



Original: English

No.: ICC-01/04-01/07

Date: 30 January 2019

THE PRESIDENCY

Before: **Judge Chile Eboe-Osuji, Presiding**
 Judge Robert Fremr
 Judge Marc Perrin de Brichambaut

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

*IN THE CASE OF
THE PROSECUTOR v. GERMAIN KATANGA*

Public redacted version of the

**Defence Application for Reconsideration of the Presidency Decision pursuant to article
108(1) of the Rome Statute**

Source: Defence for Mr Germain Katanga

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence for Germain Katanga
Mr David Hooper Q.C.
Ms Caroline Buisman

State
Democratic Republic of the Congo

REGISTRY

Registrar
Mr Peter Lewis

INTRODUCTION

1. The defence for Germain Katanga (“the defence”) hereby requests the Presidency to reconsider its ‘Decision pursuant to article 108(1) of the Rome Statute’ rendered on 7th April 2016 (the ‘108 Decision’).¹ The decision permitted the DRC to prosecute Mr Katanga. Despite the subsequent lengthy passage of time there has been absolutely no progress in that prosecution. Mr Katanga remains in custody three years after the date designated by the ICC for his release. No reasonable Presidency would have given its approval to the DRC to prosecute had it known the consequences of the decision.

2. Article 108(1) provides:

Limitation on the prosecution or punishment of other offences;

A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment [...] for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

3. By the 108 Decision, the Presidency, as then composed,² gave approval for the Democratic Republic of Congo (‘DRC’) to prosecute Mr Katanga for offences additional or complementary to those dealt with by the International Criminal Court (‘ICC’) and relating to the same period. The Presidency stated its belief that the prosecution would be consistent with the fair trial rights contained in the constitution of the DRC and other relevant international instruments ratified by the DRC. Subsequent events demonstrate this premise was wrong. The DRC has shown itself incapable of providing Mr Katanga with the basic elements necessary for a fair trial. As shown by subsequent events, the 108 Decision was manifestly unsound and its consequences manifestly unsatisfactory. No reasonable tribunal, including the Presidency, would have given approval to prosecute Mr Katanga had it known the consequences. Accordingly, the Presidency’s permission to prosecute should be revoked.

4. Accordingly, the defence requests the Presidency to:

- (i) Reconsider its Decision relating to article 108;
- (ii) Revoke its permission to the DRC to prosecute Mr Katanga for the crimes set out in the ‘*Décision de renvoi*’;
- (iii) Order the DRC to discontinue the proceedings against Mr Katanga; and

¹ Decision pursuant to article 108(1) of the Rome Statute, ICC-01/04-01/07-3679.

² Judge Silvia Fernández de Gurmendi, President, Joyce Aluoch, First Vice-President, Judge Kuniko Ozaki, Second Vice-President.

(iv)Order the DRC to release Mr Katanga immediately upon revocation of the Court's permission for these proceedings.

PROCEDURAL BACKGROUND

5. Mr Katanga was arrested and detained by the DRC authorities on 26 February 2005. The history of the subsequent DRC proceedings between 2005 and 2007 are summarized at paragraph 11 of the Defence Motion Challenging the Admissibility of the case³ and are referred to further below.⁴

6. On 19 April 2004, the President of the DRC, by letter, referred the situation in the DRC to the ICC.⁵ The Prosecutor of the ICC opened his investigation in the DRC on 23 June 2004.⁶

7. On 3 July 2007, Pre-Trial Chamber I issued an arrest warrant against Mr Katanga.⁷ On 18 October 2017, Mr Katanga was surrendered to the ICC and transferred from the DRC to The Hague. On 7th March 2014, Mr Katanga was convicted as an accessory pursuant to article 25(3)(d) to one crime against humanity and four war crimes.⁸ On 23rd May 2014, he was sentenced to twelve years imprisonment.⁹ On 13 November 2015, the Appeals Chamber reduced his sentence by 3 years and 8 months and set the date for the completion of his sentence to 18 January 2016.¹⁰

8. On 24 November 2015, an "*Accord ad hoc entre le gouvernement de la République Démocratique du Congo et La Cour Pénale International sur l'exécution de la peine de M. Germain Katanga, prononcée par la Cour*" was signed, which describes the framework for the acceptance by the DRC of Mr Katanga at a prison facility in the DRC to serve the remainder of his sentence of imprisonment.¹¹ On 8 December 2015, the Presidency designated the DRC as the State of enforcement of Mr Katanga's sentence.¹² On the same day, the

³ ICC-01/04-01/07-949.

⁴ at paragraph 48.

⁵ ICC Press release ICC-OTP-20040419-50, ICC - Prosecutor receives referral of the situation in the Democratic Republic of Congo.

⁶ ICC Press release ICC-OTP-20040623-59, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation.

