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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"

Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova

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

The Office of the Prosecutor
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Mr David Hooper
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REGISTRY

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Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova

INTRODUCTION

1. We agree with the conclusions on the preliminary issues addressed in paragraphs 10 to 15 of the "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'" dated 12 July 2010[1] (hereinafter: "Majority Judgment").

2. However, we disagree with the Majority Judgment in upholding the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings"[2] (hereinafter: "Impugned Decision"). As a result of the errors we have found, we would reverse the Impugned Decision and remit the matter to the Trial Chamber to issue a new decision on the "Defence motion for a declaration on unlawful detention and stay of proceedings"[3] (hereinafter: "Defence Motion"). The reasons for this dissent are set out below.

3. In deciding to confirm the Impugned Decision, the Majority reached the following conclusions: the Trial Chamber did not err in law in relation to the timing in general of motions alleging illegal pre-surrender arrest and detention and seeking a stay of proceedings; there was no retroactive application of a time limit; and there was no error in the Trial Chamber's assessment of the facts and circumstances of this case.

4. We cannot agree with these conclusions. In our view, the Trial Chamber erred both as to the timing of motions alleging illegal pre-surrender arrest and detention (and seeking a stay of the proceedings) and in the exercise of its discretion. It also erred when it applied a time limit retroactively. As a result, the Trial Chamber erred in not entertaining the Defence Motion on its merits, to the detriment of Mr Katanga. This dissent follows the overall structure of the Majority Judgment and is divided into five parts.

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[1] ICC-01/04-01/07-2259.
[2] ICC-01/04-01/07-1666-Conf-Exp-tENG, 20 November 2009. The public redacted version, ICC-01/04-01/07-1666-Red-tENG, is dated 3 December 2009.
[3] ICC-01/04-01/07-1258-Conf-Exp, filed on 30 June 2009. A public redacted version was filed on 2 July 2009 as ICC-01/04-01/07-1263.

5. In Part I, the dissent makes some preliminary remarks. In Part II, the dissent considers the issue of the requirement laid down by the Trial Chamber for the first time in the Impugned Decision, namely that motions alleging unlawful pre-surrender arrest and detention (and seeking a stay of the proceedings) must be filed at the pre-trial stage. It concludes that this requirement, as such, has no legal basis. The dissent also notes that this requirement was further developed in paragraph 62 of the Impugned Decision in such a way that the paragraph contradicted the requirement earlier established by the Trial Chamber.

6. In Part III, the dissent considers whether the findings made in relation to the requirement were applied retroactively to the Defence Motion. It concludes that they were and that in doing so the Trial Chamber again erred.

7. In Part IV, the dissent addresses the Trial Chamber's exercise of discretion under article 64 (2) of the Statute (hereinafter, provisions of the Statute are referred to as: "article"). It finds that the Trial Chamber failed to properly balance the factors contained in that provision, in particular those of expeditiousness and Mr Katanga's right to a fair trial. It finds that the Trial Chamber did not take into account the need for adequate notice and the fundamental nature of the right that Mr Katanga was asserting, in addition to several other factors, including the stage of the proceedings at the time of filing of the Defence Motion (the preparatory phase) and Mr Katanga's possible strategy. The dissent also finds that the Trial Chamber failed to properly assess all of the relevant facts of this case. It concludes that a proper consideration of all of these factors would have led the Trial Chamber to rule on the merits of the Defence Motion. In Part V, the dissent summarises its overall conclusions.

I. PRELIMINARY REMARKS

A. First Preliminary Remark

8. The first preliminary remark relates to the issue on appeal. The Defence Motion contained two clear requests in the 'relief sought': first, to "(1) FIND violations of the rights of the accused relating to his prior detention; thus enabling the Defence to make an application for compensation and submissions on sentence at the appropriate time;" and second, to "(2) ORDER a stay in the proceedings against Germain Katanga

or termination thereof".[4] Notably, the Impugned Decision referred sometimes to the issue of unlawfulness of detention in a general sense,[5] while on other occasions expressly linked unlawful detention to a request for a stay of the proceedings.[6] Although the Trial Chamber ultimately dismissed the Defence Motion,[7] it did not refer directly to the issues of compensation and mitigation of sentence in its analysis and findings.[8] In granting leave to appeal, the Trial Chamber spoke more generally about unlawful detention without linking it to any remedy.[9]

9. The Majority Judgment, pointedly, links the issue of unlawfulness to the request for a stay of the proceedings indeed referring solely to e.g. "motions alleging unlawful arrest and detention of a suspect prior to his or her surrender to the Court and seeking a stay of proceedings".[10] In doing so, it appears that the Majority made a connection between the request for a stay of proceedings and unlawful pre-surrender arrest and detention, making it easier to reach the conclusion that such motions should in principle be filed at the pre-trial stage. However, it ignores the fact that, as stated above, Mr Katanga also made requests concerning compensation and mitigation of sentence.[11]

10. The issue before the Appeals Chamber, in the view of the dissent, was the dismissal of the request for a finding of unlawful detention, irrespective of the remedy sought in relation thereto. However, since this dissent is from the Majority Judgment, we cannot but follow its approach to a certain extent and express our disagreement with its findings in relation to the request relating to unlawful detention and its link to stay of proceedings.

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[4] Defence Motion, p. 39.
[5] *See e.g.* Impugned Decision, para. 40.
[6] *See e.g.* Impugned Decision, para. 38.
[7] Impugned Decision, para. 23.
[8] Impugned Decision, paras 34-67. The Trial Chamber simply notes Mr Katanga's requests relating to compensation and mitigation. *See* Impugned Decision, paras 22 and 35.
[9] "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 la détention et en suspension de la procédure*'", 11 February 2010, ICC-01/04-01/07-1859, para. 18 (Trial Chamber refering to, *inter alia*, "the issue of challenges to the lawfulness of the Accused's arrest and detention". In 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*", 30 November 2009, ICC-01/04-01/07-1691, para. 2 (reclassified as public by way of an instruction of 1 February 2010) (hereinafter: "Application for Leave to Appeal"), Mr Katanga asserts that the Trial Chamber erred in dismissing the Defence motion "in its entirety".
[10] Majority Judgment paras 32, 39, and 40; *see also* p. 15 (title).
[11] Defence Motion, *inter alia*, p. 39.

B. Second Preliminary Remark

11. The Trial Chamber dismissed the Defence Motion on the basis that it was filed too late and found that Mr Katanga "ha[d] not advanced any convincing reasons to justify the filing of the [Defence] Motion at such an advanced stage in the proceedings."[12] The Trial Chamber gave no indication, prior to issuance of the Impugned Decision, that timing was an issue and that Mr Katanga's filing was potentially too late. Nor did the Trial Chamber advise the parties that it was the only determinative issue in its disposal of the motion. The issue of timing was also not raised by either Mr Katanga or the Prosecutor in their filings prior to issuance of the Impugned Decision which were instead focused on the merits.[13] In this sense, Mr Katanga referred only to why he had been persuaded to file the Defence Motion when he did.[14] Otherwise, he did not make submissions as to why the Defence Motion should be accepted as being on time. After the filing of the Defence Motion, the Trial Chamber, in our view, gave the impression that it intended to consider the Defence Motion's merits (see further below), as a result of which, Mr Katanga, presumably, did not see the need to request the opportunity to make submissions on timing. The consequence of all of this was that the Trial Chamber did not provide Mr Katanga with the opportunity to advance "convincing reasons"[15] as to why the Defence Motion was filed on time.

12. Although "there is no obligation upon [a Chamber] to share every conceivable aspect of the decision-making process with the parties before arriving at a decision",[16] in this particular case, the Trial Chamber should have given notice of this issue, which it considered to be the only one determinative in its disposition of the Defence Motion. Thus, it should have provided the parties, and in particular Mr Katanga, with the opportunity to make submissions thereon. This approach also finds support in the

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[12] Impugned Decision, para. 61.
[13] *See generally* Defence Motion; "Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings", 17 August 2009, ICC-01/04-01/07-1381.
[14] Defence Motion, para. 3.
[15] Impugned Decision, para. 61.
[16] *Prosecutor v. Germain Katanga*, Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, (OA), 13 May 2008, para. 108.

jurisprudence of the European Court of Justice[17] and the European Court of Human Rights (hereinafter: "ECtHR"), the latter of which has a line of cases indicating that part of the right to adversarial proceedings is that parties must be heard when the Chamber decides an issue on grounds identified on its own motion.[18] However, despite this error, the parties have now had the chance to make submissions on this issue before the Appeals Chamber, and therefore, we find it essential to address the errors made by both the Trial Chamber and the Majority Judgment.

II. MAJORITY JUDGMENT'S FINDING THAT THERE WAS NO LEGAL ERROR AS TO THE TIMING OF MOTIONS ALLEGING ILLEGAL PRE-SURRENDER ARREST AND DETENTION AND SEEKING A STAY OF PROCEEDINGS

A. Summary of Impugned Decision and Majority Judgment

13. In the opening paragraph of the Impugned Decision, the Trial Chamber stated that it was acting pursuant to articles 64 and 67, rule 122 of the Rules of Procedure and Evidence (hereinafter, provisions of the Rules of Procedure and Evidence are referred to as: "rule") and article 24 of the Code of Professional Conduct for counsel. In addressing the Defence Motion, the Trial Chamber first noted, based on previous Appeals Chamber jurisprudence, that the motion was of a *sui generis* nature.[19] It decided that, before it could address the substantive arguments set out in the Defence Motion, it "must satisfy itself that the Motion is admissible."[20] It stated that "[i]t must, in particular, determine whether the provisions of the Statute, the Rules and other relevant provisions authorise a party to introduce a motion for a declaration on unlawful detention and stay of proceedings following the confirmation of charges and at the current stage of the proceedings."[21] It went on to state the following (under the

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[17] European Court of Justice, Grand Chamber, *Commission v. Ireland and others*, "Judgment", 2 December 2009, Case C-89/08 P, para. 54 ("A court must itself observe the rule that the parties should be heard, in particular, when it decides a dispute on a ground it has identified of its own motion").
[18] *See* ECtHR, *Skondrianos v. Greece*, "Judgment", 18 December 2003, application nos 63000/00, 74291/01 and 74292/01, paras 29-32; ECtHR, *Case of Clinique des Acacias and Others v. France*, "Judgment", 13 October 2005, application nos 65399/01, 65406/01, 65405/01 et 65407/01, paras 36-43; ECtHR, *Prikyan and Angelova v. Bulgaria*, "Judgment", 16 February 2006, application no. 44624/98; ECtHR, *Cimolino v. Italy*, "Judgment", 22 September 2009, application no. 12532/05, paras 47-51. It has been argued that *Skondrianos* "goes a considerable way" towards imposing an obligation on the judiciary to assist applicants by letting them know in advance where the court is aiming when it rejects an appeal. S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), p. 94 (hereinafter: "Trechsel").
[19] Impugned Decision, para. 36.
[20] Impugned Decision, para. 38.
[21] Impugned Decision, para. 38.

heading "Stage at which a motion for a declaration on unlawful detention must be submitted"):

> 39. The Chamber considers that a challenge to the unlawfulness 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.
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> 40. 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. Such a requirement is justified by the need to settle at the start of the proceedings any issue that could delay or obstruct the fair conduct thereof.
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> 41. In this regard, the Chamber notes, for example, that under article 19 of the Statute challenges to admissibility or jurisdiction must be made at the earliest opportunity, so as to avoid obstructing or delaying the proceedings. Furthermore, under rule 122(2) of the Rules, if during the confirmation hearing the Pre-Trial Chamber is called upon to rule on such a challenge, it must ensure compliance with the provisions on expeditiousness expressly prescribed by rule 58 of the Rules. Moreover, paragraphs 3 and 4 of rule 122 further provide that any objection or observation concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be raised at the start of the hearing, failing which it will no longer be possible to do so subsequently.
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> 42. Under article 64(2) of the Statute, the Trial Chamber must ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused. Moreover, in the instant case, which involves two accused persons, the Chamber must ensure that Mathieu Ngudjolo's right to be tried without undue delay is also respected [citations omitted].

14. The Trial Chamber then went on to consider what occurred at the pre-trial phase of the proceedings.[22] In doing so, it outlined the history of particular filings and hearings before the Pre-Trial Chamber. It concluded that Mr Katanga did raise the issue of his unlawful detention before the Pre-Trial Chamber but that ultimately he did not file a motion. It stated:

> 48. Yet, for the reasons set out above, the Chamber considers that such a motion should have been introduced during the pre-trial phase and addressed at that stage.

