Cour Pénale Internationale

International Criminal Court

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Date: **26 February 2016**

THE PRESIDENCY

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA

Public - With Public Annex 1

Further observations following the defence mission to Kinshasa

Source: **Defence for Mr Germain Katanga**

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

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INTRODUCTION

1. Further to its preliminary observations,[1] the defence for Mr Katanga ('the defence') hereby informs the Presidency of further matters and in particular its recent mission to Kinshasa[2] and subsequent developments. During the mission, discussions were held with Mr Katanga as well as with members of the army's judicial authorities. The defence took the opportunity to observe the preliminary hearing of the case brought against Mr Katanga and others at the *Haute Cour Militaire* and has since received information relating to two subsequent hearings.

2. In respect to the DRC's continuing failure to comply with article 108 and Rule 214(1) of the RPE, the defence refers to its Preliminary Observations at paragraphs 17 to 21 and its further observations concerning the failure to provide the Protocol required under Rule 214(1)(d).[3] It is understood that Mr Katanga, through his lawyer in DRC Maître Urbain Mutuale, submitted a summary of his views on the proposed trial to the *Haute Cour Militaire.*

MR GERMAIN KATANGA

3. Mr Katanga finds himself in oppressive circumstances. As previously related,[4] he was unlawfully detained by the Congolese authorities for two years before his transfer to The Hague in 2007 for trial. His conviction on a lesser mode of participation, controversially invoking Regulation 55, was in large measure based on his own testimony. He accepted the conviction, abandoned his appeal, and demonstrated genuine and appropriate remorse sufficient to move the sentence review panel to reduce his sentence to enable his early release. Following those eleven years in custody, in the course of which Mr Katanga lost his father, mother and brother,[5] he returned to the DRC in the hope and expectation of completing his sentence on 18th January 2016, rejoining and supporting his family, and contributing to the

[1] ICC-01/04-01/07-3635, Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo ("Preliminary observations"), 22 January 2016.
[2] Mission in Kinshasa from the 31st January till the 7th February 2016.
[3] Confidential Defence observations on the document 'Mémoire Unique', 5 February 2016, ICC-01/04-01/07-3650-Conf.
[4] See paragraphs 53 to 59 of the Preliminary Observations. The history is extensively set out in the 'Defence motion for a declaration on unlawful detention and stay of proceedings', 30 June 2009, ICC-01/04-01/07-1258-Conf-Exp.
[5] His stepmother is also very ill and unlikely to survive another year.

reconciliation of the Ngiti and Hema communities.[6] Instead, he is now having to contemplate a further and arduous process for alleged crimes committed during the same period of time investigated by the ICC.

4. Mr Katanga has instructed Maître Urbain Mutuale to represent him in the DRC. However, he has no means to meet his legal fees other than in the short term. He has no income or savings, there is no legal aid in the DRC, the ICC Registry has refused to assist him and, consequently, he is driven to rely on the goodwill of family and friends.[7] Given their limited means such help will not extend to funding a complex and serious case. Maître Mutuale and the Court are in Kinshasa, while the alleged crime scenes to be investigated are almost 2000 kilometers away. The allegations and proceedings involve multiple accused (their number remains unclear) involved in multiple events (of which there is a lack of clarity) spread over a broad temporal and geographical area (although time and place need to be further specified). The trial process promises to be long, even without taking into account the delays and shortcomings of the DRC justice system. Lacking the means to pay for representation, investigations and the calling of witnesses Mr Katanga will lack the basic right to have adequate time and facilities to prepare his defence.

PRELIMINARY HEARING IN KINSHASA

5. On February 3rd 2016, members of the defence attended, as observers, the preliminary hearing attended by Mr Katanga and others at the *Haute Cour Militaire* in Kinshasa. This is the court which asserts jurisdiction to try the case against him. The court was composed of five officers of rank.

6. The *Haute Cour Militaire* is competent to hear cases of individuals benefitting from 'privileges' of jurisdiction (article 82 and 120 of the Congolese Code of Military Justice) which essentially means it has jurisdiction over those of military rank and civilians charged with them. Mr Katanga is charged in his capacity as Brigadier General, though his continued membership of the army has been disputed by the DRC authorities in the past.

[6] Leading members of those communities called on Mr Katanga to assist them. See ICC-01/04-01/06-3594-Anx1-tENG to ICC-01/04-01/07-3594-Anx8-tENG.
[7] It is understood that representation at each hearing incurs legal fees of at least $300. Mr Katanga has also to pay for his transport to the Court.

