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

Date: **26 June 2019**

**THE PRESIDENCY**

**Before:** Judge Chile Eboe-Osuji, President  
Judge Robert Fremr, First Vice-President  
Judge Marc Perrin de Brichambaut, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO**

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

**Public**

**Decision on ‘Defence Application for Reconsideration of the Presidency “Decision pursuant to article 108(1) of the Rome Statute”’ (ICC-01/04-01/07-3821-Red)**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

**Defence**

Mr David Hooper Q C

Ms Caroline Buisman

**State**

Democratic Republic of the Congo

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

Mr Esteban Peralta Losilla

The Presidency of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v Germain Katanga*, has before it an application filed on 30 January 2019 by Mr Katanga ('Application') requesting the Presidency to reconsider its 'Decision pursuant article 108(1) of the Rome Statute' dated 7 April 2016 ('Article 108 Decision').

## I. PROCEDURAL HISTORY

1. On 7 March 2014, Trial Chamber II rendered its 'Judgment pursuant to article 74 of the Rome Statute' convicting Mr Katanga, as an accessory under article 25(3)(d) of the Statute, of the crime of murder as a war crime and crime against humanity, the crime of attack against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, the crime of destruction of enemy property as a war crime, and the crime of pillaging as a war crime, committed on 24 February 2003 during an attack on the village of Bogoro in the Ituri district of the Democratic Republic of the Congo ('DRC'). Mr Katanga was acquitted of charges of being an accessory, under article 25(3)(d) of the Statute, to the crimes of rape and sexual slavery as crimes against humanity and war crimes. Mr Katanga was also acquitted of the charge of committing, under article 25(3)(a), the war crime of using children under the age of 15 years to participate actively in hostilities.<sup>1</sup>
2. On 23 May 2014, Trial Chamber II sentenced Mr Katanga to 12 years of imprisonment.<sup>2</sup> On 4 May 2015, Mr Katanga indicated that he strongly desired to serve the remainder of his sentence in the DRC and requested the Presidency's assistance in pursuing this possibility.<sup>3</sup> Mr Katanga re-iterated his desire to be transferred to the DRC on 20 October 2015.<sup>4</sup> 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.<sup>5</sup>
3. On 24 November 2015, pursuant to rule 200(5) of the Rules of Procedure and Evidence ('Rules') and regulation 114 of the Regulations of the Court ('Regulations'),

<sup>1</sup> Judgment pursuant to article 74 of the Statute, 7 March 2014, ICC-01/04-01/07- 3436-tENG, pp 658-659

<sup>2</sup> Decision on Sentence pursuant to article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG-Corr, paras 170-171

<sup>3</sup> Defence Observations on the designation of a State of enforcement, ICC-01/04-01/07-3545-Conf, paras 9-10

<sup>4</sup> Defence Observations on the Possible Designation of the DRC as a State of Enforcement, ICC-01/04-01/07-3613-Conf-Exp, para 3

<sup>5</sup> Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615, paras 113-116

the signature of an '*Accord ad hoc entre le gouvernement de la République Démocratique du Congo et La Cour Pénale Internationale sur l'exécution de la peine de M Germain Katanga, prononcée par la Cour*' ('Agreement') was finalised describing 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.<sup>6</sup> On 8 December 2015, the Presidency designated the DRC as the State in which the remainder of Mr Katanga's sentence of imprisonment would be served.<sup>7</sup> On 19 December 2015, Mr Katanga was transferred to a prison facility in the DRC.<sup>8</sup>

4. On 13 January 2016, a number of documents transmitted by the DRC to the Court were filed before the Presidency, including a '*Décision de renvoi*' dated 30 December 2015 issued by the *Haute Cour Militaire* against Mr Katanga which referred to a number of offences allegedly committed by Mr Katanga between 2002 and 2006.<sup>9</sup> A letter from the *Procureur Général de la République* dated 8 January 2016 was also provided in which reference was made to article 108(1) of the Rome Statute and article 6(2)(a) of the Agreement.<sup>10</sup>
5. On 18 January 2016, Mr Katanga's sentence of imprisonment imposed by the Court was completed.<sup>11</sup> However, Mr Katanga was not released from custody by the DRC.
6. On 10 March 2016, the Registry transmitted to the Presidency a letter from the *Procureur Général de la République* dated 29 February 2016 requesting, with delay, the Court's approval pursuant to article 108(1) of the Rome Statute to prosecute Mr Katanga.<sup>12</sup> Mr Katanga filed several observations for the Presidency to consider in the exercise of its discretion pursuant to article 108 of the Rome Statute.<sup>13</sup>

