proceedings should, as a general rule, be filed at the pre-trial phase to the Defence Motion. Rather, it took a decision based on the specific facts and circumstances of the case. Thus, the Appeals Chamber is not persuaded that the Trial Chamber applied a retroactive time limit.

4. No error in the Trial Chamber's exercise of discretion in relation to the trial phase

52. Having concluded that the Trial Chamber was correct in extending its analysis to the trial phase of the proceedings, the Appeals Chamber must next consider whether the Trial Chamber correctly exercised its discretion when it held that the Defence Motion was filed too late.

53. The Appeals Chamber observes that in the circumstances of the present case, the Trial Chamber's power to determine the timeliness of a motion alleging unlawful pre-surrender arrest and detention and seeking a stay of the proceedings during the trial phase derives from article 64 (2) of the Statute. The object of article 64 (2) is to ensure that the trial is managed properly and expeditiously whilst giving full respect to the rights of the accused. However, full respect for the rights of the accused does not mean that a Trial Chamber may not control the manner in which an accused person acts in the proceedings. Under article 64 (2) of the Statute, the Trial Chamber has the power to regulate the conduct of the parties and participants so as to ensure,

¹⁰⁰ ICC-01/04-01/07-T-24-CONF-EXP, 17 April 2008, p. 25, lines 17-25 and p. 26, lines 1-9; "Decision on the 'Defence Application pursuant to Article 57 (3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)'", 25 April 2008, ICC-01/04-01/07-444; p.11; ICC-01/04-01/07-T-29-CONF-EXP, 14 May 2008, p. 9-10.

among other considerations, that such conduct does not cause undue delay to the proceedings.¹⁰¹

54. In the view of the Appeals Chamber, a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in "a timely manner". The Appeals Chamber interprets "timely manner" to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance.¹⁰²

55. Based on the facts and circumstances of the instant case, the Trial Chamber concluded that Mr Katanga did not act in a timely manner and rejected the Defence Motion on this ground. Mr Katanga contends that this conclusion was an erroneous exercise of discretion. Mr Katanga raises several arguments to support his claim, which will be addressed below.

¹⁰¹ The legislative history of article 64 (2) shows that the delegates believed that a fair and expeditious trial would not only preserve the rights of the accused but "would prevent a guilty person from delaying the proceedings, as well as secure the early release of an innocent person" and enable the court to "properly manage the case to achieve an early resolution of the case". See General Assembly, "Draft Report of the Preparatory Committee", 23 August 1996, A/AC.249/L.15, p. 14; F. Terrier, Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, (2002), p. 1264-5, where it is observed that the judges of the ICTY, in the debate preceding the enactment of this provision, emphasised the need to give judges of the Court, a "means for ensuring the rapidity of the proceedings and blocking any dilatory strategy a party might seek to pursue".

¹⁰² ICTR, Trial Chamber, *Prosecutor v. Kanyabashi*, "Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings", 23 May 2000, ICTR-96-15-I, paras 68 – 69 where the tribunal, citing the ECtHR in respect of the reasonableness of the length of proceedings, observed: "In the opinion of the European Court of Human Rights, 'reasonableness of the length of the proceedings coming within the scope of Article 6 (1) must be assessed in each case according to the particular circumstances. The Court has to have regard, *inter alia*, to the complexity of the factual or legal issues raised by the case, to the conduct of the applicants and the competent authorities and to what was at stake for the former, in addition to complying with the 'reasonable time' requirement [...]". The tribunal continued: "the Chamber emphasises that the conduct of both parties can cause the trial of an Accused to be unduly delayed and reminds both parties to perform their duties in a manner to expedite the proceedings so as to ensure respect of the Accused's fundamental human right to trial without undue delay".

