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THE APPEALS CHAMBER

Before: **Judge Daniel David Ntanda Nsereko, Presiding Judge**
Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

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

Public Document

Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber *'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire'*

Source: **Defence for Mr Germain Katanga**

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

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Introduction

1. The Defence for Germain Katanga ("Defence") respectfully submits its document in support of its Appeal against the Decision of the Trial Chamber '*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*' ("Decision")[1], filed on 22 June 2009.[2] The Defence submits this document in support of its appeal pursuant to Articles 19(6), 82(1)(a) and 83(2)(a) of the Rome Statute, Rule 154 of the Rules of Procedure and Evidence and Regulation 64(2) of the Regulations of the Court.

2. The Defence submits the following grounds in support of its appeal:
   (A) The Trial Chamber erred in finding that the challenge to admissibility was filed out of time;
   (B) The Trial Chamber erred in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents;
   (C) The Trial Chamber erred in defining "unwilling", in light of Article 17(2) and the principle of complementarity;
   (D) The Trial Chamber erred in confusing the concepts of unwillingness and inability;
   (E) The Trial Chamber's erroneous definition of "unwilling" has deprived the accused of a real and effective right to challenge admissibility.

Procedural History

3. On 2 July 2007, the Pre-Trial Chamber issued a warrant of arrest against Germain Katanga,[3] who was held in the central prison of Kinshasa since March 2005. On 18 October 2007, Germain Katanga was transferred to the Hague.

4. Counsel for Mr. Katanga was appointed on 23 November 2007. The confirmation hearing for Mr. Katanga's case was scheduled for 28 February 2008,[4] but, following the joinder of his case with that of Mr. Ngudjolo's, the confirmation was postponed until 27 June 2008.[5] Prior to confirmation, lead counsel was assisted by a legal assistant and case manager; co-counsel was not appointed until after the confirmation.

[1] ICC-01/04-01/07-1213, public. issued on 16 June.
[2] ICC-01/04-01/07-1234.
[3] ICC-01/04-041/07-1-tENG, Warrant of arrest for Germain Katanga.
[4] ICC-01/04-01/07-T-5-ENG, 22 October 2007, page 29.
[5] ICC-01/04-01/07-T-38-ENG CT2 WT 27-06-2008.

5. On 10 February 2009, the Defence filed its *Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute*.[6]

6. On 19 March 2009, the Prosecution filed a Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a),[7] to which the Defence filed a Reply on 30 March 2009.[8]

7. On 16 April 2009, the victim representatives filed their observations,[9] and on 28 April 2009, the Public Counsel for Victims filed its observations.[10]

8. On 1 June 2009, an oral hearing took place where the Defence, the Prosecution, the victim representatives, the Public Counsel for Victims and the authorities of the DRC presented their views on Mr. Katanga's challenge of the admissibility of his case before the ICC.[11]

9. On 12 June 2009, Trial Chamber II gave its oral ruling, dismissing the Defence's Motion Challenging the Admissibility of the Case.[12] On 16 June 2009, Trial Chamber II issued its *Motifs de la decision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)*,[13] against which this appeal is filed.

A. The challenge to admissibility was submitted within the prescribed timelines

10. The Defence submitted its initial Motion Challenging the Admissibility of the Case pursuant to Articles 19(2)(a) and 19(4) of the Statute. Article 19(4) of the Rome Statute provides:

[6] ICC-01/04-01/07-891-Conf-Exp, a redacted public version of which was issued on 11 March 2009, ICC-01/04-01/07-949.
[7] ICC-01/04-01/07-968-Conf-Exp, a redacted public version of which was issued on 30 March 2009, ICC-01/04-01/07-1007. Observations of the DRC were attached to this Response,
[8] ICC-01/04-01/07-1008-Conf-Exp, a redacted public version of which was issued on 1 April 2009, ICC-01/04-01/07-1015.
[9] ICC-Ol/04-0l/07-1058-Conf; ICC-01/04-01/07-1059-Conf; ICC-Ol/04-01/07-1060.
[10] ICC-Ol/04-01/07-1082.
[11] ICC-01/04-01/07-T-65-ENG ET WT.
[12] ICC-01/04-01/07-T67-ENG ET WT.
[13] ICC-01/04-01/07-1213, public.

> The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place *prior to or at the commencement of the trial*. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c). [emphasis added]

Findings of the Trial Chamber

11. The Trial Chamber has held that the Statute envisages three periods in which an admissibility challenge may be brought. The first runs up until the decision confirming the charges has been filed with the Registrar; the second is the brief period from the filing of this decision until the constitution of the Trial Chamber; the third runs from this constitution until the end of trial. The Trial Chamber has adopted the position that during the first period all admissibility challenges can be brought; during the second period challenges may be brought only if based on Article 17 (1) (c) (*ne bis in idem*); and during the third period challenges may be brought only if based on *ne bis in idem*, in exceptional circumstances and with leave from the Trial Chamber.[14]

12. In order to arrive at this complex regime for filing admissibility challenges, it was necessary for the Trial Chamber to interpret the term *at the commencement of the trial* under Article 19(4) as referring to the moment that the Trial Chamber has been constituted.[15] The Trial Chamber did so notwithstanding its own acknowledgement that many provisions in the Statute, Rules of Procedure and Evidence and Regulations

[14] Decision, para. 49.

[15] The Trial Chamber based its analysis largely on the French expression 'ouverture du procès', but Article 128 of the Statute provides that versions of the Statute in certain other languages are equally authentic. The Defence has compared all versions of the Statute. The Russian version –in relevant part-: до начала или в начале разбирательства (translates: before the *beginning* or at the *beginning* of the hearing). The Spanish version - antes del juicio o a su inicio (translates : *before* the trial or at its *beginning*). The Chinese version -这 (this) 项质疑(challenge) 应(should) 在 审判 (the trial) 开始 前 (prior to the *beginning*) 或 (or) 开始时 (at the *beginning*) 提出 (ask). The Arabic version ف للمحاكمة أنه بيد فيها البدء عند أو المحاكمة في الشروع قبل مقبولية في الطون تستند أن يجوز ولا لمحاكمةا بدء بعد أو مرة من أكثر بالطعن تأذن أن الاستثنائية الظروف الدعوى (relevant part translates: prior to the beginning or at the beginning of the trial). The Defence is grateful to Sergey Vasiliev, Nassira Mejaiti and Haizhen Zhao for interpreting the Russian, Arabic and Chinese versions respectively.

clearly suggest that the commencement of trial is when the opening statements are being presented.[16]

13. According to the Trial Chamber, other provisions suggest that the trial commences when the Trial Chamber has been constituted. Accordingly, the Trial Chamber held that the literal reading of the Statute in the context of a whole allowed both interpretations of the term *at the commencement of the trial*. The interpretation of trial as the actual trial during which evidence is being presented is consistent with a common law approach. The inquisitorial approach would allow a broader interpretation of the trial so as to include some part of the pre-trial proceedings.[17] The Trial Chamber then looked at what would be the logical interpretation to give to this term as it is used in Article 19(4) in light of all the provisions of Article 19 and in respect of the intention of the States Parties when they adopted it.[18] It concluded that the aim of the procedural arrangements of Article 19 is essentially to minimize delays.[19] In that light, it interpreted the term *at the commencement of the trial* under Article 19(4) as referring to the moment that the Trial Chamber has been constituted on the basis of which it designed the three-phase admissibility scheme as described above.