<sup>6</sup> Annex to the Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626-Anx

<sup>7</sup> Decision designating a State of enforcement, 8 December 2015, ICC-01/04-01/07-3626

<sup>8</sup> 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

<sup>9</sup> Annex I to the *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*, 12 January 2016, ICC-01/04-01/07-3631-AnxI, pp 20-21

<sup>10</sup> Annex I to the *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*, 12 January 2016, ICC-01/04-01/07-3631-AnxI, p 2

<sup>11</sup> Decision on the review concerning reduction of sentence of Mr Germain Katanga, 13 November 2015, ICC-01/04-01/07-3615, para 116

<sup>12</sup> Annex I to 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*, 9 March 2016, ICC-01/04-01/07-3666-AnxI

<sup>13</sup> Preliminary observations by the defence concerning the continued and unlawful detention of Mr Germain Katanga by the Democratic Republic of Congo, 22 January 2016, ICC-01/04-01/07-3635, Further observations following the defence mission to Kinshasa, 26 February 2016, ICC-01/04-01/07-3662, Defence 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*, 21 March 2016, ICC-01/04-01/07-3673-Conf

7. On 7 April 2016, the Presidency issued its Article 108 Decision approving the prosecution of Mr Katanga as set out in the '*Décision de renvoi*'.<sup>14</sup>
8. 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' dismissing Mr Katanga's appeal against the Presidency's Article 108 Decision<sup>15</sup> as inadmissible ('Appeals Chamber Decision').<sup>16</sup>
9. On 30 January 2019, Mr Katanga filed the Application requesting the Presidency to reconsider its Article 108 Decision.<sup>17</sup>
10. On 4 February 2019, the Presidency filed its 'Order concerning the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', requesting the competent authorities of the DRC to provide any views on any matter raised in the Application by 20 March 2019.<sup>18</sup>
11. On 20 March 2019, the Registry transmitted<sup>19</sup> *ex parte* to the Presidency the DRC's views on the Application ('DRC Views').<sup>20</sup>
12. On 1 April 2019, Mr Katanga requested disclosure of the DRC Views.<sup>21</sup> On 2 April 2019, Mr Katanga was notified with a confidential redacted version.<sup>22</sup> On 8 April 2019, Mr Katanga filed observations to the DRC Views ('Observations').<sup>23</sup>

<sup>14</sup> Decision pursuant to article 108(1) of the Rome Statute, 7 April 2016, ICC-01/04-01/07-3679

<sup>15</sup> Defence Notice of Appeal against the Presidency 'Decision pursuant to article 108(1) of the Rome Statute', 9 May 2016, ICC-01/04-01/07-3684; Defence Document in Support of Appeal Against the Presidency Decision pursuant to article 108(1) of the Rome Statute, 11 May 2016, ICC-01/04-01/07-3685-Red

<sup>16</sup> Decision on the admissibility of Mr Katanga's appeal against the 'Decision pursuant to article 108(1) of the Rome Statute', 9 June 2016, ICC-01/04-01/07-3697

<sup>17</sup> Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute, 30 January 2019, ICC-01/04-01/07-3821-Red

<sup>18</sup> Order concerning the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 4 February 2019, ICC-01/04-01/07-3822

<sup>19</sup> Transmission of the Views of the Congolese Authorities on the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 20 March 2019, ICC-01/04-01/07-3828

<sup>20</sup> Annex to the Transmission of the Views of the Congolese Authorities on the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 20 March 2019, ICC-01/04-01/07-3828-Conf-Exp-Anx

<sup>21</sup> Defence Request for disclosure of the Views of the Congolese Authorities on the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 1 April 2019, ICC-01/04-01/07-3829

<sup>22</sup> Defence Observations on the document 'Transmission of the Views of the Congolese Authorities on the Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 8 April 2019, ICC-01/04-01/07-3830-Conf, para 5