15. It went on to state:

> 49. The Chamber is nevertheless mindful that the position adopted by the Pre-Trial Chamber may have led the Defence for the Accused to believe that it

[22] Impugned Decision, paras 43-50.

was authorized to defer the filing of its motion and postpone it until after the decision on the confirmation of charges.

50. It therefore remains to be determined whether the Chamber itself was officially seized of such a motion, and in due time.

16. Later in the Impugned Decision, in its findings, the Trial Chamber stated:

62. When a party wishes to raise an issue, particularly if the issue might have repercussions on the conduct of the proceedings, it is incumbent on that party to submit the matter to the judges by motion and in a timely manner. If the filing of such a motion is contingent on obtaining information or further documents, the party in question must inform the Chamber of its need to receive such information or documents before submitting its motion. Moreover, if the objection has already been raised before the Pre-Trial Chamber, and if the party wishes to take it up again before the Trial Chamber, then it is obliged to bring it to the latter's attention, promptly and in accordance with the appropriate procedure.

17. The Majority Judgment cited paragraphs 39, 40 and 48 of the Impugned Decision providing that motions alleging unlawful detention (and seeking a stay of the proceedings) must be filed at the pre-trial stage.[23] Referring to the fact that the Trial Chamber went on to consider the opportunities available to Mr Katanga to file his motion at the trial phase, it found that "in so doing, [the Trial Chamber] recognised the need for flexibility in the application of the principle it had identified." In this sense, for the first time, it characterised what the Trial Chamber found in paragraphs 39, 40 and 48, as a "principle".[24] The Majority considered that it "must [...] determine whether the principle that the Trial Chamber identified was correct [...]".[25]

18. It went on to find that there are no express time limits for motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings and it concluded that "the approach" adopted by the Trial Chamber was correct.[26] The Majority maintained "that the principle identified by the Trial Chamber is based, firstly, on considerations of efficiency and judicial economy".[27] It observed that:

[i]t 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 illegal pre-surrender arrest and detention and seeking a stay of

[23] Majority Judgment, paras 36-37.
[24] Majority Judgment, para. 37. *See also* paras 38, 40.
[25] Majority Judgment, para. 38.
[26] Majority Judgment, para. 40.
[27] Majority Judgment, para. 40.

> 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.[28]

19. The Majority stated that "[e]xpeditiousness 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. For this reason, article 64 (2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious" (citation omitted).[29] Finally, the Majority stated "that the principle allows for flexibility."[30] It found that it "thus strikes a fair balance between the rights of the accused person and the requirement of expeditiousness."[31]

B. Analysis

20. The Trial Chamber, in reaching its findings, referred to previous Appeals Chamber jurisprudence which, it stated, characterised a motion similar to the Defence Motion as *sui generis*.[32] Derived from a general idea as to expeditiousness, giving the example of article 19, and referring to rules 122 and 58, and article 64 (2), the Trial Chamber came up with a "requirement", referred to by the Majority as a "principle", that motions alleging unlawful detention (and seeking a stay of the proceedings) should be filed in the pre-trial phase. The Trial Chamber developed on that requirement later in the Impugned Decision.[33]

21. We agree that motions alleging unlawful pre-surrender arrest and detention and seeking a stay of proceedings are not regulated by the Court's legal texts and thus may, as was previously found by the Appeals Chamber, be deemed *sui generis*.[34] We also agree that proceedings at the Court must be expeditious (a factor to be explored further below) and that there is some logic in *preferring* that motions seeking a stay of proceedings based on unlawful pre-surrender arrest and detention be filed at the pre-

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[28] Majority Judgment, para. 41.
[29] Majority Judgment, para. 47.
[30] Majority Judgment, para. 48.
[31] Majority Judgment, para. 50.
[32] Impugned Decision, para. 36.
[33] Impugned Decision, para. 62.
[34] Majority Judgment, para. 39, *referring to Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of 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, ICC-01/04-01/06-772, (OA 4), para. 24.

trial stage.[35] However, to convert this *preference* into a *requirement*, as did the Impugned Decision, or to find that it constitutes a *principle*, as did the Majority, is, in our view, an error.

22. The Trial Chamber referred to the *sui generis* nature of a similar application, to several provisions in the Court's texts and generally to the expeditiousness of proceedings. It did so without clearly specifying the legal basis and how it justified the establishment of the requirement. Some remarks in this regard are in order.

23. For example, the Trial Chamber referred to rule 122 in the opening paragraph of the Impugned Decision and sub-rules (3) and (4) of that rule in paragraph 41, in particular stating that those sub-rules "provide that any objection or observation concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing must be raised at the start of the hearing, failing which it will no longer be possible to do so subsequently."[36] Although one could argue that these sub-rules regulate the timing of the Defence Motion, and that the Trial Chamber considered this to be the case, the Trial Chamber did not clearly state that they were the basis for the establishment of the requirement, referring also, as stated above, to other elements. The result is, that the Trial Chamber seems to have simply referred to them, with article 19 (see below), as examples of provisions that regulate other procedural matters at the pre-trial phase. This conclusion finds support in the fact that the Trial Chamber referred to the Appeals Chamber's jurisprudence as endorsing the *sui generis* nature of such motions. Because the Trial Chamber made this reference, it becomes more difficult to conclude that it understood such motions to be regulated by rule 122, rather than being of a *sui generis* nature (that is, "[o]f its own kind or class; unique or peculiar"[37]). However, the uncertainty created by reference to rule 122 remains.

24. The Trial Chamber also referred to article 64 in the opening paragraph of the Impugned Decision and article 64 (2) in paragraph 42 of the Impugned Decision. The Majority Judgment characterised the Impugned Decision as one which was issued

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[35] *See generally*, Majority Judgment, paras 40-49.
[36] Impugned Decision, para. 41.
[37] B. Garner (ed.), *Black's Law Dictionary* (West Publishing Co., 8th ed., 2004) p. 1475.

pursuant to the discretionary powers of the Trial Chamber.[38] In our view, if the Trial Chamber established this requirement based on its discretionary powers, it in any event erred for the reasons that are set out below.

25. The requirement that had been established was developed upon by the Trial Chamber later in the Impugned Decision. In this respect, although the requirement did not, in our view, seem to leave room for flexibility (such motions *must* be filed in the pre-trial phase[39]), paragraph 62 adds ambiguity and some contradiction. In particular, the Trial Chamber stated in this paragraph, regarding motions generally, that, *inter alia*, "if the objection has *already* been raised before the Pre-Trial Chamber, and if the party wishes to take it up *again* before the Trial Chamber, then it is obliged to bring it to the latter's attention, promptly and in accordance with the appropriate procedure" (emphasis added).[40] Consequently, it becomes unclear as to when the Trial Chamber considered the Defence Motion should have been filed. This paragraph, despite the rigidity found in earlier paragraphs (such motions *must* be filed in the pre-trial phase[41]), seems to suggest that there is some flexibility to the requirement and that such motions could, in fact, be filed later, "again", as long as filed "promptly", which is undefined, "and in accordance with the appropriate procedure", which is also undefined.[42] Indeed, as argued by Mr Katanga, it was unclear to him when he was expected to file the Defence Motion both before and after issuance of the Impugned Decision.[43] The Majority Judgment disregarded paragraph 62, although it did conclude that the Impugned Decision, for different reasons, left room for flexibility in the application of the principle (as named by the Majority).[44]

26. In the end, however, all of this, including reference to several provisions, whether by example or not, simply adds to the ambiguity of the legal basis for the Trial Chamber's findings. Aside from a general idea of expeditiousness of the proceedings and reference to some provisions by way of example, the Trial Chamber

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[38] Majority Judgment, paras 33-34.
[39] Impugned Decision, paras 39-40
[40] Impugned Decision, para. 62.
[41] Impugned Decision, paras 39-40.
[42] Impugned Decision, para. 62.
[43] "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*", 25 February 2010, ICC-01/04-01/07-1916-Corr, para. 17 (hereinafter: "Document in Support of the Appeal").
[44] Majority Judgment, paras 37, 48 and 49.

did not state clearly on what basis it found the establishment of the requirement possible.

27. Assuming that the Trial Chamber considered the Defence Motion to be of a *sui generis* nature, it still established a requirement regulating its filing that was akin to a statutory legal provision – something which is inconsistent with the very nature of a *sui generis* motion. How it derived an idea as specific as dictating the stage of the proceedings at which such a motion should be filed (that is, at the pre-trial phase) based on some examples and a general idea of expeditiousness, remains unclear to this dissent.

28. The Trial Chamber also established a requirement applicable to a phase of the proceedings that takes place before the Pre-Trial Chamber, prior to the confirmation of charges. It did this, albeit it is clear that this is a phase of the proceedings over which the Trial Chamber has no mandate. In this regard, it is our view that Chambers cannot act beyond the scope of the powers assigned to them.

29. Finally, we cannot agree with the Majority Judgment when it elevated what the Trial Chamber defined as a "requirement" to the level of a "principle" – a notion with a different nature and scope. It is even more disturbing to contemplate the potential impact of this shift in definition on future proceedings before the Court.

30. In the end, the basis and content of the Trial Chamber's conclusions are unclear, unsubstantiated, and indeed contradictory. We therefore cannot accept the Majority Judgment's finding that the Trial Chamber did not err.

III. RETROACTIVE APPLICATION

A. Summary of Impugned Decision and Majority Judgment

31. The Trial Chamber, for the first time in the Impugned Decision, established a requirement that regulated when the Defence Motion should have been filed. It then proceeded to apply that requirement, in the same decision, to that motion. In this respect, having set out the course of events at the pre-trial phase, it "consider[ed] that such a motion should have been introduced during the pre-trial phase and addressed at

that stage."[45] It went on to state that it was "nevertheless mindful that the position adopted by the Pre-Trial Chamber may have led the Defence for the Accused to believe that it was authorized to defer the filing of its motion and postpone it until after the decision on the confirmation of charges".[46] As a result, it stated that it had to "determine[] whether [it] itself was officially seized of such a motion, and in due time", going on to consider the opportunities Mr Katanga had had to raise the motion during the trial phase.[47]

32. Having endorsed the Trial Chamber's requirement, labelling it a "principle", the Majority Judgment considered whether the Trial Chamber applied that principle retroactively.[48] It concluded that, because the Trial Chamber went on to consider what occurred at the trial phase, it "did not retroactively apply the principle that motions alleging pre-surrender unlawful arrest and detention 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."[49]

B. Analysis

33. We disagree with the Majority Judgment's finding. The idea of applying a subsequent legislation or law creating a crime or a certain prohibition to "any conduct that precedes it in time" is a manifestation of the well recognised principle of legality, which is also mirrored in the prohibition of retroactivity and *nullum crimen, nullum poena sine lege*.[50] The principle finds wide recognition not only at the national level,

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[45] Impugned Decision, para. 48.
[46] Impugned Decision, para. 49.
[47] Impugned Decision, para. 50.
[48] Majority Judgment, para. 51.
[49] Majority Judgment, para. 51.
[50] *See e.g.* ECtHR, Grand Chamber, *Streletz, Kessler and Krenz v. Germany*, "Judgment", 22 March 2001, application nos. 34044/96, 35532/97 and 44801/98, 22 March 2001, para. 50; ECtHR, Grand Chamber, *Achour v. France*, "Judgment", 29 March 2006, application no. 67335/01, para. 41; ECtHR, Grand Chamber, *Korbely v. Hungary*, "Judgment", 19 September 2008, application no. 9174/02, para. 70; ECtHR, Grand Chamber, *Kononov v. Latvia*, "Judgment", 17 May 2010, application no. 36376/04, para. 185 ("Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) [...] It follows that an offence must be clearly defined in law. This requirement is satisfied where the individual can know from the wording of the relevant provision – and, if need be, with the assistance of the courts' interpretation of it and with informed legal advice – what acts and omissions will make him criminally liable. When speaking of 'law', Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability").

but also in various international and regional human rights instruments.[51] Although this principle is related to the field of criminal law, it depicts an important principle that is related to all legal fields, that no person may be admonished for behaviour based on requirements of which he or she had no knowledge. In this regard, it is noted that:

> The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says.[52]

34. In the context of the present case, the Trial Chamber *did* apply the requirement it had established retroactively. The Trial Chamber erred in deciding that Mr Katanga should have filed the Defence Motion at the pre-trial phase on the basis of a requirement not envisaged by law and laid out by this Chamber for the first time in the Impugned Decision. Mr Katanga was not on notice that he had to raise the matter during the pre-trial proceedings and therefore did not act in accordance with this requirement. As a result, he was admonished.[53] In our view, this was an error.

