

1 International Criminal Court

2 Trial Chamber II

3 Situation in the Democratic Republic of Congo - ICC-01/04-01/07

4 Case against Germain Katanga and Mathieu Ngudjolo Chui

5 Hearing - Open Session

6 Monday, 1 June 2009

7 The hearing starts at 9.57 a.m.

8 COURT USHER: All rise. The International Criminal Court is now
9 in session.

10 PRESIDING JUDGE COTTE (interpretation): The court is in session.
11 Please be seated.

12 Security officers, please could you please bring in the suspects.

13 Fine. Court Officer, could you please call the case which is
14 before the Court today.

15 THE REGISTRAR (interpretation): Yes, your Honours. Situation in
16 the Democratic Republic of the Congo, the Prosecutor against Germain
17 Katanga and Mathieu Ngudjolo Chui, case number ICC-01/04-01/07.

18 PRESIDING JUDGE COTTE (interpretation): Thank you, Court
19 Officer.

20 I would like to make sure there is interpretation into Lingala,
21 and in advance time the interpreters and the court reporters for the
22 assistance their going to give us during this hearing. Is there
23 interpreting into Lingala? Court Officer?

24 THE REGISTRAR (interpretation): Yes.

25 PRESIDING JUDGE COTTE (interpretation): Great. I would also

1 like to extend to you the apologies of Mr. Herve Diakiese, who sent to
2 the Court a message stating that for reasons beyond his control he was
3 not able to leave his place of work because the air ticket was not put at
4 his disposal. So I would like to inform all parties and participants at
5 this hearing. So please do not be surprised by his absence, know that it
6 is due to reasons beyond his control.

7 Now, those who are attending this hearing are representatives of
8 the authorities of the Democratic Republic of the Congo, and the Chamber
9 would like to welcome them. Their presence here today is essential for
10 us, because it's going to enable the Chamber to have a full appreciation,
11 in fact, a better appreciation of the merits of the admissibility
12 challenge which we are going to examine.

13 The persons who are sitting opposite the Bench, could you please
14 introduce yourselves.

15 MR. LUZOLO (interpretation): Thank you, your Honour. At the
16 request of the Chamber of the ICC, the delegation of the Democratic
17 Republic of the Congo, which I have the honour of heading, and this is
18 the first participation of a State at a hearing of the ICC, and our
19 delegation is composed as follows: Mr. Luzolo Bambi Lessa, who is
20 myself, Minister of Justice and keeper of the seals of the Democratic
21 Republic of the Congo, focal point of the cooperation between the
22 government and the ICC. Seated next to me on my left you have
23 Mr. Mr. Joseph Mushagalusa, the general prosecutor of the Republic, the
24 legal focal point pursuant to the agreements which we have with the
25 court. So that's the focal point for the Democratic Republic of the

1 Congo. On my right you have the advocate general at the supreme military
2 court, Mr. Muntazini, the judicial authority in charge of the case under
3 consideration. And next to him you have Mr. Mabaya, an advisor and
4 expert in the cabinet of the Minister of Justice, keeper of the seals.
5 That is the composition of the delegation of the Congo.

6 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you,
7 Mr. Minister. You are seated here at the court, and you are sitting in
8 the place which is usually that of witnesses who come to give testimony
9 before this court.

10 The size of this courtroom does not enable us to organise our
11 hearings as we would have liked to, but you should understand that all
12 the persons, it's clear to everyone seated here that you are not
13 witnesses. You have come to give responses to a certain number of
14 questions which we may have to ask. So you are seated at the centre and
15 under the best conditions for us and we hope for you. The other
16 participants at the proceedings as well as the representatives of the
17 Registry are also called upon to introduce themselves.

18 Prosecution team.

19 MR. MacDONALD (interpretation): Thank you, Your Honour. The
20 Prosecution will be represented today by Mr. Fabricio Guariglia and
21 Mr. Ben Batros from the Appeals Chamber of the OTP, as well as Ms. Sara
22 Criscitelli, Ms. Sandra Schoeters, and by the section on cooperation and
23 complementarity, Mr. Turlan.

24 PRESIDING JUDGE COTTE (interpretation): Thank you,
25 Mr. Prosecutor.

1 Mr. Hooper, can you introduce your team, your Defence team today,
2 sir.

3 MR. HOOPER: Indeed. Myself, David Hooper; Andreas O'Shea who is
4 co-counsel; Caroline Buisman, legal assistant; Sophie Menegon, the case
5 manager; and also here today is Professor Goran Sluiter from the
6 University of Amsterdam who has been good enough to lend us advice,
7 particularly on an esoteric subjects such as complementarity, and we are
8 indebted to him. While I'm on my feet and plainly looking around, I
9 think I can probably claim a degree of seniority, certainly amongst those
10 at the bar. This is the first time that we've sat with the reconstituted
11 Court, and following the sad and tragic death of Her Honour Judge Saiga,
12 we have expressed our private condolences through the President of the
13 Court but perhaps it's befitting on behalf of everyone at the bar in this
14 court this morning, who I know will join me in these sentiments, may I
15 express publicly on behalf of all of us our condolences to Judge Saiga's
16 family. Thank you.

17 PRESIDING JUDGE COTTE (interpretation): Mr. Hooper, the Chamber
18 thanks you, and we appreciate the intervention you have just made. It is
19 true that other hearings were held, but there was no hearing that brought
20 together all the parties and participants, and the statement you just
21 made in memory of Judge Saiga is something we all appreciate and we thank
22 you for it.

23 Maitre Kilenda, can you introduce your team, please.

24 MR. KILENDA (interpretation): Thank you, your Honour. Ladies
25 and gentlemen of the Court, Professor Fofe, who is our associate counsel,

1 cannot attend and I would like to present his apologies because this
2 happened for reasons beyond his control. The Defence team of Mathieu
3 Ngudjolo is composed of Ms. Alie Maryse, who is our legal assistant who
4 is a lawyer of the bar of the Brussels. On my left you have Ms. Aurelie
5 Roche, who is a jurist and who is our case manager. And myself,
6 Jean-Pierre Kilenda Kakengi Basila, lawyer of the bar of Brussels,
7 representing Mathieu Ngudjolo.

8 PRESIDING JUDGE COTTE (intrepretation): The Chamber thanks you,
9 Maitre Kilenda. You have understood that we deemed it useful to invite
10 you to this hearing even though you did not challenge admissibility, and
11 you would appreciate at the right moment, I hope, whether you are going
12 to take the floor or not.

13 Now, Legal Representatives of Victims, can you introduce
14 yourselves.

15 MS. MASSIDA (interpretation): Good morning, your Honour. The
16 office of public counsel of victims represents 52 victims for now and it
17 is represented today by Maitre Maria Victoria Yazji on my right;
18 Mr. Orcholon Narantsetseg, who is seated on the third row; and myself,
19 Paolina Massidda, main or principal counsel.

20 PRESIDING JUDGE COTTE (intrepretation): Thank you.

21 Ms. Bapita.

22 MS. BAPITA (interpretation): Thank you, your Honour. My name is
23 Maitre Carine Bapita. I'm a lawyer in the bar of Kinshasa. I represent
24 47 victims in this case. Your Honour, I would like to inform you that I
25 also represent the interests of Maitre Mulamba, who gave me a proxy to

1 that extent, and for certain reasons he had to go back to Kinshasa
2 urgently, and he, too, represents 37 victims.

3 PRESIDING JUDGE COTTE (intrepretation): Thank you, Ms. Bapita.
4 Mr. Gilissen.

5 MR. GILISSEN (interpretation): Thank you, your Honours. My name
6 is Jean Gilissen, a lawyer at the bar of Liege in Belgium. I represent
7 victims a/3133, and a/010, and I would like to extend to you the
8 apologies of Mr. Keta who for professional reasons cannot attend this
9 hearing today. Thank you for your kind attention.

10 MR. NSITA (interpretation): Good morning, your Honour. My name
11 is Fidel Nsita Luvengika, a lawyer of the bar of Brussels. I represent
12 a/330/07 and 0331/07. And we represent these victims. There are three
13 of us, but my other two colleagues cannot attend, and I would like to
14 extend to you their apologies for not attending this hearing. Thank you
15 for your attention.

16 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you.
17 Can the representatives of the Registry introduce themselves.

18 MR. VANAVERBEKE (interpretation): Good morning, your Honour. My
19 name is Pieter Vanaverbeke, and I'm representing the Registry at this
20 hearing.

21 PRESIDING JUDGE COTTE (interpretation): Thank you. I would like
22 to remind you -- give a brief review of the proceedings because we do not
23 have enough time, and again, we have all read the filings which have been
24 exchanged since the 10th of February, 2009.

25 The Defence team of Mr. Germain Katanga challenges as concerns

1 this accused the admissibility of the case brought before our court on
2 the grounds that Prosecution had been initiated in part for the same
3 conduct before Congolese courts. This admissibility challenge is founded
4 on Article 19(2)(a) of the Statute and it cites the grounds provided for
5 by Article 17 of the Rome Statute.

6 May I remind you that according to this Statute, the -- the
7 International Criminal Court may exercise its jurisdiction only when
8 national legal systems fail to act, including in a case where such a
9 system claims to have acted, whereas in reality it hasn't the willingness
10 or is unable to fully carry through prosecution.

11 Furthermore, a case is inadmissible when the person concerned has
12 already been tried at a national level for the same conduct, that is,
13 according to the well-known principle of non bis in idem. May I also
14 remind you that an ex parte hearing was held on the 24th of February with
15 the Defence of Mr. Katanga to examine applications for redaction which it
16 had filed with respect to the documents mentioned in its request. The
17 public redacted version of that application was then deposited on 11th of
18 March, 2009. On 25 February 2009, pursuant to Rule 58(3) of the Rules of
19 Procedure and Evidence, the admissibility challenge was communicated to
20 the Prosecutor after it had been refiled by -- or reclassified by the
21 Chamber.

22 By a decision of 5 March 2009, the Chamber ruled or agreed on the
23 procedure to be followed pursuant to Rule 58(2) of the Rules. The
24 Chamber also ensured together with the Registry that the authorities of
25 the Democratic Republic of the Congo and the Legal Representatives of

1 Victims were put in -- well, were given the opportunity to send their
2 representations or what we would like to call their observations pursuant
3 to Rule 59. To that end, the Chamber would like to state that the
4 authorities of the Congo did not respond to its invitation and did not
5 send any written observation to the Chamber. It notes that they, rather,
6 sent their observations to the Prosecutor on the 14th of March, 2009,
7 observations signed by Colonel Muntazini Mukimapa, the Advocate General
8 at the Supreme Military Court and director of cabinet of the Auditeur
9 General.

10 Since Rule 59 provides in the clearest of terms a procedure for
11 consulting those who I could refer a situation pursuant to Article 13 of
12 the Statute, and that this should be done at the initiative of the
13 Chamber through the Registry. The Chamber can only express its surprise
14 with this initiative that was taken by you, Mr. Prosecutor, to contact
15 the authorities of the Congo, but in any case, this initiative, it was an
16 initiative that you took, deprived the Chamber of a direct written
17 response that it was hoping to receive from the Congolese authorities.

18 You have received an agenda for this hearing. That agenda,
19 considering the fact that we are running behind time, we started late, is
20 going to be amended, and you have to bear this in mind. The fact remains
21 that each party or participant who takes the floor to express their views
22 on this admissibility challenge and to whom questions shall be asked
23 should try to stick to the essentials in their views.

24 Once more, the Chamber has taken note of the submissions --
25 submit -- of the filings submitted by the various parties. This hearing

1 is going to enable the Chamber to have additional information, and this
2 is going to enable us to clarify a certain number of points, and this
3 will enable the Chamber to address this admissibility challenge on its
4 merits.

5 Mr. Hooper, questions may be put to Mr. Katanga. If that turns
6 out to be the case, then those questions will be put to him through you,
7 that is, if you wish to consult with him for a short while.

8 At this juncture in the hearing, and I am speaking directly to
9 authorities of the Democratic Republic of the Congo, everyone should bear
10 in mind that it's absolutely necessary to clarify the exact situation of
11 Mr. Katanga between March 2005, the time during which he was arrested in
12 the Democratic Republic of Congo, and July 2007, the date of issuance of
13 the warrant of arrest, followed by his transfer to The Hague in
14 October 2007.

15 The Chamber today has to obtain very precise information, very,
16 very precise information on the exact nature of the proceedings initiated
17 against him in the Democratic Republic of the Congo. What were the acts
18 which formed the basis of the Prosecution and the localities concerned by
19 such acts? What were the charges brought against Mr. Katanga? Why was
20 he charged in 2005? So what were the charges? What were the acts for
21 which was charged? And what was we, was he a main perpetrator or an
22 accomplice?

23 The Chamber would also like to have some clarifications on the
24 current status as of today, 1st June 2009, current status of Prosecution
25 activities in the Democratic Republic of Congo and the prospects with

1 regard to their completion as concerns Germain Katanga and as concerns
2 his co-accused.

3 Now, on a more general level, if you wish to refer to the
4 intentions of the drafters of this Statute, then you would have to make a
5 brief summary of them and do so clearly.

6 Given the importance of the subject under discussion, the Chamber
7 would like this hearing to be public. The principle of public hearings
8 is the norm, so each and everyone should therefore ensure that they do
9 not make reference to any statements or documents that should remain
10 confidential. However, it is up to those who are going to take the floor
11 to inform the Chamber if that they have to refer to a confidential
12 document so that the Chamber can order a private session which will hold
13 during the presentation and any subsequent commentaries on the
14 confidential document in question, except in the situation where the
15 beneficiaries of the confidentiality, which could be the authorities of
16 the Democratic Republic of Congo or legal representatives of victims,
17 accept that the content of documents which they classify as confidential,
18 unless they accept that such documents should be disclosed in public.

19 Before I give the floor to Mr. Hooper, the Chamber would like to
20 first of all issue an oral decision. The Defence team of Germain Katanga
21 contacted the Court on the 29th of May, 2009, of an application filed to
22 the Registry relating to the lifting of redactions and the passage of
23 paragraph 225 of the document, ICC-01/04-01/07-420, confidential
24 document, a document dated 21 April 2008 relating to an application for
25 the issuance of warrant of arrest against Mr. Katanga and Mr. Ngudjolo.

1 The lifting of redactions on two footnotes relating to this passage which
2 are notes 84 and note 85.

3 Mr. Prosecutor, you told us on Friday that you had no objection
4 with regard to lifting of these redactions. This application was
5 received at the time when the Chamber was not able to take a ruling in
6 writing and to register its -- or to notify of Registry of its decision.

7 Now, given the urgency of the situation, the Defence team of
8 Mr. Katanga was informed by e-mail of the fact that the Chamber
9 authorised the lifting of these redactions today pursuant to Rule 21 bis
10 of the Rules of the Court. The Chamber would like to make this
11 authorisation known to all participants so that it can be formally
12 registered in the file of this case, and for that we would like to thank
13 the Registrar.

14 The time now is 10.20. We will give the floor to Mr. Hooper to
15 present his submission on the admissibility challenge. He has
16 30 minutes. The time now is 10.20. So we expect him to speak right up
17 to 10.50. We would like to appeal to him to stick to this time-frame.

18 Mr. Hooper, you have the floor.

19 MR. HOOPER: Thank you, Mr. President, learned counsel, and
20 Honourable Delegation from the Republic of the Congo.

21 First of all, can I just clarify that the interpreters have
22 received a draft of my submissions this morning. Has that got through to
23 you, please, interpreters? Thank you.

24 I don't -- the English isn't on.

25 Very well. Can I come to the admissibility submission? I

1 appreciate I've got just 30 minutes. I also appreciate, Mr. President,
2 that you've had the benefit of close on -- I don't know if there's a
3 replacement of this. It was already damaged when I say -- when I got it
4 this morning, this lectern, but I've obviously finished it off.

5 PRESIDING JUDGE COTTE (interpretation): Well, this is a
6 practical problem, nothing legal involved. I hope we can solve it
7 rapidly so that we can get on to matters.