56. At the outset, the Appeals Chamber observes that to support his arguments, Mr Katanga relies¹⁰³ on four cases of the ECtHR developed in relation to the institution of proceedings to determine “civil rights and obligations”.¹⁰⁴ The Appeals Chamber draws attention to the fact that the jurisprudence of the ECtHR cited by Mr Katanga was developed in a different context than that giving rise to the present appeal. The case of *Golder v. United Kingdom* concerned the right of a prisoner to sue a fellow prisoner for libel;¹⁰⁵ the case of *Stubbings and others v. United Kingdom* concerned limitation periods for compensation claims based on childhood abuse;¹⁰⁶ the case of *Prince Hans-Adam II of Lichtenstein v. Germany* concerned the right to access to court “in respect of [a] claim for restitution of property, namely a painting confiscated by the former Czechoslovakia”;¹⁰⁷ and the case of *Ashingdane v. United Kingdom* concerned the right to challenge the denial of the transfer of a patient suffering from a mental disorder to another hospital.¹⁰⁸ In contrast, the present case concerns the timeliness of a motion for a stay of proceedings brought in the course of criminal proceedings, based on allegations of unlawful pre-surrender arrest and detention. Thus, in the view of the Appeals Chamber, the relevant question to be answered is not whether the Impugned Decision violated Mr Katanga’s right of access to a court, but rather whether it infringed his rights as conferred under article 67 (1) of the Statute to a “fair hearing”, thereby violating the requirement in article 64 (2) of the Statute.

(a) Adequate notice to Mr Katanga at the trial phase

57. Mr Katanga argues that, even during the trial phase, he had no clear notice of the time limit for the filing of the Defence Motion and that the Trial Chamber violated the principle of legality when it concluded that the Defence Motion was filed too late.¹⁰⁹

58. The Appeals Chamber recalls that, as stated above, the Trial Chamber did not apply a time limit. Rather, in the exercise of its discretion, it considered whether in the

¹⁰³ Document in Support of the Appeal, para. 8.

¹⁰⁴ See article 6 (1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocol 11, 213 United Nations Treaty Series 2889.

¹⁰⁵ ECtHR, *Golder v. United Kingdom*, “Judgment”, 21 February 1975, Application no. 4451/70.

¹⁰⁶ ECtHR, *Stubbings and other v. United Kingdom*, “Judgment”, 22 October 1996, Application nos 22083/93, 22095/93.

¹⁰⁷ ECtHR, *Prince Hans-Adam II of Lichtenstein v. Germany*, “Judgment”, 12 July 2001, Application no. 42527/98, para. 3.

¹⁰⁸ ECtHR, *Ashingdane v. United Kingdom*, “Judgment”, 28 May 1985, Application no. 8225/78.

¹⁰⁹ Document in Support of the Appeal, para. 18.

specific circumstances of the case the Defence Motion was filed in a timely manner. The Trial Chamber took into account Mr Katanga's failure to raise before it, prior to 1 June 2009, the issue of his allegedly unlawful pre-surrender arrest and detention in the DRC.¹¹⁰ Thus, the question is not whether there was a time limit for the filing of the Defence Motion, but whether Mr Katanga was adequately put on notice that he should have raised the issue of his allegedly unlawful pre-surrender arrest and detention earlier.

59. The Appeals Chamber notes that in its Order of 13 November 2008, the Trial Chamber asked the parties and participants to submit their views on a number of questions, covering a wide range of issues relevant to the conduct of the trial. In paragraph 5 of that order, the Trial Chamber invited the parties to "add a second part to their Written Response setting out the issues and observations which they would deem relevant and on which they would like the Chamber to rule". These issues were to be submitted by 24 November 2008 and to be discussed at the status conference scheduled for 27 and 28 November 2008. The Order of 13 November 2008 was issued pursuant to article 64 (2) and 64 (3) (a) of the Statute and regulation 28 (2) of the Regulations of the Court. The first two provisions require the Trial Chamber to regulate the proceedings in a fair and expeditious manner. Regulation 28 (2) authorises a Chamber to order participants to address specific issues in written submissions within a time limit specified by that Chamber. In the view of the Appeals Chamber, it is clear that the purpose of the Order of 13 November 2008 was to ensure that all issues would be resolved expeditiously before the commencement of the hearing of the substantive case. Thus, any pending issues should have been brought to the attention of the Chamber in the written responses of the parties to the Order of 13 November 2008 or, at the latest, at the status conference on 27 and 28 November 2008.