35. Importantly, when admonishing Mr Katanga for not filing his motion during the pre-trial phase, the Trial Chamber, though it registered the fact "that the position adopted by the Pre-Trial Chamber may have led the Defence for the Accused to believe that it was authorised to defer the filing of its motion and postpone it until after the decision on the confirmation of charges",[54] still did not give sufficient weight to that fact. In such circumstances, the basis on which the Trial Chamber would admonish Mr Katanga for what occurred during the pre-trial phase, when the Chamber seised of the matter at that time had indicated to Mr Katanga that filing later was permissible, seems inexplicable. Moreover, it should be noted that in applying the

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[51] *See e.g.* Universal Declaration of Human Rights, General Assembly, Resolution 217A (III) 12 December 1948, A/810, article 11 (2); International Covenant on Civil and Political Rights, 12 December 1966, 999 United Nations Treaty Series 171, article 15 (1); Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, as amended by Protocol 14, 1 June 2010, 213 United Nations Treaty Series 2889 (hereinafter: "European Convention") article 7 (1); and American Convention on Human Rights, OAS Treaty Series No. 36, 1144 United Nations Treaty Series 123, 22 November 1969, article 9.
[52] United Kingdom, House of Lords, *Black-Clawson Int. Ltd. v. Papierwerke Waldhof-Aschaffenburg*, 5 March 1975, [1975] A.C. 591, p. 638.
[53] Impugned Decision, para. 48.
[54] Impugned Decision, para. 49.

established requirement retroactively, a requirement applicable to the pre-trial phase, Mr Katanga could not, even if so desired, correct his actions. This is because the relevant phase of the proceedings, the pre-trial phase, had clearly ended.

36. We also consider that the Trial Chamber erred in developing on the requirement established in the Impugned Decision by setting out its general approach to the treatment of all motions, for the first time in paragraph 62 of the Impugned Decision, and in applying that approach to the Defence Motion.[55] The Trial Chamber relied on the policy set out in this paragraph when assessing whether Mr Katanga had filed the Defence Motion on time. Aside from the fact that, as seen above, this paragraph contradicts the inflexible established requirement in paragraphs 39 and 40, the Trial Chamber had not advised Mr Katanga as to its content and, therefore, as to the Trial Chamber's expectations.

37. In sum, the Trial Chamber erred in establishing a requirement that had no legal basis in addition to developing on that requirement later in the same decision. It erred in doing this for the first time in the Impugned Decision and in applying it retroactively again in that same decision, to the Defence Motion.

IV. ERROR IN THE TRIAL CHAMBER'S EXERCISE OF DISCRETION IN DISMISSING THE DEFENCE MOTION

A. Summary of Impugned Decision and Majority Judgment

38. Having accepted that Mr Katanga was led to believe that he could bring the Defence Motion before the Trial Chamber, the Trial Chamber proceeded to consider whether it had been "officially seized" of that motion, "and in due time."[56] In assessing the trial phase, it stated that "at no time did the Defence for Germain Katanga raise with it the matter of the unlawfulness of the latter's detention, despite having several opportunities to do so."[57] In particular, it considered events surrounding two status conferences and "[o]bservations filed in relation to the review of the Accused's continued detention."[58] It discounted Mr Katanga's arguments as to

[55] E.g. Impugned Decision, paras 64-66.
[56] Impugned Decision, para. 50.
[57] Impugned Decision, para. 51.
[58] Impugned Decision, p. 18 (heading *ii)*).

new information being heard in court on 1 June 2009[59] (hereinafter: "Hearing of 1 June 2009"),[60] stating that strategic reasons "cannot in themselves justify the late filing of motions such as the one currently at issue."[61]

39. The Trial Chamber in particular found that Mr Katanga had not raised the issue between the transfer of the case to the Trial Chamber and the Hearing of 1 June 2009, and that "the reasons put forward by the Defence cannot justify its inaction in this regard."[62] It considered that "[b]y not filing its Motion until seven months after the initial invitation to the Defence to submit to the Chamber the relevant issues on which it wished the latter to rule, the Defence has not met the aforementioned obligation in relation to expeditiousness, despite the many opportunities subsequently provided to it."[63] It found that "having regard to all the circumstances of the case and in the absence of any convincing explanation from the Defence for Germain Katanga, the Chamber considers that the Motion was filed at too advanced a stage in the proceedings and therefore finds it inadmissible."[64]

40. The Majority stated that, "having concluded that the Trial Chamber was correct in extending its analysis to the trial phase of the proceedings, [it] must next consider whether the Trial Chamber correctly exercised its discretion when it held that the Defence Motion was filed too late."[65] It "observe[d] 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."[66] It found that "the Trial Chamber ha[d] the power to regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct does not cause undue delay to the proceedings."[67] It considered that "a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right"[68] and that, agreeing with the Trial Chamber, "parties must

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[59] ICC-01/04-01/07-T-65-ENG.
[60] Impugned Decision, paras 60-61.
[61] Impugned Decision, para. 64.
[62] Impugned Decision, para. 64.
[63] Impugned Decision, para. 65.
[64] Impugned Decision, para. 66.
[65] Majority Judgment, para. 57.
[66] Majority Judgment, para. 53.
[67] Majority Judgment, para. 53.
[68] Majority Judgment, para. 54.

submit motions that have repercussions on the conduct of the trial in a 'timely manner'". The Majority "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."[69]

41. The Majority then considered the arguments raised by Mr Katanga, finding that he had adequate notice by virtue of the "Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute)"[70] (hereinafter: "Order of 13 November 2008"), that there was no violation of the principle of proportionality,[71] and that the Trial Chamber did not err in relying "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".[72] It also concluded that the Trial Chamber's finding as to whether Mr Katanga was given new information during the Hearing of 1 June 2009 should be accepted,[73] that Mr Katanga's strategy was properly considered[74] and that 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."[75]

B. Analysis

42. We agree, in principle, that as found by the Majority, "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."[76] From this perspective, the Trial Chamber is empowered to regulate its own proceedings under that provision. However, the exercise of its powers must be carried out in accordance with internationally recognised human rights standards. It follows that we disagree with the Majority Judgment's conclusion that the Trial Chamber committed no error in the exercise of its discretion. In particular, we cannot agree with the weight

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[69] Majority Judgment, para. 54.
[70] ICC-01/04-01/07-747-tENG, 13 November 2008.
[71] Majority Judgment, paras 63 – 67.
[72] Majority Judgment, para.73.
[73] Majority Judgment, paras 74-75.
[74] Majority Judgment, paras 76-80.
[75] Majority Judgment, para. 84.
[76] Majority Judgment, para. 53.

placed in the Impugned Decision (and by the Majority) on the need for an expeditious trial at the expense of the rights of Mr Katanga and the need to guarantee him a fair trial.

43. As was also argued in Part II above, the Impugned Decision provides little insight into the factors that the Trial Chamber took into account when reaching its decision to dismiss the Defence Motion. Although the Majority Judgment considered that the Trial Chamber was exercising its powers under article 64 (2),[77] in fact the Impugned Decision itself is somewhat obscure in this respect. Save for a reference to articles 64 and 67 in the opening paragraph[78] and a passing reference to article 64 (2) in paragraph 42, no explicit consideration of the factors set out in that provision may be found, in particular the important obligation of guaranteeing "full respect for the rights of the accused". Indeed, the bulk of the elements contained within article 64 (2) was disregarded. The only common thread running throughout the Impugned Decision is that of expeditiousness and the opportunities that Mr Katanga had to raise this issue before the Trial Chamber.

44. However, if article 64 (2) is the basis for the Impugned Decision, which we do not challenge, then clearly all the factors contained within that provision should have been considered. In this respect, a Trial Chamber "shall ensure that a 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." It is *required* to take into account the different considerations and competing interests contained within this provision. That this is mandatory is clear through use of the word "shall". However, article 64 (2) also imports an element of discretion in relation to its implementation. But, in taking a discretionary decision, the Trial Chamber must ensure that it carefully weighs all the enumerated factors. In addition, and as has been emphasised many times by the Appeals Chamber, the Trial Chamber must ensure that, as required by article 21 (3), it

[77] Majority Judgment, paras 17, 33, 53 and 77.
[78] The opening paragraph stated that the Trial Chamber, "acting pursuant to articles 64 and 67 of the Rome Statute ("the Statute"), rule 122 of the Rules of Procedure and Evidence ("the Rules") and article 24 of the Code of Professional Conduct of counsel, decides as follows:". *See* Impugned Decision, p. 3.

both interprets and applies the law (exercise of its discretion in this context) consistently with internationally recognized human rights.[79]

45. In addressing article 64 (2), the Majority Judgment primarily weighed two competing interests: expeditiousness and the right to a fair hearing, according, in our view, paramount importance to the former. The Impugned Decision also relied primarily on expeditiousness in order to reach its conclusions. Moreover, addressing Mr Katanga's arguments as to access to a court, the Majority Judgment found that "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 confirmed under article 67 (1) of the Statute to a 'fair hearing', thereby violating the requirement in article 64 (2) of the Statute."[80] In this regard, we agree with the Majority Judgment that what is at stake is whether Mr Katanga's right to a fair hearing was respected. In addressing whether it was respected, the Majority dealt with six issues, concluding that there was no violation of Mr Katanga's rights.[81] Having considered those issues, we find that the Majority erred. Accordingly, we find it necessary to first address, the question of expeditiousness, followed by, *inter alia*, the six points addressed by the Majority, in order to demonstrate, against the backdrop of the facts of the case, that Mr Katanga's right to a fair hearing in relation to the Defence Motion was indeed violated and that, therefore, the Trial Chamber erred in the exercise of its discretion in this case.

46. Thus, the next sections analyse: (a) expeditiousness; (b) adequate notice; (c) the fundamental nature of the right in question; (d) Mr Katanga's strategy; (e) new information; and (f) Mr Ngudjolo Chui's right to a trial without undue delay.

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[79] *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change'", 8 December 2009, ICC-01/04-01/06-2205, (OA 15), (OA 16), para. 37; *Prosecutor v. Jean-Pierre Bemba Gombo*, "Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled 'Decision on application for interim release'", 16 December 2008, ICC-01/05-01/08-323, (OA), para. 28; *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486, (OA 13), para. 46; *Prosecutor v. Thomas Lubanga Dyilo*, "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", 14 December 2006, ICC-01/04-01/06-772, (OA 4), paras 36-39.

[80] Majority Judgment, para. 56.

[81] Majority Judgment, paras 57-84.

(a) Expeditiousness

47. As seen above, expeditiousness was a factor referred to several times by the Trial Chamber in reaching its conclusions,[82] while it was relied on heavily in the Majority Judgment.[83] The Majority Judgment stated that "[e]xpeditiousness 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. For this reason, article 64 (2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious" (citation omitted).[84] In an earlier judgment, the Appeals Chamber has found that "[t]he expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial."[85] In this sense, an expeditious trial is a right that must be guaranteed to an accused.[86] We do not disagree that there is a need for, and obligation on, Chambers to ensure that trials before the Court are conducted expeditiously. However, Chambers are equally required to ensure "full respect for the [other] rights of the accused," as guaranteed not only through article 64 (2) but also through an independent provision dealing with the issue – article 67. In this regard, the rights of the accused must not be infringed at the expense of expeditiousness.