14. It is respectfully submitted that the Trial Chamber gave an erroneous interpretation to the term *commencement of the trial* under Article 19(4) following which its reasoning as to when an admissibility challenge can be brought and on which grounds is flawed. This is apparent from (1) the ordinary meaning of 'trial' in the context of the ICC legal instruments and the ICC jurisprudence; (2) the object and purpose of Article 19 in the context of the Statute and Rules as a whole.

Ordinary meaning of trial

15. In the view of the Defence, the use of the term 'trial' does not give rise to any ambiguity. The Defence submits that, in its ordinary meaning, the term 'trial' cannot mean anything other than the period beginning with the opening statements prior to the calling of witnesses. Indeed, on the ICC website, under the case against Germain

[16] Decision, para. 40.
[17] Decision, para. 41.
[18] Decision, paras. 42-43.
[19] Decision, paras. 44-46.

Katanga and Mathieu Ngudjolo, it states: "Commencement of trial: 24 September 2009".[20]

16. Many provisions in the Statute, Rules of Procedure and Evidence and Regulations have adopted a narrow definition of the term 'trial', limiting it to the period when evidence is presented and debates take place during the hearing. The Trial Chamber acknowledges this in its Decision and cites a long list of examples: articles 61(5), 61(9), 64(3)(c), 64(6), 64(8)(b), 64(10), 74(2), 76(1), 83(2)(b), 84(1)(b) of the Rome Statute; the French version of rule 64(2)[21], rules 77, 78, 81(2), 81(4), 84, 94(2), 128(1), 132(1), 134(1), 134(2), 135(4) and 138 of the Rules of Procedure and Evidence; regulations 55(2) and 56 of the Regulations of the Court.[22]

17. The Trial Chamber also cites the following Trial Chamber I's interpretation of the expression "prior to the commencement of the trial" under Article 61(9) of the Statute: "Although no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses".[23]

18. On an earlier occasion, Trial Chamber II confirmed that the trial commences when the Prosecution presents its opening statement followed by the presentation of evidence. When, on 27 November 2008, the Chamber asked the accused to enter a plea in respect of the counts confirmed, it explained that the purpose of entering a plea so early in the day was because "it would be radically different if one of the accused or both decided to enter in a guilty plea".[24] The Trial Chamber reassured the Defence that "the charges shall be read anew and a new opportunity to enter a plea of guilty or not guilty will be offered at the opening of the trial proper."[25]

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[20] http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/democratic%20republic%20of%20the%20congo

[21] The wording of rule 64(2) of the Rules is as follows in French: "Les décisions prises par les Chambres en matière d'administration de la preuve sont motivées; les motifs sont consignés dans le procès-verbal, s'ils ne l'ont pas été au cours du *procès* […]". In English the rule reads as follows: "A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the *proceedings* […]"

[22] Decision, para. 40.

[23] Trial Chamber I, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39. See also ICC-01/04-01/07-1197-Anx2, cited in Trial Chamber II's Decision, para. 42.

[24] ICC-01/04-01/07-T-52-ENG, Status Conference on 27 November 2008, page 10, lines 10-12.

[25] ICC-01/04-01/07-T-52-ENG, Status Conference on 27 November 2008, page 15 lines 8-10.

19. Moreover, in the decision setting the date for the trial, Trial Chamber II held that the meaning of "date of the trial" in rule 132(1) of the Rules was the date of the commencement of debates on the merits of the case.[26]

20. Further, none of the provisions cited by the Trial Chamber as supposedly referring to the trial in a broader sense, in that it includes proceedings prior to the actual trial, supports the Trial Chamber's reading of the Statute of having two different meanings of 'trial'. The specific provisions cited may equally refer to 'trial' in a restrictive sense, that is, the period beginning with the Prosecution's opening of its case.

21. Even if some of the provisions are ambiguous, those referring to *the commencement of the trial* are not. They all clearly refer to the commencement of the actual trial, beginning with the Prosecution's opening.[27] Further, it is striking that the Trial Chamber cites Rules 132(1), 134(1), 134(2) and 135(4) as examples of Rules which refer to trial as beginning with the Prosecution's opening. Yet, the Trial Chamber interprets the expression *at the commencement of trial* in Rule 133, referring to motions challenging admissibility or jurisdiction, as referring to the moment that the Trial Chamber is constituted. The Defence respectfully submits that this artificial distinction of meanings of the same term in different provisions under the same section entitled trial procedure is confusing, completely illogical and arbitrary. Indeed, it is unclear why the same term 'trial' in Rule 133 would have a different meaning from the term 'trial' used in preceding and subsequent Rules.

22. During the oral hearing on admissibility on 1 June 2009, the Defence received the first hint that Trial Chamber II may have a different view on the meaning of *at the commencement of trial* for the purposes of bringing an admissibility challenge than its ordinary meaning. During this hearing, the Trial Chamber asked the Defence and Prosecution to give their views on what constitutes the commencement of the trial for the purposes of bringing admissibility challenges of the case. Both parties agreed that, in accordance with the existing practice before the ICC, the term *commencement of the trial* for the purposes of challenging the admissibility of the case is to be interpreted

[26] Trial Chamber II, Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve), 27 March 2009, ICC-01/04-01/07-999.
[27] Very clear examples are, for instance, Articles 61(9), 64(3)(c) and 64(8)(a) of the Rome Statute.

restrictively in that it refers to "formal opening of trial proceedings with opening statements followed by evidence".[28]

23. The Defence stands by this definition, which appears to be supported by the two ICC Trial Chambers in their decisions, the Pre Trial Chamber[29], the Prosecution and the provisions referring to the term 'trial' in the Statute, Rules and Regulations. The constituting of the Trial Chamber merely marks a stage in the general organisation of the procedure. Indeed, Article 61 of the Statute deals with confirmation. Part VI headed "Trial" immediately follows the confirmation. There is no section on "Pre-Trial" although there is a period between the confirmation and trial, even were the trial to begin, as the Trial Chamber has found, with the constitution of the Trial Chamber. Accordingly, the fact that the section on trial directly follows the provision on confirmation does not mean that all that follows confirmation is referred to as the 'trial'.