7. In respect to the *Haute Cour Militaire,* the defence has been informed of two significant matters. Firstly, there is no appeal from the *Haute Cour Militaire*. That information is supported by observations made by Human Rights Watch.[8] The lack of an effective appeal mechanism will, it is submitted, render any trial process inherently unfair. Secondly, further to the general observation made in its Preliminary Observations as to the death penalty,[9] the defence understands that the DRC retains capital punishment. Indeed, a recent media report confirms that to be the case.[10]

8. The hearing attended by the defence on February 3rd 2016 was listed to start at 9 a.m but started some hours late. Mr Katanga was produced from Makala prison in the uniform of a Brigadier General. There was some confusion as to the reading out of the charges, the composition of the court and representation of the seven accused. The accused included two civilians who had been defence witnesses called by Mr Katanga at his ICC trial.[11] As with the other accused, they have been detained for many years without proper process or access to the courts and have only now been brought before the Court to face charges. Submissions were made on their behalf and on behalf of Mr Katanga.

9. On being called for, there were no victims or victim representatives present.

10. An application for recusal of the Judge President was made by the co-accused Mr Floribert Ndjabu Ngabu on the basis that the President of the Court held rank in the FARDC at the time of the events and was in charge of the proceedings which had led to Mr Ndjabu being unlawfully detained for several years. This application was adjourned until 16th February when it was dismissed, with written reasons to follow.

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[8] See Justice on Trial, Lessons from the Minova Rape Case in the Democratic Republic of Congo, Human Right Watch, 2015, pp. 3, 6, 18, 41, 80, 87, 94, @ https://www.hrw.org/report/2015/10/01/justice-trial/lessons-minova-rape-case-democratic-republic-congo.
See also the Letter to the Netherlands' State Secretary of Security and Justice on the Deportation of Three International Criminal Court Witnesses, of 4 July 2014, footnote 1 @ https://www.hrw.org/news/2014/07/04/letter-netherlands-state-secretary-security-and-justice-deportation-three.

[9] Preliminary Observations paragraph 28.

[10] RadioOkapi.net, *"Nord-Kivu: « le kidnappeur de Rutshuru » condamné à la peine de mort*", 9 January 2016, Annex 1.
See also ICC-01/04-01/07-T-65-CONF-FRA CT 01-06-2009, p 91, l. 24 to p. 92, l. 2.

[11] Floribert Ndjabu Ngabu and Mbodina Iribi Pitchou, see ICC-01/04-01/07-3631-AnxI, pp. 22-26.

11. Maître Mutuale, on behalf of Mr Katanga,[12] raised objection to the jurisdiction of the *Haute Cour* given the lack of compliance with Article 108 and Article 6 of the *Ad Hoc* agreement between the ICC and the DRC. He set out the history of Mr Katanga's original arrest in 2005, its unlawful nature and subsequent lack of process. He provided the Court with the decision of the *Avocat Général* dated 17 October 2007 in which it is stated that the case against Mr Katanga was closed following the transfer to the ICC of the case.[13] He argued that the charge of *"participation à un mouvement insurrectionnel"* fell within the ambit of the amnesty law of 2005 and that the charges contained in the *Décision de Renvoi* lack specificity. He submitted that the time period during which the alleged offences were committed was a period covered by a peace agreement between the DRC government and the armed groups. He further submitted that Mr Katanga's continued detention after January 18th was unlawful, given the absence of lawful authority to detain him and that the "*dossier de la procédure"*, which he had inspected, contained no such mandate.

12. The Court, on the application of the *Avocat Général*, adjourned the case for two weeks, to the 19th of February 2016, in order to obtain further written submissions on the issues raised in the course of the hearing.

13. On 19th February 2016, the Military Court reconvened to consider the submissions made on behalf of Mr Katanga on 3rd February. The prosecuting team had been recomposed by the Minister of Justice and now comprised *l'Avocat Général*, Major General Timothée Munkutu, assisted by General Molisho, Colonel Muntazini and Colonel Likulia.

14. Maître Mutuale repeated the submissions he made on 3rd February. The *Avocat Général* replied that the case against Mr Katanga remained open and that he intended to prosecute him in respect of matters not tried by the ICC. He stated that *"il en a fait son affaire personnelle*"[14]. He maintained that the amnesty did not cover the period charged for the offence of "*Participation à un movement insurrectionnel"*. He opposed the interim release of Mr Katanga on the basis of the risk of threats to

[12] A number of advocates present also made submissions on behalf of Mr Katanga but the defence later ascertained that only Mr Mutuale was instructed to do so.