48. The Appeals Chamber has specifically stated that the "overall role ascribed to the Trial Chamber in article 64(2) of the Statute [is] to guarantee that the trial is fair and expeditious, and that the rights of the accused are *fully respected*" (emphasis added).[87] Furthermore, Pre-Trial Chamber III has stated that the "expeditiousness of

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[82] Impugned Decision, paras 41, 42, 63 and 65.
[83] Majority Judgment, paras 33, 42-43, 45-47, 49, 59, and 64.
[84] Majority Judgment, para. 47.
[85] *Situation in the Democratic Republic of the* Congo, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 11.
[86] Article 64 (2). This view is also supported in ICTY, Appeals Chamber, *Prosecutor v. Miroslav Kvocka et al.*, "Decision on Interlocutory Appeal by the Accused Zoran Zigic Against the Decision of Trial Chamber I Dated 5 December 2000", 25 May 2001, para. 20 ("The right to an expeditious trial is an inseparable and constituent element of the right to a fair trial.").
[87] *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008'", 21 October 2008, ICC-01/04-01/06-1486, (OA 13), para. 46. This balance has also been acknowledged by other Chambers. Trial Chambers have recognised that they are under an obligation to ensure a *fair* and expeditious trial of the accused (*Prosecutor v. Lubanga*, Trial Chamber I, "Decision Regarding the Timing and Manner of Disclosure and the Date of Trial", 9 November 2007, ICC-01/04-01/06-1019, para. 21; Statement of Judge Bruno Cotte in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-71-Red-ENG, 1 October 2009, p. 3), while Pre-Trial Chambers

the proceedings, namely the speedy conduct of proceedings [should occur] *without prejudice to the rights of the parties* or participants concerned" (emphasis added).[88] This line of reasoning on expeditiousness also finds support in various decisions issued by the *ad hoc* tribunals[89] and ECtHR jurisprudence. In relation to the latter, the ECtHR has stated that "the existence and utilisation of expeditious proceedings in criminal matters is not in itself contrary to Article 6 of the Convention as long as they provide the necessary *safeguards and guarantees* contained therein" (emphasis added).[90]

49. Failure to ensure respect for the rights of the accused becomes all the more glaring when the issue in question has a direct effect on his or her liberty or the final outcome of the case, as is the situation in hand. Thus, although stating that it is acting under the umbrella of expeditiousness for the benefit of an accused, a Chamber may end up depriving that person of his or her right to be heard in respect of an alleged

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have referred to the fact that "expeditiousness of proceedings is closely linked to the concept of judicial proceedings 'within a reasonable time' and complements the guarantees afforded to the suspect, such as the right to *fair* and public proceedings" (emphasis added) (*Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", 25 August 2008, ICC-01/05-01/08-75, para 17; *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, ICC-01/05-01/08-532, para. 20).

[88] *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber III, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", 25 August 2008, ICC-01/05-01/08-75, para. 18; *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009, ICC-01/05-01/08-532, para. 20.

[89] ICTR, Trial Chamber, *Prosecutor v. Édouard Karemera et al.*, "Decision on Joseph Nzirorera's Motion for Stay of Proceedings while Unfit to Attend Trial or Certification to Appeal – Article 20 of the Statute, Rule 73(B) of the Rules of Procedure and Evidence", Case No. ICTR-98-44-T, 11 July 2007, para. 14 *endorsed in* ICTR, Appeals Chamber, *Prosecutor v. Édouard Karemera et al.*, Decision On Nzirorera's Interlocutory Appeal Concerning His Right To Be Present At Trial, Case No. ICTR-98-44-AR73.10, 5 October 2007, para, 12. *See also* ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milosevic*, "Reasons for the Decision on the Prosecution Motion Concerning Assignment of Counsel", IT-02-04, 4 April 2003, para. 41 ("A Trial Chamber has indeed an obligation to ensure that a trial is fair and expeditious; moreover, while ensuring that the trial is fair and expeditions, a Trial Chamber must also ensure that the rights of the accused, as set out in Article 21 of the Statute, are not infringed.").

[90] ECtHR, *Borisova v. Bulgaria*, "Judgment", 21 December 2006, application no. 56891/00, para. 40; ECtHR, *Galstyan v. Armenia*, "Judgment", 15 November 2007, application no. 26986/03, para. 85. Moreover, in a different judgment, in light of the reasoning in the aforementioned case of *Borisova v. Bulgaria,* the ECtHR has argued, albeit in a different context, that although allowing the "expeditious examination of disputes" in relation to election procedures was considered desirable, these procedures "should not result in undue curtailment of procedural guarantees afforded to the parties." *See* ECtHR, *Kwiecien v. Poland*, "Judgment", 9 January 2007, application no. 51744/99, para. 55.

violation of the fundamental human right to liberty – as in fact occurred in the instant case.

50. It is also recalled that the principle of expeditiousness is attributed mostly to the Chamber as an implied duty to organise the expeditious conduct of the proceedings and also to itself expeditiously handle all pending issues before it. In this regard, one may note that pursuant to article 64 (2) it is the Trial Chamber that is under a direct obligation to ensure the expeditiousness of the trial. Therefore, although the requirement of expeditiousness applies to all those concerned in the trial, as has been acknowledged in the Impugned Decision[91] and by the Majority Judgment,[92] the onus of ensuring expeditiousness falls squarely on the relevant Chamber. As a result, regardless of the conduct of the parties, it is the duty of the judicial authority in question, namely the Trial Chamber in this instance, to ensure expeditiousness.[93]

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[91] *See* Impugned Decision, para. 63. The Trial Chamber, in light of article 24(5) of the Code of Professional Conduct for Counsel made the following comment: "[...] Such an obligation [to ensure the trial is expeditious] must necessarily be performed by all those involved in the trial."

[92] Majority Judgment, para. 43.

[93] This specific responsibility has also been upheld by the Inter American Court of Human Rights (hereinafter: "IACtHR") and the ECtHR. The ECtHR has held that despite the fact that "[...] it is for the parties to take the initiative with regard to the progress of the proceedings [...] that the principle does not dispense the *courts* from ensuring compliance with the requirements of Article 6 (art. 6) as regards reasonable time." (emphasis added) (ECtHR, *Scopelliti v. Italy,* "Judgment", 23 November 1993, application no. 15511/89, para. 25. *See also* the following which refer to similar reasoning: ECtHR, *Capuano v Italy*, "Judgment", 25 June 1987, application no. 9381/81, para. 25; ECtHR, *Guincho v Portugal*, "Judgment", 10 July 1984, application no 8990/80, para. 32). In other cases the principal contention of the ECtHR is that a "judicial authority" (ECtHR, *Buchholz v. Germany*, "Judgment", 6 May 1981, application no. 7759/77, para. 50: "Without minimising the importance of the [German procedural differences], the Court considers, as did the Commission, that they do not dispense the judicial authorities from ensuring the trial of the action expeditiously as required by Article 6 (art. 6)") or a "judge" (ECtHR, *Scopelliti v. Italy,* "Judgment", 23 November 1993, application no. 15511/89, para. 25) is not relieved of his responsibility to ensure expeditiousness as a result of the fact that "the power of initiative rests with the parties [...]" (ECtHR, *Guincho v Portugal*, "Judgment", 10 July 1984, application no. 8990/80, para. 32) or that procedures before the courts are "governed by the principle of the conduct of the litigation by the parties [...]" (ECtHR, *Buchholz v. Germany*, "Judgment", 6 May 1981, application no. 7759/77, para. 50). This obligation further arises as a result of domestic legislation which provides for judges to act with "due diligence" (ECtHR, *Guincho v. Portugal*, "Judgment", 10 July 1984, application no 8990/80, para. 32) or with "speed and utmost fairness" (ECtHR, *Scopelliti v. Italy,* "Judgment", 23 November 1993, application no. 15511/89, para. 25). The IACtHR has also determined that the reasonable time during which a trial is to be conducted is determined through a variety of factors, *inter alia*, the conduct of judicial authorities (IACtHR, *Case of Genie-Lacayo v. Nicaragua*, "Judgment", 29 January 1997. Series C No. 30, para. 77; IACtHR, *Case of Suárez-Rosero v. Ecuador*, "Judgment", 12 November 1997. Series C No. 35, para. 72; IACtHR, *Case of Bayarri v. Argentina*, "Judgment" 30 October 2008. Series C No. 187, para. 107; IACtHR, *Case of Valle-Jaramillo et al. v. Colombia*, "Judgment" 27 November 2008. Series C No. 192, para. 155). It has further noted that "lack of due diligence by [...] judicial authorities" (IACtHR, *Case of García Prieto et al. v. El Salvador*, "Judgment", 20 November 2007, Series C No. 168, para. 116) and the "delay of a determination by the judiciary" (IACtHR, *Case of García Prieto et al. v. El Salvador*, "Judgment", 20 November 2007, Series C No. 168, para. 116) can contribute to a determination of a

51. In our view, primacy was wrongfully accorded to expeditiousness in both the Impugned Decision and the Majority Judgment. In addition to the other factors that should have been properly weighed against the need for expeditiousness, the following may be noted.

52. In the last paragraph of the Impugned Decision, the Trial Chamber stated that, as "it need not rule on the merits of the [Defence] Motion, the parties' and participants' submissions on the merits have not been considered in this Decision."[94] The Trial Chamber's rationale for issuing several decisions related to the merits of the motion, accepting a final filing on 6 October 2009,[95] before ultimately dismissing the Defence Motion, which was filed on 30 June 2009, on procedural grounds, is questionable, bearing in mind expeditiousness.[96] First, one may wonder why, if expeditiousness was a concern, the Trial Chamber could not have fixed shorter deadlines within which the relevant addressees had to make their filings.[97] More importantly, one may legitimately query whether the Trial Chamber could not have used that same period of time to consider the merits of the Defence Motion, which would have been in line with expeditiousness, as opposed to seeking various filings, related to the merits, over a period of five months, ultimately dismissing the motion out of concern for expeditiousness.

53. One must also consider whether the Trial Chamber's reliance on expeditiousness was reasonable given the stage of the proceedings at the time of filing of the Defence Motion. In this regard, the Defence Motion was filed at a time when the Trial Chamber was still acting during the preparatory phase of the trial. Mr Katanga advised the Trial Chamber on 1 June 2009 that he intended to file the Defence Motion; at this point, the trial was scheduled to begin nearly four months later, on 24 September 2009. The Defence Motion was filed on 30 June 2009; at this point, the trial was still scheduled to begin on 24 September 2009, that is, nearly three

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violation of the reasonable time in which a case should be investigated. Recently, it has determined that "[i]f the passage of time has a relevant impact on the judicial situation of the induvidual, the proceedings should be carried out mroe promptly so that the case is decided as soon as possible" (IACtHR, *Case of Valle-Jaramillo et al. v. Colombia*, "Judgment", 27 November 2008, Series C No. 192, para. 155).

[94] Impugned Decision, para. 67.

[95] Impugned Decision, para. 14 (Trial Chamber granted email permission to Prosecutor to file additional case law).

[96] *See* paras 72-73 below.

[97] *See e.g.* rule 101.

months later.[98] In addition, on 31 August 2009, the Trial Chamber postponed the start of the trial to 24 November 2009.[99] The Impugned Decision was issued on 20 November 2009, four days before the trial began, nearly five months after the filing of the Defence Motion and nearly six months after Mr Katanga had advised the Trial Chamber that he intended to file the Defence Motion. In the meantime, and as stated, the Trial Chamber issued decisions in relation to the Defence Motion, seeking submissions concerning, presumably, the merits of that motion. The preparatory stage of the proceedings at the time of filing of the Defence Motion was a factor leaning in favour of a decision to consider the Defence Motion on its merits, particularly given its nature.

54. As a result of the above, and read with what follows, we find that the Trial Chamber erred in how it weighed the need for expeditious proceedings in this case.

(b) Adequate Notice

55. The present case concerns the issue of whether a motion filed by Mr Katanga at a particular stage of the proceedings should have been heard on the merits by the Trial Chamber.[100] As such, the question is best phrased in terms of a denial of Mr Katanga's right to be heard, in the context of his general right to a fair trial under article 67 (1)[101] as well as in the context of article 64 (2).

56. This is a fundamental right that is guaranteed at the national level, such as in the procedural due process context,[102] and also at the international level. Article 7 (1) of

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[98] "*Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve)*", 27 March 2009, ICC-01/04-01/07-999, p. 11.
[99] "*Décision reportant la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve*", 31 August 2009, ICC-01/04-01/07-1442, (hereinafter: "Decision Delaying the Hearing on the Merits"), p. 13.
[100] The Defence characterised this issue as a right of access to courts. However, we agree with the Majority that the issue here rather relates to the right to a fair hearing. *See* Majority Judgment, para. 56. The issue on appeal is not so much the denial, by the Trial Chamber, of the *possibility* for Mr Katanga to *institute* judicial proceedings in which the legality of his arrest and detention may be reviewed. Rather, the issue under consideration is the Trial Chamber's failure, in the course of *ongoing* proceedings, to hear Mr Katanga on a specific motion alleging violations of his fundamental rights on the grounds that said motion was filed out of time.
[101] *See also* the Majority Judgment, para. 56.
[102] *See e.g.* United States of America, Supreme Court, *Mathews v. Eldridge*, 24 February 1976, 424 U.S. 319, p. 333; United States of America, Supreme Court, *Fuentes v. Shevin*, 12 June 1972, 407 U.S. 67, p. 80. English courts have held that it is required for magistrates to call upon the party to submit a preliminary view before dismissing their case, even if the court could do so on their own motion. On this, see United Kingdom, High Court of Justice Queen's Bench Divisional Court, *Department of Public Prosecutions v. Cosier*, 5 April 2000, [2000] C.O.D. 284; United Kingdom, Divisional Court, *R*

the African Charter on Human and Peoples' Rights states that "[e]very individual shall have the right to have his cause heard".[103] Having "adequate opportunity to prepare a case, present arguments and evidence" is viewed by the African Commission on Human and Peoples' Rights (hereinafter: "African Commission") as an essential element of a fair hearing.[104] The African Commission has also found the right to have one's cause heard extends to "everything related to the matter, including preliminary issues raised on the matter."[105] The ECtHR likewise recognised that "the right to a fair trial as guaranteed by Article 6 § 1 of the Convention includes the right of the parties to the trial to submit any observations that they consider relevant to their case. The purpose of the Convention being to guarantee not rights that are theoretical or illusory but rights that are practical and effective [...], this right can only be seen to be effective if the observations are actually 'heard', that is duly considered by the trial court" (citation omitted).[106] It has also been stated that "no decision, which is not entirely unconditionally in favour of an individual, may be taken unless the person concerned was previously given an opportunity to state his or her position on the issue. [...] [Further] the right to be heard can be classified as an absolute guarantee".[107] The fundamental nature of the right has also been referred to in the jurisprudence of the *ad hoc* tribunals. For example, the Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia (hereinafter: "ICTY") has stated that generally "a party always has a right to be heard on its motion",[108] while the Appeals Chamber for the Special Court for Sierra Leone has indicated that parties ought to be given an opportunity to be heard "as natural justice demands."[109]

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v. Barking and Dagenham Justices, ex parte Director of Public Prosecutions, 8 November 1994, [1995] Crim LR 953.