8 Well, I see there's being an exchange with the Office of the
9 Prosecutor, so this shows how interested they are in finding the truth
10 indeed.

11 MR. HOOPER: Thank you, Your Honour. Thank you very much.

12 The --

13 PRESIDING JUDGE COTTE (interpretation): Fine.

14 MR. HOOPER: The admissibility (Microphone not activated) -- it
15 has been submitted, has been submitted on essentially the two principal
16 points of complementarity and the duty of a state to prosecute.
17 Complementarity is course woven of through the Statute in the preamble of
18 paragraph 10 of the Statute which emphasises that court is complementary
19 to national criminal jurisdiction and immediately in Article 1 where it's
20 stated that the court shall be complementary to national systems. So
21 it's additional to and not instead of national jurisdiction. And
22 complementarity, as is commonly said, is accepted as being the very
23 cornerstone of the Statute and the court's practice.

24 But the State has the primary duty to prosecute serious offences,
25 both in customary law and by treaty. The Rome Statute, in its preamble,

1 and therefore a treaty obligation under the Vienna Convention, reminds
2 States of existing obligations, and in paragraph 6 states: "Recalling
3 that it is the duty of every State to exercise its criminal jurisdiction
4 over those responsible for international crimes."

5 And again in paragraph 4: "That their effective prosecution must
6 be ensured by taking measures at the national level and by enhancing
7 international cooperation."

8 It's also in the interest of any accused as well. It's important
9 for him that that is done, that States, fact, maintain their obligations
10 to him. It's a fact, we say, that runs through human rights law, because
11 there's an effect on the accused. It results in coming here to probable
12 delay, to less chance of expeditious trial, to language difficulties and
13 cultural difficulties in trial, to facing a different and often
14 intimidating environment, and of course it gravely affects his right to
15 family life.

16 The State has primacy over the court, and only in exceptional
17 cases does the court have jurisdiction. The court will only act when
18 national criminal justice systems fail.

19 As the Prosecutor, Mr. Ocampo has said: "As a general rule, the
20 policy of the Office of the Prosecutor will be to undertake
21 investigations only where there is a clear case of failure to act by the
22 State."

23 And in the informal expert paper that was annexed to the Defence
24 response, you will see there that it's quite clear -- it's clearly stated
25 in the view of the several and many commentators who contributed to that

1 that the ICC will intervene despite national proceedings only in clear
2 cases of willingness or in inability.

3 An overview of complementarity and admissibility was provided
4 recently by Pre-Trial Chamber II on the 10th of March, 2009, at
5 paragraph 34:

6 "Complementarity is the principle reconciling the States'
7 persisting duty to exercise jurisdiction over international crimes with
8 the establishment of a permanent international criminal court having
9 competence over the same crimes; admissibility is the criterion which
10 enables the determination, in respect of a given case, whether it is for
11 the national jurisdiction or the court to proceed. Accordingly,
12 admissibility can be regarded as the tool allowing the implementation of
13 the principle of complementarity in respect of a specific scenario."

14 That was the decision on the admissibility of the case in the
15 Kony case, which I know will be very familiar certainly to one member of
16 the reconstituted Court.

17 In the present case it is of course not the State. It is not
18 here the Democratic Republic of the Congo that is raising the issue of
19 admissibility but an individual, Germain Katanga, and it's in respect of
20 a situation that's been brought by a self-referring State. And self
21 referral does not seem to have been anticipated by the Rome Statute.
22 There's even a suggestion that it was somehow smuggled in by Judge
23 Kirsch, but it seems an accepted practice here and we take no issue with
24 self-referral and the concept of self-referral. But it does introduce a
25 certain dynamic that probably was unforeseen in the discussions in Rome

1 as the accused necessarily loses, first of all, the opportunity of having
2 his interests represented by the State and is removed from his natural
3 judge and familiar context. And indeed his own State may indeed be
4 familiar, may be rather content to see him here rather than there. There
5 may be, for example, good reasons. There may be bad reasons. There may
6 be political reasons. One cannot but note the political character of
7 those detained here from the Democratic Republic of the Congo, detained
8 here in the detention unit.

9 The accused has the right to challenge the admissibility of the
10 case and is entitled, because he has that right given to him quite
11 clearly in Article 19, for an effective remedy.

12 The Defence have already submitted, as I've said, many pages of
13 argument, and I will try to avoid reference to them, and as much as I
14 can, I will try to avoid reference to documents for the reason that it's
15 a minefield of confidentiality, and it's better, and I acknowledge that,
16 that these proceedings remain fully open to the public.

17 Article 17 is, of course, the key, and you've referred to that,
18 and perhaps I don't need to remind the Court and those who are here of
19 what -- of what it says, except, of course, the key, that the Court shall
20 determine a case is inadmissible where the case is being investigated or
21 prosecuted by a State unless there are particular exceptions, and they're
22 very limited exceptions. And in this particular case, we rely on
23 17(1)(a), and we've also pleaded 17(1)(b), but probably the focus of
24 concern is going to be 17(1)(a). We acknowledge that. It doesn't apply
25 to (c), ne bis in idem, of course. It doesn't apply to issue of gravity,

1 clearly not.

2 Germain Katanga is charged with offences arise from the attack on
3 the village of Bogoro in Ituri in Equateur Province on the
4 24th of February, 2003. At the confirmation hearing on the 26th of
5 September of last year, he was in fact confirmed in respect of charges of
6 murder, rape, sexual slavery, crimes against humanity, and wilful killing
7 using children in hostilities, direct attacks against civilians,
8 pillaging, destruction of property, and sexual slavery as war crimes.

9 The significant thing here, of course, is that all those offences
10 are alleged to have occurred on the same and one day and place, Bogoro
11 village, 24th of February, 2003. But we also note that the Prosecutor
12 relies on a slightly wider context than just Bogoro, because of course he
13 alleges widespread or systematic conduct. He also relies on it in part
14 as evidence of knowledge and perhaps even of propensity.

15 Mr. Katanga was transferred here on October the 17th, 2007, on a
16 warrant issued on the 27th of July, 2007, by Pre-Trial Chamber I.

17 The Prosecutor, complying with the system, applied for a warrant
18 of arrest against Germain Katanga to Pre-Trial Chamber I. The Pre-Trial
19 Chamber, of its own motion, determined the admissibility of the case. It
20 has its -- a discretionary power to do so under Article 19(1), and the
21 Pre-Trial Chamber found the case was admissible.

22 Of course we're aware that a much later disclosed decision in the
23 Ntaganda case of the Appeals Chamber has rather put the brakes on
24 Pre-Trial Chambers going into the issues of admissibility. A Pre-Trial
25 Chamber is only now meant to go into issues of admissibility when it is

1 appropriate. Of course what is appropriate would be a matter of
2 discretion for the Chamber, and though this plays no part in my
3 submissions this morning, the Defence submit that it is appropriate,
4 probably in more cases than not, for the Pre-Trial Chamber to look at the
5 issue of admissibility at the earliest stage. And this case demonstrates
6 that that must be right, because if the facts as we now know them to be
7 were known to the Pre-Trial Chamber, then it may well be that Germain
8 Katanga would not have been brought here from the Congo at all, because
9 the case would not have been found as admissible.

10 Our key submission is that at the time the Prosecutor applied for
11 the warrant of arrest against Germain Katanga, the case was, in the words
12 of Article 17, being investigated or prosecuted by a State, namely, the
13 DRC.

14 The Prosecutor stated in his submissions to the Pre-Trial
15 Chamber, and of course we all know that the defendant wasn't there, the
16 accused wasn't there, nor was the Defence team or anyone else there, it
17 was a strictly ex parte submission, the Prosecutor stated that the
18 information available to the OTP so far does not indicate the existence
19 of any national proceedings related to the same case, that is, Bogoro.

20 Now, that is an issue of fact. The burden is not on the Defence,
21 we submit, contrary to the submissions by the victims. Article 67(1)(i),
22 no reversal of burden, and in any event, this is an area where the onus
23 and burden of proof must be on the initial applicant, because the
24 Prosecutor has a duty, of course, by Article 53(1)(b) to consider whether
25 the case is or would be admissible, and any Pre-Trial Chamber is going to

1 assume, quite fairly, that the Prosecutor's done his job and has made
2 those inquiries and is coming to the Pre-Trial Chamber on -- and makes
3 the premise accordingly, i.e., that the case is prima facie admissible.
4 And we submit that if the Prosecutor here had done the job properly, that
5 is, thoroughly, and posed the correct questions in his inquiries in the
6 DRC, then the facts that I'm going to come to now would have come to
7 light.

8 The history, I'm not going to go into it in detail. There's a
9 great, great number of documents, and you've had the opportunity of
10 seeing them. But on that material, we submit that it is in fact clear
11 that he was being investigated or prosecuted by any normal use of the
12 word. He was arrested by the DRC in early 2005. There's a dispute as to
13 whether, as the Defence would submit, it was February 2005 or whether as
14 the DRC concede, it was March of 2005. It's perhaps little difference.
15 And he was subsequently detained in the central prison at Kinshasa until
16 his transfer here in October.

17 The arrest warrant of the 10th of March was for "atteinte a la
18 surete de l'etat," but that quickly changed in later documents to
19 genocide and crimes against humanity. We know from documents that there
20 were denunciations and evidence, photos, for example, relating to the
21 period significantly 2002 to 2004 that came into the possession of the
22 authorities in the -- in the DRC.

23 We know that as a matter of history that crimes against humanity
24 were committed in Ituri in that period. It would be difficult not to
25 include Bogoro, unless of course there was some particular reason why

1 Bogoro would be omitted from any investigation, but that's never been
2 suggested.

3 On the 15th of December, 2006, the investigation was upped, and
4 there was a Commission Rogatoire, and the DRC subsequently sought
5 assistance from this court. It received very little assistance. In
6 fact, their efforts to get assistance were essentially rebuffed with a
7 formal letter, as you know. As I say, I won't into the details of that
8 letter, but they were offered, essentially, summaries. They weren't
9 offered clearly what they were looking for.

10 There was a court hearing due in mid-February of 2007 in DRC with
11 an expectation of a remand for further investigations. We don't know
12 what happened in respect of that hearing or subsequent hearings.

13 There is one document that is absolutely crucial, and that is the
14 "Requete aux fins de prorogation." Now, at the moment that's a
15 confidential document. It's regarded as confidential at the Defence
16 request because it was seen as prejudicial. I ask for a reclassification
17 of that document so that it can become a public document for the purposes
18 of this hearing, which is 1017-891, confidential ex parte Annex H1, and I
19 would have thought because of the nature of the document which is a
20 public document in Congo that there could be no objection taken to that.
21 I don't know if Mr. MacDonald is in a position to indicate that he has no
22 objection to my seeking reclassification so that I can refer to it now in
23 open -- in open court.

24 PRESIDING JUDGE COTTE (interpretation): Yes, briefly.

25 MR. MacDONALD (interpretation): Well, your Honour, we need to

1 check that with the Congolese authorities, because this is a text that
2 was received from them by the OTP.

3 PRESIDING JUDGE COTTE (interpretation): I would like to turn to
4 the Congolese authorities, Minister, Mr. Advocate General, Legal Advisor,
5 it is -- Mr. Hooper, this is the document "Requete aux fins de
6 prorogation de detention provisoire." This is the document dated March
7 2nd, 2007. In your filing it is HH, page 20, in the French version.

8 Can the Congolese judiciary authorities accept that the content
9 of this document, as it is included in the admissibility challenge filed
10 by Mr. Hooper, could it be reclassified to become a public document?
11 This is a filing for extension of pre-trial detention. It -- in this
12 particular case it relates to the facts that Mr. Katanga and the
13 co-accused are accused of.

14 Mr. Prosecutor General, go ahead.

15 MR. MUSHAGALUSA NTAYONDEZA'NDI (interpretation): Your Honour,
16 ladies and gentlemen, we do not have any difficulty with this document
17 becoming public.

18 PRESIDING JUDGE COTTE (interpretation): Thank you very much for
19 your cooperation.

20 Madam Court Officer.

21 Let me again repeat the thanks of the Chamber, and the document
22 shall be reclassified in order for it to become public.

23 Mr. Hooper, you wanted to refer to this document. Would you
24 please continue? Don't forget that time is short and we need to hear
25 your main arguments. Of course these last few minutes were not your

1 fault.

2 MR. HOOPER: Yes, thank you. As it's an open document, it helps
3 me better articulate the argument because this is a key document, and if
4 we all have it in front of us. It shows that there there's clear
5 reference to Germain Katanga and the others, eight in all, being charged
6 for crimes against humanity, for having in the district of Ituri, in the
7 period between July 2002 and December 2005 at the head of an armed group
8 caused death in systematic attacks against the civilian population at,
9 and it names Bogoro, Kasenyi, and other places, also destruction and
10 appropriation of goods, schools, hospitals, churches, use of child
11 soldiers less than 16.

12 The -- there'd been a prorogation in December. This is a
13 document, of course, dated the 2nd of March, 2007. So very shortly
14 before the Prosecutor here is claiming that no reference to Bogoro has
15 ever been made or to the charges that he's requesting a warrant be issued
16 in respect of when he makes his submissions to the Pre-Trial Chamber.
17 And this document refers to the need for a Commission Rogatoire, waiting
18 for complementary information from the ICC, others being requesting to be
19 interviewed, and asking for 60 days requested further. That's in
20 March of 2007, two months from there, of course taking us into late --
21 into May of that year.

22 So plain that there was an investigation. When did the OTP get
23 that document is unclear. And the others named there remain in prison,
24 which would tend to suggest that there's an intent to prosecute them.
25 Indeed the Court could take an inference and should take an inference,

1 unless it hears to the contrary, that there was then and is a continued
2 intention on the part of the State, after all it's deprived them of their
3 liberty for all this time, to prosecute and to expedite an investigation.
4 So it's quite plain that the defendant was charged -- was being
5 investigated by any normal use of the words and therefore falls quite
6 clearly within Article 17.

7 Issues that may have been raised under Article 17 that had never
8 been raised is the exceptions. The Prosecution has never raised these.
9 They are unwillingness and inability of the State to genuinely prosecute.
10 Where investigations or trials are under way, there would seem to be, we
11 submit, quite rightly, a presumption that the case is inadmissible. The
12 commentary in Triffterer refers to that at page 616.

13 There is no evidence, we say, that the DRC was either unwilling
14 or unable genuinely to carry out the investigation or prosecution. The
15 Defence submit in terms of unwillingness that the word has a specific
16 meaning under the Statute and by terms of the Vienna Convention must be
17 interpreted in that way, and that is to be -- it is to be determined by
18 the criteria set out in Article 17(2)(a), (b) and (c) which is described,
19 again I resort to Triffterer as a support for this submission, as an
20 exhaustive list. It's exhaustive list to reflect when a State is, as
21 it's put, going through the motions. And in this case there were --
22 well, frankly, it doesn't apply.

23 Inability, Article 17(3). The Court shall consider whether due
24 do a total or substantial collapse, basically the judicial system, the
25 State can't do what it should. That's not been gone into, but there was

1 a slight hint of it in the Prosecutor's reply to our motion.

2 Now, this situation is referred to the ICC by Congo on the 3rd of
3 March, 2004, in the well-known letter from President Kabila, but that was
4 over five years ago and circumstances have changed for the better. There
5 have been successful national elections in 2006, and the State has
6 retaken control of the Congo and Ituri, indeed most of the Congo.

7 The State, we notice, was able to obtain this accused and was
8 seeking, on the evidence that we've placed before the Court, the evidence
9 and testimony and able to conduct an investigation and prosecute.

10 In the course of the Lubanga decision, the Pre-Trial Chamber
11 recognised the improvement in the situation, that it had undergone
12 certain changes, particularly in Ituri, that has resulted, for example,
13 in the issuance of warrants and the establishment or re-establishment of
14 a court at Bunia. So it is reasonable to assume in the absence of
15 evidence to the contrary that since those words were uttered by the
16 Pre-Trial Chamber, the Lubanga case, that the thing has continued to
17 improve.