<sup>23</sup> Defence Observations on the document 'Transmission of the Views of the Congolese Authorities on the Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 8 April 2019, ICC-01/04-01/07-3830-Conf

## II. ARTICLE 108

13. Article 108(1) of the Rome Statute provides, in relevant part, that ‘[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 [or] punishment ... has been approved by the Court at the request of the State of enforcement’.<sup>24</sup>
14. The Presidency notes that the origins of article 108 lie in the rule of speciality as a customary norm governing extradition between States. Article 108, while analogous to the rule of speciality,<sup>25</sup> has been considerably reframed from its origins.<sup>26</sup> The Presidency notes that the *travaux préparatoires* do not provide guidance as to which criteria should be applied by the Court when considering approval of the prosecution, punishment or extradition of a sentenced person by a State of enforcement.
15. In the Article 108 Decision, the Presidency set out such criteria. The Presidency noted that the Court only has jurisdiction over a limited number of international crimes and that, even in this respect, it is an institution of last resort, intended to complement and not replace national systems.<sup>27</sup> A State’s capacity to prosecute serious crimes should not be lightly inhibited.
16. The Presidency considered that, under article 108(1) of the Rome Statute, the approval of the prosecution, punishment or extradition of a sentenced person should only be denied when it may undermine certain fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court.<sup>28</sup> This is an assessment of whether a prosecution is contrary to certain fundamental principles of the Rome Statute, such as, for example, *ne bis in idem*, and is distinct from an assessment of whether a prosecution would violate specific provisions of the Rome Statute if it were being done in the course of proceedings by the Court.

<sup>24</sup> Rule 199 of the Rules of Procedure and Evidence provides, *inter alia*, that the powers of the Court under this provision shall be exercised by the Presidency

<sup>25</sup> See also Rome Statute, article 101

<sup>26</sup> Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court A Commentary*, 3rd edition 2016, C H Beck, Hart, Nomos, pp 2199 -2204

<sup>27</sup> Article 108 Decision, para 20

<sup>28</sup> Article 108 Decision, para 20

### III. THE PRESIDENCY'S DETERMINATION

17. The Presidency has carefully reviewed the Application,<sup>29</sup> the DRC Views<sup>30</sup> and the Observations,<sup>31</sup> and all relevant material necessary for its determination. For the sake of judicial economy, the Presidency shall refer to these submissions to the extent necessary for its reasoning.

#### A. Preliminary matters

##### 1 Confidentiality

18. The Presidency notes that on 10 April 2019, the Registry informed it that the DRC had expressed that the information contained in its views could be made public. Mr Katanga has also informed the Presidency that his Application as well as his Observations could be reclassified as public.<sup>32</sup> Consequently, the Presidency considers that these documents, as well as any related documents subsequently filed confidentially, can be reclassified as public.

##### 2 Admissibility of Mr Katanga's Observations

19. Mr Katanga submits that leave from the Presidency to reply to the DRC Views is not necessary because the latter is not a response to the Application but rather a response to the Presidency's order of 4 February 2019. He further submits that regulations 24 and 34 of the Regulations do not apply to replies before the Presidency and that, in any case, a reply is warranted because proceedings pursuant to article 108 of the Rome Statute and rules 214 to 216 of the Rules are *sui generis* and novel.<sup>33</sup>

20. The Presidency considers that whilst regulations 24 and 34 of the Regulations may potentially be applied before the Presidency in certain circumstances, it is evident that

<sup>29</sup> Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute, 30 January 2019, ICC-01/04-01/07-3821-Red

<sup>30</sup> Annex to the Transmission of the Views of the Congolese Authorities on the 'Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 20 March 2019, ICC-01/04-01/07-3828-Conf-Anx-Red

<sup>31</sup> Defence Observations on the document 'Transmission of the Views of the Congolese Authorities on the Defence Application for Reconsideration of the Presidency Decision pursuant to article 108(1) of the Rome Statute', 8 April 2019, ICC-01/04-01/07-3830-Conf

<sup>32</sup> Observations, paras 7-8

<sup>33</sup> Observations, paras 9-13

these provisions are focussed on regular proceedings of a case and are not apt to the present circumstances, in which the Presidency is considering an exceptional request from a person who has been transferred to a State of enforcement and is no longer under the Court's jurisdiction. The Presidency accepts the Observations and takes them into consideration.

