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TRIAL CHAMBER II

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

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

Public document

Public redacted version of the “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings” of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp)

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Éric MacDonald, Senior Trial Lawyer

Counsel for Germain Katanga

Mr David Hooper
Mr Andreas O'Shea

Counsel for Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djofia Malewa

Legal Representatives of the Victims

Mr Jean-Louis Gilissen
Mr Fidel Nsita Luvengika

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER II (“the Chamber”) of the International Criminal Court (“the Court”), 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 for counsel, decides as follows:

I. PROCEDURAL BACKGROUND

1. On 22 and 25 June 2007, the Office of the Prosecutor (“the Prosecutor”) requested the issuance of a warrant of arrest for Germain Katanga (“the Accused”),¹ which was issued by the Pre-Trial Chamber on 2 July 2007.²

2. That Chamber also instructed the Registrar to inform the authorities of the Democratic Republic of the Congo (DRC) of the existence of the warrant of arrest and to prepare a request for cooperation seeking the arrest and surrender of Germain Katanga “as soon as practicable”.³

3. [REDACTED]

4. [REDACTED], the Registry decided to proceed with the notification of the warrant of arrest to the DRC authorities in accordance with articles 87 and 89 of the Statute, indicating to them for the first time the identity of Germain Katanga.⁴

5. [REDACTED]

6. In the night of 17 to 18 October 2007, Germain Katanga left the *Centre pénitentiaire et de rééducation de Kinshasa*, where he was being detained, to be

¹ Office of the Prosecutor, “Prosecutor’s Application for Warrants of Arrest under Article 58 and Request for Expedited Consideration (Part One)”, 22 June 2007, ICC-01/04-01/07-31-Conf-Exp; “Prosecutor’s Application for Warrants of Arrest under Article 58 and Request for Expedited Consideration (Part Two)”, 25 June 2007, ICC-01/04-01/07-33- Conf-Exp.

² Pre-Trial Chamber I, *Warrant of Arrest for Germain Katanga*, 2 July 2007, ICC-01/04-01/07-1-tENG.

³ Pre-Trial Chamber I, *Order on the execution of the warrant of arrest for Germain Katanga*, 2 July 2007, ICC-01/04-01/07-2-Conf-tENG (public redacted version filed on 5 November 2007, ICC-01/04-01/07-54-tENG), p. 7.

⁴ *Ibid.*, para. 8. [REDACTED].

surrendered to the Court by the competent authorities of the DRC and transferred on 18 October 2007 to the Court's Detention Centre in The Hague.⁵

7. On 22 October 2007, Germain Katanga appeared before the Pre-Trial Chamber. During that hearing, the Registry and Principal Counsel of the Office of Public Counsel for the Defence made statements concerning the Accused's arrest and transfer to The Hague.⁶

8. The confirmation hearing took place before the Pre-Trial Chamber from 27 June to 16 July 2008. That Chamber confirmed certain of the charges brought against the Accused.⁷

9. On 30 June 2009, the Defence for Germain Katanga submitted a motion for a declaration on unlawful detention and stay of proceedings, the public redacted version of which was filed on 2 July 2009 ("the Motion").⁸

10. On 7 July 2009, the Prosecutor requested access to the report filed by the Registry on 22 May 2008 concerning the execution of the warrant of arrest for the Accused, which was initially filed as "confidential, *ex parte*, only available to the Registry and the Defence for Germain Katanga".⁹ On 15 July 2009, having requested¹⁰

⁵ Pre-Trial Chamber I, *Decision on the confirmation of charges*, 30 September 2008, ICC-01/04-01/07-717, paras. 42 and 43. See also ICC-01/04-01/07-T-5-ENG, 22 October 2007, pp. 19 to 20.

⁶ ICC-01/04-01/07-T-5-ENG, 22 October 2007, pp. 15 to 26.

⁷ ICC-01/04-01/07-717.

⁸ Defence Team for Germain Katanga, "Public Redacted Version of the Defence motion for a declaration on unlawful detention and stay of the proceedings (ICC-01/04-01/07-1258-Conf-Exp)", 2 July 2009, ICC-01/04-01/07-1263. The Motion was initially filed as "confidential, *ex parte*, only available to the Defence for Germain Katanga and the Registry" and was subsequently reclassified on 3 July 2009 as "confidential, *ex parte*, only available to the Defence for Germain Katanga, the Registry and the Office of the Prosecutor". Annexes A to H of the Motion were reclassified as "confidential, *ex parte*, only available to the Defence, the Registry and the Office of the Prosecutor", while Annexes I to K were reclassified as public documents on 3 July 2009.

⁹ Office of the Prosecutor, "Prosecution request for re-classification of Report of the Registrar", 7 July 2009, ICC-01/04-01/07-1276. This request referred to the report filed by the Registry on 22 May 2008, cited *supra*, footnote 4.