18 The Defence referred to a booklet published just in March of this
19 year by Advocats Sans Frontieres and I'll try and ensure that the
20 Democratic Republic delegation gets a copy of it, if it hadn't seen it
21 already, which sets out a list of significant cases. Those cases, and
22 the Court's had the opportunity of seeing the list, I hope, details
23 trials that have been held and mainly concluded in DRC. Most involve
24 many defendants and many victims, significantly one involves Chief Kahwa,
25 the head of PUSIC, one of the leading organisations that was caught up in

1 the problems in Ituri. And there are cases at Bunia, too. And Bogoro,
2 of course, we remind the Court is just down the road. You could walk it
3 in a couple of hours from Bunia.

4 There's also, we note, the request by the DRC for Mr. Nkunda, a
5 request made to Rwanda for extradition, an order presumably to try him,
6 and there's been the recent refusal to hand over Ntaganda to this court
7 on the basis that the DRC can deal with him, which again one assumes is
8 an intent to try him there.

9 So functionality now, functionality over the past several years.
10 So we submit on that basis that they have the ability and they do not
11 fall within the exceptions to Article 17. And also that if the Pre-Trial
12 Chamber had known of the status of this investigation, and in particular,
13 for example, perhaps that document which has just been made public which
14 the Prosecutor must have had for some time, then applying the Article 17
15 admissibility test, they could not possibly have found this case, we
16 submit, admissible.

17 Just in a few more minutes, there's quite a lot made in our
18 submissions as to the --

19 PRESIDING JUDGE COTTE (interpretation): Mr. Hooper. Mr. Hooper.
20 It's 10 to 11.00, in fact. You have another five minutes. We're
21 granting you another five minutes since it's necessary to have a short
22 exchange with the authorities from the Congo, but at 5 to I would like to
23 take the floor.

24 MR. HOOPER: Very well. The wrong test. We don't need to argue
25 it, because even on the application of this strict test in the Lubanga

1 case this case is not admissible, we say, and there's reference in our
2 submissions to alternative tests, comparative gravity, for example,
3 comprehensive test.

4 On reflection, perhaps it's more accurate to submit this: That
5 the Defence objection is not so much to the name of the test that's
6 applied, whether it's conduct or whatever, though conduct, we'd say, is
7 inappropriate name because conduct is a word that appears, for example,
8 in Article 20 and in other Articles in quite different circumstances and
9 so confuses the issue. But whatever word is used, the objection is to a
10 test that results in such a narrow interpretation that the complementary
11 principle is overwhelmed by the test. It becomes effectively a primacy
12 test. It does not reflect the object and purpose of the Rome discussions
13 and Statute, and that submission gains support with several commentators.

14 Case, the word used in Article 17, is "case," but case is not
15 defined and it's not an easy word to define. Where does Pre-Trial
16 Chamber I in Lubanga get that criteria, that definition of specific
17 incidents during which one or more crimes within the jurisdiction seem to
18 have been committed? Where does that come from? In tracing it seems to
19 be this: That it was in fact a comment in a written submission to the
20 Security Council made by Mr. Ocampo back in 2006, and is referred to in
21 Triffterer, 2nd edition, page 640, footnote 12. So that's the source of
22 that. It's never been commentated on, it's never been appealed or
23 discussed.

24 The commentary precedes that reference by saying that the concept
25 of case would seem to imply that an individual or individuals had been or

1 were targeted during an investigation or situation. The Defence submit
2 that that is much closer perhaps to an effective test that should in fact
3 take into account the -- the extent and the nature of the -- of the
4 investigations by the State. The overall picture, as it were. And yet
5 in Lubanga it seems that that the word "case" with that definition then
6 mutated through "conduct" and into "charge," specific charge, in that
7 case child soldiers, and that, we submit, is too specific, and we raised
8 the example of the nine villages out of ten. I don't go into that as
9 really a pretty good measure of the inappropriateness of that.

10 And so we say the Pre-Trial Chamber was wrong to focus on
11 whether -- on the word "charge" when in fact in the DRC there were crimes
12 against humanity, child soldiers, clearly references to destruction and
13 the like, widespread in ambit of offences over wide temporal period of
14 2002 to 2005, whether or not Bogoro was specified, though of course we
15 say it is.

16 So those are my submissions this morning, and I just say this:
17 This is, as it's been noted, a construction site, and we can all see here
18 that here is a bit that doesn't quite follow the builder's plan in terms
19 of this use of this word "case" or interpretation of it. The Pre-Trial
20 Chamber, we submit with respect, got it wrong, and without debate nor
21 reviewed on appeal, and you have the opportunity to put it right, to
22 re-adjust, to bring the alignment back in plan, to respect
23 complementarity, and to allow what's been described as a suitable margin
24 of appreciation in selecting crimes also.

25 Those are my submissions this morning. Thank you.

1 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you,
2 Mr. Hooper. I would like to ask our Registrar to tell us at what time it
3 is necessary to break.

4 (Trial Chamber and Registrar confer)

5 PRESIDING JUDGE COTTE (interpretation): As we started a little
6 late, we should try and readjust our agenda. Half an hour, perhaps a
7 little less, will be spent on questions put to Mr. Katanga's Defence, and
8 then 20 minutes will be given to the Prosecution to explain his response
9 to us.

10 Would the interpretation agree to adjourn at 11.45? Yes? In
11 that case, thank you.

12 Mr. Hooper, the Chamber has a certain number of questions it
13 would like to put to you. Mr. Hooper, you may remain seated if you like.
14 The Chamber is aware of the fact that these questions might lead you to
15 repeat yourself or to go back to certain issues that you have already
16 presented, so we are fully aware of the fact that there might be some
17 repetition. These questions will have to do with agreeing to the
18 objection, the role that you would like the Chamber to play evaluating,
19 assessing admissibility, and the Chamber is also asking itself about the
20 change in Mr. Germain Katanga's attitude. This has to do with his desire
21 to come to the ICC and now to go back to national jurisdictions in the
22 DRC.

23 As far as the admissibility issue is concerned, which is at the
24 heart of the debate, the Chamber would like you to state briefly, it's
25 not simple since it's difficult matter, what is your interpretation of

1 the last lines of Article 19(4) of the Statute? Naturally I will read it
2 out very slowly, but you might prefer to read it in the English version.
3 I'm reading:

4 "The admissibility of a case or the jurisdiction of a court may
5 be challenged once by any person or a State referred to in paragraph 2.
6 The challenge shall take place prior to the commencement of the trial.
7 In exceptional circumstances, the Court may grant leave for a challenge
8 to be brought more than once or at a time later than the commencement of
9 the trial. At trial, a case shall be inadmissible if the person has
10 already been judged for the case and can only be judged pursuant to
11 paragraph -- to Article 20(3)."

12 So that takes us back to ne bis in idem. Item 4 of this
13 Article 19 combined with Item 6, doesn't it make a very clear distinction
14 between the provisions of Article 17(a) and (b) that we are familiar
15 with, namely the absence of willingness or incapacity for a State to
16 exercise its sovereignty, and doesn't have to do with the provisions of
17 Article 17(C) as well, ne bis in idem, which refers to the protection of
18 rights. In other terms and in simpler terms isn't it in the spirit of
19 the Statute that it's only after the confirmation of the charges hearing,
20 that is to say, at the beginning of the trial, that it's possible to have
21 objections founded on the principle of non bis in idem?

22 Mr. Hooper, what do you have to say about this interpretation of
23 the texts?

24 MR. HOOPER: For my part, I've seen it as a restriction on the
25 kind of -- of challenge to admissibility that can be made and that once

1 the trial has started, that, subject to possible exceptional
2 circumstances, that a challenge as to admissibility after the trial has
3 started can only be concerned -- can only concern a submission on ne bis
4 in idem. That's how I see it.

5 What is the start of the trial? The start of the trial, we
6 submit, is the opening submissions by the Prosecutor, i.e., of the trial
7 itself, as one would understand the use of the word. So there we are
8 post-confirmation. We are not in trial.

9 I don't know if that is -- or answers the purpose and object of
10 the question.

11 PRESIDING JUDGE COTTE (interpretation): Mr. Hooper, it responds
12 perfectly to the question put to you. However, you might open up a new
13 debate about the notion of the start of trial. Putting this question, we
14 don't have to solve the issue here before the Bench right now, but in
15 your mind, the fact that the hearing of the 27th and 25th of November --
16 well, were Mr. Katanga and Mr. Ngudjolo both invited to state explicitly
17 whether or not they intended to plead guilty or not guilty, but wouldn't
18 this in fact be at the beginning of the trial pursuant to the provisions
19 of our Statute?

20 MR. HOOPER: There was -- there was some concern on the part of
21 the Defence, and -- and we raised it both with the Pre-Trial Chamber,
22 indicating that we had an issue of admissibility, and we also alluded to
23 it at the time when those charges were put, because we were concerned,
24 because, for example, I know that there's some authority in my
25 jurisdiction for saying that when -- that one -- one aspect of trial can

1 be seen as starting when an indictment is put.

2 Now, in fact, my understanding was that those charges were put
3 without prejudice to the -- to the -- to the accused. And I'm being
4 shown here an extract from Lubanga, reference 01060184, that it says
5 that: "Although no definition is provided as to when the trial is
6 considered to have begun, the Bench is persuaded that this expression
7 means the true opening of the trial when the opening statements, if any,
8 are made prior to the calling of witnesses."

9 So I can say that -- our -- the Defence position in this case has
10 been done on an understanding. It has been sign-posted to both the
11 Pre-Trial Chamber and to this Tribunal that there was admissibility
12 issues that were arising and that, in any event, the Defence, if, for
13 example, a contrary view was taken, should not be wrong-footed and put at
14 a disadvantage by being perhaps led to some extent to believe that no
15 prejudice was to be done by -- by submitting these matters
16 post-confirmation.

17 In any event, we can see that admissibility is capable of renewal
18 also. Article 19(4) is perhaps not the best drafted of sections, but it
19 gives a right to renewal of review as well.

20 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.
21 The Chamber would like to restate that Article 64(8)(a) of the Statute,
22 which was stated during the first status conference of the 27th, 28th
23 November, provides that at the opening of the trial, the Chamber -- the
24 Pre-Trial Chamber is going to read to the accused the charges previously
25 confirmed by the Pre-Trial Chamber. The Trial Chamber ensures that the

1 accused person understands the nature of the charges and gives the
2 accused the opportunity to plead guilty or not guilty according to
3 Article 705 (as interpreted).

4 Now, on this point, Mr. Prosecutor, do you wish to take the
5 floor?

6 MR. MacDONALD (interpretation): We can answer the questions of
7 the Chamber and return to the statements which have been raised by Mr.
8 Hooper.

9 PRESIDING JUDGE COTTE (interpretation): Thank you.

10 Mr. Hooper, I'll move on to the next question because we are
11 running behind time. In your request in paragraph 29, 30, and 54, you
12 state that the admissibility assessment carried out by the Pre-Trial
13 Chamber at the time of the issuance of the warrant of arrest was not very
14 thorough. You also stated that this morning.

15 Now, very briefly, in your opinion, what could the Chamber have
16 done more, that is, pursuant to the criteria which it has to follow but
17 criteria which you challenge? In other words, was it the responsibility
18 of the Chamber to carry out research or verifications relating to the
19 willingness or the capacity of the Democratic Republic of the Congo to
20 carry out prosecution, whereas the Democratic Republic of the Congo had
21 clearly stated its willingness not to prosecute Mr. Germain Katanga for
22 crimes committed in Bogoro.

23 MR. HOOPER: We-- we totally accept that the Pre-Trial Chamber
24 was not provided with this information, and there was nothing, therefore,
25 to trigger a deeper inquiry. I don't see how the Pre-Trial Chamber can

1 be faulted. The fact that it addressed admissibility at all, we would
2 say, is appropriate. In doing so, what the Pre-Trial Chamber could have
3 expected was that the Prosecutor had fulfilled his obligations as to
4 looking into admissibility, had done that thoroughly and would be in a
5 position to raise the matters that I raised this morning. That, of
6 course, would have provoked certainly a Pre-Trial Chamber to have made
7 investigations of the State and further demands of the Prosecutor; but if
8 there is any suggestion of fault, as it were, on the part of the
9 Pre-Trial Chamber, that certainly isn't my position whatsoever.

10 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.
11 Another question. You stated in your motion to challenging admissibility
12 that you are expressing yourself at this stage because you have finally
13 obtained sufficient information and that you had to wait for the
14 confirmation hearing -- well, you had to wait for the confirmation
15 hearing to be heard -- to be held and for the confirmation decision to be
16 given. Even though you may find this question surprising, the Chamber
17 would like to know why you did not file the inadmissibility -- or the
18 admissibility challenge before the Pre-Trial Chamber before the holding
19 of the confirmation hearing. Why did you not raise this admissibility
20 before the Pre-Trial Chamber early enough because it would appear that
21 you already have enough proof, enough documents. When we look at the
22 written submission of the Prosecutor, we find that between the
23 21st of January and 13th of March, 2008, a very large number of documents
24 were disclosed to you. In fact, most of the documents which are attached
25 to your admissibility challenge motion.

1 Now, a short while ago you said that it was more expedient to
2 raise issues of admissibility challenge earlier, and if that was done,
3 Mr. Katanga would not have been brought to The Hague. Why did you not
4 raise this challenge before the holding of the confirmation hearing? Can
5 you answer that question, answer this question which is at the very
6 centre of this review that you've asked us to carry out.

7 MR. HOOPER: We took the view that we would look for the best
8 evidence possible. Our first mission to Kinshasa took place in December.
9 My first mission was in January, February of this year. I'm delighted to
10 see the Minister of Justice here today. I -- particularly as I spent
11 three days in his waiting-room in anticipation of seeing him but was
12 unable to do so when I was there in January and February of this year.

13 Before the confirmation hearing, as you know, we don't get the
14 services of co-counsel. Before the confirmation hearing, the Court will
15 be aware of the huge amount of paperwork and work that was demanded of
16 this -- of this team. Before the confirmation hearing, it was difficult
17 to calculate the period of time within which confirmation would take
18 place. Right at the beginning when the possibility of an admissibility
19 challenge first appeared, but without us having, we thought, at that
20 stage perhaps a basis to put it on, the expectation was that the
21 confirmation would probably be February. We had a date for confirmation,
22 and so we were working to oppose confirmation submission. We couldn't
23 have possibly got the admissibility argument before the Pre-Trial
24 Chamber, for example, if the confirmation had taken place when it was due
25 to because we would have had so much more to do. We just couldn't have

1 handled that as well.

2 And in fact what happened then was our expectation was frustrated
3 because Mr. Ngudjolo was then produced. We will absolutely no notice
4 that he was coming until he was brought here. I don't know why the
5 Defence couldn't have been told. If we had been told and appreciated
6 that we're then going to have a very long or longer extended period of
7 time, we may have readdressed our priorities, including missions and the
8 like.

9 The other factor is, though this was not a principal factor but
10 it is a factor, is that we only get one shot at admissibility. You have
11 to ask yourself as a practitioner or an ex-practitioner, do you go before
12 the same Tribunal that's made the decision that a case is admissible and
13 argue that it was inadmissible, or do you go to a fresh Bench that is
14 unburdened by a previous decision for your one shot? What is reasonable
15 to do in those circumstances? But that wasn't the primary reason. As I
16 say, it was a question of time and management and expectation of when the
17 submission could be made that got frustrated, but we kept to our
18 timetable, and that -- and that was the reason.

19 The other matter, of course, was that we received -- indeed
20 that's right. Our last DRC observations at our request were only
21 received because we had to come to the Court to ask for the Court's
22 assistance get the DRC to respond to us, and our final response was
23 almost September of last year. 28th of August, 2008. And you know that
24 the confirmation hearing was -- was over by then.

25 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.