[13] ICC-01/04-01/07-40-Anx3.6, final paragraph : *"Décidons en outre de clôturer la procédure judiciaire engagée à rencontre dudit prévenu par l'Auditorat Général afin de faciliter la jonction des poursuites au niveau de la CPI ainsi que la bonne application du principe « ne bis in idem ».*

[14] Understood by the defence to mean that Katanga's case had become, for the Avocat General, a personal issue.

witnesses.[15] The *Avocat Général* further argued that the unlawful detention of Mr Katanga was the result of a "*cas de force majeure*". (The '*force majeure'* referred to is the same as that spoken of by General Molosho in the Décision of the *Haute Cour Militaire* on 24/12/15 in the case against Goda Sukpa and others, which dismissed their application for release on the basis of '*force majeure'*, namely that for years there was no judge of the necessary rank available to try their case.)

15. The *Avocat Général* referred to a Letter from the Minister of Justice to the ICC in which the Minister stated that if Mr Katanga could not be tried by the DRC, then this would lead to a breach of the cooperation between the ICC and the DRC. Maître Mutuale responded that such political considerations should not be allowed to influence the judicial process.

MEETING WITH JUDICIAL AUTHORITIES

16. While on mission in DRC the defence met, amongst others, with the *Avocat Général*, Major General Timothée Munkutu, who is in charge of the prosecution. He made it plain that he intended to pursue the prosecution of Mr Katanga. He stated that, in his view, there was nothing to prevent Mr Katanga being prosecuted for any crime except those concerning Bogoro. As submitted in its Preliminary Observations, given the particular circumstances of this case, the defence strongly disagrees with such a narrow interpretation.

Article 108 should be given a broad interpretation

17. The defence accepts that consecutive, or parallel trials, as between a State and the ICC, may be appropriate in certain cases. The discretionary exercise of approval under article 108 will necessarily be done on a case by case basis. The defence refers to paragraphs 26 to 45 of its Preliminary Observations and its submission that, in deciding whether to grant approval under article 108 for further prosecution the Presidency should not only consider the principle of 'non bis in idem' but also consider whether it is appropriate and fair to prosecute the sentenced person for additional offences.

[15] It is not known if the DRC prosecutor has even begun to find witnesses at this stage.

18. The defence notes that, in support of its submission that Article 108 of the Rome Statute has a wider ambit than the principle of *ne bis in idem* contained in article 20(2),[16]article 20(2) refers to 'crimes' while article 108(1) speaks of 'conduct'. In light of the nature of article 108 deriving from the rule of speciality set out in article 101, and the broader reading of it acknowledged by Single Judge Gurmendi in the *Ble Goude* case, the word 'conduct' under article 108 should receive a wider interpretation than that given to 'crimes'. Judge Gurmendi noted *inter alia* that: "[article 101(1)] not only refers to specific offences or conduct but also to the broader term of 'course of conduct', which reflects the systemic nature of crimes under the Statute. In this regard, the provision contained in article 101(1) is much broader than the rule of speciality as traditionally formulated in extradition law".[17]

19. With regards to the nature of both provisions, Kimberly Prost states: "Articles 101 and 108 (…) reflect a principle of general extradition law and practice – the rule of specialty. Article 101 places a specialty obligation on the Court not to prosecute, proceed against or detain a person surrendered to the Court in relation to pre-surrender conduct other than that which formed the basis for the surrender, without a waiver by the surrendering state."[18] In turn, "[i]n Part 10 a similar rule was incorporated but this time with respect to the State of enforcement. It provides that a State of enforcement shall not prosecute or punish the sentenced person (…) for pre-transfer conduct, unless the Court approves. Article 108 specifically provides that the Court should seek the views of the sentenced person before taking a decision on any such request."[19]

20. Further, Professor Schabas notes that: "[article 108] is a particular formulation of the rule of speciality that is dictated by the unique circumstances of international criminal prosecution, and that is set out explicitly in article 101".[20] Interestingly, while the rule of speciality "establishes the right of the extraditing State to require that the

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[16] « No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court."
[17] *Prosecutor v. Charles Ble Goude*, Decision on the "Defence request to amend the document containing the charges for violation of the rule of speciality", ICC-02/11-02/11-151, 11 September 2014, para. 10.
[18] Kimberly Prost, "Enforcement", in Roy S. Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, 673 (Transnational Publishers 2001), p. 690.
[19] Kimberly Prost, "Enforcement", in Roy S. Lee, *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, 673 (Transnational Publishers 2001), p. 690.
[20] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 1st ed. (Oxford University Press 2010), p. 1089.