¹⁰ *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.

and received the observations of the Registry¹¹ on the matter, the Chamber granted the Prosecutor's request.¹²

11. The Prosecutor responded to the Motion on 24 July 2009.¹³ A public redacted version of his response was filed on 17 August 2009 ("the Prosecutor's Response").¹⁴

12. The legal representatives of the victims, Mr Jean-Louis Gilissen and Mr Joseph Keta, submitted their observations concerning the Motion on 23 July 2009.¹⁵

13. On 25 August 2009, the Chamber invited the Registry¹⁶ and the competent authorities of the DRC¹⁷ to file their observations. The Registry filed its observations on 8 September 2009;¹⁸ the authorities of the DRC did not deem it necessary to submit observations.

14. On 4 September 2009, the Prosecutor filed an application under regulation 28 of the Regulations of the Court for leave to add a reference from case law.¹⁹ Once it had received the observations of the Defence teams on this matter, the Chamber granted

¹¹ Registry, "*Observations du Greffe concernant la demande de reclassification du document ICC-01/04-01/07-497-Conf-Exp*", 13 July 2009, ICC-01/04-01/07-1297-Conf.

¹² *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.

¹³ Office of the Prosecutor, "Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings", 24 July 2009, ICC-01/04-01/07-1335-Conf-Exp.

¹⁴ Office of the Prosecutor, "Prosecution Response to Defence motion for a declaration on unlawful detention and stay of proceedings", 17 August 2009, ICC-01/04-01/07-1381.

¹⁵ Legal Representatives of the Victims, "*Observations des représentants légaux des victimes représentées par M^e Jean-Louis GILLISEN et M^e Joseph KETA sur 'The Defence motion for a declaration on unlawful detention and stay of proceedings' (ICC-01/04-01/07-125-Conf-Exp)*", 23 July 2009, registered on 24 July 2009, ICC-01/04-01-07-1331 ("the Observations of the Legal Representatives").

¹⁶ *Decision Inviting Observations from the Registry on Germain Katanga's Application for a Declaration on Unlawful Detention or Stay of Proceedings*, 25 August 2009, ICC-01/04-01/07-1425-tENG.

¹⁷ *Décision aux fins de recueillir des observations de la République démocratique du Congo sur la requête de Germain Katanga demandant la déclaration de l'illégalité de sa détention ou la suspension de la procédure*, 25 August 2009, ICC-01/04-01/07-1426.

¹⁸ Registry, "Observations from the Registry pursuant to Trial Chamber II's order (ICC-01/04-01/07-1425) following the Defence Motion for a declaration on unlawful detention and stay of proceedings", 8 September 2009, ICC-01/04-01/07-1462-Conf ("the Observations of the Registry").

¹⁹ Office of the Prosecutor, "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.

the Prosecutor's application,²⁰ and the Prosecutor filed his additional reference on 6 October 2009.²¹

II. SUBMISSIONS

15. The Chamber has considered all of the submissions presented by the parties and participants. It outlines only the salient points below.

A. Defence Submissions

16. In its Motion, the Defence for Germain Katanga asks the Chamber to declare the Accused's detention unlawful and to stay the proceedings. It submits that Germain Katanga was unlawfully arrested and detained by the authorities of the DRC, which, it claims, is a "flagrant breach" of his fundamental rights, that is, the right to liberty, the right to be brought promptly before the judicial authorities, the right to be informed of the charges, and the right to assistance of counsel.²² It submits that "these violations must be viewed in the light of the actions and omissions of the Office of the Prosecutor and the Registry, and in the context that this detention was in part at the behest and for the purposes of the [...] Court".²³

17. The Defence is of the view that the facts concerning the violations of the Accused's rights can be divided into three distinct periods: first, the initial and subsequent detention of Germain Katanga following his arrest in the DRC on 26 February 2005, at a time when he was not yet envisaged as an accused before the Court;²⁴ second, his detention as of the point when he became a principal suspect in the case in November 2005, but prior to the issuance of an international warrant of

²⁰ See e-mail of 6 October 2009, by which the Legal Adviser to the Trial Division informed the Prosecutor of the Chamber's decision.

²¹ Office of the Prosecutor, "Prosecution's submission of additional authority regarding 'Defence motion for a declaration of unlawful detention and stay of proceedings'", 6 October 2009, ICC/01/04-01/07-1511.

²² Motion, paras. 1 and 61-77.

²³ Ibid., para. 1.