[103] African Charter on Human and Peoples' Rights, signed on 27 June 1981, entered into force 21 October 1986, 1520 United Nations Treaty Series 26363, art. 7 (1).

[104] African Commission on Human and People's Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa", 2001, p. 2, accessed at http://www.achpr.org/english/declarations/Guidelines_Trial_en.html. ("Principles and Guidelines").

[105] African Commission, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe*, "Decision", 24-30 June 2009, application no. 284/2003, para. 174.

[106] ECtHR, Grand Chamber, *Perez v. France*, "Judgment", 12 February 2004, application no. 47287/99, para. 80. See also ECtHR, Grand Chamber, *Andrejeva v. Latvia*, "Judgment", 18 February 2009, application no. 55707/00, para. 96.

[107] Trechsel, p. 89-90.

[108] ICTY, *Prosecutor v. Goran Jelisic*, Appeals Chamber, "Judgement", 5 July 2001, IT-95-10-A, para. 25.

[109] SCSL, *Prosecutor v. Alex Tamba Brima et al.*, Appeals Chamber, "Judgment", 22 February 2008, SCSL-2004-16-A, para. 64.

57. At the same time, we do not dispute that the right to be heard is not absolute and may be subject to limitations.[110] As stated above, the African Commission mentions how a fair hearing only requires "adequate" opportunity to present one's case.[111] In the absence of adequate opportunity to be heard, a fundamental right, such as the right to a fair hearing, is only restricted in human rights and ad hoc tribunal jurisprudence through a proportionality assessment that looks to whether the restriction is in service of a sufficiently important objective that must impair the right no more than is necessary to accomplish the objective.[112] International jurisprudence reveals several examples where a party's right to be heard was found to be validly circumscribed.[113]

58. In our view, the issue turns on whether Mr Katanga had an adequate opportunity to be heard, which in turn relates to whether he had certainty as to when he had to file the Defence Motion.

59. Under the European Convention the need for certainty is an indispensable element of a right to a fair hearing. The ECtHR stated that "[t]he right to a fair hearing before a tribunal as guaranteed by Article 6 § 1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things,

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[110] For example, it is agreed in principle that it is acceptable to deny an applicant of the right to be heard on the merits of his or her motion when it is filed outside a *clearly defined* time limit and an extension of time is not merited (e.g. see regulation 35 of the Regulations of the Court). Several such time limits are indicated in the Regulations of the Court. *E.g.* regulation 34 (responses and replies); regulation 50 (specific time limits for victims and State parties); regulation 58 (1) (time limits for appeals under Rule 150); and regulation 64 (2) (time limits for appeals under Rule 154).

[111] Principles and Guidelines, p. 2.

[112] For example, the ECtHR has consistently found in the limiting defence disclosure context that "only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1" and that "in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities". ECtHR, Grand Chamber, *Edwards and Lewis v. United Kingdom*, "Judgment", 27 October 2004, application nos. 39647/98 and 40461/98, paras 46, 48; ECtHR, Grand Chamber, *Jasper v. United Kingdom*, "Judgment", 16 February 2000, application no. 27052/95, para. 52; ECtHR, Grand Chamber, *Rowe and Davis v. United Kingdom*, "Judgment", 16 February 2000, application no. 28901/95, para. 61; ECtHR, Grand Chamber, *Fitt v. United Kingdom*, 16 February 2000, application no. 29777/96, para. 45. *See also* ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, IT-02-54-AR73.7, para. 17 (restrictions on fundamental right like right to self-representation guided by "some variant of a basic proportionality principle").

[113] The Appeals Chamber has previously held that a party has no right to be heard in a case where the reason arguments were not considered because the party's original submissions on the same matters lacked specificity. *Prosecutor v. Germain Katanga*, "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475 (OA), para. 108. The ICTY Appeals Chamber found no error when the prosecution was denied a right to an oral hearing in a situation when all their basic arguments were made in a written motion that required no oral supplement. *Prosecutor v. Goran Jelisic*, "Judgement", 5 July 2001, IT-95-10-A, para. 25.

the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty". In the ECtHR the standard of "lawfulness" is set by the Convention. The standard "requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail."[114]

60. Thus, in order to achieve certainty, a Chamber, when faced with an issue that is not regulated by a relevant legal provision, should compensate for the lack of such a provision that would otherwise provide certainty. In doing so, the Chamber provides the necessary certainty and predictability to the parties and it ensures that the proceedings are properly organised. This in turn guarantees due respect for the rights of the parties. In this respect, Chambers should have in place a clear policy which will indicate to the parties how it expects the proceedings to unfold and in particular, as far as the issue at stake is concerned, that parties are expected to file motions, not otherwise regulated by law, whenever they are in a position to effectively exercise their right. This is an assessment that depends primarily on the facts of each particular case.

61. In the case in hand, the Trial Chamber found that the Defence Motion was filed too late. The result of its conclusions, even though it did not expressly say it, must have been that Mr Katanga was adequately on notice that his motion should have been filed at a much earlier phase in the proceedings, in particular, even at the pre-trial phase. We cannot agree. As put by the Majority, the question is "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",[115] and, in our view, that failure to do so would render his application inadmissible. In addition, whether he had reasonable grounds for not filing his motion earlier. In our view, although Mr Katanga may have missed earlier opportunities when he *could* have filed the Defence Motion, it does not follow that his filing was too late (or not within a reasonable time), when he had not been clearly advised as to when 'too late' would be. Three groups of

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[114] ECtHR, Grand Chamber, *Medvedyev and Others v. France*, "Judgment", 29 March 2010, application no. 3394/03, para. 80.
[115] Majority Judgment, para. 58.

proceedings will be examined; the pre-trial phase, the trial phase and detention reviews.

(i) Pre-Trial Phase

62. As seen above, the Trial Chamber established a requirement that the Defence Motion should have been filed during the pre-trial phase. It admonished Mr Katanga for not having done so. However, the record illustrates that Mr Katanga's conduct in this respect cannot be faulted. Indeed, Mr Katanga may have acted on interpretations of the law and statements made by the Pre-Trial Chamber and certainly had not been advised that he was required to file his motion at this time.

63. Mr Katanga raised this issue from the very earliest moment, his first appearance in Court, on 22 October 2007.[116] Thereafter, he requested the Pre-Trial Chamber's assistance in order to obtain relevant information from the authorities of the Democratic Republic of the Congo (hereinafter: "DRC") and sought its guidance as to the time limits for filing his motion (see further below).[117] The Pre-Trial Chamber made statements in this respect, based on its interpretation that the issues raised related to jurisdiction. In addition, the information sought from the DRC was only received by Mr Katanga on 28 August 2008, which was after the conclusion of the confirmation hearing (which ended on 16 July 2008), and during the 60 day period provided to the Pre-Trial Chamber to issue its written decision.[118] In the result, this was approximately one month before the issuance of that confirmation decision on 30 September 2008.[119]

64. It seems clear to us that the Trial Chamber criticised Mr Katanga for failing to take advantage of opportunities to file his motion during the pre-trial phase, despite

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[116] *See* Impugned Decision, para. 43.
[117] During the initial appearance, Mr Katanga was invited by the Pre-Trial Chamber to submit his arguments in writing. Mr Katanga filed an application, on 7 April 2008, with a view to obtaining the DRC's cooperation in providing documents to substantiate his allegations. In view of his concern as to the deadline by which he had to file his application, the Pre-Trial Chamber, on 17 April 2008, stated that, even if he did not obtain the documents before the confirmation hearing, this would not affect his right to make his challenge under article 19, the Pre-Trial Chamber having characterized the matter as falling under that provision. Further statements were made by the Pre-Trial Chamber in an *ex parte* decision of 25 April 2008 and during a hearing on 14 May 2008. *See* Impugned Decision, paras 43-45.
[118] Regulation 53 of the Regulations of the Court.
[119] "Decision on the confirmation of charges", 30 September 2008, ICC-01/04-01/07-717, (Public Redacted Version).

the fact that it accepted that it would consider the opportunities at the trial phase.[120] It seems also clear that the Trial Chamber took this into account in its overall assessment of the case.[121] In our view, and having considered the facts, in particular the Pre-Trial Chamber's statements to Mr Katanga based on its interpretation of the law, the Trial Chamber erred in taking those possibilities into account. Mr Katanga had not been advised, before the issuance of the Impugned Decision, that he should have filed his motion during the pre-trial phase. He relied on the Pre-Trial Chamber's interpretation of the law and respected the view taken in this regard by the Pre-Trial Chamber, which was seised of the case prior to the trial phase. Nevertheless, he was admonished. In our view it was an error to sanction Mr Katanga for procedural behaviour that was in compliance with a view of a Chamber which was at the relevant time seised of his case. The Trial Chamber's criticism of his failure to raise the matter during that phase is, therefore, unwarranted. Although it is true that Mr Katanga received the information sought from the DRC one month before the confirmation of charges decision was issued by the Pre-Trial Chamber,[122] it is not unreasonable that in these circumstances he did not file the Defence Motion before that Chamber, in particular as that Chamber had indicated that he could file it later.

(ii) Trial Phase

65. Turning to the trial phase, indeed the Trial Chamber's main criticism seems to be, as it states at the outset of its analysis on this phase, "that, between its constitution on 24 October 2008 and the hearing held by it on 1 June 2009, at no time did the Defence for Germain Katanga raise with it the matter of the unlawfulness of the latter's detention, despite having several opportunities to do so."[123] Our study of the record has not uncovered any instances where Mr Katanga advised the Trial Chamber that he intended to raise this matter (that is, before the Hearing of 1 June 2009). Neither has Mr Katanga asserted that this was the case. However, as stated above, the question is whether he knew he had to raise the issue earlier. The Trial Chamber, in the Impugned Decision, did not expressly consider whether Mr Katanga had such notice. Rather, it largely focused on the opportunities that were available to him in addition to the Order of 13 November 2008. In considering those opportunities, the

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[120] Impugned Decision, paras 48-50.
[121] *See* Impugned Decision, paras 48, 66.
[122] *See above*, para. 63.
[123] Impugned Decision, para. 51.

Trial Chamber referred to the Order of 13 November 2008, the status conferences of 27 and 28 November 2008 and 3 February 2009 and its reviews of Mr Katanga's detention as required under article 60. The Majority Judgment, however, considered whether Mr Katanga had adequate notice, and in doing so relied heavily on the Order of 13 November 2008.[124] In our view, we must now consider whether Mr Katanga had adequate notice and certainty as to when he had to raise this issue during the trial phase.