prosecution and punishment be confined strictly to the substance of the extradition request[,][…] article 108 is presented as an individual right that protects a person, whose sentence is being or has been served, from prosecution within the enforcement State".[21] In this respect, "[a]rticle 108(2) underscores the fact that the right set out in the article belongs to the accused, unlike the rule of speciality, which is a norm to be invoked by the extraditing State."[22]

21. In considering whether it is appropriate and fair to prosecute Mr Katanga for additional offences, the defence submits that it is no more correct for the DRC to pursue the particular charges at this stage than it would be for the ICC Prosecutor to do so. The alleged offences for which the DRC seeks approval are offences of a nature similar to those for which Mr Katanga was tried at the ICC, committed at a similar period of time and in the same capacity. He was tried at the ICC because the DRC requested the ICC to do so. His ICC trial and sentencing was a long and complex process that inflicted considerable hardship on him. Not only that, but the DRC charges come eleven years after the event and with no prior notice that the DRC intended to proceed with them. The proposed prosecution would not be a fair and proper exercise of complementarity but unfair, inappropriate and oppressive and would therefore reflect adversely on the ICC. The Presidency has the authority to approve or not to approve the further trial. As previously submitted,[23] the discretion to be exercised by the Presidency under Article 108(1) must be based on principles of fairness and, in light of article 21(3), must be consistent with internationally recognised human rights.

22. In striking a balance that takes into account the principle of complementarity the Court must guard against permitting a regime of prosecution that is unfair or oppressive. Repeated prosecution of an individual can give rise to unfairness, as the defence submits is the situation in the present case. Article 22 provides very limited protection. The defence suggests that one way in which such unfairness can be avoided is not to approve the prosecution and punishment of a sentenced person under article 108 in circumstances where, absent compelling and exceptional grounds to the contrary, the further prosecution concerns offences which fell within the temporal and

[21] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 1st ed. (Oxford University Press 2010), p. 1089.
[22] William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, 1st ed. (Oxford University Press 2010), p. 1093.
[23] See the Preliminary Observations at para 28 et seq.

geographical ambit of the ICC investigation – the 'catchment area' of the investigation. In the present case the proposed charges concern incidents that were in plain view to the OTP at the time of its investigation.[24] They are not offences that only came to light later. (The criteria could also extend to incidents that should have been known through the exercise of reasonable diligence, though the defence stresses that in the present case the incidents were known.) Mr Katanga was made subject to the choices made by the ICC Prosecutor as to which of the incidents to charge. He had no say in the matter. The Prosecutor, having chosen to focus on particular crimes and not to focus on the others, such as those alleged in the *Décision de Renvoi,*[25] would surely be prevented from seeking at this stage to prosecute Mr Katanga in respect of the other matters, even if consent from the DRC was forthcoming to do so. In the unlikely event such an application were to be made by the OTP, then the defence submits the Court could and would intervene on the basis that further prosecution would be oppressive and unfair.

23. Similarly, the DRC authorities should, absent any compelling reason to the contrary, be prevented from prosecuting Mr Katanga for those crimes**.** Indeed, the '*Décision de Renvoi'* may be regarded as analogous to an OTP motion to reopen its case in chief before the Court and deserves to be put at least to the same test as its ICC counterpart.

24. Further, at no time did the DRC indicate to the ICC, or put Mr Katanga on notice prior to his return to the DRC, that it wished to pursue those matters. Had it in fact been stated to the Trial Chamber in 2009, at the time of the inadmissibility motion, that the DRC intended to prosecute Mr Katanga on those matters then it is unlikely that the case would have been found admissible, in which case the problem of sequential trials would not have arisen. There would have been no ICC trial and no sentence and Mr Katanga would not have spent eight years at The Hague. In its oral submissions[26] to the ICC in 2009, the DRC authorities made it plain that; Mr Katanga

[24] See the Preliminary Observations at paragraphs 35 et seq.
[25] *Prosecutor v. Germain Katanga*, Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo, ICC-01/04-01/07-3635, 22 January 2016, para. 34.
[26] See transcript ICC-01/07-01/04-T-65-TENG, pages 90 et seq. See in particular in the French version, pp 85-86:
"M. MUNTAZINI MUKIMAPA : Il n'existe plus de titre de détention contre Germain Katanga en République démocratique du Congo, et lors de la remise de M. Germain Katanga à la CPI, il a été mis fin aux poursuites contre M. Germain Katanga sur le territoire de la RDC.