²⁴ Ibid., paras. 5 and 6 to 15.

arrest for him on 2 July 2007;²⁵ and third, from the time of the issuance of the international warrant of arrest until his transfer to The Hague on 18 October 2007.²⁶ It is alleged that the last two phases involved the participation of organs of the Court, thus giving continuity to the unlawfulness of the detention within the processes of the Court.²⁷

18. The Defence submits that the serious violations of the Accused's rights under international law continued through these three phases.²⁸

19. In respect of the first period, the Defence contends in particular that the Accused's arrest and detention were unlawful under the national law of the DRC as well as international law and that, given the length of unlawful detention, they amounted to "serious mistreatment".²⁹ In respect of the second period, the Defence submits that it was from the time Germain Katanga was considered by the Prosecutor to be a suspect and, further, from the time of the issuance of a warrant for his arrest that the organs of the Court became involved "in ensuring the persisting nature of the unlawful situation of the accused".³⁰

20. Lastly, the Defence alleges that, during the third period, from 2 July to 18 October 2007, the Court authorised and effectively sanctioned the Accused's detention for the purpose of proceedings before it. The Defence submits that, once the warrant of arrest was issued on 2 July 2007, the Accused fell under the "constructive custody" of the Court until his transfer in October of the same year.³¹ It adds that "any continuing illegality becomes the shared fruit and responsibility of

²⁵ Ibid., paras. 5 and 16 to 30.

²⁶ Ibid., paras. 5 and 31 to 39.

²⁷ Ibid., para. 5.

²⁸ Ibid., para. 40; see also paras. 41 to 77.

²⁹ Ibid., paras. 61 to 68.

³⁰ Ibid., para. 78; see also paras. 79 to 100.

³¹ Ibid., para. 101.

the DRC and the ICC by virtue of this constructive custody”.³² In the view of the Defence, [REDACTED], the Registry participated in the “delay in the effective date of constructive custody” and the protection of the Accused’s rights under article 59 of the Statute.³³

21. After citing national and international case law relating to the matter, the Defence submits that the Trial Chamber has the power and responsibility to review and supervise the persisting situation of unlawfulness of the detention of the Accused. In the view of the Defence, the Chamber has the inherent power to ensure that its process is not undermined by serious human rights violations of a continuing nature which pierce to the heart the Court’s integrity and standing in the international community as an instrument of justice.³⁴

22. The Defence contends that the circumstance in which the Accused was detained has such an impact on the integrity of the process that the appropriate remedy is a stay or termination of the proceedings. The Defence submits in the alternative that the Accused is entitled to financial compensation for the breaches and/or alternatively, and only in the event of a conviction, that relief be reflected in a reduction of any sentence imposed.³⁵

B. Prosecutor’s Submissions

23. In his Response, the Prosecutor divided the time frame into two periods. The first period runs from Germain Katanga’s arrest by the DRC authorities on 26 February 2005 until the Registry’s transmission, [REDACTED] to the authorities of that State of the Court’s request for the arrest and surrender of the Accused. The

³² Ibid., para. 101. In the view of the Defence, “custody may be said to be constructive once it serves the interests of, enables, and is in fact being taken advantage of by the [Court] for the purpose of his eventual transfer to the [Court]” (ibid., para. 102).

³³ Ibid., para. 109.

³⁴ Ibid., paras. 114 to 119.

³⁵ Ibid., para. 2; see also paras. 121 to 138.

second period extends from [REDACTED] until the transfer of the Accused to the Court on 18 October 2007.³⁶

24. The Prosecutor is of the view that the Accused's detention during the first period cannot be attributed to the Court and cannot affect its jurisdiction.³⁷ Citing a decision of the Appeals Chamber in *Lubanga*,³⁸ he states that the Accused's detention during that period was unrelated to the process of bringing him to justice for crimes that form the subject-matter of the proceedings before the Court.³⁹ It is alleged that the facts show that neither the Prosecution nor any other organ of the Court was involved in the Accused's arrest and detention by the DRC authorities prior to the transmission by the Registrar of the Court's request for his arrest and surrender.⁴⁰

25. The Prosecutor submits that, contrary to what the Defence maintains, he had no duty of care to the Accused during that first period.⁴¹ He adds that, unless the previous detention of the Accused by the DRC authorities was part of the process of bringing him to justice for the crimes which form the subject-matter of proceedings before the Court, the Statute does not vest the Prosecution, or the Court as a whole, with authority to assess whether such detention was in compliance with the applicable legal standards.⁴² He further considers that there is no evidence to support allegations of "concerted action" between the Prosecutor and the DRC authorities to detain Germain Katanga in order to ensure that he would be available for surrender to the Court, since, as the DRC authorities expressly confirmed, the Accused had not been kept in detention for facts related to Bogoro.⁴³

³⁶ Prosecution Response, para. 3.

³⁷ *Ibid.*, para. 4.

³⁸ *Ibid.*, para. 4, referring to the Decision of the Appeals Chamber in *Lubanga* (ICC-01/04-01/06-772 OA 4, ("the *Lubanga* Judgment").

³⁹ *Ibid.*, para. 31. In this respect, the Prosecutor recalls that the Chamber held that "there is no conclusive evidence demonstrating that the judicial authorities of the DRC were conducting an investigation into the facts charged in the pending case before this Court" (*Ibid.*, para. 34).