24. For instance, Article 64 sets out the functions and powers of the Trial Chamber, one of which is to provide for disclosure 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. This is a pre-trial function and the term 'trial' in this provision refers to the actual trial, beginning with the Prosecutor's opening. Pursuant to Article 64(8)(a), the Trial Chamber shall have read to the accused the charges at the commencement of the trial. This provision indicates that the actual trial commences after reading the charges and that there is a period between confirmation and trial. The reading of the charges does not define the start of the trial.

25. If there is any ambiguity at all, the Defence fundamentally disagrees with the Trial Chamber's proposed solution of reading 'trial' sometimes as referring to the actual trial and sometimes as referring to the proceedings commencing with the constitution of the Trial Chamber. It cannot reasonably be accepted that the term 'trial' has a different meaning depending on the purpose of the provision in which reference to trial is being made. Such proposition would violate principles such as legal certainty and foreseeability, would create total confusion and allow for arbitrary interpretations.

[28] ICC-01/04-01/07-T-65-ENG, page 45, line 12 – page 46, line 2 (Prosecution submissions); for a similar interpretation see also: page 29, lines 5-8 (Defence submissions).
[29] As reviewed in paragraph 54 of the impugned decision

26. Accordingly, the Defence submits that the term trial should be given the same interpretation in the various provisions throughout the Statute, Rules of Procedure and Evidence and Regulations, and this interpretation should be consistent with the ordinary meaning of trial, which is the period during which evidence is being presented before the Trial Chamber.

Object and Purpose of Article 19

27. The Defence submits that the Chamber erred in its understanding of the object and purpose of Article 19. In defining the object and purpose of this Article, the Trial Chamber has only resorted to the interpretative methods applicable to treaties (Vienna Convention on the Law of Treaties). The Defence submits that in international criminal justice interpretative methods related to criminal law carry equal force. In this light, the interpretative principle of in *dubio pro reo* is of relevance. When the Trial Chamber acknowledges that the statutory text is not unequivocal,[30] there is every reason to interpret these texts to the benefit of the accused.

28. The Trial Chamber has held that the aim of the procedural arrangements of Article 19 is essentially to minimize delays.[31] But this provision is not only about expediting proceedings. It is also about the attribution of a right to the accused which must be real and effective. The right of an accused to challenge the admissibility of the case against him received a great deal of support during the negotiations of the Rome Statute.[32] Nonetheless, the Trial Chamber appears not to have considered this right as part of the objective. Instead, the interprétation offered by the Trial Chamber of Article 19(4) significantly hampers the effective application of this right by limiting it to the period up to confirmation save on grounds of *non bis in idem*.

29. As to the legal side, when the same-conduct test continues to be in force, a matter not discussed by the Trial Chamber, it is only after the Confirmation Decision that the Defence is in a position to compare investigations and prosecution at the national level and at the ICC. It cannot reasonably be expected that the Defence speculate as to the outcome of the confirmation hearing. The argument found at paragraph 47 of the Trial

[30] Decision, para. 56.
[31] Decision, paras. 44-46.
[32] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, page 61.

Chamber Decision is equally applicable to the current same-conduct criterion as to *non bis in idem*.

30. This is even more apparent in relation to jurisdiction challenges to which the Trial Chamber's interpretation of the relevant provisions would equally apply. Article 19(4) does not distinguish between the timing for admissibility and jurisdiction challenges. It would be particularly problematic if the Defence was forced to file a jurisdiction challenge before the confirmation decision is rendered. It is only after confirmation that the Defence will be in a position often to know the temporal and geographic scope of the charges, and how the crimes are defined, so as to file an effective challenge.

31. While the time between arrest and confirmation will vary from case to case the original expectation was for this to be a relatively short time. The Defence submits that it would be very difficult for defence teams, who have only one counsel in the pre confirmation stage, to meet the demands of a new case, new institution, huge amounts of filings to respond to and digest, consider evidence and other material and also discharge ancillary matters such as preparation and drafting of substantial pleadings such as that demanded by an admissibility challenge -- let alone to conduct appropriate investigations into the issue.

32. The proceedings leading to confirmation, therefore, clearly gives the Defence insufficient time to properly prepare an admissibility or jurisdiction challenge. This Defence team has experienced difficulties in obtaining all relevant information to prepare a factually solid case before confirmation.[33] Rushing the Defence to such an extent causes unfairness and undermines the right of the accused to challenge the admissibility of the case or the jurisdiction of the court, particularly given that an accused may only challenge this admissibility or jurisdiction once. It will further undoubtedly delay the confirmation proceedings, which significantly prejudices the accused.

33. The Trial Chamber primarily finds support of its position in Article 19(5) requiring a State intending to bring an admissibility challenge to do so at the earliest opportunity. However, Article 19(5) explicitly refers to a State and not to an accused. It is therefore difficult to see how the Article can be extended to the accused. The intention of the

[33] ICC-01/04-01/07-T-65-ENG ET WT., 01 June 2009 (David Hooper's submissions), pages 33-34.

drafters was clearly to include the State only. Given the relative access, as between a State and an individual, to the necessary material on which to found a challenge to admissibility, the distinction is wholly reasonable.

34. The differential treatment as between a State and an accused as to when they can and should bring admissibility challenges was discussed during the Rome negotiations. During these negotiations, a view was expressed that there should be no distinction between the right of the State and that of the accused with regard to when either could challenge the jurisdiction of the Court.[34] Notwithstanding this expressed view, Article 19(5) found its entry into the Rome Statute, referring to the State only with the explicit and considered exclusion of the accused.

35. The position of the accused is different from the position of the State. The Prosecution depends on State cooperation in respect of the execution of a warrant of arrest. If, therefore, the State maintains that there are admissibility issues, such should be resolved as early as possible in order to avoid delay of the arrest proceedings. Otherwise, reluctant States may deliberately attempt to buy time before giving their cooperation in transferring an accused.

36. The accused is generally informed of the warrant of arrest against him at a much later stage than the State. In the instant case, Mr. Katanga was not informed of this warrant until the day he was transferred to The Hague. Accordingly, his earliest opportunity to even consider the question of admissibility was when he arrived in The Hague, after his legal team was constituted, many months after the State had such an opportunity. Given that admissibility challenges may implicate the conduct of the State in addition

[34] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly, Official Records, Fifty-first Session, Supplement No.22 (A/51/22), para. 250 :
It was stated that only in exceptional cases should challenges to jurisdiction be permitted during the trial. Such exceptional cases would include the discovery of new facts which could affect the question of jurisdiction. It was also noted that a fugitive at large should not be permitted to challenge jurisdiction, thereby taking advantage of the processes of the Court, while maintaining the option of refusing to submit to it if it ruled against him or her. The question was also raised as to whether an accused should be permitted to wait until the later stages of a trial to raise a jurisdictional challenge that could have been brought much earlier. A view was also expressed that there should be no distinction between the right of the State and that of the accused with regard to when either could challenge the jurisdiction of the Court. Hence paragraph (b) of article 34 should be deleted. It was further stated that an accused should not be able to challenge admissibility on the grounds of a parallel investigation by national authorities where those national authorities had in fact declined to challenge the Court's jurisdiction. These issues involved how best to allocate prosecutorial power between the Court and those States where the accused did not have a proper role.

to the ICC Prosecution, the accused must necessarily have a longer time to challenge the admissibility of the case than the State.