had never been investigated or prosecuted in respect of the Bogoro incident; that the only case that concerned him related to the deaths of the MONUC soldiers; and that his transfer to the ICC meant even that issue was 'dismissed'. The DRC authorities went so far as to say that his surrender to the ICC "automatically put an end to his detention in the DRC";[27] and that he was no longer concerned in the proceedings against his former co-accused.[28] The DRC, far from indicating a retention of interest in any prosecution, stated quite clearly that it was leaving the prosecution of Mr Katanga to the ICC.[29] It will be unfair to approve the prosecution of the charges given such express indications and without appropriate notice to the contrary.

25. Mr Katanga conducted his case at the ICC unaware that the DRC would later seek to prosecute him for these matters and at no time was he put on notice that it might do so. Had he known of such an intention the course he took in defending himself at the ICC may have been different. Mr Katanga may have chosen to remain silent to avoid the risk of implicating the DRC in criminal activity, or otherwise stating things that may now be held against him to his prejudice.

26. In the event that he is further tried and sentenced, Mr Katanga may find himself worse off than if he had spent the past eleven years unlawfully detained in the DRC. His detention and sentence by the ICC is unlikely to be taken into account when assessing 'time served' in respect of any future sentence.

FAIR TRIAL ISSUES

27. With respect to article 108(2), *Kress and Sluiter* state that "[n]either Article 108 (…) nor the RPE contain substantial criteria which should guide the Presidency in its decision. Some criteria can be deduced from the ICC Statute. An obvious limit on the Presidency to grant the request is the principle *of ne bis in idem* as contained in

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M. LE JUGE PRÉSIDENT COTTE : Donc, en d'autres termes, l'acte qui porte, je crois, la signature de l'auditeur général est au regard de vos textes de procédure pénale de qui concrétise la fin des poursuites en RDC contre M. Germain Katanga ; c'est bien cela ?
M. MUNTAZINI MUKIMAPA : Affirmatif."
At p 88, l. 10 : *"Par rapport à la demande d'arrestation de remise, l'exécution de la demande d'arrestation et de remise, donc du mandat d'arrêt international a donné lieu s'agissant de la première affaire, donc l'affaire des Casques bleus, quand à M. Germain Katanga à un classement qui vaut non lieu. »*

[27] ICC-01/04-01/07-T-65-ENG, 01-06-2009, 95 lines 4-7; see also lines 8-11.
[28] ICC-01/04-01/07-968-Conf-Exp-AnxJ (19-03-2009), para. 5.
[29] Decision of the *Avocat Général* dated 17 October 2007, ICC-01/04-01/07-40-Anx3.6.

Article 20(2). Further limits follow from Article 21(3).[30] The applicability of this provision should not be restricted to direct violations of internationally recognized human rights by the ICC. Article 21(3) should rather be read more broadly so as to prevent the Presidency from contributing to the violation of internationally recognized human rights by granting the request. This suggestion is in line with the *Soering* approach to international cooperation in criminal matters.[31] It follows that the Presidency should deny a request if a violation of internationally recognized human rights is likely to materialize in the course of the requested prosecution/enforcement and the gravity of such a violation would outweigh the legitimate extradition interests.[32]

28. As previously submitted (see paragraph 53-59 of the Defence Preliminary Observations), the Presidency cannot have sufficient confidence in the DRC being able and willing to provide a fair trial. The history of the DRC proceedings against Mr Katanga, filed by the defence in the record of the case,[33] clearly demonstrates the lack of fairness of the proceedings hitherto and provides no grounds for optimism as to future improvement.

29. Defence concerns as to unfair trial[34] may be summarised briefly as follows: excessive delay; lack of legal aid; lack of adequate facilities for the preparation of the defence; inability to secure the attendance and examination of witnesses under the same conditions as the prosecution; absence of appeal from the *Haute Cour Militaire* on the merits of the case (paragraph 7 above); continued availability of the death penalty (paragraph 7 above); systemic failures of the DRC justice system[35] (see paragraphs

[30] "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."
[31] *ECrtHR, Soering v. the United Kingdom*, 7 July 1989, para. 113.
[32] Claus Kress and Goran Sluiter, "Imprisonment", in Cassese et al., *The Rome Statute of the International Criminal Court*, *Volume II,* 1757 (Oxford University Press 2002), p. 1812.
[33] See ICC-01/04-01/07-1263, Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of proceedings (ICC-01/07-01/04-1258-Conf-Exp), 2 July 2009, paras 6 & seq.
[34] And see paragraphs 46-71 of the Defence Preliminary Observations.
[35] Also demonstrated by the previous history of the process against Mr Katanga and others accused with him involving excessive delay and lack of process (see paragraphs 50-59 of the Defence Preliminary Observations).