⁴⁰ *Ibid.*, para. 35; see also paras. 36 to 45.

⁴¹ *Ibid.*, para. 47.

⁴² *Ibid.*, para. 51.

⁴³ *Ibid.*, paras. 5 and 31.

26. In respect of the second period, the Prosecutor is of the view that the detention based on the Court's formal request for arrest and surrender lasted approximately one month and is attributable to the Court. However, he characterises this period of detention and the subsequent procedure of the Accused's surrender to the Court as "legally and factually unblemished".⁴⁴

27. Lastly, the Prosecutor submits that the Defence has failed to substantiate that the Accused suffered torture or any other serious form of mistreatment which could have the consequence that the Court cannot properly proceed against him.⁴⁵

C. The Observations of the Registry

28. The Registry is of the view that, pursuant to articles 87(1)(a), 87(2), 89 and 91 of the Statute and rule 176 of the Rules, it has a specific mandate with regard to the notification and transmission of requests for cooperation.⁴⁶

29. [REDACTED]

30. [REDACTED]

31. [REDACTED]

32. Lastly, the Registry explains the manner in which Germain Katanga was transferred from Kinshasa to The Hague. It indicates that, from the time it took Germain Katanga into custody, it ensured that all necessary procedures were followed and that his rights were not prejudiced. In the Registry's submission, all required procedures were carried out and hence Germain Katanga's rights were respected.⁴⁷

⁴⁴ Ibid., paras. 6, 32 and 53 to 61.

⁴⁵ Ibid., paras. 7 and 62 to 78.

⁴⁶ Observations of the Registry, paras. 1 and 7.

⁴⁷ Ibid., paras. 9 to 12.

D. Observations of the Legal Representatives

33. The legal representatives, Mr Jean-Louis Gilissen and Mr Fidel Nsita Luvengika, submit in particular that the termination of proceedings sought by the Defence is not a feasible remedy, given the seriousness of the crimes with which the Accused has been charged. In their view, terminating the proceedings against Germain Katanga would be prejudicial to the rights of the victims, the truth and justice.⁴⁸

III. THE CHAMBER'S ANALYSIS

34. The Chamber take note of the Defence submissions on the arbitrary arrest and detention of Germain Katanga by the DRC authorities prior to his transfer to The Hague, and on the existence of irregularities in the implementation of the request for arrest and surrender of the Accused.

35. It further notes that, in its Motion, the Defence asks the Chamber to find that there were violations of the rights of the Accused in relation to his prior detention, and to stay or terminate the proceedings. Moreover, the Chamber notes that, in the alternative, the Defence requests that financial compensation be awarded for the violations suffered and/or – only in the event of a conviction – a reduction of any sentence imposed.⁴⁹

36. The Chamber observes that the Defence invokes the doctrine of abuse of process in order to challenge the Court's jurisdiction. The Defence maintains that, in the interest of justice, the Court has the power to remedy breaches of process. In this respect, the Chamber would point out that in the *Lubanga* case, in which an application based on similar facts was filed under article 19(2) of the Statute, the Appeals Chamber held that "the application [...] and the proceedings following do not raise a challenge to the jurisdiction of the Court within the compass of article 19

⁴⁸ "Observations of the Legal Representatives", paras. 12 and 13.

⁴⁹ Motion, paras. 2 and 121 to 128.

(2) of the Statute” and that the application’s “true characterization may be identified as a *sui generis* application, an atypical motion, seeking the stay of the proceedings, acceptance of which would entail the release of [the accused]”.⁵⁰ Moreover, the Appeals Chamber, citing article 21(3) of the Statute, found that “[u]nfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial”,⁵¹ despite the fact that a stay in the proceedings for abuse of process is not provided for by the Statute.⁵²

37. Lastly, the Chamber found that the motion further alleges a violation of Germain Katanga’s rights under article 59 of the Statute.

38. Before being in a position to consider the substantive arguments put forward by the parties and the participants, the Chamber must satisfy itself that the Motion is admissible. It 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.

1. Stage at which a motion for a declaration on unlawful detention must be submitted

39. The Chamber considers that a challenge to the lawfulness of the arrest and detention of an accused, in particular where such a challenge is accompanied by an application to stay or terminate the proceedings, must be submitted in the initial phase of the proceedings.

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

⁵⁰ *Lubanga* Judgment, para. 24.

⁵¹ *Lubanga* Judgment, para. 39. The Appeals Chambers adds that, in such circumstances “the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.” (ibid)

⁵² *Lubanga* Judgment, para. 35.

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.

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.⁵³ 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.