⁷ ICC-01/04-01/07-1.

⁸ ICC-01/04-01/07-3436.

⁹ ICC-01/04-01/07-3484.

¹⁰ ICC-01/04-01/07-3615, Decision on the review concerning reduction of sentence of Mr Germain Katanga.

¹¹ ICC-01/04-01/07-3626-Anx.

¹² ICC-01/04-01/07-3626.

defence submitted several Observations on Mr Germain Katanga's imminent return to the DRC.¹³ Mr Katanga was transferred into the DRC's jurisdiction on 19th December 2015.¹⁴

9. Mr Katanga was not released on 18th January 2016. He remains detained at Makala prison, Kinshasa.

10. On 30 December 2015, Mr Katanga was notified of the '*Décision de Renvoi*' (Referral Decision) indicating an intention by the DRC authorities to prosecute him for crimes allegedly committed between 2002 and 2005.¹⁵ On 8th January 2016, the Registrar transmitted a letter from the *Procureur Général de la République* to the President of the ICC, together with a number of annexes, relating to legal proceedings before the *Haute Cour Militaire*, including the *Décision de Renvoi*.¹⁶ On 14 January 2016, the Presidency requested the DRC to explain the legal consequences of the "*Décision de Renvoi*" and to clarify whether or not its letter constituted a request for the necessary approval of the Court in order for the DRC to prosecute Mr Katanga.¹⁷

11. On 19 January 2016, the Registry received a letter from the DRC¹⁸ by which the DRC clarified that the "*Décision de Renvoi*" acted to remit a suspect at the disposition of "*une juridiction de jugement aux fins de poursuites*" and re-iterated its intention to conduct domestic criminal proceedings against Mr Katanga. [REDACTED].

12. By its Order of 21 January 2016, the Presidency sought the DRC's continuing assistance by the provision of the documents required by article 6(2)(a) of the Agreement and rule 214(1) of the Rules, including the protocol containing the views of Mr Katanga in order that the Presidency may make its determination under article 108(1) of the Rome Statute as soon as possible.¹⁹

13. On 22 January 2016, the defence filed its *Preliminary Observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic*

¹³ ICC-01/04-01/07-3627-Conf-Exp.

¹⁴ Press Release, "Thomas Lubanga Dyilo and Germain Katanga transferred to the DRC to serve their sentences of imprisonment", 19 December 2015, ICC-CPI-20151219-PR1181.

¹⁵ ICC-01/04-01/07-3631-AnxI, annexed to ICC-01/04-01/07-3631, Registry *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*.

¹⁶ ICC-01/04-01/07-3631, *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*.

¹⁷ ICC-01/04-01/07-3632, Order requesting information in relation to the "*Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*".

¹⁸ ICC-01/04-01/07-3633, 'Réponse des autorités congolaises à l'Ordonnance ICC-01/04-01/07-3632 en date du 14 janvier 2016'.

¹⁹ ICC-01/04-01/07-3634, Order to the Registrar concerning the communication of information to the Democratic Republic of the Congo in relation to the "*Réponse des autorités congolaises à l'Ordonnance ICC-01/04-01/07-3632*".

*Republic of Congo,*²⁰ by which it asked the Presidency for an oral hearing and to request the DRC to provide further material.

14. On 25 January 2016, the Registry filed a *Complément à la réponse des autorités congolaises soumises le 19 janvier 2016.*²¹

15. On 25 January 2016, the defence submitted *Urgent Further matters concerning the 'Preliminary observations made by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo'*.²² The defence asked the Presidency: to remind the DRC of its obligations under Article 108 of the Statute; to request the DRC not to act further in the investigation and prosecution unless and until it had received the approval of the Presidency to do so; and to request the DRC not to proceed with the hearing on 29th January so far as it concerned Mr Katanga.

16. By its Order of 27 January 2016, the Presidency expressed its concern in light of "the apparent progression of the criminal proceedings against Mr Katanga even though it has not yet been able to consider whether to approve his prosecution."²³ On 2 February 2016, the Registry notified several letters from the DRC prosecutor.²⁴

17. On 4 February 2016, the Presidency submitted its Order concerning the "*Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*".²⁵ [REDACTED].²⁶ [REDACTED].

18. On 5 February 2016, the defence filed its *Observations on the document 'Mémoire Unique'*,²⁷ according to which it would be inappropriate to treat the document *Mémoire Unique* as the protocol required by Rule 214 (1)(d) of the Rules of Procedure and Evidence ("RPE").

19. On 16 February 2016, the Presidency issued an *Order to the Registrar concerning the "Second complément d'informations soumis par les autorités congolaises et information sur*

²⁰ ICC-01/04-01/07-3635.

²¹ ICC-01/04-01/07-3637.

²² ICC-01/04-01/07-3638-Red.