60. In the view of the Appeals Chamber, counsel for Mr Katanga was aware of the purpose of the Order of 13 November 2008 and of the status conference. The Appeals Chamber notes that at the status conference on 28 November 2008, Mr Katanga's counsel stated:

¹¹⁰ Impugned Decision, paras 59 *et seq.*



In addition to the matters that are there, perhaps it's appropriate because I appreciate that a large part of this exercise is in order for you and your colleagues to see better the geography of the case ahead, and at least in this respect can I just raise one matter?

It is proposed on behalf of Mr. Katanga to make a submission in respect of Article 17, which deals with the admissibility of a case before the ICC. This is a matter that must be raised before or at the start of the trial.

Appreciating the significance of that [...] motion and its potential effect, of course, on the future conduct of the case, I can say that we undertake, [...] to have that motion before you this year. But I mention that because it will involve or may well involve a hearing at some time in the New Year, and you, Mr President, will be better positioned to know if that's necessary once you've seen the motion itself.¹¹¹

61. Counsel for Mr Katanga thus found it necessary to notify the Trial Chamber at that status conference of a possible admissibility challenge even though article 19 of the Statute would allow him, at least in his view, to bring the challenge later, before the hearing of the substantive case. Yet, he refrained from alerting the Trial Chamber of a possible motion for a stay of proceedings based on his alleged unlawful arrest and detention in the DRC although this was a matter that he had raised on several occasions before the Pre-Trial Chamber and despite the fact that such a motion could have a significant impact on the proceedings.

62. The Appeals Chamber therefore finds that the Order of 13 November 2008 sufficiently put Mr Katanga on notice that he had to raise the issue of the lawfulness of his pre-surrender arrest and detention in his written observations due on 24 November 2008 or at the subsequent status conference.

(b) No violation of principle of proportionality

63. Mr Katanga submits that the Trial Chamber's decision not to consider the merits of the Defence Motion lacked proportionality in light of the fundamental nature of the issues raised in the Defence Motion.¹¹²

64. The Appeals Chamber is not persuaded by these arguments. In its view, when dismissing the Defence Motion, the Trial Chamber appropriately balanced Mr Katanga's rights and the need for expeditiousness. Requiring the accused person to

¹¹¹ ICC-01/04-01/07-T-53-ENG, 28 November 2008, p. 49, lines 15-25 and p. 50, lines 1-5.

¹¹² Document in Support of the Appeal, para. 21.

act in an expeditious manner is not in itself inconsistent with full respect for his rights. In the view of the Appeals Chamber, in circumstances such as the present, the accused's rights are given full respect so long as the accused person has been given adequate opportunity to assert them. In the matter at hand, the Appeals Chamber finds that Mr Katanga was given an adequate opportunity to raise his alleged unlawful arrest and detention in the DRC. He did not, however, avail himself of this opportunity.

65. The Appeals Chamber finds that in issuing the Order of 13 November 2008, the Trial Chamber was discharging its duty to be fair to Mr Katanga, in the sense of giving him a chance to raise, *inter alia*, the issue of his alleged unlawful pre-surrender arrest and detention in the DRC. By inviting the parties to present relevant issues a month after it was constituted, the Trial Chamber was seeking to ensure that the trial proceeded fairly and expeditiously. In this context, the Appeal Chamber notes that Mr Katanga informed the Trial Chamber at the status conference on 28 November 2008 of his intention to file an admissibility motion, but failed to mention to the Trial Chamber the issue of the alleged unlawfulness of his pre-surrender arrest and detention.

66. Mr Katanga submits furthermore that the Impugned Decision was disproportionate because the Trial Chamber did not consider that he did not only seek a stay of proceedings but also a finding of unlawful arrest and detention to enable him "to make an application for compensation and submissions on sentence at the appropriate time".¹¹³ The Appeals Chamber is not persuaded by this argument. As stated above, Mr Katanga had an adequate and effective opportunity to present the Defence Motion. It is irrelevant in this context that he sought several remedies. As the Prosecutor correctly notes, since the Trial Chamber declined to consider the merits of the Defence Motion, "any request for remedies deriving from the Defence Motion was moot".¹¹⁴

67. The Appeals Chamber therefore finds that the Trial Chamber respected the principle of proportionality in the present case, ensuring fairness to Mr Katanga and the expeditiousness of the proceedings when concluding that Mr Katanga had not

¹¹³ Defence Motion, para. 39; *see* Document in Support of the Appeal, para. 26.