66. In the Order of 13 November 2008, the Trial Chamber, pursuant to article 64 (2) and 64 (3) (a) and regulation 28 (2) "address[ed] a list of questions to the participants and the Registry [...]",[125] requesting answers thereto which they could then expand on in status conferences to be later convened. It "further invite[d] the participants and the Registry 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."[126] In the list of questions, it included a question as to whether "the Defence [has] any observations to make concerning the conditions of detention of the accused".[127] Mr Katanga submitted the "Defence Response to the Order dated 13 November 2008" in which he did not raise issues other than those in the "list of questions" and otherwise, responded to the latter question by indicating gratitude for the arrangement of a visit from his family, making no observations on the conditions of his detention.[128]

67. As stated, the Majority focused on this order, finding that it "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."[129] It is also notable that nowhere in the Impugned Decision does the Trial Chamber itself rely on the Order of 13 November 2008 as establishing a deadline. It is only in paragraph 65 of the Impugned Decision that the Trial Chamber implicitly refers to this order when stating that by "not filing its Motion until seven months after the initial invitation to the Defence to submit to the

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[124] Majority Judgment, paras 59-62.
[125] Order of 13 November 2008, para. 3.
[126] Order of 13 November 2008, para. 5.
[127] Order of 13 November 2008, para. 10.
[128] ICC-01/04-01/07-763, 24 November 2008, p. 3.
[129] Majority Judgment, para. 62.

Chamber the relevant issues on which it wished the latter to rule, the Defence has not met the aforementioned obligation in regard to the expeditiousness, despite the many opportunities subsequently provided to it". Indeed, the reference to "the many opportunities subsequently provided to [Mr Katanga]" is also indicative of the fact that the Trial Chamber did not consider the Order of 13 November 2008 to establish a time limit. Rather, as stated above, it seemed to focus on expeditiousness and the opportunities that Mr Katanga purportedly had. In addition, it is noted that although the title on the cover page of the document refers to an "order", the participants were, in fact, in paragraph 5 of that order, *invited* to raise issues with the Trial Chamber.[130] They were not ordered to do so.

68. It is also striking to compare the wording (albeit also not wholly clear) in the Impugned Decision with the unclear wording of the Order of 13 November 2008. In our view, that order lacked certainty both as to deadlines and any possible policy that the Trial Chamber may have established in relation to how it intended to deal with such issues. In this respect, there was a distinct lack of certainty as to the expected procedural behaviour of Mr Katanga. As a result, we cannot agree with the Majority that the Order of 13 November 2008 provided Mr Katanga with adequate notice.

69. As for whether certainty was provided in any other manner, the following facts further illustrate our conclusion that the Trial Chamber established neither a clear time limit nor a policy.

70. In the hearing on 27 and 28 November 2008, which followed the Order of 13 November 2008, the Trial Chamber did not state that no further issues could be raised during or after that hearing.[131] Indeed, albeit his written submissions were due to have been filed on 24 November 2008,[132] the Trial Chamber did not object to Mr Katanga bringing up the issue of admissibility, which had not been discussed in those written submissions, during the status conference on 28 November 2008.[133] The Trial Chamber, in the Impugned Decision, also stated that Mr Katanga did not introduce the

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[130] Order of 13 November 2008, p. 1 (title), para. 5.
[131] *See* ICC-01/04-01/07-T-52 ENG, 27 November 2008; ICC-01/04-01/07-T-53 ENG, 28 November 2008 (hereinafter: "Status Conference of 28 November 2008").
[132] Order of 13 November 2008, p. 11.
[133] Status Conference of 28 November 2008, pp. 49-52.

issue of his unlawful detention during the status conference on 3 February 2009.[134] However, again, the Trial Chamber did not indicate to Mr Katanga, at the time, that this could be problematic.[135]

71. Later, the Trial Chamber scheduled the Hearing of 1 June 2009 in order to deal with Mr Katanga's admissibility challenge. At the end of that hearing, Mr Katanga's counsel stated that he intended to file an application regarding the unlawfulness of his detention. When asked by the Presiding Judge when it would be filed, as "time is running", he replied that it would be "by the end of the month".[136] Just after, the Presiding Judge stated that "[...] it would have been more expeditious to file that motion earlier [...]".[137] When counsel for Mr Katanga responded by stating that "[...] [they would] do [their] utmost to get this motion before [the Chamber] really as soon as [they could]",[138] the Presiding Judge responded by saying: "Well, then, do your best even more". The Presiding Judge also asked his fellow judges, at the end of the hearing, whether they had anything to add. They indicated that they did not. Assuming, *arguendo*, that the Order of 13 November 2008 was sufficient to put Mr Katanga properly on notice, this subsequent exchange, during that hearing, overrode that order and revealed acceptance by the Presiding Judge that the filing was not problematic. The Chamber thereby indicated that the motion would be accepted when filed and that it was not out of time. In fact, one could even consider that the Presiding Judge, through what he stated, established a deadline for the motion in question, though not a fatal one given the aforesaid comment he made at the hearing (i.e.: "Well, then, do your best even more"). Further, if the Trial Chamber was aware that the motion would be too late when filed at the end of June 2009, or that it had imposed a deadline of the sort understood by the Majority in the Order of 13 November 2008, then one would have expected it to have stated that it would reject the intended filing or, at the very least, to have expressed some real concern. It did not.

72. Even if one takes the view that the Trial Chamber could not necessarily be expected to respond definitively to an issue raised in a hearing without prior warning,

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[134] Impugned Decision, para. 53.
[135] *See* "Status Conference", 3 February 2009, ICC-01/04-01/07-T-56 ENG.
[136] Hearing of 1 June 2009, p. 118.
[137] Hearing of 1 June 2009, p. 118.
[138] Hearing of 1 June 2009, p. 119.

the first time it became clear to the parties that there was a problem was in the Impugned Decision, a decision rendered more than five months after the Hearing of 1 June 2009.[139] The fact that the Trial Chamber issued several decisions in the intervening period, rather than illustrating a concern that the Defence Motion had been filed too late, instead demonstrated that the Trial Chamber intended to consider the matter on its merits. In this regard, the Trial Chamber granted a request by the Prosecutor on 7 July 2009[140] for access to the report filed by the Registrar concerning the execution of the warrant of arrest.[141] On 25 August 2009, it issued decisions inviting the Registry[142] and the DRC[143] to file observations. The Trial Chamber later granted a Prosecutor request to file an additional authority,[144] this new authority was filed on 6 October 2009.[145] It should be emphasised that all of the observations submitted to the Trial Chamber dealt with the merits of the Defence Motion and did not touch upon the issue of timing, presumably because no indications had been given by the Chamber that this was an issue. Moreover, the fact that the Trial Chamber sought submissions from both the DRC and the Registry illustrates even more clearly that the Trial Chamber must have been inclined to entertain the merits of the Defence Motion, as such orders must have been directed towards receiving substantive submissions on the merits.

73. It is unusual that, in a case where the Trial Chamber seems to assume that it should have been clear to Mr Katanga that the Defence Motion was late, it itself seems to have been under the impression, until at least the start of October 2009, the date of the last preliminary decision on the issue before the Impugned Decision, that the application could be considered on its merits. Indeed, the Decision Delaying the Hearing on the Merits relies on the need to dispose of the Defence Motion as being

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[139] *See also* the "Second Preliminary Remark" above.
[140] "Prosecution request for re-classification of Report of the Registrar", ICC-01/04-01/07-1276, paras 5-6.
[141] "*Ordonnance autorisant la reclassification d'un rapport du Greffe (norme 23 bis du Règlement de la Cour)*", 15 July 2009, ICC-01/04-01/07-1306.
[142] "Decision Inviting Observations from the Registry on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings", ICC-01/04-01/07-1425-tENG.
[143] "Decision Inviting Observations from the Democratic Republic of the Congo on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings", ICC-01/04-01/07-1426-tENG.
[144] Impugned Decision, para. 14. *See also* "Prosecution Request Pursuant to Regulation 28 for Leave to Present Additional Authority Regarding 'Defence motion for a declaration of unlawful detention and stay of proceedings'", 4 September 2009, ICC-01/04-01/07-1455.
[145] "Prosecution's submission of additional authority regarding 'Defence motion for a declaration of unlawful detention and stay of proceedings'", ICC-01/04-01/07-1511.

one of the reasons why it needs to postpone the trial. The need to dispose of the Defence Motion is not, it must be acknowledged, the main reason, but nevertheless it is one of the reasons. Again, one may question why, if it was clear that it was already too late by this stage, which it should have been if there was a deadline or relevant policy in place, this would have been such a deciding factor.

74. The lack of certainty is also apparent when one looks at the Trial Chamber's inconsistent approach. The Trial Chamber, in relation to admissibility, explicitly decided that, although the "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute"[146] (hereinafter: "Admissibility Challenge") was late, it nevertheless would consider that challenge. It found that such challenges must be filed before the Pre-Trial Chamber,[147] but it excused Mr Katanga's late filing, before the Trial Chamber, because of *the ambiguity of the relevant provisions and the indications that the Pre-Trial Chamber had given Mr Katanga.*[148] As a result, it considered the Admissibility Challenge on its merits.[149] The Trial Chamber found:

> The Chamber is of the view that the reasons given do not excuse the late filing of the Motion. It should indeed be pointed out that strategic considerations invoked by parties cannot by themselves justify the filing of a document out of time. However, in the opinion of the Chamber, and in view of the ambiguity of the provisions of the Statute and of the Rules, there are reasonable grounds to believe that the Defence was never aware that it was filing the Motion out of time and that it was not its intention to do so. On the contrary, the position adopted by the Pre-Trial Chamber at the *ex parte* hearings may even have led the Defence to believe that a challenge, based on any of the grounds set out in article 17(1), could be brought under article 19 of the Statute after the confirmation of charges.[150]

75. It is not clear why the Trial Chamber considered that ambiguity in the latter instance would nevertheless allow it to consider the merits of that challenge, whereas ambiguity in the instant case would not. This is all the more so, since the Trial

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[146] ICC-01/04-01/07-891-Conf-Exp., 10 February 2009. The public redacted version is dated 11 March 2009.
[147] Save for challenges based only on *ne bis in idem*, which could be allowed with the leave of the Trial Chamber and "only in exceptional circumstances", "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 49 (hereinafter: "Reasons for Decision on Admissibility").
[148] Reasons for Decision on Admissibility, paras 56-58.
[149] Reasons for Decision on Admissibility, para. 56.
[150] Reasons for Decision on Admissibility, para. 56.

Chamber, in that case, specifically recalled the position of the Pre-Trial Chamber that "may have led the Defence to believe that a challenge, based on any of the grounds set out in article 17(1), could be brought under article 19 of the Statute after the confirmation of the charges."[151] In the instant case, and as illustrated above, there seems to have been sufficient "ambiguity of the provisions of the Statute and of the Rules" for the Trial Chamber itself to have appeared to have initially proceeded on the basis that it would consider the merits of the Defence Motion. Indeed, there was not only ambiguity but also a clear absence of a provision regulating the timing of the filing of the Defence Motion.

76. Finally, even if the Trial Chamber had intended for the Order of 13 November 2008 to alert Mr Katanga to the fact that he had to file the Defence Motion earlier, this was the first time that the timing of such motions had been considered. In such circumstances, it seems reasonable to us that the Trial Chamber should have followed the approach taken in relation to the Admissibility Motion, clarifying the law and considering the merits. This was, in fact, the predictable approach that Mr Katanga could have expected, based on the Trial Chamber's past practice.

(iii) Detention Reviews

77. The Trial Chamber also relied on reviews of detention as providing Mr Katanga with opportunities to raise the issue of his alleged pre-surrender unlawful arrest and detention.[152] At the same time, the Trial Chamber itself acknowledged that Mr Katanga was not *required* to raise the issues in the Defence Motion in the context of these reviews and that he "doubtless considered that the detention then under review covered only the period starting with his arrival at the Court's Detention Centre on 18 October 2007".[153] Nevertheless, the Trial Chamber went on to use the fact of those hearings in support of its assertion that they were opportunities for when Mr Katanga should have raised the issue. Surprisingly, it also referred to filings that took place *after* the filing of the Defence Motion, and after the issuance of the Impugned

[151] Reasons for Decision on Admissibility, para. 56.
[152] Impugned Decision, paras 54-58.
[153] Impugned Decision, para. 58.

Decision, as being occasions when Mr Katanga could feasibly have filed his motion.[154]

78. It is not disputed that Mr Katanga may have had opportunities for raising the issue, but that is not the same as saying that he was *required* to raise this issue at that time. Indeed, the Trial Chamber's continued reliance and referral to hearings during which Mr Katanga *could* have raised this issue do nothing but illustrate the lack of certainty as to when the cut off date would have been. It was not clear when was too late. If 30 June 2009 (the date of filing of the Defence Motion) was too late, then one may legitimately question why the Trial Chamber would refer to filings after that date in weighing up the opportunities that Mr Katanga had to raise the issue.

Conclusion as to Adequate Notice

79. The facts, as presented in the previous paragraphs, demonstrate that the Trial Chamber had neither a clear policy in place nor had it fixed a clear deadline, both of which would have provided Mr Katanga with certainty as to when the Defence Motion was due to be filed. Mr Katanga was, accordingly, deprived of certainty in relation to the Trial Chamber's expectations of his procedural behaviour.