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.⁵⁴

2. *The Defence's right to submit the Motion*

a) **Pre-Trial Phase**

43. In this case, the Chamber notes that on 22 October 2007, during the Accused's initial appearance hearing, Counsel for the Defence emphasised the unlawful nature, in his view, of the Accused's arrest and of his detention in the DRC from February 2005 until his transfer to The Hague.⁵⁵ The Pre-Trial Chamber then invited the

⁵³ See in particular, article 19 of the Statute, paras. 4, 5 and 8. See also *Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)*, 16 June 2009, ICC-01/04-01/07-1213, para. 44.

⁵⁴ Article 67(1)(c) of the Statute.

⁵⁵ ICC-01/04-01/07-T-5-ENG, 22 October 2007, pp. 15 to 25.

Defence for Germain Katanga to submit the matter to it in writing. On 7 April 2008, the Defence submitted to the Chamber an application pursuant to article 57(3) of the Statute seeking the DRC's cooperation.⁵⁶ In that application, the Defence requested the Pre-Trial Chamber to direct the Congolese authorities to provide it with the information and documentation necessary for the preparation of its case, including in particular material pertaining to Germain Katanga's right against arbitrary arrest.⁵⁷ It stated therein that the requested documents were necessary in order to substantiate certain of its submissions concerning the lawfulness of prior proceedings, and it stressed the urgency of such cooperation given the time limits set by rule 122(3) and (4).⁵⁸ At an *ex parte* hearing held on 17 April 2008, the Defence reiterated this request, expressing the concern that it risked finding "the door closed" before the Trial Chamber if it did not raise such matters "that are really rooted in Article 59 rights", within the time limits prescribed by rule 122(3) and (4).⁵⁹ At that same hearing, the Defence for Germain Katanga was informed that, even if there was no response from the Congolese authorities to the request for cooperation prior to the confirmation hearing, no prejudice would be caused to the right of the Accused to make such challenges (to the lawfulness of prior proceedings or the admissibility of the case) under article 19 of the Statute.⁶⁰

44. In an *ex parte* decision issued on 25 April 2008,⁶¹ the Pre-Trial Chamber held that article 59(2) of the Statute "is only applicable to those proceedings that take place after the transmission by the Registrar of the relevant cooperation request for arrest and surrender, [REDACTED]"⁶² and, accordingly that "any alleged prior violations of

⁵⁶ Defence Team for Germain Katanga, "Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of the Congo (DRC)", 7 April 2008, ICC-01/04-01/07-371-Conf-Exp, p. 6.

⁵⁷ *Ibid.*, p. 15.

⁵⁸ *Ibid.*, p. 15.

⁵⁹ ICC-01/04-01/07-T-24-CONF-EXP-ENG ET, 17 April 2008, p. 27.

⁶⁰ *Ibid.*, p. 26.

⁶¹ The nature of the information repeated by the Chamber in this decision does not undermine the *ex parte* nature of the decision issued by the Pre-Trial Chamber.

⁶² Pre-Trial Chamber I, *Decision on the "Defence Application pursuant to Article 57(3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)"*, 25 April 2008, ICC-01/04-01/07-443-Conf-Exp.

international human rights standards *vis-à-vis* a suspect [...] that, according to the Defence, may prevent this Court from exercising its jurisdiction over him, must be raised as a challenge to jurisdiction pursuant to article 19 of the Statute, to which the time limits provided for in rule 122 (3) and (4) of the Rules do not apply”.⁶³

45. The Pre-Trial Chamber confirmed this position at a hearing on 14 May 2008. In response to the same concerns and doubts expressed by the Defence on the procedure to be followed in order to raise such an issue, the Chamber also informed it that a similar motion had been filed with the Pre-Trial Chamber in the *Lubanga* case.⁶⁴

46. Furthermore, the Chamber notes that the issue of the arrest and detention of Germain Katanga was raised neither at the confirmation hearing, nor in the written observations which preceded it. In a decision establishing a calendar in view of the confirmation hearing, rendered on 29 April 2008, the Pre-Trial Chamber had in effect given the parties until 23 June 2008 to file a list concisely setting out those issues pertaining to jurisdiction and admissibility and any other issue concerning the proper conduct of the prior proceedings that they intended to raise under rule 122(2) and (3).⁶⁵ Furthermore, the *Decision on the Schedule for the Confirmation Hearing*, rendered on 13 June 2008, gave the parties the possibility of presenting observations on jurisdiction, admissibility, and any other procedural issue.⁶⁶ On 24 June 2008, the Defence for Germain Katanga filed its written observations,⁶⁷ and on 2 July 2008 it stated them orally before the Pre-Trial Chamber.⁶⁸ On 28 July 2008, it submitted

⁶³ Ibid., p. 11.

⁶⁴ ICC-01/04-01/07-T-29-CONF-EXP-ENG, pp. 9 to 11.

⁶⁵ Pre-Trial Chamber I, *Decision Establishing a Calendar according to the date of the Confirmation hearing: 27 June 2008*, 29 April 2008, ICC-01/04-01/07-459.

⁶⁶ Pre-Trial Chamber I, *Decision on the Schedule for the Confirmation Hearing*, 13 June 2008, ICC-01/04-01/07-587-AnxI.