1 A very brief answer, which is very important for the Chamber. According
2 to you, when it was requested to issue a warrant of arrest, and you
3 stated this morning the Pre-Trial Chamber, don't you think -- was not
4 sufficiently and correctly informed? Now, of course the Prosecution is
5 going to say something on this point, but what is the basis of such a
6 peremptory statement. You said that the Pre-Trial Chamber apparently did
7 not see things correctly.

8 MR. HOOPER: Yes. I -- I think -- I don't want to go back on my
9 submission except to say this, that what the Pre-Trial Chamber was -- was
10 told in respect -- I'll just find the quote. Is it up there still? Yes.
11 By the Prosecutor at paragraph 225, the one that's been unredacted and
12 referred to already, that paragraph, starts off: "The information
13 available to the Office of the Prosecutor so far does not indicate the
14 existence of any national proceedings related to the same case."

15 That is in June of 2007, but we know that in March, we've seen
16 the document, the prorogation document, plain as the nose on my face,
17 Bogoro, crimes against humanity, pillage, destruction of property and
18 over the time period of 2002 to 2004. And my criticism isn't, I stress,
19 of the Pre-Trial Chamber. The Pre-Trial Chamber needn't have done so,
20 but it did ask the Prosecutor, you know, what is the position with any
21 investigations in the DRC and of answer effectively they got -- well,
22 they got the answer there was no investigations when there were
23 investigations.

24 Now, we submit that that was clearly inadvertent, but it was not
25 an inadvertence that -- but an inadvertence that seems to be borne of

1 negligence, because there were meetings between the Prosecutor and the
2 DRC, and the Prosecutor, reading the documents that we have, seems to
3 have been focussed on Bogoro from as early as 2006. So that's where the
4 interest seems to have been first laid, 2006. And instead of going to
5 the State and saying, "Well, look, tell us frankly, what it's position
6 with Bogoro? What have you got on Bogoro?" They didn't seem to do that.
7 They step around it. It's sort of, you know, "What have you got? You
8 show me yours," and then that's where we're left in that situation. And
9 there's those early meetings where the matter is not -- is not dealt
10 with.

11 There's a confidential document I'll just refer to as an e-mail,
12 look at that. It really is bit of beating around the bush there. It
13 doesn't actually come to grips with the question. The issue is there but
14 it's not confronted by the Prosecutor and it should have been.

15 How long had the Prosecutor had this document? When did this
16 come to light? It was served on us via the Prosecution, the prorogation
17 document that's been referred to this morning. That's a matter I'm sure
18 Mr. MacDonald will be dealing with this this morning. But whether they
19 had this document or not, we say they should have had it, and if they'd
20 done a proper job they would have had it, and that would have set the
21 alarm bells ringing for sure.

22 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.
23 I will have to place myself under some form of discipline because we have
24 very limited time to take the floor.

25 I will now turn to the position of Mr. Katanga, a position on

1 which the Chamber would like to get some clarifications. The Chamber had
2 the feeling or may have had the feeling that it is a bit contradictory to
3 ask to appear before the International Criminal Court on the 31st of
4 January, 2007, in a memorandum which was sent to the authorities of the
5 Democratic Republic of the Congo in their motion paragraph 11ZEE, and
6 then in 2009, to challenge the jurisdiction of this court through this
7 motion challenging admissibility. And so for that reason the Chamber
8 notes that in the report on Germain Katanga on 17 October 2007 which
9 accompanied the decision of the Auditeur General to close the Prosecution
10 initiated in the DRC concerning Mr. Germain Katanga, the accused is
11 called upon to answer the following question: "The International
12 Criminal Court has sent us an application for you to be surrendered to
13 the court, and what do you think about this?" And he answered, "I
14 agree."

15 Now, don't you think there is something contradictory in this?
16 Can you answer that question to explain this change of attitude between
17 the memorandum of January 2007, his acceptance to be transferred to
18 The Hague, and then the filing of a motion challenging admissibility
19 which seems to translate into the fact that he wished to be returned to
20 answer his charges before the national courts of Congo? Can you answer
21 this question very briefly because after this I'm going to put other
22 questions to you.

23 MR. HOOPER: What I'd ask is leave to consult with Mr. Katanga on
24 this issue. I notice from, and subject of course to your Honour's view
25 and questions you may have to pose but may relate to that, I don't know,

1 but I note that from the proposed agenda the Prosecutor gets some
2 20 minutes to respond, and it may be whatever my response would be --

3 PRESIDING JUDGE COTTE (interpretation): I would like to suggest,
4 Mr. Hooper, that since you will have an opportunity to speak again at the
5 end of the day, you could perhaps make use of the breaks to speak with
6 Mr. Katanga and give us your reply later on. The Chamber can wait until
7 mid-afternoon in order to receive an answer to that question, but I would
8 like to ask you to reflect upon it.

9 Since you are still standing, I have another question. In
10 paragraph 25 of your application you state that the duration of the
11 trial -- well, you refer to the duration of the trial, and you quote a
12 decision of the ICTY, the Rasevic and Todovic, which refers to the right
13 to an expeditious trial which is sometimes better respected in national
14 jurisdictions than the ICTY.

15 Do you think that in this case, that is, if Germain Katanga were
16 to be returned to the national courts, would he be tried more
17 expeditiously?

18 And a second question: In paragraph 22 you deplore the fact, in
19 fact, you said this morning that he be withdrawn from the national
20 courts. Do you think that if he were to be returned to the DRC, would he
21 benefit from better guarantees of his rights than if he were to be judged
22 here at the ICC?

23 I would like to turn the authorities of the DRC. Please do not
24 be upset by any of these questions. I hope you understand that our
25 purpose here is to have as much information as possible. Therefore,

1 we're all to express each other freely. Please do not take umbrage to
2 what I'm saying.

3 So Mr. Hooper, as regards the duration of the trial, do you think
4 he would be tried more expeditiously in the DRC, and would he benefit
5 from additional protection of his rights? Perhaps you can answer those
6 questions later on along with the previous question.

7 MR. HOOPER: I'm grateful for that opportunity later. Thank you.
8 I'll take -- I think it's an issue that is -- is very much wrapped up
9 with the preceding question, and I'd like to take instructions on that
10 position, because of course it's not really my view that the Court's
11 perhaps concerned with here so much as the view of the accused,
12 particularly as it appears to contradict or may be contradictory to an
13 initial position. So I'll deal with that later.

14 PRESIDING JUDGE COTTE (interpretation): In that case -- in that
15 case, you would be so kind as to respond on those matters later on once
16 you have been able to consult with your client. Thank you.

17 Now, very, very quickly, in spite of the fact that this is an
18 important matter, in paragraph 28 of your motion, you state that in order
19 to decide admissibility, you must -- one must take account of the
20 situation at the point in time when the arrest warrant was issued, and
21 you continue saying that it is therefore not relevant to know whether at
22 this present point in time Mr. Katanga is still under investigation or
23 prosecution in the DRC.

24 Would it therefore be something to be considered to send someone
25 back to a national jurisdiction, whereas he had already been initially

1 referred to the ICC, whereas it is considered that the judiciary system
2 in the country in cause has deteriorated even further since the issuance
3 of the arrest warrant? Do you think we should completely set aside this
4 aspect, that is, if we were to send him back to the Congo? Should we not
5 even consider the present state of affairs in the legal system in the
6 Democratic Republic of the Congo?

7 MR. HOOPER: We submit that admissibility is a matter that can be
8 revisited from time to time, and those certainly concern some issues
9 relating to current admissibility. Our submission, as you know, and I
10 don't go into it in detail, it's in the -- in the filings, is essentially
11 that if his transfer was ordered on the basis of a mistake in the sense
12 that the Pre-Trial Chamber was deprived of the necessary information,
13 that then of course once transfer has occurred, you're not going to get
14 continued investigation in the transferring State. So you're going to be
15 handicapped in every case where there's been a transfer if that's going
16 to be the way the matter's going to be looked. And so we argue that it's
17 only fair, really, to hold the hands of the clock on this question and
18 issue of admissibility to the point when that mistake was made, but we
19 accept that the issue of admissibility is an ongoing thing and that it's
20 a matter the Chamber's entitled to revisit from time to time. And it
21 would follow in those circumstances that issues of where the accused is
22 and the like are relevant.

23 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.
24 Perhaps we will ask you an additional question this afternoon once you
25 respond to the remaining questions.

1 I'd like to turn now to the Prosecutor. You now have 20 minutes
2 to describe what you have to say in response to the challenge to
3 admissibility presented by Mr. Hooper. We have, of course, read your
4 filings and the various other documents that have been annexed.

5 I would like to apologise to the interpreters. It would seem
6 that I'm speaking a little bit fast. Please do inform the Court Officer
7 who will immediately remind me of that situation.

8 MR. MacDONALD (interpretation): Thank you, your Honour. I'd
9 like to give the floor to my colleague, Mr. Guariglia, who is going to be
10 speaking of the more legal aspects, and then I shall speak about the
11 facts, and we shall endeavour to answer some of the questions that were
12 put to the Prosecution and those that you asked to Mr. Hooper.

13 PRESIDING JUDGE COTTE (interpretation): Twenty minutes, which
14 takes us to 10 to, then we'll have a break and we will ask you questions
15 before the break. Go ahead.

16 MR. GUARIGLIA: Good morning, your Honours. I will try to be
17 very brief in my response to the legal aspects of the submission by my
18 learned friend Mr. Hooper, leaving time for Mr. MacDonald to address the
19 factual matters.

20 The position of the evidence of the Prosecutor is that the case
21 against Mr. Germain Katanga is admissible and that his prosecution before
22 this court is consistent with the object of purpose of the Rome Statute,
23 namely, to put an end to impunity for the perpetrators of the most
24 serious crimes of concern to the international community as a whole.

25 Now, this is a court of last resort. It obviously intervenes

1 when national authorities are not investigating or prosecuting. Whether
2 that is the case, whether there is a national investigation or
3 prosecution is a fact, as correctly pointed out by my learned friend.
4 And for the purpose of determining this fact it is not relevant what the
5 challenging party considers the State should or could be doing but rather
6 what the State is --

7 JUDGE DIARRA (interpretation): Please remember that you're being
8 interpreted into French and that you're speaking very rapidly. (In
9 English) you're going to fast.

10 MR. GUARIGLIA: That is the problem in my life in all languages,
11 your Honour. Thank you.

12 Going back then, the relevant issue is what the State was
13 effectively doing or is effectively doing in relation to the specific
14 case. Now, this court cannot force national authorities to prosecute,
15 nor can it dismiss a case before this court on the ground that even
16 though there is no national investigation or prosecution of that case,
17 the State should be impelled to investigate or prosecute that case.

18 And similarly if this Court is satisfied that a given case or a
19 cluster of incidents is not being investigated by the national
20 authorities or is not being prosecuted by the national authorities, the
21 Court cannot remain inactive on the basis of a mere hypothetical
22 possibility that at some uncertain point in the future a national
23 investigation may encompass those incidents. The relevant issue again is
24 what the State is doing at the relevant time in relation to those
25 incidents.

1 Now, if there is inaction in a given case, if there is no
2 investigation or no prosecution, then there is no need to enter into a
3 discussion as to whether the national authorities are willing or able.
4 What is happening is that the national authorities are not investigating
5 or prosecuting. Pre-trial Chambers of this court have consistently
6 determined that in cases of inaction, resort to the other limbs of
7 Article 16 is not necessary, and I note that the same expert report
8 relied upon by our learned friends on issues of complementarity makes the
9 same distinction between inaction and unwillingness or inability.

10 The challenge by the Defence is based on two flawed propositions.
11 The first one, that there was an investigation for Bogoro; the second
12 one, which is an alternative one, is that the same conduct test applied
13 by Pre-Trial Chambers of this court so far is flawed and should be
14 replaced by alternative tests although it would also seem to be the case
15 that this position has somewhat mutated for the purposes of this hearing.

16 Mr. MacDonald will explain to you in detail why there was no
17 national investigation for the attack on Bogoro. I will only add here
18 that when in a situation that there is clear indication of inactivity,
19 either assurances by a State that a certain incident is not being
20 investigated, then absent extraordinary circumstances, that should be the
21 end of the discussion. The Defence is asking you to create national
22 investigative activity where there was none.

23 Now, another critical point is that if there are no national
24 investigations or prosecutions for Bogoro, it is extremely unclear to
25 what the Defence expects you to refer the case. Now, surely the Defence

1 cannot expect this court to defer the case back to the national
2 authorities in the absence of national proceedings. Similarly, the court
3 cannot force States to prosecute a given incident, which means that if we
4 are right, as we submit we are, in asserting there are no investigative
5 efforts for Bogoro involving Germain Katanga in the DRC, then referring
6 this case back to the DRC authorities may well mean impunity for the
7 crimes committed in Bogoro.

8 To deal with the fact that there was no national investigation
9 for Bogoro, the Defence is asking you to reject the same conduct test and
10 instead to adopt different tests in the brief, a comprehensive gravity
11 test or a comparable gravity test, which basically means that you should
12 depart from the existing jurisprudence of this court.

13 Now, we've dealt with this extensively in our brief, and I will
14 not repeat here our legal arguments. I will only note that contrary to
15 my learned friend's position, the concept of "case" is not a blurry
16 concept that can even mutate meaning depending on the paragraph of
17 Article 17 the Court is dealing with. On the contrary, that this case is
18 a term of art. It is used, as we have demonstrated in our brief, in a
19 consistent manner throughout the Statute and our interpretation brings
20 together, as they should be, Article 20 and Article 17, which are closely
21 related provisions, as well as those provisions in part 9 of the Statute,
22 which turn effective the principle of complementarity in its -- the
23 interplay of the court with national States.

24 The interesting -- the important point here is that this Chamber
25 is bound to apply the law as it is. This courtroom is not the place to

1 engage in policy discussions as to how the Statute should be, but it is a
2 room where the only relevant consideration is what the law says. In his
3 brief and his oral argument, my learned friend has basically developed a
4 number of policy considerations as to why you should prefer a different
5 test that is nowhere to be found in the Statute, a test that basically
6 lacks any support on any plausible interpretation of the Statute and that
7 even runs contrary to the literal interpretation of the terms of the
8 Statute. So what you have before you is not a challenge based on what
9 the law is but a challenge based on what an accused person considers the
10 law should be.

11 Now, I will -- I'm mindful of the time and the facts of this case
12 are very important. I will only very briefly address your Honour's
13 question as to what we understand to be the commencement of trial for the
14 purposes of a challenge brought against admissibility of a case. And I
15 will only note that the existing practice so far of the court appears to
16 embrace a restrictive interpretation of commencement of trial whereby
17 only the formal opening of trial proceedings with opening statements
18 followed by evidence constitutes the commencement of trial; and, for
19 instance, apart from the decision quoted by my learned friends from --
20 from Trial Chamber I, also in the context of the Lubanga trial the Trial
21 Chamber instructed the Registrar to notify to Mr. Lubanga the request for
22 reparations that have been lodged by the victims under Rule 94(2) which
23 requires that such step be taken at the commencement of trial. So the
24 practice so far clearly shows a preference for a restrictive
25 interpretation of commencement of trial confined to the instant

1 proceedings and not to the preparatory proceedings, the ones that are
2 taken before the opening statements take place.

3 Now I will give the floor to Mr. MacDonald and I will be
4 available for questions later.

5 PRESIDING JUDGE COTTE (interpretation): Mr. MacDonald, you may
6 proceed.

7 MR. MacDONALD (interpretation): Thank you, your Honour. I would
8 like to clarify a number of points that the Chamber has no doubt already
9 taken note of when they examined the filings on -- by both parties, both
10 the Defence and the OTP, but I would like to draw your attention to the
11 number of times the word "Bogoro" was mentioned or quoted in the
12 documents, in particular, the Auditeur General's file, the Military
13 Auditeur General.