80. Although the Trial Chamber refers to several possibilities for when the Defence Motion could have been raised, it did not state with clarity when it would have been too late. It found that seven months constituted an unjustified delay; this, despite the fact that Mr Katanga could not have known that this was the case. Had the delay been five or six months (or any number of months), Mr Katanga would still not have known that this was unreasonable, without the Chamber having indicated its approach in advance. The examples given by the Trial Chamber indeed illustrate, if anything, a lack of certainty itself as to when the motion had been due, a conclusion which sits uncomfortably with a finding that it should have been clear to Mr Katanga. This is further illustrated by the events and indications by the Trial Chamber surrounding the actual filing of the Defence Motion which were not of the sort that would have caused him to be concerned as to the timing of his filing, nor to the extent that he would have felt the need to argue that his motion should be accepted as being on time.

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[154] Impugned Decision, para. 56.

81. We also cannot agree with the Majority Judgment's reliance on the Order of 13 November 2009, its finding that that order was sufficiently clear to have put Mr Katanga on notice that he had to file his motion by a certain time and its reliance on the other opportunities that were available to Mr Katanga. None of this meets the standard required to ensure a fair trial, notwithstanding the fact that it is accepted that limitations on the right to be heard may be imposed. In this respect, we accept that the Trial Chamber can regulate its proceedings. But in this case, the Trial Chamber did not indicate with sufficient certainty when and under what conditions motions were to be filed. Clarity for the participants is an essential element of a fair trial and in this case, it was not provided.

(c) The Fundamental Nature of the Right in Question

82. The Trial Chamber's error is also manifested by the complete disregard of the fundamental nature of Mr Katanga's right to be heard in relation to an alleged violation of his right to liberty. The underlying allegation in the Defence Motion is that of unlawful arrest and detention. The right of detainees to have the lawfulness of their arrest or detention reviewed by a court of law and to be released if the detention is found to be unlawful is an integral part of the right to liberty, and is enshrined in the major human rights instruments.[155] The IACtHR has recognised the fundamental nature of this right and has stated that it must be protected even in emergency situations.[156] Even though not all jurisdictions find this right to be non-derogable,[157] fundamental rights, like the right to challenge unlawful detention, can only be restricted through a proportionality assessment that looks to whether the restriction is in service of a sufficiently important objective that must impair the right no more than

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[155] International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668, art. 9 (4); 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5 (4); American Convention on Human Rights "Pact of San Jose, Costa Rica", 22 November 1969, 1144 United Nations Treaty Series 17955, art. 7 (6).

[156] IACtHR, *Habeas Corpus in Emergency Situations (Art. 27.2 and 7.6 of the ACHR)*, "Advisory Opinion", 30 January 1987, Series A, no. 8, para. 33; more recently, *see*, IACtHR, *Castillo Petruzzi et al. v. Peru*, "Judgment", 30 May 1999, para. 187 (stating "of the essential judicial guarantees not subject to derogation or suspension, habeas corpus is the proper remedy in reassuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.").

[157] *E.g.* United States, Article 1 Section 9 of United States Constitution, adopted on 17 September 1787 ("The privilege of the Writ of Habeas Corpus shall not be suspended, *unless when in Cases of Rebellion or Invasion the public Safety may require it*") (emphasis added).

is necessary to accomplish the objective.[158] Thus, international human rights law recognises the right of a detained person to challenge the legality of arrest and detention;[159] as a result, the right to judicial review of the lawfulness of arrest and detention is violated whenever a detained person is not allowed access to courts for judicial review of his or her detention.[160] In addition, the detaining authorities are put under an obligation to provide prompt and automatic review of detention[161] by a court having the power to order the release of the detainee. An application challenging the legality of arrest and subsequent detention must be heard promptly even if the court

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[158] *See* ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, IT-02-54-AR73.7, para. 17 (citing a variety of national and regional human rights jurisprudence to support the idea that "any restriction of a fundamental right must be in service of 'a sufficiently important objective,' and must 'impair the right... no more than is necessary to accomplish the objective.'").

[159] As noted by the Inter-American Court of Human Rights, the right to *habeas corpus* and prompt recourse to a court enshrined in articles 7 and 25 of the American Convention of Human Rights "are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by article 27 (2) – the non derogation clause - of the Convention" in that they serve to "preserve legality in a democratic society". IACtHR, *Habeas Corpus in Emergency Situations* (Arts. 27 (2) and 7 (6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R, (Ser. A) No.8 (1987), para. 42. The Court held that articles 25 and 7 of the ACHR were so fundamental that they could be implied into article 27 (2) – the non derogation clause of the ACHR – in spite of the fact that they were not expressly mentioned in that provision. Specifically, article 27 states that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by [...] this Convention". *See also*, IACtHR, *Martin Javier Roca Casas v. Peru*, OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, para. 95; Inter-American Commission on Human Rights, *Camilo Alarcon Espinoza, Sara Luz Mozombite, Jeronimo Villar Salome, Daniel Huaman Amcifuen v. Peru*, cases 10.941, 10.942, 10.944, 10.945, Report No. 40/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 780 (1997), paras 93-95. Similarly, the ECtHR has stated that article 5 (4) of the European Convention entitles a detained person to a review of the procedural and substantive conditions which are essential to the lawfulness of his detention, *see* ECtHR, Court, *Brogan & others v. United Kingdom*, Judgment, 29 November 1988, application no. 11209/84; 11234/84; 11266/84; 11386/85, para. 65; ECtHR, *Assenov & others v. Bulgaria*, Judgment, 28 October 1998, application no. 90/1997/874/1086, para. 162; ECtHR, *Vodeničarov v. Slovenia*, Judgment, application no. 24530/94, 21 December 2000, para. 33.

[160] IACHR (Commission), *Luis Lizardo Cabrera v. Dominican Republic*, 13 April 1998, OEA/Ser.L/V/II.98, doc. 6 rev., para. 110; Human Rights Committee, *Hammel v. Madagascar*, "Views", CCPR/C/29/D/155/1983, 3 April 1987, para. 20. The Appeals Chamber of the ICTR in the Barayagwiza case, for instance, has emphasised that the "right to be heard on the [writ of habeas corpus] is an entirely separate issue from the underlying legality of the initial detention" and that an applicant's right is violated if the writ is not heard. *Prosecutor v. Jean-Bosco Barayagwiza*, "Decision", 3 November 1999, ICTR-97-19-AR-72, para. 89. At paragraph 88, the ICTR Appeals Chamber states: "[a]lthough neither the Statute nor the Rules specifically address writs of habeas corpus as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules" and that "this right allows the detainee to have the legality of the detention reviewed by the judiciary".

[161] Automatic in the sense of not being dependent on an application made by the detainee. *See also* article 60 (3) of the Statute; IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, "Advisory Opinion OC-9/87", January 30, 1987, Series A No.9. At paragraph 24 the Court stated that: "for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress".

ultimately rejects the application as having no merit. The extent of the protections afforded a detained person in this arena are therefore extensive. A failure to consider such a motion will not necessarily advance the fairness of the trial nor be in the interests of judicial economy. Indeed, an unheard application for judicial review of detention could cause irremediable harm to the accused and call into question the overall fairness of the proceedings. In this regard, if dismissed, this will enable the trial to proceed without the semblance of unfairness, while if upheld, the Chamber avoids injustice to the accused and the waste of judicial resources. Such an approach is thus generally in the interests of the fair administration of justice.[162]

83. It is, however, not suggested that the right to be heard on such a motion overrides the right of the Trial Chamber to regulate its proceedings to ensure that the trial proceeds in a fair and expeditious manner. But, the Chamber should consider the fundamental nature of this right in reaching its decision as to whether to consider the matter. It must weigh this up together with the other factors that must be considered in this balancing exercise under article 64 (2). The burden placed on the Trial Chamber pursuant to this provision requires it to ensure that the fair administration of justice is upheld at all times. In some cases, this may mean that the Trial Chamber may have to exercise its discretion in favour of hearing a motion, even where the party in question has failed to take advantage of earlier opportunities offered by the Chamber. This is the case where there would be no effective remedy for the violation of the accused person's rights at the end of the trial.[163] It would not be enough to say that the accused person has a right to compensation at the end of the trial if the violations against him were such as to warrant a termination of the proceedings at an earlier stage. Therefore, in appropriate cases, the Trial Chamber must hear a motion simply because it is in the interests of the administration of justice to do so. The Trial Chamber must not abuse

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[162] *See* the approach adopted in ICTR, Appeals Chamber, *Prosecutor v. Barayagwiza,* "Decision", 3 November 1999, ICTR-97-19-AR72, para. 72. The Appeals Chamber in deciding that the motion filed by the accused requesting a stay of proceedings on the grounds of gross violations of fundamental human rights was admissible stated: "Given that the Appeals is of the opinion that to proceed with the trial of the Appellant would amount to an act of injustice, we see no purpose in denying the Appellant's appeal, forcing him to undergo a lengthy and costly trial, only to have him raise, once again the very issues currently pending before this Chamber. Moreover, in the event the Appellant was to be acquitted after trial we can foresee no effective remedy for the violation of his rights."

[163] ICTR, Appeals Chamber, *Prosecutor v. Barayagwiza,* "Decision", 3 November 1999, ICTR-97-19-AR72, para. 72.

its discretion, but rather must be flexible in its assessment of the competing interests and must balance them carefully.

84. In this case, the Trial Chamber failed to give sufficient weight to the nature of the Defence Motion. If it had done so, together with the other factors, it would have seen the need to consider the matter on its merits. The Appeals Chamber has stated that "human rights underpin the Statute [...] first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety".[164] In this context, it is difficult to conceive how the issues underlying the Defence Motion, i.e. an allegation of unlawful detention, which is of such a fundamental nature, would not have an impact on the concept of a fair trial, and which, together with the other issues, would not have led the Trial Chamber to consider it on the merits. The Trial Chamber stated that "[i]t is in the interests of all, and primarily 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".[165] Expedition is certainly in the interests of suspects, as long as there is no impact on their right to liberty and it does not deprive them of the right to be heard by a court of law. For the sake of expeditiousness, Mr Katanga was denied the right to be heard on an issue of a fundamental nature and directly related to the deprivation of his liberty.

(d) Mr Katanga's Strategy

85. Regarding his strategy, Mr Katanga argues:

> 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

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[164] *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "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 December 2006", 14 December 2006, ICC-01/04-01/06-772 (OA4), para. 37.
[165] Impugned Decision, para. 40.

> the case. Both depended in different ways on the intentions of the DRC in detaining the accused.[166]

86. He goes on to argue that:

> 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.[167]

87. He also argues that "[t]he 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."[168] The Trial Chamber found that "any strategic reasons which could account for the filing of submissions at specific times in the proceedings cannot in themselves justify the late filing of motions such as the one currently at issue."[169] We do not necessarily disagree. Although participants must be allowed some discretion to deciding how to conduct their cases, this cannot override the Chamber's duty to regulate the proceedings within the confines of the law. It is true that counsel strategy may be validly circumscribed by the provisions of the ICC statutory scheme, ethical considerations[170] and properly exercised discretion by a Chamber.[171]

88. The question here is whether the Trial Chamber correctly took into account Mr Katanga's right to have a certain strategy. In this respect, although in a different

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[166] Document in Support of the Appeal, para. 29.
[167] Document in Support of the Appeal, para. 30.
[168] Document in Support of the Appeal, para. 37.
[169] Impugned Decision, para. 64.
[170] *Egs* Code of Professional Conduct for Counsel, 2 December 2005, ICC-ASP/4/Res.1, art. 5 (counsel must exercise mission before the International Criminal Court with integrity and diligence, honourably, freely, independently, expeditiously and conscientiously); art. 14 (counsel must abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code); art. 24 (3) (counsel shall not deceive or knowingly mislead the Court).
[171] *E.g.* article 64 (2) of the statute.

context, the Appeals Chamber has stated that "[a]s a rule, counsel is best placed to appreciate the needs of a case, especially the time needed for going into matters at issue in the way expected of counsel."[172] Accepting that proceedings at the ICC are not the same, one may also note that the ICTR Appeals Chamber stated that "the proceedings at the Tribunal are essentially adversarial and it is the parties who are primarily responsible for the conduct of the debate. A Trial Chamber cannot dictate to a party how to conduct its case."[173] Indeed, the ICTY Appeals Chamber has also stated that "as a general principle, an accused's right to a fair trial is infringed when counsel admittedly does not understand the case of his client and fails to prepare a proper defence strategy."[174] It has been found to be a violation of counsel's duty of reasonable diligence to his/her client to not make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber."[175] Therefore, it is clear that counsel is entitled, and indeed should, ensure that he or she has a strategy for how he or she will defend a client.