⁶⁷ Defence Team for Germain Katanga, “Defence Written Submissions on Fact and Law pursuant to Rule 121(9)”, 24 June 2008, ICC-01/04-01/07-641-Conf.

⁶⁸ ICC-01/04-01/07-T-41-ENG, 2 July 2009.

written observations on the issues addressed at the confirmation hearing.⁶⁹ The issues pertaining to jurisdiction and admissibility and other procedural matters were addressed both at the hearing of 2 July 2008 and in the written observations. However, it would appear that the Defence was then seeking primarily to challenge the admissibility of certain evidentiary material tendered for the purpose of the confirmation hearing.⁷⁰ It thus challenged, *inter alia*, the admissibility of a record of an interview before the military court dated 20 January 2006. It was solely in that context that the Defence emphasised that, at that time, the Accused did not yet have counsel and had not yet been informed of the charges and reasons for his detention.⁷¹

47. In sum, it was only at an *ex parte* hearing held on 11 July 2008 that the Defence for Germain Katanga referred again to the need to obtain the information and documents requested of the DRC authorities before it could formulate and file challenges to jurisdiction and to the admissibility of the case.⁷² However, it did not seek to revisit the unlawfulness of the arrest and detention in its final observations of 28 July 2008.⁷³

48. Accordingly, the Chamber finds that, during the pre-trial phase of the proceedings, the Defence did raise the issue of the unlawful detention of the accused on several occasions and as of his initial appearance. The Chamber notes, however, that, ultimately, it did not submit a motion in that regard to the Pre-Trial Chamber, whether by claiming that the proceedings were unlawful or by raising a challenge to jurisdiction. 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.

⁶⁹ Defence Team for Germain Katanga, "Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing", 28 July 2008, ICC-01/04-01/07-698.

⁷⁰ See in particular, ICC-01/04-01/07-T-41-ENG, 2 July 2008, pp. 4 to 14 and 49 to 52.

⁷¹ *Ibid.*, p. 5, lines 6 to 18.

⁷² ICC-01/04-01/07-T-47-CONF-EXP-ENG, 11 July 2008, p. 3.

⁷³ Defence Team for Germain Katanga, "Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing", 28 July 2008, ICC-01/04-01/07-698.

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 was authorised 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.

b) Trial Phase

51. The Chamber notes 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. It failed to do so at the status conferences held on 27 and 28 November 2008 and 3 February 2009, or in the filings submitted by it to the Chamber, or indeed at the hearings on the continued detention of the Accused.

i) Status conferences

52. The Chamber would recall that, by order of 13 November 2008, it addressed to the participants a list of questions pertaining to the preparation and the conduct of the trial, inviting them, moreover, to inform it of "issues and observations which they would deem relevant and on which they would like the Chamber to rule".⁷⁴ It informed them that all of these matters could be addressed orally at the initial status conference scheduled for 27 and 28 November 2008.⁷⁵ The questions addressed to the Defence teams included one which specifically invited them to make any relevant observation on the conditions of detention of the Accused.⁷⁶ However, the Chamber is bound to note that the Defence for Germain Katanga did not articulate a single

⁷⁴ Ibid., para. 5.

⁷⁵ *Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference*, 13 November 2008, ICC-01/04-01/07-747-tENG ("Order of 13 November").

⁷⁶ Order of 13 November 2008, paras. 4 and 10(1).

issue concerning the unlawfulness of his arrest and detention, whether in its written submissions or orally at the hearings held on 27 and 28 November 2008.⁷⁷

53. A second status conference was held on 3 February 2009 and, here again, the Defence for Germain Katanga failed to raise the issue of the unlawful conditions under which its client had allegedly been detained, despite having the opportunity to do so.⁷⁸

ii) Observations filed in relation to the review of the Accused's continued detention

54. In accordance with the first decision on Germain Katanga's detention rendered on 21 February 2008,⁷⁹ and the decision on the conditions of his continued detention rendered on 21 April 2008,⁸⁰ the Defence for Germain Katanga, at the Chamber's request, filed observations on its client's detention on 4 December 2008.⁸¹ The Chamber is bound to observe once again that, in its written submissions, the Defence did not request the Accused's interim release and that it confined itself to stating that, at that stage, it had no particular observations to make and that it was reiterating its previous observations.⁸² On 12 December 2008, the Chamber undertook a second review of the Decision of 21 April 2008, and decided to maintain the Accused in detention.⁸³

55. On 5 March 2009,⁸⁴ during the third review of the conditions of Germain Katanga's continued detention, the Chamber invited the participants to file

⁷⁷ ICC-01/04-01/07-T-53-ENG, 28 November 2008.

⁷⁸ ICC-01/04-01/07-T-56-ENG, 3 February 2009.