¹¹⁴ Response to Document in Support of the Appeal, para. 23

furnished it with any convincing reasons why the Defence Motion was filed seven months after the Order of 13 November 2008 and declining to consider its merits.

(c) Other opportunities to raise the issue at the trial phase

68. Mr Katanga argues that Trial Chamber should not have taken into account his failure to raise the issue of his alleged unlawful pre-surrender arrest and detention when his detention was reviewed under article 60 of the Statute and at the status conference of 3 February 2009. In his submission, these opportunities to raise the issue were irrelevant factors to the determination of the timeliness of the Defence Motion.¹¹⁵

69. Regarding the reviews of his detention, Mr Katanga asserts that he was not under any obligation to raise the issue of his alleged unlawful pre-surrender arrest and detention at any of those reviews because they were related to his current and not his pre-surrender detention.¹¹⁶ The Appeals Chamber disagrees with this argument. The Appeals Chamber recognises that Mr Katanga may not have been obliged to raise the question of the lawfulness of his arrest and detention in the DRC when the Trial Chamber reviewed his detention at the Court. The Appeals Chamber, nonetheless, notes Mr Katanga's submissions in the Defence Motion, when he states:

In this case, there has been no clean break from the initial and continuing illegality of the detention. It will continue throughout the trial under conditions where the total disregard for the basic rights of the accused in arresting and detaining him and the use of this to enable his transfer to the Court cloud the legitimacy of his presence in the courtroom every additional day the accused is kept in detention.¹¹⁷

70. He concludes:

It is therefore submitted that the trial will remain unfair as long as the continued detention formerly based on a total disregard for the rights of the accused persists, and justice administered by the court has been brought into such serious disrepute that a fair trial has in fact become an impossibility, regardless of the impartiality of the judges in the assessment of the evidence.¹¹⁸

71. Thus, in the Defence Motion, Mr Katanga linked the detention in the DRC with his detention at the Court. Given Mr Katanga's position that his alleged unlawful

¹¹⁵ Document in Support of the Appeal, paras 34 and 35.

¹¹⁶ Document in Support of the Appeal, para. 40.

¹¹⁷ Defence Motion, para. 130.

¹¹⁸ Defence Motion, para. 131.

detention was ongoing, the Appeals Chamber considers it striking that he failed to raise the alleged unlawfulness of his pre-surrender arrest and detention when his detention at the Court was reviewed. In light of Mr Katanga's arguments in the Defence Motion, the Appeals Chamber finds it reasonable for the Trial Chamber to have expected Mr Katanga to utilise the reviews of his detention to raise the issue of his alleged unlawful arrest and detention in the DRC, in order to put an end to what he considered to be an ongoing illegal detention. Mr Katanga cannot now argue that the reviews of the conditions of his detention had nothing to do with the issue at hand. The Appeals Chamber is thus of the view that Mr Katanga's failure to raise the issue of his allegedly unlawful arrest and detention in the DRC when his detention was reviewed under article 60 of the Statute was a relevant factor for the Trial Chamber's decision. The Trial Chamber did not err in this respect.

72. As to the status conference held on 3 February 2009, the Appeals Chamber notes that it was intended to resolve any further outstanding issues before the trial, following the status conferences held in November 2008, and to set a date for trial.¹¹⁹ The Trial Chamber thus gave the parties the chance to raise any issues of concern at this status conference. In light of the purpose of the status conference, the Appeals Chamber finds it reasonable for the Trial Chamber to have taken into account Mr Katanga's failure to raise the issue of his allegedly unlawful arrest and detention in the DRC on 3 February 2009, when determining whether there were convincing reasons why he did not file the Defence Motion earlier.

73. In view of the foregoing, the Appeals Chamber sees no error in the Trial Chamber's reliance on other opportunities afforded to Mr Katanga as one of the relevant factors for its decision to reject the Defence Motion for not having been filed in a timely manner.

(d) New information on 1 June 2009?

74. Mr Katanga submits that the information disclosed by the DRC at the hearing of 1 June 2009, namely that it had not conducted any investigations in respect of Mr

¹¹⁹ ICC-01/04-01/07-T-56-ENG, 3 February 2009, pp. 3-4.