37. Moreover, Article 19(6) refers to admissibility challenges brought before and after confirmation of the charges. It states that, after confirmation of the charges, admissibility challenges shall be referred to the Trial Chamber. There is no hint in this provision that admissibility challenges submitted after confirmation of the charges are subject to restrictions and can be brought only on the basis of *non bis in idem*.

38. The Chamber further states that Rule 60, which complements Article 19(6) and allows admissibility challenges to be submitted to the Presidency after the confirmation of the charges, demonstrates that the drafters of the Statute and of the Rules wanted challenges of this nature to be submitted at the earliest opportunity.[35] The Defence respectfully disagrees that the existence of Rule 60 allows for such a conclusion. On the contrary, the existence of Rule 60 demonstrates that admissibility challenges can be made after the confirmation seemingly without any restrictions. On the face of Article 19(6) and Rule 60, these provisions cannot be read to support the Trial Chamber's view that admissibility challenges must be made at the earliest possibility. Nothing in these provisions suggests that the drafters meant to say this. Nor is it possible or logical to read in the text an artificially imposed restriction of such admissibility challenges post confirmation being limited to *ne bis in idem* arguments, and after the Trial Chamber is constituted only in exceptional circumstances and with leave of the Court.

39. The Defence finally notes the Trial Chamber's following observation: 'Sans préjuger d'une interprétation contraire résultant d'une analyse plus approfondie que pourrait donner la Chambre ou toute autre chambre appelée à se prononcer sur l'une de ces dispositions (….)' (unofficial translation : 'Without wishing to prejudge a conflicting interpretation arising from a more in depth analysis than that which could be given by the Chamber or any other chamber called upon to rule on one of these provisions').[36] The Defence wonders whether it follows from this that a more thorough analysis could have led to a different result. If so, the question arises why the Trial Chamber has not immediately conducted a more thorough analysis of the relevant provisions.

[35] Decision, para. 44.
[36] Decision, para. 38.

40. Accordingly, whilst it may be argued that the Defence filed its *Challenge to Admissibility* late, though good reasons were provided, the timing of the filing cannot reasonably be said to be contrary to the Statute or Rules.

41. The Defence appreciates that it was not prejudiced by the Trial Chamber's erroneous interpretation of the time limit for filing an admissibility challenge pursuant to Article 19(4) of the Rome Statute because it reviewed the admissibility challenge on its merits. The Defence nonetheless requests the Appeals Chamber to review the Chamber's erroneous interpretation and correct it in accordance with Article 83(2)(a) of the Statute. The Trial Chamber's interpretation of the commencement of trial may have wider implications and creates confusion regarding the interpretation of other provisions relating to the commencement of trial. It is also important for future applicants that the Trial Chamber's error be corrected.

B. The Bogoro and related Documents should have been brought to the attention of the Pre-Trial Chamber

42. The Defence submits that it will often be in the interest of the Court, the suspect and the State concerned to consider the question of admissibility in the course of the application for an arrest warrant. Thus, whereas the Trial Chamber in paragraphs 61 to 65 of its Decision follows the Appeals Chamber's view that the Prosecutor is under no duty to provide the Pre-Trial Chamber with "the necessary factual information to determine the admissibility of the case" when seeking the issuance of a warrant of arrest, the Defence considers this a view that is not in keeping with the principle of complementarity. It is also, it is submitted, conducive to the unnecessary waste of the Court's resources. It is submitted that the fair and effective administration of justice requires an accusing party to give full and frank disclosure of relevant facts.

43. In any event, even applying the standard accepted by the Trial Chamber that the Prosecutor must disclose all 'decisive' documents to the Pre-Trial Chamber enabling it to exercise effectively its discretionary power recognized by the Appeals Chamber in respect of clear cases of inadmissibility,[37] the Defence submits that the Trial Chamber erred in finding that the document indicating that Mr. Katanga's alleged criminal

[37] Decision, para. 65.

conduct in Bogoro was subject to investigations in DRC ("Bogoro Document")[38] and other related documents[39] do not qualify as 'decisive'.

44. The Defence submits that the Trial Chamber committed several errors leading to the erroneous conclusion that neither the Bogoro Document, nor any of the other related documents, nor the sum of all of them together, should have been submitted to the Pre-Trial Chamber in accordance with the standard set out by the Appeals Chamber.

45. First, the Trial Chamber seems to have developed a test that offers the Prosecutor almost unfettered discretion in making that determination.[40] The inevitable result of granting the Prosecutor such a wide discretion would be that the Pre-Trial Chamber is fully dependent upon the determination of the Prosecutor as to what he considers 'decisive information'. Without any objective parameters, this would deprive the Pre-Trial Chamber of any effective supervision of issues related to admissibility from a very early stage, which harbours risks and prejudices for the Court, the suspect and the State concerned.

46. Given the significance of the matter, the Defence submits a test in which 'decisive' information to be provided to the Pre-Trial Chamber should at least include relevant national documents in relation to arrest and detention. The arrest and prolonged detention of an individual based, inter alia, on an accusation which goes to the heart of the Prosecutor's case –in fact is the Prosecutor's case- cannot be regarded other than being of a truly decisive nature. With the benefit of hindsight, and after having heard all parties concerned including the DRC authorities in an oral hearing on admissibility on 1 June 2009, the Trial Chamber concluded that the Bogoro document did not appear to contain decisive information on the "circumstances of the case".[41] However, that conclusion may be drawn now, but may not necessarily have been drawn at the time the admissibility decision was made by the Pre-Trial Chamber. It is respectfully submitted that the Trial Chamber, in assessing the admissibility challenge now, cannot

[38] "*Requête aux fins de prorogation de la détention provisoire*", 2 March 2007, ICC-01/04-01/07-891-Conf-Exp-AnxH1. Pursuant to oral decision of 1 June 2009 by Trial Chamber II, this document was made public. ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 20, line 21.
[39] The Annexes of the Defence Motion Challenging the Admissibility of the Case, ICC-01/04-01/07-891-Conf-Exp, Annexes A to Z, include 51 documents, all of which relate to investigations against Germain Katanga in DRC. Only one of the 51 documents (affidavit of counsel for Germain Katanga, Mr Mutuale, AnxD2) could not have been in the possession of the Prosecution at the time of the issuance of the arrest warrant.
[40] Decision, para. 69.
[41] Decision, para. 72.

substitute the Pre-Trial Chamber in performing its supervisory task at the earliest opportunity.