⁷⁹ Pre-Trial Chamber I, *Decision Concerning Pre-Trial Detention of Germain Katanga*, 21 February 2008, ICC-01/04-01/07-222.

⁸⁰ Pre-Trial Chamber I, *Decision on the Conditions of the Pre-Trial Detention of Germain Katanga*, 21 April 2008, ICC-01/04-01/07-426, ("the Decision of 21 April 2008").

⁸¹ Defence Team for Germain Katanga, "Defence observations on the detention of Mr Germain Katanga", 4 December 2008, ICC-01/04-01/07-780.

⁸² *Ibid.*, para. 1.

⁸³ *Second Review of the Decision on the Conditions of Detention of Germain Katanga*, 12 December 2008, ICC-01/01-04/07-794-tENG.

⁸⁴ *Decision Inviting Observations from the Participants Concerning the Detention of Germain Katanga (Rule 118(2) of the Rules of Procedure and Evidence)*, 5 March 2009, ICC-01/04-01/07-942-tENG.

observations. The Defence for Germain Katanga did so on 19 March 2009.⁸⁵ On 23 March 2009, pursuant to rule 118(3) of the Rules, the Chamber held a public hearing at which the parties set out their respective arguments.⁸⁶ At that hearing, the Defence for Germain Katanga stated, as it had in its written submissions,⁸⁷ that it was taking a realistic and pragmatic position.⁸⁸ In this respect, the Defence essentially stressed that, in the absence of any facility enabling release under judicial supervision in the Netherlands or a neighbouring State, it “[saw] no practical purpose served in applying for the provisional release of Mr. Katanga at th[at] time”.⁸⁹ Moreover, it made it clear that it was not making an application for interim release,⁹⁰ that it had “come relatively empty-handed before the Court”,⁹¹ and that it was confining itself to seeking a pragmatic solution to a problem which went beyond Germain Katanga’s case alone.⁹² On that occasion, once again, the Defence made no reference whatever to the unlawfulness of its client’s prior detention, despite the fact that the hearing had been convened with the specific aim of raising and addressing any issue concerning the Accused’s detention. On 6 April 2009, the Chamber decided to maintain Germain Katanga in detention.⁹³

56. In view of the fourth and fifth reviews of the Decision of 21 April 2008 and at the Chamber’s request,⁹⁴ the Defence for Germain Katanga filed observations on

⁸⁵ Defence Team for Germain Katanga, “Defence Observations on the Detention of Mr Germain Katanga”, 19 March 2009, ICC-01/04-01/07-967-Conf-Exp and ICC-01/04-01/07-970 (public redacted version).

⁸⁶ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009.

⁸⁷ ICC-01/04-01/07-967-Conf-Exp, para. 6.

⁸⁸ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 19, lines 13 and 14; p. 19, line 22 and p. 27, line 23.

⁸⁹ ICC-01/04-01/07-967-Conf-Exp, para. 6; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 27, lines 18 and 19.

⁹⁰ ICC-01/04-01/07-967-Conf-Exp, para. 6; ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 27, lines 18 and 19.

⁹¹ ICC-01/04-01/07-T-63-ENG ET WT 23-03-2009, p. 28, lines 21 to 23.

⁹² Ibid., pp. 25 to 27 and p. 27, lines 19 to 23. See also *Third Review of the Decision on the Conditions of Detention of Germain Katanga*, confidential decision, *ex parte*, only available to the Office of the Prosecutor and the Defence for Germain Katanga, 6 April 2009, ICC-01/04-01/07-1027-Conf-Exp-tENG (“Decision of 6 April 2009”), para. 8.

⁹³ Decision of 6 April 2009, paras. 10 to 18.

⁹⁴ *Decision Inviting Observations from the Participants concerning the Detention of Germain Katanga* (Rule 118(2)), 29 June 2009, ICC-01/04-01/07-1252-tENG; *Decision requesting the parties’ observations regarding*

13 July and 9 November 2009.⁹⁵ Once more, it did not request the Accused's release and contented itself with referring to its previous submissions.⁹⁶ On 21 July and 19 November 2009, the Chamber decided to maintain the Accused in detention.⁹⁷

57. Accordingly, the Chamber finds that the Defence did not raise the issue of the unlawfulness of Germain Katanga's detention either at the initial status conferences of 27 and 28 November 2008, despite the opportunity which was provided to it, nor did it do so in the observations it was invited to file during the various reviews of the Accused's continued detention, or indeed at the hearing convened specifically to address his conditions of detention. At no time whatsoever, did the Defence articulate the intention to raise this issue. Nor, moreover, did it apply to the Chamber for leave to appeal the decisions on continued detention.

58. The Defence for Germain Katanga 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. It remains the case that the Defence contends that the participation of the organs of the Court during the period of detention prior to the accused's transfer contributed to "giving continuity to the unlawfulness of the detention into the processes of the ICC".⁹⁸ In view of such a contention, it follows that the failure to act on the part of the Defence for Germain Katanga cannot be justified.

the review of the detention of Germain Katanga pursuant to Rule 118(2) of the Rules of Procedure and Evidence, 16 October 2009, ICC-01/04-01/07-1535.