Katanga, was “decisive to [his] decision to file the motion”¹²⁰ and that prior to that date he had not received adequate information from the DRC.¹²¹

75. In his response, the Prosecutor’s avers that by March 2008 he had disclosed to Mr Katanga all the relevant information on the proceedings against him in the DRC.¹²² In this connection, the Appeals Chamber observes that while Mr Katanga asserts that new information came to light at the hearing of 1 June 2009, he does not substantiate this assertion in any meaningful way. His Document in Support of the Appeal does not demonstrate to the Appeals Chamber how the information he received at the hearing on 1 June 2009 was new to him or how, prior to that hearing, the lack of information materially affected his ability to file the Defence Motion at an earlier stage. The Appeals Chamber also notes that in the Impugned Decision, the Trial Chamber stated that the information Mr Katanga relied on in the Defence Motion was largely available to him during the pre-trial phase.¹²³ The Appeals Chamber will defer to this finding of the Trial Chamber in the absence of any concrete substantiation as to how the finding was erroneous. This is because the Trial Chamber is better placed to assess the accuracy of Mr Katanga’s assertions. The Appeals Chamber discerns no error in the Trial Chamber’s conclusion that Mr Katanga relied on information that was already available to him during the pre-trial phase and that he had received the necessary information as of 28 August 2008.

(e) Mr Katanga’s defence strategy

76. Mr Katanga contends that the Trial Chamber did not give sufficient weight to the discretion that a party should enjoy as to when to file a motion.¹²⁴ The Appeals Chamber disagrees with this argument. The Appeals Chamber finds that, contrary to these contentions, the Trial Chamber took this factor into consideration, but concluded that it was outweighed by other relevant considerations.¹²⁵

77. The Appeals Chamber finds the Trial Chamber’s treatment of Mr Katanga’s discretion as to when to file the Defence Motion was reasonable in the circumstances. While a party has a discretion to organise and conduct his or her case in a manner that

¹²⁰ Document in Support of the Appeal, para. 29.

¹²¹ Document in Support of the Appeal, para. 29.

¹²² Response to Document in Support of the Appeal, para. 26.

¹²³ Impugned Decision, para. 61.

¹²⁴ Document in Support of the Appeal, para. 36.

¹²⁵ Impugned Decision, para. 64.



he or she deems appropriate, that discretion is not absolute. As Mr Katanga concedes, the discretion may be circumscribed by the Statute, Rules of Procedure and Evidence and the Regulations of the Court.¹²⁶ Additionally, the Appeals Chamber must also emphasise that the Trial Chamber's obligation to regulate the proceedings to ensure that the trial is fair and expeditious under article 64 (2) of the Statute.¹²⁷ Thus, while the parties are allowed some leeway in deciding how to conduct their cases, this cannot override the Trial Chamber's said obligation. The defence strategy must respect both the procedural framework established by the Court's legal instruments and the overall interests of the administration of justice.

78. As stated above, while Mr Katanga mentioned his intention to file a motion challenging the admissibility of the case at the status conference in November 2008, he did not do the same with regard to the issue of the lawfulness of his detention in the DRC. Even if he was not ready in November 2008 to file a motion regarding his alleged unlawful pre-surrender arrest and detention, his counsel could have informed the Trial Chamber of this potential future motion. This would have allowed the Trial Chamber to take the issue into consideration when planning the proceedings (e.g. by extending the hearing on 1 June 2009 also to this issue). The same applies to the status conference held on 3 February 2009 to set the date for the trial and resolve all pending preliminary issues.¹²⁸

79. It is not for the Appeals Chamber to speculate why Mr Katanga did not raise the issue of the alleged unlawful pre-surrender arrest and detention in November 2008 and 3 February 2009. The Appeals Chamber notes, however, that Mr Katanga, by failing to do so for the sake of his strategy, took the risk that the Trial Chamber may later decide to reject a motion for stay of proceedings based on these facts. In that sense, Mr Katanga's decision cannot be said to have been reasonable. The Appeals

¹²⁶ Document in Support of the Appeal, para. 37.