²³ ICC-01/04-01/07-3640, Order to the Registrar concerning the "Further matters concerning the 'Preliminary observations made by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo'".

²⁴ ICC-01/04-01/07-3647, '*Second complément d'informations soumis par les autorités congolaises et information sur les procédures nationales*'.

²⁵ ICC-01/04-01/07-3649-Conf.

²⁶ [REDACTED].

²⁷ ICC-01/04-01/07-3650-Conf.

les procédures nationales",²⁸ by which it requested the DRC to provide further information by 11 March 2016.

20. On 26 February 2016, the defence filed *Further observations following the defence mission to Kinshasa*,²⁹ by which it submitted that the Presidency should not approve prosecution for the offences listed in the *Décision de Renvoi*.

21. On 9 March 2016, the Registry filed its '*Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome*',³⁰ by which it notified several documents emanating from the DRC authorities.

22. On 14 March 2016, the Presidency filed its *Order concerning the "Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome"*,³¹ by which it ordered the defence to provide any final views of Mr Katanga on the Court's exercise of its functions under Article 108(1) by 21 March 2016.

23. On 21 March 2016, the defence filed its *Observations on the Rapport du Greffe dans le cadre des consultations entre la Présidence de la Cour et les autorités congolaises sur l'application de l'article 108 du Statut de Rome*.³² The defence reiterated that prosecution for the offences listed in the *Décision de Renvoi* should not be approved.

24. On 7 April 2016, the Presidency issued its Decision pursuant to article 108(1) of the Rome Statute. The Presidency ruled that, "*taking into account the information available, the Presidency is of the view that the proposed prosecution of Mr. Katanga, as set out in the "Décision de renvoi", does not undermine fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court. Therefore, the Presidency hereby approves, pursuant to article 108(1) of the Statute, the prosecution of Mr. Katanga as set out in the "Décision de renvoi"*".³³

25. On 9 May 2016, the defence filed its *Notice of Appeal against the Presidency Decision pursuant to article 108(1) of the Rome Statute* and its *Defence Document in Support of Appeal Against the Presidency Decision*.³⁴

²⁸ ICC-01/04-01/07-3654.

²⁹ ICC-01/04-01/07-3662.

³⁰ ICC-01/04-01/07-3666.

³¹ ICC-01/04-01/07-3667-Conf.

³² ICC-01/04-01/07-3673-Conf.

³³ ICC-01/04-01/07-3679.

³⁴ ICC-01/04-01/07-3684 and ICC-01/04-01/07-3685-Red.

26. On 9 June 2016, the Appeals Chamber issued its *Decision on the admissibility of Mr Katanga's appeal against the "Decision pursuant to article 108(1) of the Rome Statute"*,³⁵ dismissing the appeal on the basis that it lacked jurisdiction over such decisions.

RECONSIDERATION

27. While the Rome Statute is silent on the matter, ICC Chambers have consistently recognised their inherent power to reconsider their own decisions at the request of one of the parties or *proprio motu*.³⁶ This is consistent with the practice relating to implied powers and inherent jurisdiction.³⁷ The capacity to reconsider relates both to administrative matters and to matters of substance.³⁸ The test adopted and followed is that reconsideration of decisions is appropriate when the decision is manifestly unsound and its consequences manifestly unsatisfactory. Such review can take into account new facts and new arguments. In the *Kenyatta* case the position was summarized as follows:

“The Statute does not provide guidance on reconsideration, but the Chamber agrees with the observation made by Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* that it would be incorrect to state that decisions can only be varied 'if permitted by an express provision in the Rome Statute framework'. The Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or *proprio motu*. In reference to Trial Chamber I's practice, Trial Chamber V (*Ruto* case) acknowledged that 'it may reconsider past decisions when they are "manifestly unsound and their consequences are manifestly unsatisfactory." Reconsideration should only be done in

³⁵ ICC-01/04-01/07-3697.

³⁶ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC- 02/04-01/15-468, para. 4 ; Decision on Legal Representatives' Request Regarding Opening Statements, 29 November 2016, ICC-02/04-01/15-610. Para 7; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', 24 September 2015, ICC-01/05-01/13-1282, para. 8; Trial Chamber V-A, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, 10 February 2015, ICC-01/09-01/11-1813, para. 19.

³⁷ See ICJ – “...the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, knowns as « implied » powers.” Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (1996) ICJ Reports 66 [International Court of Justice], para. 76. And see Nuclear Tests Case (New Zealand v France) (Judgment) (1974) ICJ Reports 457 [International Court of Justice], para. 23; Nuclear Tests Case (Australia v France) (Judgment) (1974) ICJ Reports 253 [International Court of Justice], para. 23. That the ICC Chambers also possess such implied powers and inherent jurisdiction was recognised in: Trial Chamber V-A, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274, para. 77-78.