67-71 of the Defence Preliminary Observations); political or executive interference and lack of impartiality.[36]

30. As to the latter, in the course of providing the Trial Chamber with the truth, Mr Katanga put himself at risk by implicating the DRC authorities through testifying about deliveries of weapons from Kinshasa and the role of EMOI in helping to organise the attack on Bogoro, Tchomia and Bunia. Two of his witnesses, Mr Ndjabu Ngabu and Mr Pitchu Iribi, similarly provided evidence of Kinshasa's involvement and later unsuccessfully sought asylum on the basis that they had placed themselves at risk by doing so. Several persons met by the defence, whose opinions merit being given weight, considered that the further charging was driven by ulterior motives, such as resentment by the authorities because of the evidence produced during his trial concerning the role of the DRC authorities; the granting of Mr Katanga's early release by the ICC in the face of opposition by the DRC authorities to do so; and even as a warning to Jean-Pierre Bemba, who remains a significant challenge to the Kabila camp, not to return, if available to do so, to contest the future Presidential elections.

31. Nor should the possibility of such interference be dismissed lightly. The defence notes that the *Avocat Général*, Brigadier General Munkutu, who leads the prosecution against Mr Katanga, has previously been the subject of critical comments by Human Rights Watch.[37] In its extensive review of the criminal justice system in DRC in the context of the Minova Rape Case, HRW wrote; "In both the civilian and military justice systems in Congo, certain top justice officials have strong ties with the executive or other political officials. This can be an impediment to independence. For example, Gen. Timothée Mukunto, in the General Military Prosecution Office in Kinshasa, is seen by many as a controversial and politicized figure. He was formerly the president of the *Cour d'Ordre Militaire*, a feared exceptional court created in 1997 by then-President Laurent-Désiré Kabila, which was widely criticized for unfair and politically biased trials. Mukunto reportedly had other non-judicial functions that

[36] See also Justice on Trial, Lessons from the Minova Rape Case in the Democratic Republic of Congo, Human Right Watch, 2015.

[37] Justice on Trial, Lessons from the Minova Rape Case in the Democratic Republic of Congo, Human Right Watch, 2015, p. 87: The footnote to that section reads: " Timothée Mukunto was the adviser to Pierre Lumbi, President Kabila's security advisor, and a member of the "National Security Council," an informal body that advises the president on national security issues. Human Rights Watch telephone interview with Congolese justice expert, September 20, 2014; Human Rights Watch interview with Congolese justice expert, Kinshasa, November 10, 2014; Human Rights Watch interview with Congolese civil society activist, Kinshasa, November 11, 2014; Human Rights Watch interview with Congolese judicial official, Kinshasa, June 2, 2015.

made him close to senior political and security officials in Kinshasa for a long time." HRW obviously does not make such comments lightly. The footnotes to that section go on to say: "As general prosecutor, General Mukunto was involved in a number of judicial cases with high political stakes, including the Kilwa case (which involved the Anvil mining company), the case involving the murder of human rights activist Floribert Chebeya, and the case of the murder of Col. Mamadou Ndala. Serious concerns about political interference and lack of impartiality were raised in each of these cases."

32. By Article 21(3) of the Statute, the Court is bound to apply and interpret the law in a manner 'consistent with internationally recognised human rights'. The defence refers to paragraphs 46 to 59 of its previous filing. The defence agrees with the view expressed by *Kress and Sluiter* that article 21(3) should "be read more broadly so as to prevent the Presidency from contributing to the violation of internationally recognized human rights by granting the request" and submits that article 108 provides the court with a supervisory function similar to that applied in cases of abuse of process or in extradition law.