14 Mr. Hooper, as soon as early 2006, noted that the Congolese
15 authorities were investigating the Bogoro attacks. We submit that this
16 is not exact. It is true, if you examine the file in filing 891 of the
17 Defence in their initial motion, dated February 10th, 2009, in Annexes Q
18 and Q1. Q1 is in fact the summary record, the transcript. The other
19 Annex is also a certificated copy of the transcript. The transcript was
20 discussed in full detail during the confirmation of charges hearing,
21 which was in public session. The word "Bogoro" appears in a precise
22 context where the accused, while being questioned, mentions the fact that
23 the attacks he participated in were defensive attacks, and at that point
24 the Auditeur asked the question, "Well, what defensive attacks did you
25 participate in?" And a number of attacks were listed including Bogoro,

1 and he mentioned between 2000 and 2004 or 5, if I'm correct. In any case
2 it was Mr. Katanga himself who mentioned Bogoro. He was never questioned
3 about Bogoro. If you take a look at the other localities that were
4 mentioned, Lengabo was mentioned and also the Blue Helmets, but Bogoro
5 was never referred to by the Auditeur.

6 The second point, the second mention made by the Auditeur was
7 dated March 2nd, 2007. This is now a public document, Annex H of the
8 admissibility challenge on the part of the Defence, which is filing 891.
9 Bogoro was mentioned in the request for the extension of detention.

10 Before that date, the name "Bogoro" was never mentioned, be it in
11 the summary note dated 2005, which is included in the file, or in the
12 warrant, the Commission Rogatoire which was sent to Ituri. Bogoro was
13 never mentioned. It was the first and only time in the auditor's
14 documents that the name "Bogoro" was mentioned officially.

15 The Defence posed certain questions in its response or today
16 before you to determine when the Prosecution found out about the
17 existence of Bogoro. This date is the 24th of May, 2007. The 24th of
18 May, 2007, the OTP was in Kinshasa and obtained a copy of the case file
19 from the Auditeur, the military Auditeur such as it was at the time. In
20 the course of the analysis carried out here we have seen the document in
21 question, the motion for the extension of time limit and Bogoro is
22 referred to and we see an NGO document where the Bogoro attack is
23 referred to.

24 On the 30th of May -- I'm checking the time. On the 30th of
25 May --

1 PRESIDING JUDGE COTTE (interpretation): Another five minutes.

2 MR. MacDONALD (interpretation): On the 30th of May, the OTP met
3 the Congolese authorities again, the Military Auditeur General and his
4 chef de cabinet, and for the first time direct questions were put. For
5 example, what is the case with regard to Bogoro in the light of this
6 document? What is the context under which you obtained this document?
7 Are you investigating Bogoro? Why do you have this document? And
8 naturally the Chamber has the information, the transcript and the report
9 from this meeting. It's Annex E of our brief, 968, dated the 19th of
10 March, 2009. I won't go back to it now, but you have the response, and
11 the context is referred to. Did the chef de cabinet mention this at the
12 time?

13 We submit that when a request is made for information, and this
14 request is submitted to the Congolese authorities so that they can
15 clarify their positions in writing with regard to what is stated in the
16 30th of May transcript, well, they responded to us. This could have
17 caused a certain amount of confusion with regard to the request for
18 information that the Chamber itself made or served on the Congolese
19 authorities, and we do apologise for such confusion. It obviously wasn't
20 the OTP's intention to cause such confusion.

21 But what happened to the response dated the 14th of March, 2009,
22 from the Congolese authorities? Well, the response corroborates the fact
23 that this meeting was on the 30th of May, 2007, the meeting that the
24 Prosecution had. The Bogoro case was an allegation within the framework
25 of what's called a pure-form case. There was this request for an

1 extension of the time limit. Bogoro wasn't being investigated, and it
2 was said that they didn't have the intention to continue prosecuting or
3 investigating the allegations at the time. Having obtained this
4 information, the OTP in June presented in two stages, a first part and a
5 second part, presented a request for an arrest warrant for Mr. Katanga
6 and Mr. Ngudjolo, a joint request.

7 Reference was made to the fact in a -- you can have a look at
8 5 -- paragraphs 5, 6, and 7. Paragraph 7, 8, and 9, in fact, refer to
9 the situation that Mr. Katanga is in. It refers to the fact that
10 Mr. Katanga is in detention because he's being investigated, and
11 procedures have been instituted in the Congo. It's -- in paragraph 225,
12 it also says that we, the OTP, went to meet the Congolese authorities,
13 having obtained certain information, and we were provided with guarantees
14 according to which Bogoro wasn't being investigated. We stated this in
15 our request for a warrant. We stated that as far as we knew, and in
16 accordance with the jurisprudence of the court in the Lubanga case, we
17 stated that there were no obvious or ostensible investigations being
18 conducted.

19 So you should also remember, your Honour, that Judge Steiner
20 specifically provided us with a request for additional information, and
21 if in the light of the information that the OTP provided she had wanted
22 additional information on this matter, and there was also an ex parte
23 hearing on the 18th or 19th of June, the Defence is aware of the fact,
24 well, if she had wanted such information she would have asked for such
25 additional information, but she didn't do so.

1 And to conclude, the Chamber notes that the Prosecution disclosed
2 the case file from the military Auditeur. We didn't hide anything. The
3 Defence had all the relevant documents, as you have seen, that concern
4 the period from January to March, and there were also exchanges of
5 e-mail. The Defence asked us for information in those e-mails. We
6 provided information. That was as of the month of December. So we are
7 not trying to mislead anyone, to manipulate the facts in any way. That's
8 far from being the case.

9 Thank you very much.

10 PRESIDING JUDGE COTTE (interpretation): Thank you,
11 Mr. MacDonald. When questions are put to you, you can go back to a
12 certain number of items that you have addressed. The Chamber would like
13 to thank you and thank the interpreters who agreed to work a little
14 beyond the schedule. They have a difficult task to perform. We are
15 aware of the fact and we thank them for their work. And I would just
16 like to inform you that we will now have a half-an-hour break, and we
17 will resume at 12.20. Please be here at 12.20. I'd like everyone to be
18 in the courtroom at 12.20.

19 And I should have already stated this, I'm addressing the
20 authorities from the Congo. You will take the floor at a somewhat late
21 stage because we would like you to be able to hear all the exchanges
22 between the Prosecution, the Defence, the legal representatives of the
23 victims, before you take the floor and then you will have an overall view
24 of the situation. We will now adjourn.

25 I apologise. The first Prosecution representative, you're not

1 here with -- very often with us, perhaps that's why I forgot, but you
2 need to refer to the decisions that you have quoted. You referred to a
3 Lubanga decision with regard to the opening of the proceedings, the start
4 of the trial, you have to come back with a reference to this decision
5 after the break. Thank you very much.

6 We will now adjourn.

7 Recess taken at 11.53 a.m.

8 On resuming at 12.30 p.m.

9 COURT USHER: All rise.

10 PRESIDING JUDGE COTTE (interpretation): You may sit down. I'd
11 like to ask the security officers to be so kind as to bring Mr. Katanga
12 and Mr. Ngudjolo into the courtroom, and the Chamber would like to
13 apologise. We asked you to be here at 12.20, and you were here at 12.20.
14 However, we had certain administrative matters that we had to deal with
15 urgently immediately prior to resuming the hearing.

16 We'll work until -- we'll work for an hour and a half, and then
17 we'll have a one and a half hour break. We will then resume at 3.30 p.m.
18 for about one full hour. So this will enable you to plan your time.
19 Mr. Ngudjolo and Katanga are with us so we can resume at the point that
20 we left off at.

21 The Prosecution should give us the reference to the decision in
22 the Lubanga case. Do you have that reference?

23 MR. GUARIGLIA: I do, your Honour. It's not a decision but
24 rather a sequence of discussions that happened in the Lubanga case on the
25 26th of January, 2009. That is transcript page 24, and there you have a

1 discussion with Registry on the applicability of Rule 94(2). Earlier
2 references to the commencement of the trial being viewed as -- the
3 commencement of the trial proceedings proper are -- can be found at
4 page 23.

5 PRESIDING JUDGE COTTE (interpretation): So it's a legal point of
6 view that has been expressed -- that was expressed on that occasion. We
7 are not dealing with a legal decision that would in some way constitute
8 the case law. It's -- that's the case, isn't it?

9 MR. GUARIGLIA: In that case it is correct that the Chamber is
10 not deciding a contentious matter, but the Chamber is referring to the
11 applicability of Rule 94(2), which specifically applies at the
12 commencement of trial.

13 Now, there is a decision, an earlier decision, from the
14 13th of December, 2007, number ICC-01/04-01/06, and at paragraph 39 the
15 Trial Chamber concludes that although no definition is provided as to
16 when the trial is considered to have begun, the Bench is persuaded that
17 this expression means the true opening of the trial when the opening
18 statements, if any, are made prior to the calling of witness. And this
19 is, I think, the same decision relied upon by my learned friends from the
20 other side. So you have a combination of an affirmative decision from
21 Trial Chamber I and the practical discussions that I quoted on -- on the
22 26th of January.

23 PRESIDING JUDGE COTTE (interpretation): Very well. So those who
24 have the advantage of understanding English perfectly have understood
25 you. I unfortunately wasn't receiving any interpretation, so I'll be

1 informed of this later.

2 Yes?

3 MR. MacDONALD (interpretation): We're not receiving any
4 interpretation into the French language.

5 PRESIDING JUDGE COTTE (interpretation): That's what I realised.
6 What is the technical problem that we are facing at the moment?

7 Well, what's important is that the information has been provided.
8 The information was provided in one of the official languages of the
9 court. It's in the transcript, and we will obtain the information
10 subsequently, but in any event, I would like to thank the OTP
11 representatives.

12 Mr. MacDonald, you had certain restrictions when presenting your
13 case earlier on. The questions that will be put to you now -- we started
14 at 12.30. Could someone please provide me with an agenda update -- the
15 agenda, rather, that was -- we were supposed to resume at 12.20 and we
16 resumed at 12.30, so we'll have 20 minutes for the OTP from 12.30 until
17 12.50.

18 Even if you have to repeat what you've already said, the Chamber
19 would like you to inform it as precisely as possible of the reasons,
20 because when reading all the submissions that we have received, this is
21 the feeling we had, the Chamber would like you to inform it as precisely
22 as possible of the reasons that led you to limit the scope of the
23 prosecution to Bogoro on the 24th of February, 2003, because the case
24 referred to the ICC is limited to this one attack in Bogoro, and this
25 limitation naturally means that we limit ourselves to Germain Katanga,

1 who was subsequently joined by Mr. Ngudjolo. So it's a limited number of
2 persons who have been charged, but there were other crimes, other attacks
3 of a systematic nature that were carried out during the same time period
4 and could have been crimes to charge them with. It could have been the
5 case in the proceedings instituted by the High Military Court. Is this
6 clear?

7 So why have you limited yourselves to Bogoro and to two
8 individuals, only two individuals have been charged, whereas there were
9 other systematic attacks that were carried out at the same time in the
10 same area, and they could have been crimes for which charges were made,
11 and they could have been prosecuted before the High Military Court?
12 We're listening to you.

13 MR. MacDONALD (interpretation): Thank you, your Honour.
14 Initially, I would like to respond to you in the following manner -- and
15 I'm referring to the submission of the 19th of March, 2009. I don't have
16 the reference available, the number at the moment, but in footnote 57, we
17 pointed out the kind of discussions that we could have with our Congolese
18 colleagues during our meeting, and I will then provide you with a direct
19 answer to the question.

20 When we meet with the authorities from the DRC or from other
21 countries who have referred a situation, that is, being investigated to
22 the court, the approach is always the same. We do not inform the
23 authorities about what we are investigating. The first reason is that we
24 do not want to be perceived as trying to influence the local authorities
25 when it comes to pursuing their legal affairs. And the Chamber will also

1 understand that the Prosecution always bears in mind its obligations when
2 it comes to the security and protection of witnesses pursuant to
3 Article 54 or 68.

4 Having said that, to answer your question more directly, why is
5 it that we chose Bogoro? We have to return to the policies pursued by
6 the OTP. One of its policies is to have what we call in English a
7 focused investigation. So we have to have investigations that focus on
8 something that are precise.

9 So what are the objectives of a focused investigation? Well, we
10 want to bring before the court the accused as expeditiously as possible.
11 We must take into consideration security matters, the protection of
12 witnesses. We have to take into account judicial issues such as time and
13 resources. We mustn't waste time. We mustn't waste resources. But we
14 also have to cover incidents, the gravity of which fall under the
15 jurisdiction of this court. We have to deal with those who are most
16 responsible for alleged crimes.

17 The incidents, the case that we choose, they must represent the
18 crimes committed in the course of a given attack. So we do choose a
19 certain -- particular incidents that are representative. We could have
20 chosen Bunia, in fact. We could have chosen other incidents, but we
21 decided to choose Bogoro because this was the first attack that was
22 carried out by two groups. They had created an alliance, and these two
23 groups at that point in time were commonly called the FNI and FRPI, even
24 though certain distinctions were -- were made later, but there were two
25 leaders, two important and very active leaders at the time, Mr. Ngudjolo

1 and Mr. Katanga, who were involved. And it is alleged that there were
2 over 200 victims, a number of people who were subject to violence, who
3 were harmed, et cetera.

4 The village of Bogoro was destroyed to a large extent. Given the
5 information that the Prosecution was able to gather in the field at the
6 time, it was easier to conduct an investigation into this attack and in
7 accordance with the criteria that I have already mentioned. This was the
8 sole matter that we considered when choosing this incident.

9 And in addition, your Honours, you have seen that the first
10 statement, if I may use the term, the first statements in the case that
11 concern Mr. Katanga and Mr. Ngudjolo, were taken at the beginning of
12 October and November 2006, far before the word of "Bogoro" appeared. So
13 we were surprised to see Bogoro appear. And then we asked -- then the
14 question was posed to the Congolese authorities as to whether they were
15 investigating Bogoro or not.

16 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr.
17 MacDonald, but I would like to expand on the question I put to you. The
18 Chamber would like to go back to the text, the text at that we all have
19 to respect. Article 53 is what I have in mind in particular with regard
20 to the opening of the investigations. The reasons -- or one of the
21 reasons that led you to exclude other attacks committed during the same
22 time period, well, are these reasons dealt with by 53(2)(a), the lack of
23 sufficient basis; or are these reasons covered by Article 53(2)(b), the
24 fact that the case is not admissible, that's the problem we're dealing
25 with; or is it Article 53(2)(c), the interests of justice? Because

1 apparently Article 53, in paragraph 2, provides that there are certain
2 reasons that might lead the Prosecution not to initiate proceedings or
3 not to prosecute for certain matters. So it has to -- with exclusion of
4 certain things, is it based on 53(2)(a), 53(2)(b), 53(2)(c), and if we're
5 dealing with 53(2)(c), did you inform the Trial Chamber as provided for
6 by Article 53? So this is the question that we have asked ourselves and
7 we would like an answer to that question.

8 MR. GUARIGLIA: I would take this question, your Honour. The
9 Prosecution has made in the DRC situation to date no negative
10 investigation -- no negative decision under 53(2). We have only made
11 affirmative decisions, first to open investigations in the DRC situation
12 generally, and then we have decided, again affirmatively, to prosecute
13 certain cases within that investigation. We have taken no negative
14 decision not to prosecute a case that we had investigated. We have taken
15 only positive decisions to investigate conduct within that situation.

16 Obviously the resources of the Office of the Prosecutor are
17 limited. Obviously there is always a degree of discretion as to the
18 choice of cases within the situation that can be prosecuted, and we have
19 formulated transparent criteria to explain to Judges of the court and to
20 the world how we select these cases, but we have made no negative
21 decision under Article 53. We have only decided to move forward
22 investigations, and we have only decided to move forward cases.

23 PRESIDING JUDGE COTTE (interpretation): So you agree with us
24 that you did not take any explicit negative decision, but if selective
25 affirmative decisions are taken, then at the same time you are excluding

1 from the scope of prosecution a certain number of acts which could have
2 been included.