³⁸ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para 15.

exceptional circumstances. The Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include 'new facts or new arguments'"³⁹

28. The fundamental objective is to avoid injustice. Trial Chamber IX in a number of decisions stated "As previously noted by the Chamber, reconsideration is an exceptional measure which should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. New facts and arguments arising since the issuance of the decision might be taken into consideration."⁴⁰ Trial Chamber I noted that "the reason for permitting the exercise of this discretion is, not least, that it maintains public confidence in the criminal judicial system".⁴¹

29. The Appeals Chamber of the ICTY, recognising its "inherent power to reconsider any decision, including a judgment where it is necessary to do so in order to prevent an injustice",⁴² gave, as a reason, that unlike domestic systems with multi layered mechanisms for appeal, *ad hoc* tribunals provide only one level of appellate court and consequently "the prospect of an injustice resulting from a judgment of the Appeals Chamber is not met by any further levels of appeal. Such a prospect must be met in some way to ensure that the Tribunal's proceedings do not lead to injustice."⁴³ The court said: "The principal purpose of the Tribunal's existence is to administer justice, and to ensure that its proceedings do not lead to injustice. [...] How then is the prospect of injustice to be prevented? The absence of any reference in the Tribunal's Statute to the existence of a power to reconsider is no answer to

³⁹ Trial Chamber V(b), *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial ICC-01/09-02/11-863 para. 11. See also, *inter alia*, ICTY, *Prosecutor v. Goran Hadzic*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5; *Prosecutor v. Vojislav Seselj*, IT-03-67-T, Decision on Prosecution's Motion for Reconsideration of the Decision on the Second Bar Table Motion Filed 23 December 2010, 22 January 2013, para. 28; ICTY, *Prosecutor v. Jadranko Prlic et al*, IT-04-74-AR73.16, Decision on Jadranko Prlic's Interlocutory Appeal against the Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 6, 18; see ICTY, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204; ICTR, *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, 15 July 2010, paragraphs 16-17; ICTR, *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010, 27 January 2011, paragraphs 24-25.

⁴⁰ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements ICC-02/04-01/15-1259, 11-05-2018.

⁴¹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.

⁴² ICTY, *The Prosecution v/ Zdravko Mucic et al*, case number IT-96-21Abis, Appeals Judgment on Sentence, 8 April 2003, para. 49.

⁴³ ICTY, *The Prosecution v/ Zdravko Mucic et al*, case number IT-96-21Abis, Appeals Judgment on Sentence, 8 April 2003, para. 51.

the prospect of injustice where the Tribunal possesses an inherent jurisdiction to prevent injustice. There was no reference in the Tribunal's Statute to the particular issues dealt with in the cases to which reference has already been made in which the Tribunal's inherent powers were exercised. It was the very absence of any such reference which led to the exercise of those inherent powers, because it was necessary to do so in those cases in order to ensure that the Tribunal's exercise of the jurisdiction which is expressly given to it by that Statute was not frustrated and that its basic judicial functions were safeguarded.”⁴⁴

The Presidency's power to reconsider its own decision

30. The Presidency is one of the four organs of the Court and is comprised of the President together with the First and Second Vice-Presidents. Its functions are defined by article 38 as: “(a) The proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) The other functions conferred upon it in accordance with this Statute”. Article 108 comes under part X. Rule 199 provides that the Presidency is the organ responsible for the functions of the Court under Part X. While a broad range of the Rules, set out in the footnote below⁴⁵ and concerning the Presidency's oversight of the Registry, explicitly state certain decisions of the Presidency to be final, no such reference of finality is made in respect of article 108.

31. Aside from decisions concerning article 108, the Presidency's functions are administrative. Article 108 is not an administrative function. It provides the only interface between the ICC and a State seeking to prosecute a sentenced person who has already been subject to the jurisdiction of the ICC. It provides the one opportunity for the Court to intervene in that State's decision and to affect the manner in which complementarity is exercised after trial by the ICC. The decision to give or withhold approval for further prosecution will affect the overall fairness of the proceedings conducted against an individual, whether conducted by the ICC, the requesting State or co-jointly. The Court has a duty of fairness to the sentenced person. If the further prosecution is inappropriate or a marked

⁴⁴ ICTY, *The Prosecution v/ Zdravko Mucic et al*, case number IT-96-21Abis, Appeals Judgment on Sentence, 8 April 2003, para 52.