33. It is submitted that, in the context of the present proceedings, article 108 grants the Presidency 'supervisory powers'. This concept has been described by the ICTR Appeals Chamber as "closely related to the abuse of process doctrine"[38]. In this respect, the *Barayagwiza* Appeals Chamber stated: "It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated: 'This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.' The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's

[38] *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, ICTR-97-19-AR72, 3 November 1999, para. 76.

rights; to deter future misconduct; and to enhance the integrity of the judicial process."[39]

34. In *Barayagwiza*, the Appeals Chamber explained that the 'abuse of process' doctrine "may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."[40]

35. In Mr Katanga's case, in light of the controversial history of the DRC proceedings initiated against him, both situations apply. In relation to the first situation, the Appeals Chamber noted that in *Bell v. DPP of Jamaica*, "the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as a result of unreasonable delay. In making this determination, the court set fourth four guidelines for determining whether a delay would deprive the accused of a fair trial: (1) the length of the delay; (2) the prosecution's reasons to justify the delay; (3) the accused's efforts to assert his rights; and (4) the prejudice caused to the accused."[41]

36. The defence has previously set out in detail the significant delays and breaches that have occurred in these proceedings and which now render fair trial impossible. In having regard to fair trial, it is necessary to look at the overall fairness of the proceedings, which includes the pre-trial phase. Mr Katanga was detained for over two years in DRC before being produced before a judge, during which time he had inadequate notice of the grounds for his arrest, let alone the charges against him, despite his best efforts to obtain such information.[42] This is an "impermissibly lengthy" period. The ICTR Appeals Chamber found that Barayagwiza's "right to be promptly charged" had been violated because he had spent "an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him"[43] Barayagwiza had been detained for 11 months before being informed

[39] *Ibid.,* para. 76.
[40] *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, ICTR-97-19-AR72, 3 November 1999, para. 77.
[41] *Ibid.*, para. 75 (emphasis added).
[42] And see the letters written by Mr Katanga or his lawyer during his detention in the DRC: ICC-01/04-01/07-891-Conf-Exp-AnxO, AnxP1, AnxP2, AnxT1, AnxT2, AnxE1, AnxE2, AnxO1.
[43] *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, ICTR-97-19-AR72, 3 November 1999, paras. 85, 100.

of the general nature of the charges against him, a significantly shorter period that that spent by Mr Katanga. The same reasoning should apply to Mr Katanga's case.

37. The explanation provided by the DRC Court to justify the eleven-year delay in prosecuting the offences, namely that no Judge was available, falls below any reasonable standard of justice. As has been observed, states have an obligation "to organize their legal systems so as to allow the courts to comply with the requirements of article 6(1)" and that a failure to allocate adequate resources may engage state responsibility[44]. The fact that Mr Katanga was transferred to the ICC for part of that time is not a relevant aspect of the delay as the delay also applies to co-accused who remained in DRC throughout the period. Even in complex cases, the European Court has stated that lengthy periods of unexplained inactivity cannot be viewed as "*reasonable*".

38. During his DRC detention, prior to transfer to the ICC, Mr Katanga made several attempts to obtain adequate information as to the grounds for his arrest and the charges against him. Even now, eleven years after his initial detention Mr Katanga remains largely uninformed as to the charges and evidence against him. The case file appears to be empty. There is no indication that any investigation has been carried out.

39. In the event that the DRC requests the ICC Prosecutor to provide it with the evidence to prosecute the proposed offences (significantly, evidence that is the product of the ICC investigation) then the OTP should not, the defence submits, provide any such material until the determination of the Presidency, as to do so may compromise any future finding. In any event, the defence submits, it would be improper for the ICC or OTP to cooperate in such a manner in circumstances where a flagrant breach of fair rights has occurred or may occur. In such circumstances the ICC has a positive duty not to cooperate.

40. The ICC position on abuse of process was summarised by Trial Chamber V(B). At paragraph 14 of the *Decision on Defence application for a permanent stay of the*

[44] Zimmerman and Steiner v Switzerland (1983) 6 EHRR 17 at para 29. Abdoella v The Netherlands. *Application no. 12728/87)*

proceedings due to abuse of process, in the Kenyatta case[45] , relying on the ICC's previous jurisprudence, the following principles were identified:[46]:

> (i) the jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where it would be repugnant or odious to the administration of justice to allow the case to continue or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible;
>
> (ii) in imposing a stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith; it is sufficient to show that: a. the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing and b. there is no sufficient indication that this will be resolved during the trial process;
>
> (iii) a stay of proceedings is an exceptional remedy to be applied as a last resort; not every violation of fair trial rights will justify the imposition of a stay of proceedings; and
>
> (iv) to 'conceive of a stay of proceedings' as an appropriate remedy for any difficulties encountered in accessing information or facilities during trial preparation 'would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process'.

41. There is no significant departure between the ICC jurisprudence and the criteria for ordering a stay of proceedings found in the domestic jurisdictions or as applied by the *ad hoc* tribunals and reflected in the first of the principles above, namely, "the availability of a stay of proceedings where it would be repugnant or odious to the administration of justice to allow the case to continue or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible…".