3 MR. MacDONALD (interpretation): With your permission, your
4 Honour, I would like to answer that question. We cannot investigate all
5 the incidents that happened in Ituri during the period under
6 consideration. The Chamber can appreciate the difficulties that we would
7 have if we try to investigate every incident. We have to work with a
8 small number of witnesses. That is one of the objectives of the court.
9 We have to choose the major incidents.

10 The Chamber must have noted from the evidence that we have
11 submitted that we put questions to witnesses on a variety of incidents to
12 ensure that such incidents took place.

13 Once Bogoro was retained, we found that Bogoro was representative
14 of the crimes that were committed during that period by the FNI and the
15 FRPI, led by Mr. Ngudjolo and Mr. Katanga, from the beginning of
16 January 2003 right up to the month of June, July 2003. So that is a
17 choice that was made, but is this a choice that was informed by the
18 imperatives of security, rapidity, and other considerations which I've
19 already mentioned.

20 PRESIDING JUDGE COTTE (interpretation): Thank you, Prosecutor.
21 Don't be mistaken. The Chamber is not trying to make things difficult
22 for anyone. We are trying to get information to better understand
23 things, because we have before us a motion on -- on an admissibility
24 challenge. So it is our obligation, therefore, to have a full
25 understanding of the initiatives that were taken and then try to

1 understand the intentions of each and every one, starting with the Office
2 of the Prosecutor.

3 Now, very quickly, I have a question which the Chamber would have
4 liked to ask this morning to Mr. Hooper, but we did not have the time,
5 but we think that it would be interesting for us to put that question to
6 you as well, Prosecutor.

7 Can you tell us very briefly what your definition is, a
8 definition of a case as provided for under Article 17 of the Statute? As
9 far as you're concerned, does it only have to do with the collection of
10 general information? That is the first hypothesis. Does it entail what
11 we call initial police investigations, establishment of the commission of
12 crimes on site, seizures, initial interviews of victims and witnesses?
13 That is the second hypothesis. Or third hypothesis, is the investigation
14 for you -- an investigation for you, does it mean the conduct of more
15 advanced procedural measures taken by the judicial authorities? Can you
16 define for us what you understand by a case?

17 MR. MacDONALD (interpretation): Can I have one moment, your
18 Honour?

19 (Prosecution counsel confer)

20 MR. GUARIGLIA: Thank you, your Honour. Your question has two
21 dimensions. One refers to what should be considered a case, and as your
22 Honours are well aware of, in our brief we had presented arguments as to
23 why a case should be interpreted in a strict fashion, meaning by that
24 specific conduct involving specific persons, and that the term "case"
25 must have a uniform meaning within Article 17 and cannot be a concept

1 that mysteriously changes its meaning and content depending on which
2 sub-provision within Article 17 the court is dealing with.

3 The second aspect of your question is: What does an
4 investigation mean, and when can one properly conclude that some
5 authority is investigating?

6 Now, our position is an investigation requires the existence of
7 identifiable and meaningful investigative steps in relation to specific
8 conduct and specific persons linked to that conduct. Obviously an
9 investigation evolves throughout time, but that doesn't mean that the --
10 what is required is exactly that, the existence of identifiable
11 benchmarks that show that there are meaningful investigative steps being
12 taken in the domestic proceedings. That is why in our position there was
13 never any investigation of Bogoro. There are no meaningful investigative
14 steps that can be identified in relation to Bogoro. There is a sporadic
15 mention, isolated mention in the dossier, a mere allegation that is never
16 followed through, as the same DRC authorities have clarified on the
17 record.

18 So the opposite interpretation means that a dossier is some sort
19 of a nebulous concept whereby every allegation that is thrown at it
20 immediately forms part of an investigation, and we think that this is in
21 opposite. We think that this is not a proper interpretation of what an
22 investigation is.

23 An investigation is specific identifiable investigative steps in
24 relation to specific conduct. Absent those identifiable steps, the only
25 conclusion is that there is no investigation.

1 I don't know if this addresses your Honour's question.

2 PRESIDING JUDGE COTTE (interpretation): One last clarification.

3 One last clarification. Looking at what you just said and what was said
4 by Mr. MacDonald, the Chamber should therefore consider that your
5 investigation was limited to the acts committed in Bogoro. You did not
6 investigate into other crimes committed at the same time, during the same
7 period, in the same region.

8 I am putting this question to you, because I was looking to
9 Article 53(2)(a) and (c), and I asked you if you -- there was any
10 information of the Pre-Trial Chamber with respect to investigation to any
11 of these other crimes and whether you decided not to prosecute those
12 crimes the interests of justice? I don't know if you understood me.

13 MR. MacDONALD (interpretation): With your permission, your
14 Honour, can I have one moment with my colleagues, please?

15 (Prosecution counsel confer)

16 MR. MacDONALD (interpretation): As the Chamber must have
17 noticed, during the investigation into the incidents in Bogoro, it is
18 clear that the Prosecution interviewed witnesses. We obtained
19 information on other attacks in Mandro, Tchomia, Kasenyi. We asked
20 questions to try to understand the authority that Mr. Ngudjolo and
21 Katanga wielded over their respective groups and any interactions between
22 the various groups. We obtained this information with respect to
23 contextual, contextual facts on war crimes. However, our investigations
24 in Mandro, our investigations in Tchomia were not the direct objective of
25 the Prosecution in this case, but we did collect some information on

1 those attacks.

2 There is also the case law, your Honour, the case law of the
3 Pre-Trial Chamber which indicates that, still with respect to
4 Article 53(2), once certain positive measures have been taken, then
5 Article 52(3)(a) no longer applies.

6 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you.

7 We will now turn to the Legal Representatives of Victims. They
8 have a relatively short time, 20 minutes, to make a presentation, give us
9 some information that can supplement their written submissions.

10 Ms. Massida, you have the floor.

11 MS. MASSIDA (interpretation): Thank you, your Honour. We are
12 not going to take too much time. We are going to be very brief.

13 First of all, I would like to recall the arguments which the
14 office wrote in -- had in its written submission of 29 April 2009, and to
15 make two other observations in support of the arguments which the office
16 developed in points 4, 5, and 6 of our written submission.

17 This morning I heard from the Office of the Prosecutor, and they
18 have just confirmed this, they talked -- I read the word "Bogoro." I
19 learned that the Bogoro -- the word "Bogoro" appeared only in two
20 documents, the documents from the Auditeur. The documents in Annex K and
21 document H1 which were made public -- that is Annex Q and document H1
22 which were made public this morning, which I can now cite.

23 In document H1, there is reference to eight persons who were
24 charged with certain crimes from July 2002 to September 2005.

25 It is true that the locality of Bogoro, and it is mentioned this

1 document which is a five-page document, that Bogoro is cited in this
2 document. I would like to draw the attention of this Chamber to the fact
3 that this document does not give any other indication with respect to who
4 and with respect to on what date these crimes were charged or to whom
5 these crimes were charged, and these crimes are indicated in summary. So
6 I think that from Annex H1, we cannot conclude that the authorities of
7 the Congo were, at one moment or another, in the process of carrying out
8 investigations into the attack on Bogoro as already stated by the Office
9 of the Prosecutor.

10 I would also like to state, your Honours, and my colleagues from
11 Congo can correct me if I'm wrong, the village of Bogoro, between 2002
12 and 2003, was attacked several times. Now, if I'm not mistaken, six or
13 seven times.

14 Now, since we cannot identify the exact period, I think it would
15 be difficult to conclude that the authorities of the Congo were carrying
16 out investigation into the attack of Bogoro on the 24th of February,
17 2003, which is the subject of our hearing today.

18 I would also like to draw the attention of the Chamber with
19 respect to this point. I know that you are particularly attentive, draw
20 your attention to other annexes which have not -- which do not cite or
21 mention Bogoro. I'm talking about Annexes I, B1, F3, and 2-1 (as
22 interpreted).

23 My last point, your Honour, relates to what I call the incapacity
24 of Congolese authorities to successfully carry out investigations and
25 prosecution pursuant to Article 17, and I would like to refer to an

1 observation that was made by the Supreme Military Court in two other
2 annexes, Annexes Y1 and Annex Y, in which the Haute Cour Militaire, or
3 the Supreme Military Court, decides to stay all proceedings, because the
4 authorities of the Congo are not able to set up a court which could end
5 up trying Mr. Katanga.

6 I would like to stop there, because the documents are
7 confidential, so I would not dare to cite something which should not be
8 brought to the attention of the public, but that is clearly stated in the
9 two annexes which I have just mentioned.

10 Thank you, your Honour.

11 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you,
12 Ms. Massida, and we thank you for attending this hearing, and we -- at a
13 time when your service is moving to the new building.

14 Now, Ms. Bapita, you have the floor.

15 MS. BAPITA (interpretation): Thank you, your Honour, for giving
16 me the floor.

17 Your Honour, I confirm the content of our written submission
18 signed by me, Maitre Diakiese, and Maitre Mulamba. I listened very
19 attentively to the arguments presented by the Defence and the
20 Prosecution, and I endorse the observations made by Maitre Paolina, but I
21 would like to highlight two points which I think are important and which
22 should be stated here orally.

23 The victims whom we represent, that is, the three counsels I
24 mentioned, the three lawyers I mentioned, would like to make their voices
25 heard before the International Criminal Court for two reasons. First of

1 all, the Democratic Republic of the Congo has willingly referred to the
2 Katanga case to your court, and so we cannot force it to take back this
3 case.

4 Secondly, during the confirmation hearing, you retained the
5 aspect of an international conflict.

6 Now, if your Chamber rules on the admissibility, rules and grants
7 this motion challenging admissibility, and sends the case back to
8 Congolese courts, one of the questions which will remain pending will be
9 the following: How will the Democratic Republic of Congo have the
10 facilities, or how possible would it be for the country to bring before
11 the legal authorities certain countries that participated in the
12 perpetration of the crimes, including certain generals and officials from
13 neighbouring countries and certain multinational companies? That is one
14 of the main concerns. The consequence is that most of the victims which
15 we represent would prefer not to talk. They would prefer to be silent
16 for security reasons, for obvious security reasons, and the same would
17 equally apply to witnesses.

18 I'm sure, your Honour, that you are aware of the fact that the
19 protection of witnesses and victims is not easy even here before the
20 court, and it requires numerous precautions and measures that would not
21 be possible to implement in the present state of affairs in the DRC. The
22 victims want the world to know what actually happened to them. So once
23 and for all, we be able to take measures which will discourage similar
24 behaviour in the future. We do not see how we could draw the attention
25 to such facts if a case were to be tried only in the DRC.

1 And lastly, your Honour, the last point that I would like to make
2 is that the victims consider that the admissibility challenge raised by
3 the Defence is just a way of biding time, and if indeed the Chamber were
4 to decide in favour of that challenge, it would not be the ICC that would
5 try the case, nor would it be the DRC, simply because the Defence would
6 be the first to rise and say that in the DRC they would not -- the
7 accused would not benefit from a fair trial.

8 So what is being presented today as a -- an accused will then
9 present himself as a victim. How can we transform in such a way the
10 status of an individual from accused to victim? I don't know how long it
11 would take to have an independent court in the DRC, or in the ICC, or how
12 such a jurisdiction would actually exist, and I think that is indeed the
13 purpose of this admissibility challenge on the part of the Defence.
14 Therefore, we ask that indeed you reject this challenge and declare that
15 the court is indeed -- has jurisdiction.

16 Thank you.

17 PRESIDING JUDGE COTTE (interpretation): Thank you. Who is going
18 to be speaking on behalf of the victims?

19 MR. GILISSEN (interpretation): Your Honour, I can be extremely
20 brief, indeed for reasons of timing, but also because of the matters at
21 hand.

22 The Chamber must deal with the first issue which relates to your
23 first question, which is can the Defence indeed raise the admissibility
24 challenge that they are presenting today? The point in time at which
25 they decided to challenge admissibility, is it the right point in time?

1 Now that the Defence tell us that they didn't see the potential
2 difficulties is difficult to believe, because as of page 3 in their own
3 submissions, the Defence describes three arguments, in particular the
4 time limit, the very fact that the right to raise an admissibility
5 challenge you will see in paragraph 2 on page 3 out of 47 pages the
6 Defence has indicated, first of all, they had already informed the
7 Chamber that they intended to challenge admissibility. So this is not
8 quite the same thing as raising an admissibility challenge, and that the
9 Defence was not able. And of course we do understand given the scope of
10 work that must be done by the Defence that they were not able to raise
11 this challenge given the supplementary investigations that had to be
12 carried out on site.

13 Therefore, a number of choices were made, tactical choices,
14 management choices that were made which led the Defence to raise this
15 challenge so late in the day over and beyond what is described in
16 Article 52 -- 54 of the Statutes.

17 Now, having made that choice and having raised the issue before
18 the court, I think that this is a very cruel choice and perhaps even a
19 very dangerous and lethal one that the Defence decide to raise this at
20 this point in time. I do not see, and this is just for the information
21 of the Bench, I don't see how this can go on if you look at Article 64 of
22 the Statute, the commencement of the procedure, how that can be different
23 from what is mentioned in Article 19 of the Statutes. In the very same
24 expression, using the same words, so to speak, the Chamber would be thus
25 deciding that the concepts are different in spite of the same word being

1 used for some -- for reasons of a strange use of language the same
2 expression would have two different meanings? I personally have the
3 feeling, in spite of the interest of the admissibility challenge, I
4 believe that the Defence should not be allowed to raise it in the
5 conditions that we're all familiar with.

6 Your Honour, if I can be brief, perhaps three or four words.
7 It's difficult for lawyers to be so brief. You do understand that the
8 Defence has there own interpretation of the text. This is not the
9 interpretation of the court and the other participants. The Defence has
10 its own interpretation of the facts. That is not the interpretation of
11 the other participants nor the facts of the case. Therefore, the legal
12 reasoning is such that we can only be opposed given that we do not see
13 the same thing in the same way and, therefore, we cannot agree with their
14 position.

15 Ladies and gentlemen, your Honours, of course if I had more time
16 you would say I'm far too talkative, and therefore I will conclude there.

17 PRESIDING JUDGE COTTE (interpretation): No, you haven't been too
18 lengthy.

19 As regards the concept of the commencement of the trial,
20 Mr. Hooper, I do think it would be interesting for us to hear again your
21 understanding and that you respond to what has just been said later on in
22 the day when you have an opportunity to speak.

23 Now, the last team for Legal Representatives, would you like to
24 take the floor?

25 MR. NSITA (interpretation): Your Honour, thank you very much.

1 I'm the last person to speak. I can only say that I agree with what has
2 been said on this side of the courtroom, and I would like to refer you to
3 our filings. I would like to ask the Chamber when you examine the
4 challenge to admissibility presented by the Katanga Defence that you take
5 account of the positions of all the various parties, and I believe that
6 you will understand the matters related to the protection of the rights
7 of the accused, but we would also like you to take account, of course, of
8 the protection of the interests of the victims. We're referring here to
9 international crimes, and it is the task of this court to try such crimes
10 and punish such crimes. Therefore, the guarantees that have been
11 provided under international law, that is, a fair trial, can only be
12 provided to the victims at the -- here at the ICC.

13 We're not saying that the DRC or that Congolese justice is not
14 able to provide a fair trial as regards the case at hand, but what we're
15 saying is that as regards the protection of victims and witnesses, the
16 protection of the rights to a fair trial given the means available to the
17 ICC compared to the means available to justice in DRC, there is just no
18 comparison. Therefore, we believe that we must examine the rights of the
19 accused, of course, and take account of them, but also take account of
20 rights of all of the parties involved. Thank you, your Honour.

21 PRESIDING JUDGE COTTE (interpretation): You spoke last, and you
22 said some very interesting comments which anticipate to a certain extent
23 our questions. We do not need to ask questions of fact, but here legal
24 matters are very close to the facts and our question was, do you think
25 that victims would indeed be able to participate in a trial in DRC if the

1 case were to be tried there. You have just given us our opinion.