¹²⁷ See for e.g., ICTR, Appeals Chamber, *Leonidas Nshogoza v. Prosecutor*, "Decision on Appeal Concerning Sanctions", 26 June 2006, ICTR-2007-91-A, paras 7-8. In this case, the Trial Chamber had imposed a pecuniary sanction on counsel for the Defence for flouting the Chamber's order to shorten her witness list. On appeal against this decision, the Appeals Chamber found the penalty to be impermissible, but did not question the Trial Chamber's power to request that counsel reduce his witness list.

¹²⁸ At that status conference, counsel for Mr Katanga stated: "[...] I am aware that a principal objective of you, Mr President and fellow Judges this afternoon is to, as it were, feel the pulse of this case in order to better assess a practical [...] date for trial". See ICC-01/04-01/07-T-56-ENG, 3 February 2009, p. 50, lines 12-15.



Chamber sees merit in the Trial Chamber's conclusion that strategic reasons in themselves could not justify the untimely filing of the motion.¹²⁹

80. The Appeals Chamber therefore finds no fault in the Trial Chamber's treatment of Mr Katanga's strategy in this case. The Trial Chamber properly weighed Mr Katanga's discretion to determine his strategy against the Trial Chamber's duty to ensure the fair and expeditious conduct of the trial and considered it appropriate to reject the Defence Motion.

(f) Mr Ngudjolo Chui's rights

81. Mr Katanga also takes issue with the Trial Chamber's reference in the Impugned Decision to its over-all duty "to ensure that Mathieu Ngudjolo's right to be tried without undue delay is also respected".¹³⁰ He submits that irrespective of whether he was being tried jointly or separately, his rights must be respected. As such, any possible delay resulting from applications by co-accused is relevant for a decision to join two cases, "but is not a matter which should lead to an accused having time limits for the exercise of his rights which vary from those accused in other single trials".¹³¹

82. The question to be determined is whether Mr Ngudjolo Chui's right to be tried expeditiously was taken into account in the Impugned Decision and, if so, whether the Trial Chamber's consideration of Mr Ngudjolo Chui's rights unfairly compromised Mr Katanga's rights.

83. The Appeals Chamber acknowledges that the Trial Chamber's reference to Mr Ngudjolo Chui's rights may *ex facie* give the impression that it considered this factor when deciding the case. The Appeals Chamber, nevertheless, takes the view that reference to Mr Ngudjolo Chui's rights is in itself not improper, given that the trial is a joint one. It would have been improper if the Trial Chamber relied on Mr Ngudjolo Chui's rights at the expense of Mr Katanga's rights. However, in the view of the Appeals Chamber, the Trial Chamber's analysis shows that this was not the case. The reference to Mr Ngudjolo Chui's rights did not in any way affect the Trial Chamber's conclusions as to the timeliness of the Defence Motion. In the Impugned Decision, the

¹²⁹ Impugned Decision, para. 64

¹³⁰ Impugned Decision, para. 42.

¹³¹ Document in Support of the Appeal, para. 41.

Trial Chamber focused on the opportunities that Mr Katanga had had to file his motion and on the reasons why it was not convinced that the late filing of the motion was justified. The Trial Chamber denied the Defence Motion because Mr Katanga did not raise his alleged unlawful pre-surrender arrest and detention at the appropriate time, and not because of Mr Ngudjolo Chui's rights.

84. On this basis, the Appeals Chamber finds that in the circumstances of this case, the reference to Mr Ngudjolo Chui's right to be tried without undue delay was not a factor that was considered to the detriment of Mr Katanga's rights.

5. *Conclusion*

85. As stated above, the Appeals Chamber will not interfere with a discretionary decision of another Chamber unless that decision is vitiated by a legal error, a factual error or a procedural error, and only if the error materially affected the decision. For the above reasons, the Appeals Chamber has discerned no error that justifies interference with the Impugned Decision.

V. APPROPRIATE RELIEF

86. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, the Appeals Chamber has not identified any error in the Impugned Decision. It is therefore appropriate to confirm that decision and to dismiss the appeal.

The dissenting opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova will be filed shortly.

Done in both English and French, the English version being authoritative.



Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 12th day of July 2010

At The Hague, The Netherlands