47. Looking at this from a practical perspective, submission of the Bogoro and related documents to the Pre-Trial Chamber at the relevant time would at least have enabled it to form an opinion on the nature of the document. The Pre-Trial Chamber may have agreed with the Prosecution and declared the case admissible notwithstanding the Bogoro and other relevant documents. On the other hand, the Pre-Trial Chamber may have made further inquiries, and even suspended the arrest proceedings awaiting further information or indefinitely halted them. Be that as it may, the Pre-Trial Chamber should have been able to take such steps, which is far more preferable than having to consider a *fait accompli* after the surrender of the accused to the Court.

48. Secondly, the Defence submits that the Trial Chamber has erred in assessing the importance of the Bogoro Document by apparently requiring a certain degree of precision.[42] This is remarkable considering that, by nature, the investigative stage is uncertain, because by definition it is intended to clarify matters. Yet, a State should be provided the opportunity to bring investigations to an end and it would be a too demanding standard, in the context of an admissibility determination, to require precision as to matters such as time of commission or mode of liability. The Trial Chamber has also failed to establish what degree and type of precision it expects in relation to national investigations.

49. Thirdly, the Trial Chamber has only looked into the significance of the Bogoro Document. Whilst it is true that, in its oral submissions on 1 June 2009, the Defence primarily focused on the Bogoro Document, the initial Motion Challenging the Admissibility of the Case discusses ample related documents.[43] The totality of these documents clearly suggests, in the Defence submission, that the DRC was investigating the alleged criminal conduct of Mr. Katanga and some of his co-detainees in the Ituri region including Bogoro. Given that there is a total number of 50 documents directly or indirectly indicating that Mr. Katanga's and others' alleged criminal conduct in Bogoro and neighbouring villages was subject to investigations in DRC, it was completely inappropriate to withhold all that information from the Pre-

[42] Decision, paras. 70 and 71.
[43] See footnote 39.

Trial Chamber. Even if the Appeals Chamber is not persuaded that each document on its own merits being qualified as 'decisive', the totality of them should so qualify.

50. Accordingly, the Defence submits that the Trial Chamber erred in finding that the Prosecutor was under no obligation to bring the Bogoro and other related documents to the attention of the Pre-Trial Chamber enabling it to exercise its discretionary powers regarding admissibility in the context of arrest proceedings.

51. This error led to the Trial Chamber's erroneous conclusion that the initial Pre-Trial Chamber's Decision on Admissibility was rendered on proper grounds. The Defence submits that, if not for the Chamber's erroneous factual and legal finding that the documents in question did not have to be presented to the Pre-Trial Chamber, it would have concluded that the initial Decision was flawed. Had the Pre-Trial Chamber seen these documents, it may well have come to a different conclusion on the admissibility of the case. Therefore, the Defence requests that the Appeals Chamber reverses this part of the Decision pursuant to Article 83(2)(a).

C. The Trial Chamber's definition of unwillingness was erroneous in light of Article 17(2) and the complementarity principle

52. The Chamber has held that a State may be considered as unwilling, not only for the grounds set out in Article 17(2), that is, where it has no intention genuinely to bring a person to justice because it seeks to shield that person from criminal liability, but in addition, where it chooses not to investigate or prosecute a person in its own jurisdiction, but has nevertheless every intention of seeing that justice is done.[44]

53. The Chamber acknowledges that this second form of unwillingness is not explicitly provided for in Article 17 of the Statute but considers that it is in line with the object and purpose of the Statute, in that "it fully respects the drafters' intention "to put an end to impunity" while at the same time adhering to the principle of complementarity".[45]

[44] Decision, para. 77.
[45] Decision, para. 78, unofficial translation.

54. The Trial Chamber thus finds that Article 17(2) is not exhaustively concerned with the situations set out in sections a, b and c, but is open-ended and could also apply to a State which is for any other reason unwilling to investigate or prosecute.

55. It is respectfully submitted that the Trial Chamber erroneously enlarged the definition of 'unwillingness' in a manner (1) not intended by the drafters of the Statute and not in compliance with its objective and purpose; and (2) contrary to the fundamental values underlying the complementarity principle.

Scope of unwillingness as foreseen in the Statute

56. Article 17(2) of the Statute provides:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

57. The Defence submits that Article 17(2) contains an exhaustive list of circumstances from which unwillingness on the part of the State to bring genuinely a person to justice can be detected. It is evident from the manner in which Article 17(2) is phrased that this is a self-contained regime leaving no room for discretion to rely on forms of unwillingness other than those described under (a), (b), or (c) of Article 17(2). Indeed, Article 17(2) states that the Court shall consider whether any of the circumstances under Article 17(2) (a), (b) or (c) exist. It does not state that the Chamber may consider those circumstances. Neither does it include any phrase suggesting that the Court has any discretion to consider any circumstances other than those under Article 17(2). The Defence submits that, had the drafters intended that the Chamber may define "unwillingness" in a broader manner than provided for in Article 17(2), they

would have made this intention apparent by including a phrase such as "including but not limited to", "inter alia", "amongst others", "such as", "for example" or a similar phrase indicating that the Chamber may look beyond Article 17(2) in defining "unwillingness".

58. The Defence's contention that Article 17(2) provides an exhaustive list of circumstances that the Court shall consider in determining whether a State is willing genuinely to bring a person to justice under Article 17(1)(a) or (b) is not only supported by the ordinary meaning of that provision but also by the literature. For instance, S.A. Williams held regarding the Article 17(2) circumstances that "[i]t is an exhaustive list".[46]

59. Further, J. Holmes, who was the reporter on Article 17 in the 1997 preparatory committee and during the negotiations of the Rome Statute, held that "since the main purpose of adding a provision on "unwillingness" was to preclude the possibility of sham trials aimed at shielding perpetrators, this criterion was easily included"[47]. Similarly, H. Olasolo stated in respect of the circumstances set out in Article 17(2) that « these circumstances have been designed to cover scenarios in which, despite overwhelming incriminating evidence, the national courts of the acting States deliver judgments acquitting the accused or where the sentence imposed is clearly insufficient in light of the gravity of the crimes of which the accused is convicted."[48]

60. Moreover, Article 17 gives effect to the principle of complementarity, which is guiding principle in determining the admissibility of a case.[49] Indeed, as J. Holmes indicates, « since the principle itself was already elaborated in Article 17, delegations decided that it was no longer necessary to include further elaboration in the Preamble and that the basic principle would suffice."[50] Accordingly, and in line with the

[46] S.A. Williams, "Article 17 – Issues of admissibility", *in Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), Beck, 2008, pages 622-623; also see: H. Olasolo, *The triggering procedure of the International Criminal Court*, Martinus Nijhoff, 2005, page 150.
[47] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, page 50.
[48] H. Olasolo, *The triggering procedure of the International Criminal Court*, Martinus Nijhoff, 2005, p. 150, at page 153.
[49] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, page 56; S.A. Williams, "Article 17 – Issues of admissibility", *in Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), Beck, 2008, page 613.
[50] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, page 55.

objective of the drafters of the Rome Statute who made the best effort to give the most precise and objective definition to the concepts of unwillingness and inability,[51] Article 17 must be strictly interpreted.