### 3. *The Presidency's capacity to reconsider its own decisions*

#### a. Submissions

21. Mr Katanga argues that the Presidency has implied authority to reconsider its own decisions. Mr Katanga submits that Presidency decisions taken pursuant to article 108 of the Rome Statute are not final.<sup>34</sup> He also argues that the Presidency's functions deriving from article 108(1) are not administrative and that decisions to give or withhold approval for further prosecution by the State of enforcement will affect the 'overall fairness of the proceedings conducted against an individual whether by the ICC, the requesting State or co-jointly'.<sup>35</sup> According to Mr Katanga, the Court has a duty of fairness to the sentenced person and 'if further prosecution is inappropriate or unfair, by giving its approval, the Court initiates an unfair process and brings the ICC into ill repute'.<sup>36</sup> Further, Mr Katanga submits that the Presidency's implied authority to reconsider its own decisions is all the more compelling given the significance of article 108 decisions and the fact that the Court's underlying texts do not permit appellate review of such decisions.<sup>37</sup> Mr Katanga submits that, '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 decisions'.<sup>38</sup>

22. The DRC submits that reconsideration is not provided for by the Rome Statute and that, in any case, according to the jurisprudence of the *ad hoc* tribunals, reconsideration is an exceptional measure which can only be taken if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice.<sup>39</sup> It further

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<sup>34</sup> Application, para 30

<sup>35</sup> Application, para 31

<sup>36</sup> Application, para 31

<sup>37</sup> Application, paras 32-33

<sup>38</sup> Application, para 33

<sup>39</sup> DRC Views, pp 64-65



submits that reconsideration of a decision is appropriate when such decision is manifestly unsound and its consequences manifestly unsatisfactory.<sup>40</sup> The DRC argues that reconsidering the Article 108 Decision would amount to condoning impunity and sacrificing the rights of the victims.<sup>41</sup>

#### b. Findings of the Presidency

23. The Presidency recalls that pursuant to article 38 of the Rome Statute it is responsible for (a) the proper administration of the Court, with the exception of the Office of the Prosecutor; and (b) the other functions conferred upon it by the Rome Statute. One of such other functions is the supervision of the enforcement of sentences as provided in Part 10 of the Rome Statute and regulated by Chapter 12 of the Rules.
24. The Presidency considers that article 108 of the Rome Statute affords it a wide discretion with regard to its determination as to whether criminal proceedings initiated by a State of enforcement may be approved. Such discretion may include reconsidering a decision taken pursuant to article 108, if appropriate.
25. In this regard, the Presidency notes that while the Rome Statute framework does not explicitly provide for a procedure for general reconsideration of decisions, Chambers of the Court have consistently recognised their inherent power to reconsider their own decisions, whether on administrative or substantive matters,<sup>42</sup> at the request of one of the parties or *proprio motu*.<sup>43</sup> Reconsideration of a decision has been held to be appropriate when such a decision is manifestly unsound and its consequences manifestly unsatisfactory.<sup>44</sup> It 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.<sup>45</sup> New facts and arguments arising since the issuance of the

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<sup>40</sup> DRC Views, p 65

<sup>41</sup> DRC Views, p 65

<sup>42</sup> 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, paras 13-18

<sup>43</sup> 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, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 14 December 2012, ICC-01/09-01/11-511, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863

<sup>44</sup> Decision on the Prosecution's Motion for Reconsideration of the Decision Excusing Mr Kenyatta from Continuous Presence at Trial, 26 November 2013, ICC-01/09-02/11-863, para 11

<sup>45</sup> 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, Decision on Kilo Defence Request for Reconsideration, 15 July 2015, ICC-01/05-01/13-1085, para 4, 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

decision might be taken into account<sup>46</sup> It is for the requesting party to demonstrate the appropriateness of such measure.<sup>47</sup>