⁹⁵ Defence Team for Germain Katanga, "Defence Observations on the Detention of Mr Germain Katanga", 13 July 2009, ICC-01/04-01/07-1298; "Defence Observations on the Detention of Mr Germain Katanga", 9 November 2009, ICC-01/04-01/07-1612.

⁹⁶ *Ibid.*, para. 1.

⁹⁷ *Fourth Review of the Pre-Trial Chamber's Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to rule 118 (2) of the Rules of Procedure and Evidence, 21 July 2009, ICC-01/04-01/07-1325; Fifth Review of the Pre-Trial Chamber's Decision Concerning the Pre-Trial Detention of Germain Katanga pursuant to rule 118 (2) of the Rules of Procedure and Evidence, 19 November 2009, ICC-01/04-01/07-1651.*

⁹⁸ *Ibid.*, para. 5.

c) The Chamber's Findings

59. It was only at the hearing of 1 June 2009, addressing a challenge to admissibility brought by the Defence for Germain Katanga,⁹⁹ that the latter announced that it was intending shortly to file a motion for a declaration on the unlawfulness of the detention of the Accused.¹⁰⁰ When invited by the Chamber to specify when that motion would be filed, as the commencement of the trial was imminent, the Defence responded that it had been “occupied [...] with other matters and other things”, and that it hoped to have that motion before the Court by the end of the month.¹⁰¹ The Chamber recalls that the Motion was not filed until 30 June 2009, seven months after the initial status conference.

60. The Defence states that it was in fact persuaded to file the Motion after being apprised “of all of the documents, views of the DRC on the nature and course of the national proceedings as well as those of the Prosecutor on his knowledge of documents and interactions with the DRC, but especially those observations expressed on the 1st of June 2009.”¹⁰² It further states that it only received the reasons for the oral decision on the admissibility of the case on 16 June 2009, an unofficial English translation of which was provided to it on 25 June 2009.¹⁰³

61. The Chamber considers that the Defence for Germain Katanga has not advanced any convincing reasons to justify the filing of the Motion at such an advanced stage in the proceedings. In the view of the Defence, the information provided by the DRC representatives at the hearing of 1 June 2009 was decisive in the filing of the Motion. It 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

⁹⁹ Defence Team for Germain Katanga, “Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 of the Statute”, 10 February 2009, ICC-01/04-01/07-891-Conf-Exp (public redacted version filed on 11 March 2009, ICC-01/04-01/07-949).

¹⁰⁰ ICC-01/04-01/07-T-65-ENG, pp. 117 and 118.

¹⁰¹ Ibid., p. 118.

¹⁰² Motion, para. 3.

¹⁰³ Ibid.

2008, the Defence had received the requested information from the DRC authorities.¹⁰⁴

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.

63. The Chamber would recall that, under article 24 of the Code of Professional Conduct for counsel, counsel acting before the Court have the obligation *inter alia* to represent their clients "expeditiously with the purpose of avoiding unnecessary [...] delay in the conduct of the proceedings".¹⁰⁵ This provision is simply a reminder to the Defence of the Chamber's general and ongoing obligation under article 64(2) of the Statute to ensure that the trial is expeditious. Such an obligation must necessarily be performed by all of those involved in the trial.

64. Between 24 October 2008, when this case was referred to the Chamber,¹⁰⁶ and 1 June 2009, when it was informed of the intention of the Defence for Germain Katanga to file such a motion, the issue was never raised before the judges or submitted to them. In the view of the Chamber, the reasons put forward by the Defence cannot justify its inaction in this regard. Moreover, it should be emphasised that any strategic reasons which could account for the filing of submissions at

¹⁰⁴ Registry, "*Transmission des observations du Gouvernement de la République démocratique du Congo*", 28 August 2008, ICC-01/04-01/07-708-Conf-Exp.

¹⁰⁵ See article 24(5) of the Code of Professional Conduct for counsel.

¹⁰⁶ Presidency, *Decision constituting Trial Chamber II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729.

specific times in the proceedings cannot in themselves justify the late filing of motions such as the one currently at issue.

65. By 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 regard to expeditiousness, despite the many opportunities subsequently provided to it.

66. Accordingly, 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.

67. Since the Chamber considers that it need not rule on the merits of the Motion, the parties' and participants' submissions on the merits have not been considered in this Decision.

FOR THESE REASONS,

The Chamber

DISMISSES the Motion.

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

[signed]

Judge Bruno Cotte
Presiding Judge

[signed]

Judge Fatoumata Dembele Diarra

[signed]

Judge Christine Van den Wyngaert

Dated this 3 December 2009
At The Hague, The Netherlands