⁴⁵ Rule 21(3) of the Rules of Procedure and Evidence, Assignment of legal assistance: Regulation 72(4) of the Regulations of the Court, Review of decisions of the Registrar: Regulation 85(3) of the Regulations of the Court, Decisions on payment of legal assistance: Persons as: Regulation 56(4) and (11) of the Regulations of the Registry, Experts: Regulation 125(6) of the Regulations of the Registry, List of assistants to counsel: Regulation 126(5) of the Regulations of the Registry, Removal from the list of assistants to counsel: Regulations 137(7) of the Regulations of the Registry, List of professional investigators: Regulations 138(5) of the Regulations of the Registry, Removal from the list of professional investigators: Regulation 147(n) of the Regulations of the Registry, Election of the members of the Disciplinary Board

unfairness to the sentenced person then, by giving its approval, the Court initiates an unfair process and brings the ICC into ill repute.

32. When deciding it lacked jurisdiction to review the Presidency 108 Decision, the Appeals Chamber observed:

“Although the Appeals Chamber considers that the Statute and the Rules do not expressly provide for appeals of decisions under article 108 of the Statute, decisions taken pursuant to that provision are important in nature and it may be, in light of the Presidency’s approach to article 108 of the Statute, that a right to appeal such decisions is appropriate. In that respect, it notes that the Presidency considered issues that are of significance, namely the upholding of certain fundamental principles or procedures of the Statute and otherwise of the integrity of the Court, requiring considerations relevant to e.g. *ne bis in idem*, the possible imposition of the death penalty and the possibility of holding a fair trial. The Appeals Chamber further notes that, where such issues are addressed in similar or comparable proceedings, an appeals mechanism is often in place. The Appeals Chamber therefore considers that there is merit in the Assembly of States Parties addressing whether the Court’s underlying legal texts should be amended so as to permit appellate review in relation to the decision taken under article 108 of the Statute.”⁴⁶

To date, in so far as the defence is aware, no steps have been taken by the Assembly of States Parties to provide an appeal mechanism for article 108 decisions.

33. The Presidency’s implied authority to reconsider its own decisions is therefore all the more compelling given the significance of the decision. As the Appeals Chamber observed, the 108 Decision concerned “issues that are of significance, namely the upholding of certain fundamental principles or procedures of the Statute and otherwise of the integrity of the Court”. Further, there is no opportunity to appeal to the Appeals Chamber or elsewhere. The only remedy where a Presidency decision is shown by subsequent events to be ‘manifestly unsound and its consequences manifestly unsatisfactory’ must lie in the capacity of the Presidency to reconsider its own decision. Otherwise, the Presidency would be without the means to correct a decision no matter how manifestly unjust the decision or its effect. Whether reconsideration is appropriate will depend on the particular circumstances of the case and the extent the decision is amenable to change.

34. Passage of time is no bar in itself to reconsideration. It is submitted that a key criterion is whether, in the particular circumstances, reconsideration is appropriate and viable. Reconsideration today of the 108 Decision and the withdrawal of the approval is appropriate

⁴⁶ ICC-01/04-01/07-3697, para 16

and viable. There has been no progress in Mr Katanga's trial in the DRC and the status of his prosecution today is little changed from the time when the 108 Decision was made in April 2016. The withdrawing of approval for his prosecution will not, to adopt a metaphor, require the eggs to be retrieved from the omelet.

THE 108 DECISION

35. The DRC recommenced its prosecution of Mr Katanga with service of the document '*Décision de Renvoi*' on 30th December 2015. Contrary to the Rules of procedure and evidence, which require the Presidency's prior approval for such prosecution, the DRC only later sought approval from the Presidency. The Presidency gave its approval on 7th April 2016.

36. In reaching its 108 Decision the Presidency observed: "The legal texts of the Court do not expressly set out any relevant criteria to be applied by the Court when considering the approval of the prosecution, punishment or extradition of a sentenced person by a State of enforcement."⁴⁷ It decided "[...] the Court's approval should only be denied when the prosecution, punishment or extradition of sentenced persons may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court".⁴⁸ Whatever the correctness of the Presidency's overall approach (and the Appeals Chamber implied some doubt about it),⁴⁹ a principal element to consider was the risk of unfair trial. Plainly the Presidency would not have given its consent to prosecute an unfair trial. This was of particular relevance as the defence had raised the issue both generally and in relation to specific issues of delay, systemic failings, lack of legal aid and absence of appeal from the *Haute Cour Militaire*.⁵⁰

37. When dealing with the issue of unfair trial the Presidency expressed its view;

"...that the DRC has emphasised in this regard that the prosecution of Mr. Katanga will occur consistently with the rights of the defence recognised in the Constitution of the DRC. The Presidency further notes that the DRC is party to relevant international instruments recognising minimum guarantees in relation to the right to a fair trial, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. The former guarantees both the right to have legal assistance assigned without

⁴⁷ 108 Decision, para 20.

⁴⁸ 108 Decision, para 20 and 26.

⁴⁹ "[...] in light of the Presidency's approach to article 108 of the Statute, that a right to appeal such decisions is appropriate [...]."