26. The Presidency considers that for reconsideration to be appropriate in the instant case, it must be satisfied that, in view of new arguments or facts which could not have been known at the time of the Article 108 Decision, the prosecution of Mr Katanga by the DRC now undermines fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court and as such approval should now be revoked in order to prevent an injustice. The Presidency makes such an assessment at a general level and the need to ensure that fundamental principles or procedures of the Rome Statute or the integrity of the Court not be undermined does not necessarily require the Presidency to review in detail the human rights compliance of national proceedings. In this regard, the Presidency recalls that the Appeals Chamber has emphasized that ‘the Court was not established to be an international court of human rights, sitting in judgment over domestic legal system to ensure that they are in compliance with international human right standard’.<sup>48</sup>

## **B. Merits**

27. Turning to the merits of the Application, Mr Katanga argues that reconsideration of the Article 108 Decision is appropriate because, since its issuance, the DRC has not been able to guarantee his right to a fair trial.<sup>49</sup> He submits that the Presidency’s approval of his prosecution by the DRC was based on ‘the erroneous premise that the DRC would offer the minimum of fair trial guarantees,’<sup>50</sup> and that had the Presidency known that the DRC would not be able to do so, it would not have given its approval.<sup>51</sup> According

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8, Decision on Prosecution Request for Reconsideration of, or Leave to Appeal, Decision on Use of Certain Material during the Testimony of Mr Ntaganda, 23 June 2017, ICC-01/04-02/06-1973, para 14

<sup>46</sup> Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, para 11, 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

<sup>47</sup> 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 16, referring to ICTY, *Prosecutor v Radovan Karadzic*, Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010, IT-95-5/18-T.

<sup>48</sup> Article 108 Decision, para 31, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’, 24 July 2014, ICC-01/11-01/11-565, para 219

<sup>49</sup> Application, para 48

<sup>50</sup> Application, para 49

<sup>51</sup> Application, para 49

to Mr Katanga, the assumptions of the Presidency in the Article 108 Decision were thus manifestly wrong and its consequences manifestly unsatisfactory.<sup>52</sup>

28. Mr Katanga argues that the DRC has not been able to guarantee (i) his right to an expeditious trial;<sup>53</sup> (ii) his right to be notified of the charges and evidence against him;<sup>54</sup> (iii) his right to adequate representation;<sup>55</sup> and (iv) his right to an appellate review.<sup>56</sup> In addition, Mr Katanga expresses concerns about the upholding of the former government of the DRC's undertaking not to impose the death penalty should he become eligible for such sentence.<sup>57</sup> The Presidency will address each of these arguments in turn.

*1 Whether reconsideration of the Article 108 Decision is warranted on the basis that the national proceedings held by the DRC against Mr Katanga now violate his right to an expeditious trial*

a. Submissions

29. Mr Katanga submits that since his return to the DRC in December 2015 there has been no progress in his case before the *Haute Cour Militaire*, including hearings on the substance or on the evidence,<sup>58</sup> and that there is no indication that the trial is being prosecuted or investigated.<sup>59</sup> He argues that the three long years of inaction of the *Haute Cour Militaire* as concerns evidence gathering and starting the trial, coupled with the fact that there is 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. He thus requests that the Presidency revoke its approval and that, proceedings against him be halted.<sup>60</sup> In addition, Mr Katanga submits that States have a duty to organise their legal systems in order to ensure the right of an accused to

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<sup>52</sup> Application, para 49

<sup>53</sup> Application, paras 40-41, 43-44

<sup>54</sup> Application, para 42

<sup>55</sup> Application, paras 45, Observations, para 24

<sup>56</sup> Application, para 46, Observations, para 25

<sup>57</sup> Application, para 47.

<sup>58</sup> Application, para 40

<sup>59</sup> Application, para 41

<sup>60</sup> Application, para 49

be provided with a final decision within a reasonable time and that such States must do what is required to prevent lengthy periods of inactivity and congestion in the courts.<sup>61</sup>