89. We have already noted that Mr Katanga *could* have advised the Trial Chamber of his forthcoming motion at an earlier stage, but that, based on the lack of certainty as to how the proceedings were to be conducted, he was not obliged to do so.[176] Again, we do not find that a counsel has an unlimited right to strategise at the expense of the trial as a whole, but he must have a certain right. There is a difference between strategic decisions that are made as part of an overall defence strategy to the case and decisions that amount to strategic efforts to undermine the conduct of proceedings. The timing of the Defence Motion may have been part of Mr Katanga's strategy but is not in itself an effort to undermine the proceedings. Although it is not that it should have been the sole reason why the Defence Motion should have been considered on

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[172] *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, "Decision of the Appeals Chamber on the Defence application for an extension of time of 9 May 2007", 11 May 2007, ICC-01/04-01/06-903, (OA 8), para. 3.
[173] ICTR, *Ferdinand Nahimana et al. v. The Prosecutor*, Appeals Chamber, "Judgement", 28 November 2007, ICTR-99-52-A, para. 124, footnote 289. *See also* ICTR, Appeals Chamber, *Prosecutor v. Simon Bikindi*, "Judgement", 18 March 2010, ICTR-01-72-A, para. 22.
[174] *Prosecutor v. Momcilo Krajisnik*, Appeals Chamber, "Decision on Appellant Momcilo Krajisnik's Motion to Present Additional Evidence," 20 August 2008, IT-00-39-A, para. 19.
[175] ICTY, Appeals Chamber, *Prosecutor v. Zoran Kupreškić et al.*, Appeals Chamber, "Judgment", 23 October 2001, IT-95-16-A, para. 50, *citing* ICTY, *Prosecutor v. Dusko Tadić*, Appeals Chamber, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, IT-94-1-A, para. 47.
[176] *See above*, para. 78.

its merits by the Trial Chamber but his counsel's right to develop a strategy should have been properly weighed against the other factors at issue.

(e) New Information

90. Mr Katanga also refers to the existence of new information that came to light in the Hearing of 1 June 2009, which gave him further incentive to file the Defence Motion.[177] The Trial Chamber stated that despite Mr Katanga's argument that this information "was decisive in the filing of the Motion [...] [i]t nevertheless appears that the arguments set out in the latter rely *for the most part* on information which was already available to the Defence at the Pre-Trial phase. Moreover, the Chamber notes that, as of 28 August 2008, the Defence had received the requested information from the DRC authorities" (emphasis added).[178] In this way, the Trial Chamber itself left open the possibility that *some* information was new, although it did not reveal the nature of that new information. Mr Katanga reiterated, on appeal, that "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."[179]

91. The Majority considered that as Mr Katanga had not substantiated his submission that there was new information, it would defer to the findings of the Trial Chamber on this question.[180] In this regard, there are two issues that merit consideration: first, whether the information raised in the Hearing of 1 June 2009 was indeed new (there seems to be disagreement as to whether this is the case[181]); and second, even if the information was not new, whether Mr Katanga could have reasonably expected that during the Hearing of 1 June 2009 new information could potentially come to light.

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[177] Document in Support of the Appeal, para. 37.
[178] Impugned Decision, para. 61.
[179] Document in Support of the Appeal, para. 26. Later he refers to his decision being "partly based upon" the information provided and that it "was a significant factor in its final decision to file the motion." And, that "[t]he 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." Document in Support of the Appeal, paras 29, 39.
[180] Majority Judgment, para. 75.
[181] Impugned Decision, para. 61, Document in Support of the Appeal, paras 26, 29 and 39, "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", 11 March 2010, ICC-01/04-01/07-1957-Conf-Exp; a redacted version was filed at the same time as ICC-01/04-01/07-1957-Red, paras 5, 28.

92. By reviewing the observations of the DRC which were transmitted to the ICC Registrar,[182] one may observe that the information provided therein was confined to copies of the warrant of arrest for Mr Katanga and documents related to the extension of his provisional detention. The information thus provided was inconsistent and was limited to different legal characterisations of the alleged criminal conduct of Mr Katanga and to different locations in the Democratic Republic of the Congo. This made it reasonable for the Defence to seek more specific and thus useful information for its motion when the proper opportunity became available, this arising in the Hearing of 1 June 2009. It was logical that Mr Katanga wait until he had the opportunity to hear from the DRC 'in person' before he filed his motion, especially since this motion directly involved the actions of those authorities.[183] Certainly, in our opinion, the expectation that during the Hearing of 1 June 2009 new information could potentially come to light was reasonable. Our review of the transcripts of the Hearing of 1 June 2009 show some new information at least in comparison with that provided by the DRC in the DRC Annex.[184] The manner, however, in which the Trial Chamber as well as the Majority treated this question is marginal. More surprising is the approach endorsed by the Trial Chamber in deciding on this matter. In reaching its decision, the Trial Chamber, placed itself in the position of Mr Katanga and assessed, on his behalf, whether the information that arose during that hearing was important

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[182] ICC-01/04-01/07-708-Conf-Exp-Anx2-tENG, registered on 27 August 2008 (hereinafter: "DRC Annex"). We are aware of the confidential *ex parte* nature of this filing. However, we do not consider how we refer to it to be inconsistent with the confidential *ex parte* nature of the document as such.

[183] *See also*, the Application for Leave to Appeal, para. 26: "The Defence was not in possession of the relevant information prior to the decision confirming the charges despite its best efforts to obtain it. The Defence submits that it had good grounds to wait until it had all relevant information. The Defence submits that it would be unprofessional to submit such an application unless it is fully informed of all circumstances surrounding the arrest of the accused. For this, it was perceived necessary to hear the views from the DRC. The Defence made efforts to contact DRC authorities and to get documents from them, but to no avail. Therefore, the Defence submits that it was entirely appropriate to wait until after 1 June 2009, when the DRC authorities made their submissions." The comments made by Mr Katanga's counsel during the Hearing of 1 June 2010 are also noted. On the Presiding Judge stating that it would have been more expeditious for him to file the Defence Motion earlier, Mr Katanga's counsel stated: "[...] We had thought of it, but we felt that it was appropriate to wait until we heard what the representatives of the democratic republic would say, and I think having heard what has been said this afternoon, Mr President, I hope you can see the sense of that, but may I say I've heard what you said, and we will do our utmost to get this motion before you really as soon as we can." Hearing of 1 June 2010, pp. 118-119.

[184] *See* for instance the information provided in the DRC Annex, pp. 19-20 and reiterated in the Reasons for Decision on Admissibility, para. 68. When comparing this information with the statements made by the DRC in the Hearing of 1 June 2009, one could potentially consider that the latter were relatively new. According to the information provided in the DRC Annex, there appear to be charges against Mr Katanga for crimes against humanity committed in Bogoro. Later, in the Hearing of 1 June 2009, the DRC confirmed that there was nothing to that effect. *See* for example, Hearing of 1 June 2009, p. 78, lines 4-5, p. 79, lines 11-13, 15-22.

for him. In this respect, one may question whether the Trial Chamber was in a better position than Mr Katanga to assess whether the information which came to light was decisive for him for the sake of a successful motion.

(f) Mr Ngudjolo Chui's Right to a Trial Without Undue Delay

93. The Trial Chamber stated that:

> [u]nder article 64(2) of the Statute, the Trial Chamber must ensure that the trial is fair and expeditious and conducted with full respect for the rights of the accused. Moreover, in the instant case, which involves two accused persons, the Chamber must ensure that Mathieu Ngudjolo's right to be tried without undue delay is also respected [citation omitted].[185]

94. Mr Katanga argued that the Trial Chamber erred in making this statement and that the Trial Chamber should not compromise his right to raise an issue simply because he has a co-accused.[186] The Majority Judgment found as follows:

> 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.[...].[187]

95. Noting the factors that the Trial Chamber then considered, the Appeals Chamber concluded that the reference made by the Trial Chamber "was not a factor that was considered to the detriment of Mr Katanga's rights."[188]

96. It is true that it is not possible to speculate whether the Trial Chamber relied on this factor in reaching its overall conclusion. However, the fact that the Trial Chamber referred to Mr Ngudjolo Chui's right to a trial without undue delay, in the context of a decision taken on the basis of a need for expedition indicates that the Trial Chamber took this factor into account. This was an error. Taking such an issue into account would have as a consequence that joint trials *per se* are not possible (clearly that is not

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[185] Impugned Decision, para. 42.
[186] Document in Support of the Appeal, para. 41.
[187] Majority Judgment, para. 83.
[188] Majority Judgment, para. 84.

the case at the ICC)[189] or it would imply that in joint trials there are legitimately limited procedural rights for co-accused. The result would be that a co-accused could potentially not raise violations of his or her personal rights as they would possibly have to be rejected because of the rights of the other accused. In our view, although the Trial Chamber did concentrate on the opportunities that were available to Mr Katanga to file the Defence Motion, one may also conclude that its reference to this issue, meant that it gave it some weight and that it based its finding on the need for expeditiousness also on the basis of Mr Ngudjolo Chui's rights. Having done so, in our view, it erred.

Mr Katanga's Requests Related to Compensation and Mitigation of Sentence

97. Finally, we cannot but express concerns regarding the issues of compensation and mitigation of sentence as identified in the relief sought in the Defence Motion. As seen above, the Defence Motion contained two requests, the first of which related to compensation and mitigation of sentence, and the second of which was a request for a stay of the proceedings.[190] The Impugned Decision did not explicitly address the former request, although in the operative part, it "DISMISSES the [Defence] Motion", i.e., in its entirety.[191] Although the Majority Judgment found that the issue was moot because the Trial Chamber did not address the motion on its merits,[192] it is still a valid concern that the Impugned Decision might have an impact on compensation and mitigation despite the specific procedures in place for these issues (article 85 and rules 173-175 regarding compensation and articles 76-78 and rules 145-148 related to the sentence stage).

Conclusion in Relation to Discretion

98. Deciding, nearly five months after the filing of the Defence Motion, that it was filed too late, when there was no clear and express policy of the Chamber in place, including a time limit for the filing of the Defence Motion, and based on a scheme that was set out *ex post facto* in the Impugned Decision, is not a correct use of the discretionary powers of the Trial Chamber. The fact that the Trial Chamber wished to

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[189] *See* rule 136 (dealing with "[j]oint and separate trials").
[190] Defence Motion, p. 39.
[191] Impugned Decision, p. 23.
[192] Majority Judgment, para. 66.

ensure expeditious proceedings is, in and of itself, acceptable. Yet, the Trial Chamber failed to properly satisfy the criterion of certainty. It also failed to properly weigh the need for expeditiousness and to take account of the fundamental nature of the right which Mr Katanga was asserting, Mr Katanga's strategy and new information. In these circumstances, weighing all factors together, the Trial Chamber should have considered the merits of the Defence Motion.

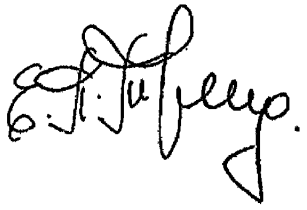
V. OVERALL CONCLUSION

99. The Trial Chamber erred in dismissing the Defence Motion as a result of how it considered all of the circumstances of this case. It erred in establishing a so-called requirement that such motions should be filed at the pre-trial stage, in articulating that requirement for the first time in the Impugned Decision and in applying that requirement retroactively to the Defence Motion in the same decision and to the detriment of Mr Katanga. The Trial Chamber also erred in the exercise of its discretion by failing to properly balance the factors contained in article 64 (2) and, in particular, by placing too much emphasis on the requirement for expedition without considering the rights of the accused. The Impugned Decision is vitiated by all of these errors, taken together and considered within all the relevant circumstances of the case. In this respect, the Trial Chamber erred in relation to all stages, taken individually and as a whole, and Mr Katanga was ultimately prejudiced by the dismissal of his motion.

100. As to the result of our findings, the Appeals Chamber may confirm, reverse or amend a decision (rule 158 (1)). The Trial Chamber erred in fact and in law when it did not consider the Defence Motion on its merits having found it inadmissible for having been filed at too advanced a stage in the proceedings. In view of our conclusions, we would reverse the Impugned Decision and remit the matter to the Trial Chamber to issue a new decision on the Defence Motion.

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

Judge Erkki Kourula



Judge Ekaterina Trendafilova

Dated this 28th day of July 2010

At The Hague, The Netherlands