⁵⁰ 108 Decision, para. 30 and footnotes.

payment in the event of a lack of sufficient means and the right to review of a conviction and sentence by a higher tribunal according to law. In addition, article 153 of the Constitution of the DRC provides, inter alia, that “*[l]es cours et Tribunaux, civils et militaires, appliquent les traités internationaux dûment ratifiés*”⁵¹ and article 215 thereof provides, inter alia, that “*[l]es traités et accords internationaux régulièrement conclus ont, dès leur publication, une autorité supérieure à celle des lois*”⁵².

38. The Presidency approved the prosecution of Mr Katanga by the DRC stating; “taking into account the information available”, the Presidency was of the view “that the proposed prosecution of Mr Katanga, as set out in the “*Décision de renvoi*”, does not undermine fundamental principles or procedures of the Rome Statute or otherwise affect the integrity of the Court.”⁵³

THE SITUATION SINCE THE 108 DECISION

39. The Presidency observed that by its constitution and adoption of relevant international instruments the DRC has the duty to observe minimum guarantees in relation to the right to a fair trial. Providing trial within a reasonable time is one such duty and recognised as such in the DRC constitution. The DRC is signatory to international instruments. Article 9 of the International Covenant on Civil and Political Rights provides that ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.’ Article 7 of the African (Banjul) Charter on Human and Peoples Rights provides the right to be tried within a reasonable time by an impartial court or tribunal.

40. Yet, the matter of gravest concern is that since Mr Katanga’s return to the DRC in December 2015, he remains in custody with no sign of progress in the case approved by the 108 Decision. There is no justifiable explanation for the inactivity. The Military Court seized of the matter has not progressed the case. It has convened irregularly without addressing the substance of the case. There have been no evidential hearings. The last convening of the Military Court – and where nothing of note was done – was in February 2018. For the past year there has not even been a constituted court as two of the judges have withdrawn from the case. The distinct impression is that the DRC is unable or unwilling to progress the case against him, preferring to leave him in custody without trial.

⁵¹ Suggested translation ‘the Courts and tribunals, civil and military, apply duly ratified international treaties’

⁵² Suggested translation ‘the treaties and international agreements regularly concluded have, since their publication, a higher authority than the laws’

⁵³ 108 Decision, para 32.

41. There has been no indication that the trial is being prosecuted. Despite the passage of time no appropriate investigations appear to have been carried out. The allegations against Mr Katanga concern events in Ituri similar to those charged at the ICC, yet even at this stage, three years on, there has been no proper investigation conducted in Ituri by the DRC prosecutor in support of his allegations.

42. Nor has there been provision of material sufficient for Mr Katanga to know the nature of the charges and evidence against him, in violation of article 67(1)(a) of the Rome Statute, article 6(3)(a) of the European Convention on Human Rights, article 9(2) of the International Covenant on Civil and Political Rights. A purported ‘dossier’, for which Mr Katanga had to pay to gain access, does not relate to his involvement in the crimes charged but is composed of documents gathered in the past, largely by NGO’s, and unrelated to the DRC proceedings. The dossier constitutes no case and relates to events and people that do not concern him. Mr Katanga can not prepare an adequate defence to such unclear, unsupported charges.

43. Though Mr Katanga was in the custody of the ICC for eight years from 2007 to 2015, his absence from the DRC is irrelevant to the lack of progress in his case. The problem is a systemic one. Mr Katanga has been co-joined with others⁵⁴ who, despite having been detained for the past thirteen years, themselves remain untried. When one of Mr Katanga’s co-accused, Mr Emery GODA SUKPA, challenged his case in 2015 for disregarding his fair trial rights, the *Haute Cour Militaire* found his detention lawful despite his having been detained without trial for eleven years. The reason given was ‘*l’existence d’un cas de force majeure*’; said to be that there had been no military judge of sufficient rank to try his case.⁵⁵

44. States have the duty to organise their legal systems so as to ensure the right of an accused to be provided with a final decision within a reasonable time.⁵⁶ Even in complex cases, the European Court of Human Rights (‘ECrtHR’) has held that lengthy periods of inactivity cannot be viewed as “reasonable” and amount to a violation of the right to a fair

⁵⁴ Inter alia, Emery GODA SUKPA, Floribert NDJABU NGABU and Mbodina Iribi PITCHOU.