30. The DRC has provided information about the history of the national proceedings held against Mr Katanga, in particular on the suspension of trial proceedings pending the Presidency Article 108 Decision,<sup>62</sup> the incident involving Mr Katanga's lawyer and his related suspension,<sup>63</sup> the disqualification request filed by Mr Katanga and his co-accused,<sup>64</sup> and the resignation<sup>65</sup> and retirement of several judges in the case.<sup>66</sup> The DRC argues that the delays in the proceedings were caused by these incidents.<sup>67</sup> The DRC has also explained that since January 2019, the *Haute Cour Militaire* was prevented from holding hearings because it shares its premises with the Constitutional Court which is occupied with adjudicating presidential elections related litigations.<sup>68</sup> The DRC argues that, despite these incidents, it has not violated Mr Katanga's right to be tried within a reasonable time.<sup>69</sup> In this regard, the DRC submits that the notion of reasonable time is not a quantifiable one but is rather to be appreciated *in concreto*.<sup>70</sup>
31. Mr Katanga in turn observes that the DRC does not demonstrate a 'purposeful attempt to prosecute' the case against him or 'significant activity or progress over the past two years'.<sup>71</sup> He submits that 'the fact remains that the DRC has been unable to provide a court or the means to try the case in breach of its duty to do so'.<sup>72</sup>

#### b. Findings of the Presidency

32. The Presidency first reiterates that, in considering whether Mr Katanga's request for reconsideration is appropriate, the question for determination is whether the new information provided is such that the prosecution of Mr Katanga by the DRC now undermines fundamental principles and procedure or otherwise affects the integrity of the Court. The Presidency also recalls that the right to an expeditious trial enshrined in article 67(1)(c) of the Rome Statute is a fundamental right of an accused.

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<sup>61</sup> Application, para 44

<sup>62</sup> DRC Views, p 57

<sup>63</sup> DRC Views, p 58

<sup>64</sup> DRC Views, p 58

<sup>65</sup> DRC Views, p 59

<sup>66</sup> DRC Views, p 59

<sup>67</sup> DRC Views, p 62

<sup>68</sup> DRC Views, p 59

<sup>69</sup> DRC Views, p 61

<sup>70</sup> DRC Views, p 61

<sup>71</sup> Observations, para 18

<sup>72</sup> Observations, para 20

33. The Presidency notes that since commencement, the national proceedings held against Mr Katanga were interrupted five times,<sup>73</sup> and halted in January 2019 due to the ongoing adjudication of the presidential election litigation.<sup>74</sup> In this regard, the Presidency notes that the national proceedings resumed shortly after the issuance of the Article 108 Decision<sup>75</sup> and that a number of hearings addressing substantial matters were then held.<sup>76</sup> The Presidency also notes that the other interruptions were caused by incidents which may arise in the ordinary course of criminal proceedings. With regard to the halt in the national proceedings in January 2019, the Presidency understands that national proceedings against Mr Katanga resumed on 11 April 2019.
34. The Presidency is satisfied with the explanations provided concerning the delays in the proceedings to date and does not consider that the manner in which national proceedings have been conducted since the Article 108 Decision currently warrants any exceptional reconsideration.

*2 Whether reconsideration of the Article 108 Decision is warranted on the basis that the national proceedings held by the DRC against Mr Katanga now violate his right to be notified of the charges*

a. Submissions

35. Mr Katanga submits that since commencement of the national proceedings, he has not been provided with material sufficient to notify him of the nature of the charges and evidence against him.<sup>77</sup>
36. The DRC submits that the wording of the charges against Mr Katanga is clear and that Mr Katanga did not raise this issue at the opening of his trial. It explains that the procedure applicable to trials led by the *Haute Cour Militaire* does not impose an obligation on the prosecutor to communicate the charges brought against the accused. Such procedure only requires that the accused be given access to the entirety of the case file, which was done in the case of Mr Katanga.<sup>78</sup>

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<sup>73</sup> DRV Views, pp 57-59

<sup>74</sup> DRV Views, p 59

<sup>75</sup> DRC Views, p 57

<sup>76</sup> DRC Views, pp 106-113, 114-120, 121-125, 126-129, 130-136

<sup>77</sup> Application, para 42

<sup>78</sup> DRC Views, p 63

37. In turn, Mr Katanga observes that the specificity of the charges does not go further than what is stated at page 72 of the DRC Views and that contrary to the DRC's contentions, Mr Katanga has asked for more details on the charges brought against him during the national proceedings.<sup>79</sup>

b. Findings of the Presidency

38. The question for determination is whether the new information concerning Mr Katanga's access to evidence and information about the charges against him is such that the prosecution of Mr Katanga by the DRC now undermines fundamental principles and procedure or otherwise affects the integrity of the Court.