61. Accordingly, if the Appeals Chamber does not agree that 'unwillingness' can only be defined in terms of Article 17(2), then at the very least unwillingness must be justified on good grounds, or be similar to those set out in Article 17(2).

Complementarity Principle

62. The Trial Chamber is of the view that in the interest of combating impunity and in line with the complementarity principle, a State can waive its right to prosecute persons for international crimes and choose not to challenge the admissibility of a case, even if there are objective grounds for bringing an admissibility challenge. As a result, according to the Trial Chamber, the fight against impunity is not disserved by an expansive interpretation of Article 17 (2).[52]

63. The Trial Chamber further holds that, notwithstanding "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes", as set out in paragraph 6 of the Preamble, the State may decline to exercise its criminal jurisdiction over a person allegedly responsible for international crimes on the mere ground that it considers it more opportune if the ICC exercises its jurisdiction over this person. In the view of the Chamber, a State which is able to prosecute would fulfill its duty to prosecute international crimes if it transfers cases to the ICC and fully cooperates with it.[53]

64. The Defence respectfully disagrees with this reasoning and submits that it violates paragraph 6 of the Preamble, as well as the fundamental values underlying the complementarity principle as inherent in the Preamble, Articles 1 and 17 of the Rome Statute. Indeed, if States are granted an unconditional right not to prosecute, this would seriously jeopardize any encouragement for States to prosecute domestically and thereby endanger the correct application of the principle of complementarity.

[51] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, pages 48-56, 74.
[52] Decision, para. 78.
[53] Decision, para. 79.

65. This interpretation of the complementarity principle and the duty upon States to prosecute, as set out in the Preamble, is contradicted by the view of the Pre-Trial Chamber in the case against *Kony et al*, holding:

> "Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed."[54]

66. Allowing States to transfer cases to the ICC despite being able to deal with such cases within their own jurisdiction would negate this persisting and primary responsibility for States to prosecute international crimes. Such would be wholly inconsistent with Article 1 of the Statute, which provides that the Court "shall be complementary to national criminal jurisdictions". It would also violate Article 17 affirming the principle that able and willing States should deal with cases concerning international crimes in their own jurisdiction.

67. One of the objectives of the establishment of the ICC was to encourage States to investigate and prosecute international crimes and to reinforce their legal capacity to do so. The drafters of the Rome Statute envisaged the ICC as a Court of last resort to come into action in the most exceptional circumstances only, when a State is genuinely unable or unwilling to take action within its own jurisdiction. A successful ICC has no or very few cases, the majority of cases being investigated and prosecuted domestically.

68. This accords with the view of J.T. Holmes that,

> « throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. Such a system would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes – obligations which existed for all States under conventional and customary international law."[55]

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[54] *Prosecutor v. Kony et al*., Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, para. 34.
[55] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, p.74.

69. Similarly, H. Olasolo concluded that "the principle of complementarity has two main goals: first, promoting the investigation and prosecution by national jurisdictions of "the most serious crimes of international concern" with full respect to the principles of justice contained in the RS; and, secondly, extirpating through the ultimate action of the ICC the virus of the impunity for the perpetrators of such crimes which is preventing national jurisdictions from investigating and prosecuting." [56]

70. H. Olasolo was further of the view:

> "The dynamic configuration of the principle of complementarity, along with its broad personal scope, sacrifices to a certain extent the role of the ICC could play in the investigation and prosecution of the crimes provided for in the RS in order to strengthen the incentive given to national jurisdictions to investigate and prosecute such crimes. As a result, one may conclude that the RS has created a "watchdog Court" that, on the one hand, gives an incentive to States to investigate and prosecute if they wish to avoid the ICC investigating and prosecuting the crimes committed in situations occurring in their territory or where their nationals are substantially involved. And, on the other hand, it indirectly legitimizes national investigations and prosecutions that are concluded under the supervision of the Court."[57]

71. In sum, when the duty on every State to exercise its jurisdiction over persons alleged to be responsible for international crimes is read in light of Articles 1 and 17 and viewed against the background of the intention of the drafters of the Rome Statute, it is clear that Court may only exercise its jurisdiction over a case if a State is unwilling or unable genuinely to bring a person to justice, not if it simply prefers the ICC to take over the case.

72. Accordingly, the Trial Chamber gave an erroneous interpretation to the term 'unwilling' as defined under Article 17(2), which constitutes a legal error which has materially affected the decision. If not for this error of law, the Trial Chamber would have come to a different conclusion on admissibility and found that the DRC was willing to prosecute Mr. Katanga in the DRC. Therefore, the Defence requests that the Appeals Chamber reverses this part of the decision pursuant to Article 83(2)(a).

[56] H. Olasolo, *The triggering procedure of the International Criminal Court*, Martinus Nijhoff, 2005, p.146-147.
[57] Id., p. 168-169.

D. The Trial Chamber's confusion unwillingness – inability

73. In its Decision,[58] the Trial Chamber holds that a State may decide to transfer a case to the Court if it is unwilling to exercise its own jurisdiction in respect of the case in question, because it considers itself unable to deliver a fair and effective trial or when there are no favourable circumstances for effective investigations or a fair trial. The Defence submits that this analysis amounts to *Etiquettenschwindle*. These examples do not concern 'unwillingness', but 'inability'. The Trial Chamber's examples of 'unwillingness' are given in error because following this logic would make any refusal amount to 'unwillingness'.

74. Different regimes apply to inability and unwillingness. Inability is covered by Article 17(3) and unwillingness is covered by Article 17(2). Thus, the grounds for alleging (un)willingness or (in)ability and the analysis thereof are not the same.

75. Until the Trial Chamber rendered its Decision on admissibility, willingness had not been an issue which was raised or discussed or was even in dispute. Even at the oral hearing on 1 June 2009, the discussion evolved around the alleged inability of the DRC, not its alleged unwillingness. The Trial Chamber did not ask any concrete question about unwillingness.