⁵⁵ ICC-01/04-01/07-3666-AnxIV, p. 18, *Arrêt avant dire droit statuant sur les exceptions soulevées par la défense*, 24 Dec. 2015 ; see in particular pages 25 and 28 :

« Quant à l’irrégularité de la détention jugée trop longue par la Défense, le Ministère Public indique que celle-ci est à situer à partir du 20 juin 2007, date à laquelle la dernière prolongation avait atteint son terme. En réalité, la juridiction militaire s’est trouvée devant un cas de force majeure à savoir l’absence d’un juge Magistrat de carrière porteur du grade de général des Forces Armées devant connaître de cette affaire. De plus, les prévenus n’ayant pas d’adresses connues à Kinshasa, aucune mesure de liberté provisoire ne pouvait leur être accordée. »

« Quant à la durée de la détention, la Haute Cour Militaire constate avec le Ministère Public l’existence d’un cas de force majeure, en l’espèce l’absence pendant la période ayant précédé la comparution des prévenus à l’audience du 28 février 2014, d’un juge magistrat militaire de carrière revêtu du grade de général pouvant valablement siéger. »

⁵⁶ ECrtHR 14 Nov. 2000, *Delgado v/ France*, § 50, n° 38437/97. See also ECrtHR 25 Feb. 1993, *Dobbertin v/ France*, § 44, n° 13089/87.

trial. The State must do what is required to prevent lengthy periods of inactivity⁵⁷ and to resolve the problem of congestion in the courts.⁵⁸ Thus, should there be congestion of the courts due to structural or systemic problems within a State, such circumstances do not excuse the excessive length of proceedings.⁵⁹ The ECrtHR stresses that "persons held in detention pending trial are entitled to "special diligence" on the part of the competent authorities (...). The Court concludes that where a person is kept in detention pending the determination of a criminal charge, the fact of his detention is a factor to be considered in assessing whether the requirement of a decision on the merits within a reasonable time has been met."⁶⁰ International criminal tribunals have made similar observations. One ICTR Chamber observed that a trial is inequitable if it is too long drawn out. Speed, in the sense of expeditiousness, is an element of an equitable trial.⁶¹ Delay resulting from the unavailability of one or more judges over a protracted period is no excuse because logistical considerations cannot trump fair trial rights.⁶²

45. The right to adequate representation is considered one of the most fundamental aspects of a fair trial.⁶³ On 17 June 2016, Mr Katanga appeared before the *Haute Cour Militaire* and informed the judges that he did not have the money to pay for a lawyer and applied for legal aid. To date he has not been provided with legal aid despite the serious nature of the charges approved in the 108 Decision. The *ad hoc* Tribunals have recognized that the issue of funds to be allocated to an accused person for the conduct of his defence impacts on his or her right to a fair and expeditious trial.⁶⁴ Despite statements by the DRC to the contrary there is no functioning system of legal aid. Despite the seriousness of the allegations the accused are left to their own devices.

46. There remains no appeal on the facts from the Military Court. Since the 108 Decision, there has been no amendment of the Military Court's constitution to provide such an appeal mechanism. It is a fundamental aspect of fair trial proceedings that an individual has a venue

⁵⁷ ECrtHR 7 Feb. 2002, *H.L. v/ France*, n° 42189/98.

⁵⁸ Comm. EDH 6 Dec. 1989, *Garcia v/ Portugal*.

⁵⁹ ECrtHR, 26 oct. 1988, *Martins Moreira v/ Portugal*, §§ 54 et 61.

⁶⁰ ECrtHR, 12 Oct. 1992, *Abdoella v/ The Netherlands*, § 24, n° 12728/87.

⁶¹ Prosecutor v Nyiramasuhuko et al, No. ICTR-98-41-A15bis, Decision in the Matter of Proceedings Under Rule 15bis(D) (24 September 2003), para. 24.

⁶² Prosecutor v Niyiramasuhuko et al, No. ICTR-98-42-A, Judgement (14 December 2015), para. 376.

⁶³ Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 Duke J. Comp. & Int'L [1997] 519, 522. (<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1007&context=djcl>); Wolfgang Schomburg, 'The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights', 8 NJIHR [2009] 1, para. 61 (<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1091&context=njihr>). See also article 6(3)(c) of the European Convention on Human Rights.

⁶⁴ Prosecutor v Seselj, No. IT-03-67-R33B, Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence Rendered on 8 April 2011 (17 May 2011), paras. 20-21.

to review a decision of acquittal or conviction both at the national and international levels.⁶⁵ Human rights courts have emphasized the importance of the right to appeal in criminal matters both as part of the right of access to a court, and as an independent right.⁶⁶ The right to appeal must be respected without imposing too many administrative hurdles so as to make the right to appeal ineffective.⁶⁷ The continued lack of an appeal mechanism from the *Haute Cour Militaire* is a clear violation of Mr Katanga's right to a fair trial. It is also in violation of the DRC Constitution which recognizes the right of appeal in criminal matters.

47. In granting its consent the Presidency took into account the undertaking given by the then DRC Government not to impose the death penalty in the event that German Katanga became eligible for such a sentence. When given the opportunity to abolish the death penalty in 2011 the DRC parliament declined to do so. The death penalty remains available to courts in the DRC albeit that a moratorium means that no executions have taken place since 2003. With the change in government following the January 2019 elections, it is unclear what the view of the new government will be and the extent to which it feels bound by any past undertaking.