39. The Presidency notes that in the context of the national proceedings, Mr Katanga was notified with a '*Décision de renvoi*' dated 30 December 2015, which referred to a number of offences allegedly committed by Mr Katanga between 2002 and 2006.<sup>80</sup> The Presidency also notes that, in the context of the 2016 article 108 procedure, the DRC provided further details regarding such charges.<sup>81</sup> Moreover, after the Article 108 Decision, the *Haute Cour Militaire* issued an '*Arrêt Avant-Dire Droit*' on 17 June 2016 which reiterated the charges forming the basis of the prosecution of Mr Katanga in the DRC.<sup>82</sup> In addition, the Presidency notes that Mr Katanga has had access to the entirety of the case file against him.<sup>83</sup> The fact that Mr Katanga considers the content of the case file to be irrelevant to the charges against him is a matter for him to raise in the context of the national proceedings.

40. In light of the above, the Presidency considers that Mr Katanga has failed to demonstrate that the new information concerning his right to be promptly notified of the charges is such that his prosecution by the DRC now undermines certain fundamental principles or procedures of the Rome Statute or otherwise affects the integrity of the Court. Consequently, the Presidency finds that reconsideration of the Article 108 Decision on this basis is not justified.

<sup>79</sup> Observations, para 23

<sup>80</sup> Annex I to the *Communication des autorités congolaises concernant les poursuites nationales à l'encontre de Germain Katanga*, 12 January 2016, ICC-01/04-01/07-3631-AnxI, pp 20-21, Article 108 Decision, para 4

<sup>81</sup> Annex II to 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*, 9 March 2016, ICC-01/04-01/07-3666-AnxII

<sup>82</sup> DRC Views, pp 71-73

<sup>83</sup> DRC Views, p 63

3 *Whether reconsideration of the Article 108 Decision is warranted on the basis that the national proceedings held by the DRC against Mr Katanga now violate his right to adequate representation and legal aid*

a. Submissions

41. Mr Katanga submits that in the context of the national proceedings, he has not been provided with legal aid despite having informed the judges of his indigence.<sup>84</sup> He argues that the right to adequate representation is one of the most fundamental aspects of a fair trial.<sup>85</sup> He explains that, as held by the *ad hoc* tribunals, the issue of funds to be allocated to an accused person for the conduct of his defence impacts on such person's right to a fair and expeditious trial.<sup>86</sup>
42. The DRC submits that Mr Katanga, who was a 'war lord' for a long period, has regularly been paid as well as continues to be paid wages, and as such is not indigent for the purpose of the legal aid.<sup>87</sup>
43. Mr Katanga in turn observes that such arguments are unreasonable and unsupported. He explains that despite the efforts of the Court, he has never received such wages and has had to rely on the goodwill of lawyers since his return in the DRC.<sup>88</sup>

b. Findings of the Presidency

44. The question for determination is whether the new information concerning Mr Katanga's access to legal aid now undermines fundamental principles and procedure or otherwise affects the integrity of the Court. In this respect, the Presidency recalls that the right to legal representation is a fundamental right guaranteed under article 67(1)(d) of the Rome Statute.
45. The Presidency notes that Mr Katanga applied for legal aid before the *Haute Court Militaire* as early as 16 June 2016.<sup>89</sup> The Presidency has not received any information as to whether this application has ever been formally rejected, although it understands that no legal aid has been paid to Mr Katanga. The Presidency reemphasises the

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<sup>84</sup> Application, para 45

<sup>85</sup> Application, para 45

<sup>86</sup> Application, para 45

<sup>87</sup> DRC Views, p 64

<sup>88</sup> Observations, para 24.

<sup>89</sup> Application, para 45

importance of an accused's right to legal representation and the impact that lack of access to legal aid may have on the fairness of the proceedings.<sup>90</sup> The Presidency strongly encourages the DRC to conduct a full assessment of Mr Katanga's *current and actual* financial situation (rather than on assumptions that he must have financial means as he had previously been a 'war lord'), in order to assess his eligibility for legal aid and ensure that the right to legal assistance, without payment in the event of a lack of sufficient means, is fully respected.