76. The Defence further notes that neither the Prosecutor nor the DRC itself have ever called in question the *substantive* willingness of the DRC to prosecute international crimes. The DRC has made it perfectly clear that it considers itself fully committed to the fight against impunity and at the hearing of 1 June 2009 expressed at multiple occasions that the reasons for not prosecuting Mr. Katanga were based on lack of ability and was not a matter of unwillingness.[59]

77. In this light, the Defence regrets that the Trial Chamber has not responded to any of the matters raised concerning inability but instead relied on unwillingness as a decisive factor in determining the admissibility of the case. The Defence submits that the Chamber was in error in doing so because it confused the notion of unwillingness with that of inability.

[58] At paragraph 80.
[59] ICC-01/04-01/07-T-65-ENG ET WT., 01 June 2009, page 72 (submissions of Mr. Luzolo, Minister of Justice of DRC). ; pages 75 - 81(submissions of Mr. Muntazini Mukimapa, Avocate General of the DRC).

78. The Defence submits that the Trial Chamber's erroneous interpretation of unwillingness was caused by the Chamber's persistent confusion between the absence of objection by the DRC and the lack of willingness. At paragraph 95 of its Decision, the Trial Chamber relies on the absence of an admissibility challenge from the DRC as an element in support of its conclusion that the DRC relegated the trial of Mr. Katanga unequivocally to the ICC. But absence of objection is clearly different from a lack of will in the sense of Article 17(2) of the Statute. If one is to conflate the two concepts, the principle of complementarity as a catalyst for national prosecutions becomes an empty shell. States will have little incentive to prosecute international crimes and the ICC risks being burdened with cases that could have been easily prosecuted elsewhere, thereby depleting the Court's resources for other cases.

79. The real issue, therefore, is inability, not unwillingness. Either way, the Defence submits that the DRC was, at the time of the issuance of the warrant of arrest and transfer, both willing and able to exercise jurisdiction over Mr. Katanga and to try him in the DRC, albeit on different grounds.

Alleged inability

80. In order to determine inability in a particular case, Article 17(3) states that the Court "shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

81. Consistent with Article 17(3), two criteria must be met in order to determine that a State is unable to exercise jurisdiction in a particular case : (1) the State must be unable to obtain the accused or the necessary evidence and testimony; and (2) its ability to do so must relate to a total or substantial collapse or unavailability of its national judicial system. These criteria are cumulative, not alternative.[60].

82. The inability of the State can be invoked only in very exceptional circumstances. H. Olasolo noted that « the notion of « inability » covers only very exceptional scenarios,

[60] J. T. Holmes, "The principle of complementarity", *in The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, page 49.

such as those where there is no central government or where exceptional circumstances such as civil wars or natural disasters lead to the total or substantial collapse of the administration of justice"[61].

83. In the case of the DRC, such exceptional circumstances cannot be shown given that the DRC has demonstrated to be perfectly able to try defendants of international crimes.[62] It has a functioning criminal justice system, as was recognised by the Pre-Trial Chamber in the case against *Lubanga*.[63] Presently, there is no total or substantial collapse or unavailability of the DRC judicial system. In addition, in the case against Katanga, there was no problem of obtaining the accused, as is evidenced by his arrest, and if there is any evidence out there, the DRC legal authorities are in a better position to obtain it than the ICC Prosecutor, given their proximity and control over the region.

84. Article 17(3) further makes it very clear that the Court determines whether a State is unable to exercise its jurisdiction over a particular case, not the State itself. This is also consistent with the determination made by the Pre-Trial Chamber in *Kony et al* that « once the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case. This flows first and foremost from the wording of the chapeau of article 17, which states that "the Court shall determine that a case is inadmissible...". It is also entailed by and consistent with the very nature of the Court as a judicial institution and

[61] H. Olasolo, *The triggering procedure of the International Criminal Court*, Martinus Nijhoff, 2005, page154; also see : S.A. Williams, "Article 17 – Issues of admissibility", *in Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), Beck, 2008, page 623.

[62] See: ICC-01/04-01/07-HNE-12, Avocats Sans Frontières, Etude de jurisprudence, L'application du statut de Rome de la CPI par les juridictions de la République Démocratique du Congo, Mars 2009, Annexe 1, Présentation des affaires étudiées.

[63] *Prosecutor v. Lubanga*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, para. 36 :
« However, for the purpose of the admissibility analysis of the case against Mr Thomas Lubanga Dyilo, the Chamber observes that since March 2004 the DRC national judicial system has undergone certain changes, particularly in the region of Ituri where a Tribunal de Grande Instance has been re-opened in Bunia. This has resulted inter alia in the issuance of two warrants of arrest by the competent DRC authorities for Mr Thomas Lubanga Dyilo in March 2005 for several crimes, some possibly within the jurisdiction of the Court, committed in connection with military attacks from May 2003 onwards and during the so-called Ndoki incident in February 2005. Moreover, as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the Centre Pénitentiaire et de Rééducation de Kinshasa since 19 March 2005. Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17(1)(a) to (c) and (3), of the Statute does not wholly correspond to the reality any longer."

has been labelled by scholars as the "fundamental strength" of the principle of complementarity."[64]

85. Accordingly, it is not for the DRC to declare itself unable to prosecute and try the accused but it is for the Chamber to make such a determination. Hence, contrary to what the Trial Chamber suggests,[65] it is not decisive that a State considers itself unable to prosecute and try the case domestically.

86. On these grounds, the Trial Chamber erred in ignoring the debate on inability. Had the Chamber appropriately interpreted the notions of unwillingness and inability, it would have found that the DRC was both willing and able to exercise jurisdiction over Mr. Katanga to prosecute and try him in the DRC. Accordingly, the Defence submits that these legal and factual errors materially affected the Trial Chamber's Decision and prays that the Appeals Chamber reverses this part of the Decision.

E. The Trial Chamber has deprived the accused of a real and effective right to challenge admissibility

87. In paragraphs 82 to 89, the Trial Chamber discusses the right of the accused to challenge admissibility. In the view of the Defence, the Trial Chamber takes a minimalist approach to the Defence's rights in the admissibility process and has misconstrued and misapplied the applicable law.

88. In paragraphs 84 and 85, the Trial Chamber dismisses the fundamental rights of the accused as a relevant factor in admissibility proceedings.[66] However, this view finds direct contradiction in paragraph 80 where the Trial Chamber adopts the position that the perceived absence of a fair trial at the national level may support admissibility of the case at the ICC (via the expanded interpretation of 'willingness' as provided for in Article 17(2)). With this, fairness of proceedings is made a relevant factor.

89. The position of the Defence is that both ability and willingness can be relative terms only, in the sense that the quality of proceedings, as an expression of willingness and

[64] *Prosecutor v. Kony et al.,* Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, para. 45 (footnotes omitted).
[65] Decision, para. 80.
[66] Decision, paras. 84-85.

ability, must be compared. One side of the equation is always and by definition the ICC. Whereas the ICC is to be expected to evaluate critically the quality of national proceedings it must also engage in critical self-evaluation. Only then is it possible to deliver a concrete finding, not in the abstract, whether national investigations or prosecutions can be regarded as falling within the scope of ability or willingness, *when compared to the ICC proceedings*.