48. While this present request for reconsideration is based on the failure to provide fair trial rights in the years since the 108 Decision was made, sight should not be lost of the overall history concerning the arrest and detention of Mr Katanga going back to 2005.⁶⁸ The 108 Decision made a leap of faith in the DRC's capacity to provide a fair trial despite clear signs that it was incapable or unwilling to do. In its submission opposing the giving of approval for prosecution, the defence drew the attention of the Presidency to the long catalogue of breaches of human rights and fair trial principles by the DRC, and in particular in respect of Mr Katanga.⁶⁹ The DRC, in its earlier submissions to the ICC Trial Chamber in 2009,⁷⁰ conceded that it could not offer any guarantee of a fair trial and that "a threshold has

⁶⁵ See e.g Coral Fanego 'The Right to a Double Degree of Jurisdiction in Criminal Offences' in Javier Garcia Roca and Pablo Santolaya: *Europe of Rights: A Compendium on the European Convention of Human Rights* (Martinus Nijhoff Publishers 2012).

⁶⁶ The right to appeal in criminal matters under Article 2 of Protocol No. 7 of the European Convention on Human Rights. See further Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series – No. 117: <https://rm.coe.int/16800c96fd>.

⁶⁷ See for instance, ECrtHR, 28 Oct. 1998, *Perez de Rada Cavanilles c/ Espagne*, §§ 44 s ; ECrtHR, 30 Oct. 1998, *F. E. c/ France*, § 46; ECrtHR, 14 Nov. 2000, *Annoni du Gussola c/ France*.

⁶⁸ See paras 6 to 30 Defence motion for a declaration on unlawful detention and stay of proceedings. ICC-01/04-01/07-1258.

⁶⁹ 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; Further observations following the defence mission to Kinshasa, ICC-01/04-01/07-3662.

⁷⁰ ICC-01/04-01/07-T-65-ENG, 1 June 2009, pp. 76-87, 99-102 (per Colonel Muntazini); ICC-01/04-01/07-968-Conf-Exp-AnxJ (19 March 2009). For a more elaborate discussion on this, see ICC-01/04-01/07-3635 (22 January 2016), paras. 67-71.

not yet been reached which would allow one to meet international criteria".⁷¹ Indeed, at that time, the ICC Trial Chamber concluded that the DRC was unable to deal effectively with the crimes charged against Mr Katanga.⁷² The events of the three years since the 108 Decision demonstrate continued systemic failure of the DRC justice system.

49. The Presidency made its 108 Decision in the expressed belief that the DRC would abide by its own constitution and international treaties. The necessity for reconsideration arises because the intervening years since the 108 Decision show that the assumptions of the Presidency were manifestly wrong and the consequences manifestly unsatisfactory. The permission for this prosecution was based on the erroneous premise that the DRC would offer the minimum of fair trial guarantees, including a trial within reasonable time, to have sufficient means to prepare a defence, full disclosure of the available evidence and legal aid. It is clear that even the most basic fair trial principles have not been respected. Had the Presidency known at the time of its 108 decision that the DRC would not provide a fair trial it would not, indeed could not, have given its approval. The inaction for three years in terms of evidence gathering and effectively starting the trial, with no reasonable prospect that the trial will advance, undermines fundamental principles and procedures of the Rome Statute or otherwise affects the integrity of the Court.⁷³ The requirements for reconsideration are therefore met. The permission should therefore be revoked and the proceedings against Mr Katanga halted.

⁷¹ ICC-01/04-01/07-T-65-ENG, 1 June 2009, p.102.

⁷² ICC-01/04-01/07-T-67-ENG, Oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case ; ICC-01/04-01/07-1497, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case. 25 September 2009.

⁷³ 108 Decision, para 32.

CONCLUSION

50. For these reasons, the defence respectfully requests that the Presidency review its past 108 decision and revoke its permission to prosecute Mr Katanga for the crimes set out in the *Décision de Renvoi*.

51. Accordingly, the defence requests the Presidency to:

- (v) Reconsider its Decision relating to article 108;
- (vi) Revoke its permission to the DRC to prosecute Mr Katanga for the crimes set out in the '*Décision de renvoi*';
- (vii) Order the DRC to discontinue the proceedings against Mr Katanga; and
- (viii) Order the DRC to release Mr Katanga immediately upon revocation of the Court's permission for these proceedings.

Respectfully submitted

A handwritten signature in black ink, appearing to read "DHooper", with a horizontal line extending from the end of the signature.

David Hooper Q.C.

Dated this 30 January 2019,

25 Bedford Row, London. WC1.