46. In any event, it is the understanding of the Presidency that lawyers have consistently represented Mr Katanga during hearings held before the *Haute Cour Militaire*<sup>91</sup> and have acted on his behalf.<sup>92</sup>

47. On the whole, the Presidency is of the view that Mr Katanga has not demonstrated that the new information concerning the manner in which the national proceedings have been conducted by the DRC since its Article 108 Decision, would currently lead it to reconsider the Article 108 Decision. Nonetheless, the Presidency strongly encourages the DRC to work with Mr Katanga to ensure a proper assessment of his need and eligibility for legal aid.

*4 Whether reconsideration of the Article 108 Decision is warranted on the basis that the national proceedings held by the DRC against Mr Katanga now violate his right to seek appellate review*

a. Submissions

48. Mr Katanga argues that the *Haute Cour Militaire*'s Constitution does not permit appeals against factual findings and that this constitutes a clear violation of his right to a fair trial, in particular his right to appeal in criminal matters.<sup>93</sup>

<sup>90</sup> Decision on Bemba Defence Request for Provisional Legal Assistance, 30 August 2016, ICC-01/05-01/13-1977, para 7, Summary of the Decision on legal assistance for the accused, 20 October 2009, ICC-01/05-01/08-568, para 4

<sup>91</sup> See DRC Views, pp 79, 80, 82, 106-107, 114, 121-122, 126, 130

<sup>92</sup> Annex V to 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*, 9 March 2016, ICC-01/04-01/07-3666-AnxV

<sup>93</sup> Application, para 46



49. The DRC specifies that pursuant to the rules governing the organisation and jurisdiction of the DRC, Mr Katanga, being an officer of the armed forces, can only be tried by the highest jurisdiction which is the *Haute Cour Militaire*.<sup>94</sup>

50. Mr Katanga observes that the submissions of the DRC confirm that there is no appeal on facts from decisions rendered by the *Haute Cour Militaire*.<sup>95</sup>

#### b. Findings of the Presidency

51. The Presidency notes that, in the context of the article 108 procedure, Mr Katanga had already put forward similar arguments with respect to appellate proceedings before the *Haute Cour Militaire*,<sup>96</sup> which the Presidency had taken into consideration in issuing its Article 108 Decision.<sup>97</sup> Given the fact that Mr Katanga does not advance any new fact or argument on this issue in the Application, the Presidency finds it unnecessary to consider this aspect of Mr Katanga's Application.

5 *Whether reconsideration of the Article 108 Decision is warranted on the basis that an alleged uncertainty now exists in respect of the DRC's undertaking not impose the death penalty*

#### a. Submissions

52. Mr Katanga explains that, following the change in government in the DRC in January 2019, it is unclear whether the new government will be bound by its predecessor's undertaking not to impose the death penalty during the national proceedings, should he become eligible for such sentence.<sup>98</sup>

53 Although, the DRC has made no submissions on this issue in the DRC Views, the Presidency notes that in the context of the Article 108 Decision, the DRC had provided

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<sup>94</sup> DRC Views, p 64

<sup>95</sup> Observations, para 25

<sup>96</sup> Further observations following the defence mission to Kinshasa, 26 February 2016, ICC-01/04-01/07-3662, para 7, Defence 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*, 21 March 2016, ICC-01/04-01/07-3673-Conf, para 39

<sup>97</sup> Article 108 Decision, para 31

<sup>98</sup> Application, para 47

formal written assurances to the Court that the death penalty will not be sought against Mr Katanga and that any such penalty would not, in any event, ever be carried out.<sup>99</sup>

b. Findings of the Presidency


54. The Presidency finds that Mr Katanga's arguments that a new government may not honour a solemn written assurance given by a previous one are mere speculation. It finds that Mr Katanga has not shown that reconsideration of the Article 108 Decision is justified on this basis.

The Presidency hereby:

Rejects Mr Katanga's application for reconsideration of the Article 108 Decision.

Orders the Registry to reclassify documents ICC-01/04-01/07-3821-Conf, ICC-01/04-01/07-3828-Conf-Anx-Red and ICC-01/04-01/07-3830-Conf as public.

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



**Judge Robert Fremr**  
**First Vice-President**

Dated this 26 June 2019

At The Hague, The Netherlands

<sup>99</sup> *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*, 9 March 2016, ICC-01/04-01/07-3666, para. 8.