2 We also wanted to ask you about the security of victims who would
3 be called to testify. Do you think that security would be provided for
4 if the prosecution were to be done in the DRC? And we'll come back to a
5 number of matters later on. It seems to me that you have already
6 expressed your opinion, and I would imagine that your colleagues are most
7 likely not in disagreement with what you have said.

8 But there's a third question that we would like to put to you,
9 because you mentioned this aspect very firmly in our status conference
10 held on November 27th and 28th in 2008, and therefore we would like to
11 put this question to you before the high-level representatives of the
12 DRC. This is a factual question. I do not mean to be anticipating on
13 the response to be given to the admissibility challenge. I'm referring
14 here to the context.

15 If the trial were to take place before a court in the DRC, would
16 the lawyers, the Legal Representatives of Victims, do you think that your
17 own security would be sufficiently provided for? I know that there are
18 five of you. Perhaps you don't all need to respond, but perhaps one of
19 you could do so rather briefly.

20 Ms. Bapita, I see you're rising. You're going to be speaking on
21 behalf of your learned colleagues, but please do be brief.

22 MS. BAPITA (interpretation): Your Honour, I can tell you that if
23 the trial were to take place in the DRC, the security of the Legal
24 Representatives of Victims would be a problem. Not only would they have
25 to be identified, in other words, know where they're situated, there

1 would have to be the security mechanisms, the necessary police or
2 military protection, and contrary to the advantages that we have here in
3 The Hague, security would only be provided roughly 60 per cent. So that
4 is an important aspect that needs to be considered.

5 PRESIDING JUDGE COTTE (intrepretation): Thank you very much,
6 Maitre Bapita, individually, but also as a spokesperson for your
7 colleagues.

8 We are now going to turn to the representatives of the DRC who
9 have accepted to be here, and as I said this morning, I would like to
10 thank you very sincerely for -- for being here with us today. You've
11 waited quite a long time before having the opportunity to speak. You now
12 have 30 minutes. It's 18 minutes past 1.00, almost 20 past, so you have
13 until 10 to 2.00 to expression your opinion, your position. We will then
14 take a lunch break, and one and a half hours later, that is, at 2.20 (as
15 interpreted), we shall ask you a number of questions when we resume.

16 For the time being, you are free to use your 30 minutes as you
17 see fit. You can share this time amongst the various members of the
18 delegation.

19 Minister, sir, you perhaps can decide who is going to be
20 speaking, the Prosecutor, the Advocate General, Legal Advisor. What we
21 want -- you've now understood what we want to understand. You've heard a
22 number of questions, and you can now express the position of the DRC.
23 You do have 30 minutes, and I will have to interrupt you at 10 to 2.00,
24 because we must take a break given the constraints, in particular, as
25 regards interpretation, et cetera.

1 You have the floor, sir. Mr. Minister, sir, you may remain
2 seated if it's easier for you.

3 MR. LUZOLO (interpretation): Your Honour, thank you very much.
4 As I said this morning, it is indeed an honour for me to be here on
5 behalf of my government, the Democratic Republic of the Congo, to speak
6 before the International Criminal Court, to give our opinion as regards
7 the admissibility challenge which has been raised by one of the parties
8 for which we in the DRC, given the difficulties that we have in our
9 country, and in -- because of our will to cooperate with the court,
10 indeed we had decided to refer the case to the ICC. Our legal and
11 judiciary experience in terms of cooperation is indeed a very interesting
12 laboratory in order to fight against impunity, issues related to
13 complementarity, subsidiarity, the inability of a state to enable the
14 rule of law to reign. These are situations we are familiar with as a
15 government. We have therefore complied with our cooperation agreement
16 fully, and we have been able to measure, day by day, how difficult it is
17 for a State Party to the Rome Statute to comply with our obligations. We
18 understand, day by day, what to means to be a State Party because we have
19 been involved on a day-to-day basis, and we have actually behaved in a
20 very avant-garde way, because sometimes our attitude has not been well
21 understood by other State Parties to the Rome Statute who have not been
22 in a similar situation as our country has been in.

23 Complementarity relates to subsidiarity. Now, is complementarity
24 part of subsidiarity? Our answer to that is yes. We, as a government,
25 in our will to comply with our obligations in terms of cooperation, we

1 have run into difficulties, and we've submitted these difficulties to the
2 court and we do not want impunity to reign. Not only in -- domestically
3 but also internationally, and we have stated that we were totally unable
4 to deal with these matters in judicial terms.

5 Now, who can evaluate whether this is truly the case or not? As
6 regards admissibility, examining admissibility is indeed a constraint
7 related to complementarity, and we prefer the term subsidiarity. The
8 investigations carried out by the ICC are to be considered in -- as a --
9 in a subsidiary way to the national investigations. It was because or
10 when the DRC was not able to investigate that the case was referred to
11 the ICC. But all of this material, all the infrastructure, the human
12 structure and the infrastructure just was such that we were not able to
13 comply with our obligations in terms of cooperation and complementarity.

14 On several occasions we have stated that prosecutions must be
15 carried out and investigations must be carried out in the interest of
16 justice. We believe that our intervention here must make it possible for
17 us to move forward in the interest of all States Parties and in light of
18 the formal decisions that are to be taken. There are a number of points
19 of interest. For example, the definition of an investigation or the
20 commencement of a trial. These discussions can give rise to
21 interpretation, but shouldn't there be a final decision so that these
22 concepts which are not precisely defined in the Rome Statute, nor in the
23 rules of evidence, be clearly defined for all those involved in the
24 court, because it's the State Parties and the national judges and
25 national legal systems are the first, basically, to interpret the Rome

1 Statute.

2 If you look at Article 13, for example, the Prosecutor can
3 intervene on the basis of various types of complaints presented by
4 victims. The Prosecutor could already intervene upon a decision by the
5 Security Council. And the court can also intervene on the basis of a
6 referral.

7 We were very surprised to hear that in referral was not legal or
8 that it was included in the Rome Statute upon the initiative of the
9 former president. We regret that, but the fact is in practice, we, the
10 Congolese government, based on all of the agreements we have signed, we
11 have been able to measure the difficulty for the court to be able to act
12 in that way if in a situation where -- in a situation where the High
13 Military Court had decided in that particular way.

14 I'd like to give the floor to one of my colleagues who is going
15 to describe the legal characterization of the charges against Germain
16 Katanga and Mr. Ngudjolo, and the present state of affairs as of
17 June 1st, today. So the first Advocate General of the Republic of DRC is
18 going to be speaking on those points, your Honour, and then later the
19 Prosecutor will perhaps answer some of your questions.

20 PRESIDING JUDGE COTTE (interpretation): Thank you. The Advocate
21 General has the floor.

22 MR. MUNTAZINI MUKIMAPA (interpretation): Thank you, your Honour.
23 The authorities in the DRC have accepted to come today to present to the
24 ICC their observations or, rather, to make their submissions with regard
25 to the admissibility challenge raised by the Katanga Defence.

1 Before I inform you of the exact position of the DRC authorities,
2 it would seem appropriate to us to provide you with an explanation of the
3 legal framework within which the procedure in question is conducted.
4 This legal framework, in fact, allows us to find certain positions,
5 information, that allows us to understand the final position of the DRC
6 authorities with regard to this admissibility challenge.

7 So the legal framework is defined by the republic's constitution
8 of the 18th of February, 2006. Article 2(1), (5) (as interpreted),
9 provides that treaties and international agreements that are regularly
10 reached have, as of the time at that they enter into force, superior
11 authority to other agreements subject to its application by the other
12 party.

13 The constitution has defined the general framework within which
14 we have to understand various treaties signed by the DRC, and we can
15 quote a certain number of legal instruments that were elaborated and
16 adopted by the DRC, and these instruments state its position with regard
17 to grave crimes. We have the Rome Statute, first of all, that the DRC
18 ratified on the 30th of March, 2002. Having ratified the Statute, the
19 DRC undertook to subject itself to the legal regime of the ICC.

20 We should respect the principle of complementarity and the
21 obligation to cooperate. The principle of complementarity assumes the
22 primacy of national jurisdictions when it comes to international crimes.
23 The ICC only takes action when a State doesn't have the will or is unable
24 to carry out investigations or to prosecute. This is Article 7(1) of the
25 Rome Statute.

1 The inability of a State can be inferred from the collapse of all
2 or a substantial part of its judicial structure, or from the fact that it
3 is not in a position to gather the necessary elements and testimony, or
4 to conduct a successful trial in other ways. Article 17 of the Statute
5 of Rome. In all cases the DRC authorities emphasised the principle of
6 complementarity doesn't in any way give the Defence the prerogative to
7 choose jurisdiction to the detriment of another jurisdiction that is
8 regularly seized. We found out today, this morning, Mr. Germain Katanga
9 on one given day wanted to be deferred -- or transferred to the ICC, but
10 then at a later stage he wanted to be sent back to the Congolese
11 authorities to be tried in the DRC. So this means that grave crimes have
12 to be punished. This can't be avoided.

13 And finally, the last legal instrument to define the legal
14 framework is the letter -- the request for referral signed by the
15 president of the DRC, the 3rd of March, 2004. The president of the DRC
16 referred the situation to the ICC, and that was as of the entry into
17 force of the Statute of Rome. The reason for this decision was that for
18 the Congolese authorities -- well, the Congo wasn't in a position to
19 carry out investigations into crimes that the ICC could be in charge of.

20 I've just referred to the wording of this text of referral.

21 Our country wanted to show its desire to cooperate fully with the
22 ICC, and we signed a certain number of agreements to this effect, interim
23 cooperation agreement, the 6th of October, 2004, and the DRC said that it
24 would fully cooperate with the ICC by establishing mechanisms for
25 assistance, by carrying out investigations rapidly and by ensuring that

1 the OTP could carry out prosecutions. Our country also ratified on the
2 3rd of July, 2007, the agreement on privileges and immunities for members
3 of the ICC whereby these individuals have guarantees to carry out their
4 mission without hindrance in the territory of the DRC. And finally,
5 there was the agreement on judicial assistance dated the 8th of November,
6 2005, which refers to the seat of the MONUC agreement. This gives MONUC
7 the mandate to assist DRC authorities when it comes to operations of
8 assistance, transport, and secure transfers to the ICC of persons who are
9 being sought by the ICC.

10 So it is within this framework that the current proceedings are
11 taking place, and in particular, the admissibility challenge raised by
12 the Katanga Defence. In fact, in reality, this admissibility challenge
13 raises three fundamental issues, and we will address these issues before
14 expressing the position of the DRC authorities with regard to the
15 admissibility challenge.

16 The first question raised by the admissibility challenge is as
17 follows: The DRC -- did the DRC really carry out successfully
18 investigations into Germain Katanga, and if so, with regard to which
19 crimes were these investigations conducted?

20 It is necessary to point out that the RMP legal case, the number
21 of which is 0121/0122/MBT/05, was opened with regard to charging the
22 individuals concerned. Germain Katanga, Goda Supa (phoen), Ndjabu Ngabu,
23 Mbodina Iribi Pitchou, Masudi Bin Kapinda, Lema Bahati Delo, Manono
24 Filemon, and Bede Ndjokaba Lambi. This case was opened after nine Blue
25 Helmets from Bangladesh were killed. Investigations into the killing of

1 these Blue Helmets encountered many difficulties. Many years after these
2 individuals were arrested, the case is still not in a state such as it
3 could be referred to a court.

4 The question that we ask ourselves is where does the allusion
5 that the Defence made with regard to Bogoro come from? The judicial
6 authorities allegedly launched an investigation into the matter. The ICC
7 Prosecution has provided us with information a while ago. The first
8 allusion reference to the facts comes from Germain Katanga himself. And
9 then we also find ourselves faced with allusions to these facts in an NGO
10 report. So this is a foreign source. It is not a DRC source.

11 Apart from this report, and I'm saying this quite clearly, apart
12 from this report, you will find -- or you won't find transcript of
13 witness interview with regard to the Bogoro event anywhere. You won't
14 find any transcripts of interviews of witnesses with regard to the Bogoro
15 events. You won't find any interview of suspects with regard to Bogoro.
16 You won't find any transcripts of the seizure or noting of facts with
17 regard to Bogoro. There's nothing procedurally significant that has been
18 established and that could support the allegations that were made. So
19 that is the first question.

20 The second question. The DRC -- did the DRC have the capacity of
21 successfully carrying out investigations into these allegations? Let's
22 recall the facts. The time period is February 2003. The DRC isn't
23 united at the time. We are still in Ituri. It is a district that is
24 under the control of various armed groups, militias, and terror reigns
25 there, and it is in such circumstances that the crimes committed in

1 Bogoro were committed. There's a general sense of insecurity in Ituri.
2 Victims are not accessible, because the victims quite rightly feared for
3 their safety. This was pointed out a while ago. Witnesses were anxious,
4 and they were sometimes the victims of acts of violence. There was the
5 lack of a good protection system for victims and witnesses as to
6 destruction of the judicial structure as a result of the war and then
7 subsequently the peace process, and the various events of the peace
8 process and the various agreements signed between the belligerents also
9 occurred. There was a lack of expertise when it comes to dealing with
10 mass crimes and when it comes to gathering evidence and preserving
11 evidence. So as a result of all these factors, the DRC did not have the
12 capacity of successfully carrying out investigations into the crimes that
13 were committed in Bogoro. Unfortunately, the situation has not improved
14 since then.

15 And my third and last question is as follows: Did the DRC carry
16 out investigations or did it prosecute -- did it launch proceedings into
17 Germain Katanga? The answer to this question is naturally a result of
18 the answers that were provided to previous questions. If in effect no
19 investigations were carried out into the crimes committed in Bogoro, it's
20 understandable that it wasn't possible to prosecute anyone for these
21 crimes.

22 It's true, your Honour, that on three occasions the Auditeur
23 General contacted the High Military Court and made requests to obtain
24 extension of provisional detention of the suspects who were arrested in
25 the case that has already been mentioned. However, this procedure,

1 pursuant to Article 209, item 4 of the Congo Military Code, didn't seize
2 the high court with the merits of the case. It was only an attempt to
3 extend detention for the suspects beyond 12 consecutive months. The
4 Defence evidence in this case is only limited to examining the grounds
5 that justifies the need to carry out further investigations or grounds
6 that relate to the interests of the republic.

7 This cannot be assimilated or confused with proceedings related
8 to the merits of the case, which can be classified through direct
9 referral. Those are the provisions of Article 214 of the military legal
10 code.

11 It is in these two specific documents that the facts of the case
12 are stated, the facts that justify the application of the principle non
13 bis in idem which is enshrined in our legal system and which -- for on
14 which -- which we have to take into consideration in this admissibility
15 challenge. Since such a document has not yet been issued, the Defence of
16 Germain Katanga cannot cite it as support for their arguments. And what
17 is our conclusion now? And here, this is the position of the authorities
18 of the DRC. The authorities of the DRC clearly state -- they state very
19 clearly that the case of Germain Katanga is subjected to two different
20 procedures. The first was the one initiated after the killing of nine
21 Bangladeshi Blue Helmets. This gives rise to the pre-trial detention of
22 all the alleged suspects, including Mr. Germain Katanga. That
23 provisional detention is still going on for his other co-accused.

24 That procedure is totally different from another procedure which
25 was initiated by the International Criminal Court. Indeed, the second

1 procedure, the one which is initiated by the ICC, concerns crimes
2 committed in Bogoro. That procedure, which was initiated by the ICC, as
3 I said, surprised Mr. Germain Katanga; that is, it happened while he was
4 being detained for the first case I'm talking about. So the case of
5 Bogoro is not the subject of any prosecution initiated by the DRC, and it
6 falls strictly within the jurisdiction of the ICC, and the judicial
7 system of the DRC has not initiated any proceedings in that regard.

8 For all the above reasons, the authorities of DRC feel that the
9 ICC has to reject the admissibility challenge raised by the Defence team
10 of Mr. Germain Katanga to ensure that this case is prosecuted by the ICC.
11 By rejecting this admissibility challenge, the ICC would be doing a
12 justice of DRC which has been plagued by the death of many victims.
13 5 million dead and more than 3 million war displaced.