90. The Trial Chamber thus erred in law by ruling that human rights, such as the right to a fair trial, are not relevant factors in admissibility proceedings.

91. The Trial Chamber further held that, when a State indicates that it is unwilling to prosecute the accused, a challenge of the Defence to the admissibility of the case can be exercised only within the limits of the expression of the sovereignty of the State concerned.[67] The Defence understands this in the sense that when a State is unwilling to prosecute the accused, the latter can no longer substantively challenge admissibility (when it concerns 17(1)(a) and (b)).

92. The Defence submits that it cannot be exclusively in the hands of the State to determine its willingness, otherwise the right of the accused to challenge the admissibility pursuant to Article 17(1)(a) is meaningless in any situation where a State does not object to the ICC trying the accused.

93. If it is considered to be the right of a sovereign State to determine its willingness without the need to justify or explain its lack of willingness, consensual burden-sharing between the ICC Prosecutor and the national jurisdiction would bind the Court and the accused; nothing the Defence would submit could alter this or put such burden-sharing into question.

94. The Defence submits that this finding violates Article 19(2)(a), which provides that "[c]hallenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58". This provision offers the accused a full and unconditional right to challenge the

[67] Decision, para. 88.

admissibility of a case. He can do so on any ground and this right has not been subjected to any restriction.

95. The informal Expert paper on complementarity supports the view that even when the Prosecutor and a State have agreed on 'burden-sharing', this being the expression of a State's sovereignty, the accused should be in a position to substantively challenge it and the matter should not be regarded as binding upon the Court, which is contrary to the position that seems to transpire from the Trial Chamber's Decision, notably paragraphs 87 and 88.[68]

96. The Defence submits that the Trial Chamber has erred in the interpretation of Article 19(2)(a), read in conjunction with Article 17(2). The starting point must be that the drafters intended to provide the accused with rights which are real and effective rather than theoretical and illusory.[69] The latter would be the case if the exercise of the right to challenge admissibility by the accused in relation to grounds 17(1)(a) and (b) would substantively be made conditional upon the absence of a State's sovereign and willing 'transfer' of the case to the ICC.

97. There is no support in law for this proposition. On the contrary, the informal Expert Paper, which seems to have been overlooked by the Trial Chamber, rightly mentions that the accused must be in a position to challenge effectively consensual burden-sharing and that any burden-sharing between the Prosecutor and the State need not bind the Court. The Trial Chamber has adopted a different and erroneous position.

98. This position cannot be based on the view that individuals cannot invoke violations of international law which do not attribute rights to them and thus do not seem to concern them. Case law of the ad hoc Tribunals supports the position that the accused can invoke a broad category of violations of international law, even sovereignty related norms, even when his rights are not directly affected.[70] Furthermore, in respect of

[68] ICC-01/04-01/07-1015-Anx, I.
[69] Airey v. Ireland, ECrtHR Judgment of 9 Oct. 1979, A-32, para.24.
[70] See ICTY case against Tadic, Appeals Chamber's Decision on Jurisdiction, 2 October 1995, para. 55:
55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members." In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.). Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the

admissibility proceedings, this right has been specifically attributed and must be interpreted so as to allow the accused to raise any violation of the Court's applicable law which could render a case inadmissible. Regarding the determination by the Trial Chamber that a State can waive its right to prosecution, the argument could be, for instance, that such waiver and ensuing forms of burden sharing would be in violation of international norms obliging a State to prosecute international crimes. Clearly, the accused should be fully able to make this argument.

99. In addition, the Defence submits that the accused is entitled to raise prejudices and violations of rights that would ensue from any consensual burden sharing. The Defence has argued above that the Trial Chamber incorrectly dismissed the corpus of human rights as irrelevant for admissibility proceedings. Another situation where the accused should be in an effective position to challenge consensual burden sharing is when his rights are violated as a result of this or when the national 'waiver of prosecution' would be unduly prejudicial. As an example of the latter, one could think of an investigation and prosecution which has been ongoing for years and, when

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principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 International Law Reports 5, 62 (1961), affirmed by Supreme Court of Israel, 36 International Law Reports 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights. Whatever the situation in domestic litigation, the traditional doctrine upheld and acted upon by the Trial Chamber is not reconcilable, in this International Tribunal, with the view that an accused, being entitled to a full defence, cannot be deprived of a plea so intimately connected with, and grounded in, international law as a defence based on violation of State sovereignty. To bar an accused from raising such a plea is tantamount to deciding that, in this day and age, an international court could not, in a criminal matter where the liberty of an accused is at stake, examine a plea raising the issue of violation of State sovereignty. Such a startling conclusion would imply a contradiction in terms which this Chamber feels it is its duty to refute and lay to rest.

combined with years of detention, the State concerned decides to break off the prosecution with a view to having the ICC deal with the case.

100. In light of the above, the Defence is concerned that the Chamber's interpretation of unwillingness will leave the suspect or accused without an effective remedy to challenge the transfer of his or her case to the ICC. Moreover, if the Court informs States that it will not inquire into the reason why the State is unwilling to investigate or prosecute, it will have the effect of encouraging the current practice of the DRC to simply keep detainees in detention indefinitely until the ICC decides whether or not it wants to prosecute them.

101. Accordingly, the Defence submits that the Trial Chamber's interpretation of 'unwillingness', leading to a deprivation of the right of the accused to effectively challenge the admissibility of the case, constitutes a legal error which has materially affected the Decision. The Defence, therefore, prays the Appeals Chamber to reverse this part of the Trial Chamber's Decision.

F. Requested relief

102. On the grounds set out in this Document in Support of the Appeal, the Defence submits that the Trial Chamber erred in declaring the case against Germain Katanga admissible. The Defence is of the view that the DRC was, at the time of the issuance of the warrant of arrest and transfer, able and willing to prosecute Mr. Katanga in the DRC. Accordingly, the ICC should have refrained from exercising jurisdiction over him. Any reasonable Trial Chamber would come to that conclusion on the facts of the case and a correct interpretation of the relevant provisions.

103. The Trial Chamber came to its erroneous conclusion that Mr. Katanga's case is admissible before the ICC due to a number of legal and factual errors, as discussed above. These legal and factual errors, individually and in total, have materially affected the Trial Chamber's Decision. If not for these errors, the Trial Chamber would have declared the case against Mr. Katanga inadmissible, as any reasonable Trial Chamber would have done.

104. Therefore, the Defence prays that the Appeals Chamber reverse the Trial Chamber's Decision on Admissibility pursuant to Article 83(2)(a) and declare the case against Mr. Katanga inadmissible.

Respectfully submitted,

David HOOPER

Dated this 8 July 2009
At The Hague