42. This is a situation where it is appropriate for the Presidency to use its supervisory powers in order "to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process."[47]

43. Were it to be that it was the prosecution that was now seeking leave to prosecute the offences set out in the *Décision de renvoi*, then, the defence submits, the principles concerning abuse of process would apply on the basis that, in the circumstances of this case, "it would be repugnant or odious to the administration of justice to allow the case to continue" and would lead judges to order a stay of the proceedings.

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[45] Decision on Defence application for a permanent stay of the proceedings due to abuse of process. ICC-01/09-02/11-868-Red.
[46] Decision on defence application pursuant to Article 64(4) and related requests ('64(4) Decision'), 26 April 2013, ICC-01/09-02/11-728.
[47] *Jean-Bosco Barayagwiza v. The Prosecutor*, Decision, ICTR-97-19-AR72, 3 November 1999, para. 76.

44. As to extradition law, European States cannot extradite a person if there is a risk of a violation of articles 2 and 3 (death or inhuman or degrading treatment), or a flagrant violation of article 6 of the European Convention of Human Rights (ECHR). In this regard, *Inazumi* states that "[t]oday's law and practice of extradition […] demonstrates some evidence of emphasis being placed on fairness and impartiality. Under conventional and customary international law, States are prohibited from extraditing individuals in certain situations, such as when a charge is based on a political offence. But more recently, it has been recognized that States should not extradite individuals if they risk having their rights violated upon extradition."[48] Indeed, in *Soering* the Europen Court of Human Rights (ECrtHR) held that extradition can be refused where the fugitive risks suffering a "flagrant denial of a fair trial in the requesting country".[49] In this respect, "[t]he refusal of extradition based on the likelihood of sham proceedings is justified because the interest of the international community in ending impunity can only be served through a fair and impartial trial. In addition, it can also be explained with the logic of the Soering Case in which it was established that the act of extraditing a person to a State where a violation of human rights is foreseen constitutes a violation of the obligation to respect human rights."[50]

45. The risk of having rights violated includes the risk of receiving ineffective legal assistance. In this regard, the European Court of Human Rights held that "*[t]he accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the ability to put all relevant defence arguments before the trial court and thus to influence the outcome of the proceedings*."[51] Very recently, in separate cases in the United Kingdom and The Netherlands, courts refused requests for extradition made by Rwanda because of the flagrant risk of unfair trial due to ineffective legal assistance and inadequate time and facilities.[52] These decisions were reached despite the fact that Rwanda provides legal aid to an accused. Both courts held that the funds were inadequate as they did not cover defence investigations. Mr Katanga's situation is significantly worse as he will receive no funding at all which,

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[48] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law,* 1st ed. (Intersentia 2005), p. 187.
[49] ECrtHR, Soering v. the United Kingdom, 7 July 1989, para. 113.
[50] Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law,* 1st ed. (Intersentia 2005), p. 187.
[51] EHRM, Can v. Austria, 12 juli 1984, para. 53; Gregačević v. Croatia, 10 juli 2012, para. 51.
[52] Decision of Hague Court, 27 November 2015 in cases of Jean Claude Iyamuremye and Mugimba (number C/09/494083 / KG ZA 15/1205), para. 4.13; *The Government of the Republic of Rwanda v. Brown et al*, Judgment, Westminster Magistrates' Court, 22 December 2015, 630-631.

coupled with the great distances involved, will prevent the defence from having effective legal assistance and preparing its case. Such flagrant risk of unfair trial under extradition law would most likely defeat an extradition request. If similar fair trial criteria, of which effective defence investigation is but one, are applied to a request under article 108, as the defence submits they should be, then the approval sought by the DRC to prosecute Mr Katanga should be denied.

46. In situations such as extradition requests or requests for stay of proceedings, courts discharge a supervisory role in respect of the fairness of proceedings. The defence submits that the ICC, through the offices of the Presidency, has an important and necessary duty to have regard to the safety and wellbeing of those who have been summoned or arrested to come before it for trial and retains, through the discretion provided by article 108, to approve or not approve subsequent prosecutions, an important supervisory function.

CONCLUSION

47. The defence respectfully requests the Presidency to consider the above observations in addition to the Preliminary Observations already submitted when considering the exercise of its discretion pursuant to article 108. The defence submits that prosecution for the offences listed in the *Décision de Renvoi* should not be approved.

Respectfully submitted,

David Hooper Q.C.

Dated this 26 February 2016, London