14 Atrocities against which His Excellency Mr. Kabila, the president
15 of Democratic Republic of the Congo, demonstrated to the entire world his
16 determination to fight impunity resolutely by making the DRC a model of
17 cooperation with the ICC, which is unprecedented.

18 That is the official position of the DRC, your Honour, with
19 respect to the admissibility challenge raised by the Defence team of
20 Mr. Germain Katanga. Thank you.

21 PRESIDING JUDGE COTTE (interpretation): Thank you.
22 Mr. Minister, as head of the delegation representing the Democratic
23 Republic of the Congo, can I ask you whether you are through with your
24 submission? Is that the end of your general submission? Fine. Thank
25 you.

1 The Chamber at going to rise at 1.45. We are going to sit again
2 at 3.15. That is one and a half hours. So between 1.45 and 3.15, the
3 Chamber -- well, when we resume, the Chamber's going to put a certain
4 number of questions to the delegation of the Democratic Republic of the
5 Congo in order to have a better understanding of the submission that has
6 been made.

7 The Defence team of Mr. Mathieu Ngudjolo would be asked to take
8 the floor if they wish to say anything, and Mr. Hooper will have about
9 20 minutes to respond and to speak in the last instance, as it is our
10 procedure.

11 So we stand adjourned until 3.15.

12 Luncheon recess taken at 1.46 p.m.

13 On resuming at 3.19 p.m.

14 COURT USHER: All rise.

15 PRESIDING JUDGE COTTE (interpretation): Could the security
16 officers bring into the courtroom Mr. Germain Katanga and Mr. Mathieu
17 Ngudjolo, please.

18 Very well. From 15.20 right up to 15.50, we are going to ask the
19 representatives of the Democratic Republic of the Congo to give some
20 clarifications on the various points which they raised in their
21 intervention at the end of this morning's session, and if possible, we
22 are going to exceed our time by about five minutes, and after that the
23 Defence team for Mathieu Ngudjolo can take the floor for about
24 10 minutes, and the last 20 minutes of our session would be devoted to
25 the response of Mr. Hooper or any other member of the Defence team of

1 Mr. Katanga, who has filed this motion to challenge admissibility.

2 I'll now turn to the representatives of the DRC who this morning
3 gave us their contribution and threw some light on certain facts. As I
4 said this morning to Mr. Hooper and to the representatives of the OTP, we
5 would like to have you repeat yourselves, and this is intentional,
6 because the Chamber would like to have these things stated as clearly as
7 possible. Our discussions are going to focus on the following: The
8 Prosecution already initiated at the DRC the place of Bogoro within the
9 framework of this Prosecution the co-accused of Germain Katanga, as well
10 as the future if this challenge of admissibility is granted.

11 You said this in the morning, but I would like to put this
12 question to you again: The Chamber would like to get as many
13 clarifications as possible on the exact nature of the prosecution which
14 was initiated against Germain Katanga in the Democratic Republic of the
15 Congo. Now, what are the acts -- what are the crimes that are charged
16 against him, and in which localities were these crimes committed? You
17 talked about certain acts that were committed which give rise to his
18 prosecution before the Supreme Military Court, Germain Katanga was
19 charged along with certain co-accused, and then you also talked about the
20 proceedings initiated by the ICC with to Bogoro, but I'm talking about
21 the prosecution initiated against him in the Democratic Republic of the
22 Congo.

23 Which are the crimes charged against him and in which localities
24 were these crimes committed? We would like you to just enumerate the
25 crimes. We don't -- would not like you to go into details. I'm putting

1 the question to all four of you, but of course, Mr. Minister, you can
2 give the floor to any of your members of delegation whom you deem most
3 suited to answer the question.

4 MR. LUZOLO (interpretation): Thank you, your Honour. I will
5 give the floor to certain members of my delegation, but before I do that,
6 the delegation of the DRC would like to know whether the observations
7 which were read and formulated before your court can be filed into the
8 case file as a text which contains the observations of our country. Is
9 there a particular procedure to be followed to ensure this?

10 (Trial Chamber and Court Officer confer)

11 PRESIDING JUDGE COTTE (interpretation): Well, I would like to
12 tell you, Mr. Minister, that the easiest thing would be for you or any
13 member of the delegation to contact the director of CMS, Mr. Dubuisson,
14 and you propose to him to take the text of your submission and put it
15 into the file, into the case file, after it has been registered. But I
16 would like to tell you that the text of your submission is also featured
17 in the transcript.

18 Now, if my questions are a bit too general in nature, please let
19 me know so that I can circumscribe its scope.

20 Now, with respect to the exact crimes for which Mr. Katanga is
21 being prosecuted before the Supreme Military Court, and we would also
22 like to hear something about the localities in which these crimes were
23 committed. Which of you is going to answer?

24 Well, the State Prosecutor, you have the floor. Please, you can
25 remain seated if you so wish.

1 MR. MUSHAGALUSA NTAYONDEZA'NDI (interpretation): If I understood
2 your question well, the Court would like to know if any prosecution was
3 initiated against Mr. Katanga in the DRC. We said this morning that we
4 initiated or opened two cases against Mr. Katanga. The first case
5 related to the killing of UN soldiers, Bangladeshi UN soldiers, and for
6 that case he was placed in preventive detention, preventive custody with
7 other co-accused who acted together with him. And this morning we said
8 that the investigation could not be carried through because it was not
9 possible for us to go to the site, to the place where the acts were
10 perpetrated. And he himself said during his examination that other acts
11 were committed in Bogoro and in other localities in Ituri, and with
12 respect to those acts, we did not carry out any investigation, because we
13 had difficulties going to the site or the scene of the crime or where the
14 acts were committed.

15 I would like to state here that the government of the Democratic
16 Republic of the Congo, at the time when the acts were committed, did not
17 have any effective authority over the territory of Ituri. The
18 authorities which were controlling that area, the district commissioner,
19 the territorial administrator, were all persons -- they were all persons,
20 as I said, appointed by the authorities of the various rebel groups
21 operating in the area, and so that area or that region was not under the
22 control of the government based in Kinshasa.

23 The Court would also like to know, if I understood you well, know
24 about the fate of those who were charged at the same time as Mr. Germain
25 Katanga, those who are still held in detention, his co-accused.

1 I would like to repeat that these persons are being held because
2 of the killing of the UN soldiers. They are not being held because of
3 the acts committed in Bogoro. And with respect to them, the
4 investigation is stagnating because of the reasons which we have stated
5 this morning. I don't think I can be any clearer than that.

6 JUDGE DIARRA (interpretation): Thank you, Mr. State Prosecutor.
7 You said that you were not able to initiate investigation with respect to
8 the acts committed in Bogoro and other localities because you had
9 difficulties in reaching or going to those localities, but you stated
10 that you did not have -- or, rather, the central government in Kinshasa
11 did not have any control over Ituri. Was there no -- didn't it have any
12 authority over Bogoro?

13 MR. MUSHAGALUSA NTAYONDEZA'NDI (interpretation): Bogoro is found
14 in Ituri.

15 JUDGE DIARRA (interpretation): Have you now regained authority
16 over that part of the territory, or is it -- does the situation still
17 persist where you don't have any control? Well, can you please answer
18 that question before I ask my second question? I repeat, have you
19 regained your authority, governmental authority, over Ituri?

20 MR. MUSHAGALUSA NTAYONDEZA'NDI (interpretation): The colleague
21 from Auditeur Militaire will answer.

22 MR. MUNTAZINI MUKIMAPA (interpretation): Thank you, your Honour.
23 Let me state here that the crimes in Bogoro were committed in
24 February 2003, as we said a short while ago, at the time the country was
25 not reunified. Later on, thanks to the political and military agreement

1 that was signed, the country was reunited and we were able to appoint
2 officials from Kinshasa to exercise state control over the district of
3 Ituri. But the insecurity continued to prevail in Ituri. I think you
4 listen to the news. Even as I speak, there is still insecurity reigning
5 in Ituri.

6 You must know, your Honour, that with respect to mass crimes,
7 there are always problems with investigation. When such investigations
8 are conducted several years after the acts have been perpetrated. We
9 have process (as interpreted) getting access to the victims because
10 sometimes the victims flee from their place of origin. They go to seek
11 shelter in neighbouring countries. We have difficulties reaching these
12 victims. There are certain victims which are afraid. They fear for
13 their security. The -- the Defence -- or, rather, the various counsels
14 talked about this situation a while ago.

15 So we have difficulties carrying this investigation through.
16 Even now that state authority has been restored in Ituri, the insecurity
17 in the region, the difficulty to reach out to victims and the difficulty
18 in collecting evidence continues to be things that hamper this exercise.
19 There have been a political process. Certain agreements have been
20 signed. There has been a process of integration and demobilisation. All
21 these factors are all difficulties which we encounter in carrying out our
22 investigations thoroughly.

23 JUDGE DIARRA (interpretation): Thank you. I would like to tell
24 you that the Prosecutor of the International Criminal Court, who is
25 carrying out investigations, is also carrying out its investigations

1 under the same conditions of difficulty of access to victims, conditions
2 of insecurity. We think that it will be easier for the government of a
3 sovereign state, which has its own appointed officials in the region, a
4 region which has oversight of its territory, don't you think -- how can
5 you explain the fact that it is more difficult for you as a government
6 than for a Prosecutor who comes from outside the country.

7 MR. LUZOLO (interpretation): Thank you, your Honour. I think
8 this is like asking us what would be the reaction of the government if
9 this admissibility challenge were granted and Mr. Katanga was asked to
10 return to the Congo.

11 Your Honour, I told you earlier that for us cooperation with the
12 court is a practical matter. It's not a matter of -- for texts of the
13 text. Let's take the situation on the ground. We have a government
14 which has been set up after so many years of warfare. Five million
15 people are dead and there are many war-displaced persons. In 2003, the
16 political agreements were signed to make sure that the belligerents come
17 together to form a government, in a Bogoro accord before reunification.
18 Reunification took place between 2003 and, I would say, 2006, the date on
19 which elections were held.

20 One of the objectives of the reunified government was the
21 restoration of the rule of law, but in fact during this period of three
22 years, all parts of the territory remained the safe havens of various
23 belligerents. The proof is that after the election of 2006, when the new
24 government was elected democratically and it started operating in 2007,
25 another faction left Ituri, went to North Kivu, and they carried out

1 certain acts that had an effect on Ituri. So this means that the
2 north-east of the territory of DRC is still fragile.

3 Full governmental control over this territory is not the same as
4 the control that would be exercised by, say, the Republic of Congo or
5 Senegal or Mali over their respective national territories, your Honour.
6 We are gradually recuperating state control over the national territory
7 gradually. And in that context, why is the justice system of the ICC
8 more accessible? It is because they do not come -- in any case, we know
9 that a court is operating on our national territory, and when the court
10 comes to our national territory and carry out an investigations, they do
11 this incognito. They do not present themselves as the International
12 Criminal Court. They work hand-in-hand with certain international
13 organisations, sometimes with MONUC. And so I would like to say that
14 MONUC has a greater presence over the national territory than the
15 government, but this does not mean that our government, that we are
16 admitting that our government is weak. I'm simply trying to be
17 realistic.

18 JUDGE DIARRA (interpretation): Thank you. Thank you. You have
19 answered my question.

20 MR. LUZOLO (interpretation): Now, with regard to the
21 inadmissibility or the -- or admissibility challenge, we think that it
22 would be unfortunate if the court tells us to take this gentleman back
23 and charge him in the Congo. I would like to say that we have confidence
24 in the court and that we should -- we put this person at the disposal of
25 the court because we wish to respect the principles of the Rome Statute,

1 the principle of a fair trial.

2 Now, if the court tells us that, "No, we as the court consider
3 that we cannot judge him, we wish to send him back to the DRC," now, do
4 you think that will be respecting the terms of the cooperation agreement
5 between the DRC and the court?

6 I think that this problem of admissibility is a point which had
7 to be raised at the beginning. When we implement a warrant of arrest --
8 arrest and surrender, we as a government, we do this pursuant to our
9 commitments under cooperation with the ICC. And if later on the same
10 court tells it us, "You have to take this gentleman and judge him back in
11 the Congo," then I think there's a problem with that, and I think that
12 this is going to call into question our cooperation with the
13 International Criminal Court, and of course this will lead us to try to
14 renegotiate or review our cooperation with the court.

15 JUDGE DIARRA (interpretation): You've answered my question.
16 Thank you.

17 PRESIDING JUDGE COTTE (interpretation): Well, Minister, it so
18 happens that the Chamber has not deliberated as of yet, has not decided
19 what it is -- its reaction to this admissibility challenge. At this
20 point in time we are asking questions to you, to the Defence, to the OTP,
21 to the representatives of victims to gain as much information as
22 possible, and then what we want is to have a full text with all the
23 information, and on the basis of the Statutes and on the basis of all the
24 information that we have heard, that is indeed what will enable us to
25 make our ruling.

1 I know that this process may seem a bit painstaking. I must,
2 nonetheless, continue, because the purpose of this exercise is to be
3 absolutely certain that we, we of the Bench, understand all of these
4 various aspects.

5 Now, my next question deals with the legal characterization of
6 the crimes for which the Supreme Military Court -- was it high treason --
7 atteinte -- well, it was "atteinte contre la securite de l'etat," high
8 treason, and then it was transformed into genocide and crimes against
9 humanity. Was that the case?

10 MR. LUZOLO (interpretation): Yes, that was the case.

11 PRESIDING JUDGE COTTE (interpretation): Regarding that trial in
12 DRC, Germain Katanga, was he prosecuted as perpetrator, co-perpetrator,
13 or an accomplice? I'm referring to the Blue Helmets case.

14 MR. LUZOLO (interpretation): As main perpetrator.

15 PRESIDING JUDGE COTTE (interpretation): Thank you very much.
16 This is a point that was mentioned this morning by several speakers, in
17 particular, Mr. Hooper. I wanted to have a clear picture of all this and
18 that is why in the Commission Rogatoire dated December 15th, 2006, there
19 was mention made of the facts committed in 2002, from the month -- in the
20 month of -- through to the month of December 2005. Now, that does
21 include the month of February 2003, but, but, the name Bogoro is not
22 mentioned anywhere. Does that mean that Bogoro was explicitly excluded
23 from the scope of the proceedings in this stage in the DRC?

24 MR. MUNTAZINI MUKIMAPA (interpretation): Indeed.

25 PRESIDING JUDGE COTTE (interpretation): Thank you very much. In

1 the document, the transcript of the pro justitia hearing of Germain
2 Katanga, dated January 20th, 2006, by an officer of public ministry of
3 the HCM, Bogoro was mentioned as one of the localities where Germain
4 Katanga had participated in attacks between the year 2000 and the --
5 March 6, 2003. This is one of the documents where the name Bogoro was
6 mentioned, as well as in the motion for extension of pre-trial detention,
7 dated March 2nd, 2007. I'm mentioning all of this simply to close the
8 chapter on the various cases being tried in the DRC. If we have time,
9 we'll come back to that later on.

10 As regards Bogoro, were you aware, that is you, the DRC
11 authorities, were you aware the fact that the Prosecutor of the ICC to
12 whom the situation had been denounced in March 2004 by your own president
13 of the republic, did you know that the Prosecutor of the ICC was
14 investigating on Bogoro and on the role played by Mr. Katanga?

15 MR. LUZOLO (interpretation): No.

16 PRESIDING JUDGE COTTE (interpretation): You say no, you weren't
17 aware, which seems to be in keeping with what Mr. MacDonald said this
18 morning. If I've understood correctly, and this is indeed mentioned in a
19 footnote in the OTP response, indeed, there were contacts between the OTP
20 of the ICC and the DRC. You said that you had stayed in the background
21 so to speak, but can you tell it us, Mr. Minister, sir, or any other
22 members of your delegation, can you tell us at what point of time you
23 learned that the ICC OTP investigation was concentrating on Bogoro, in
24 particular on Germain Katanga? Can you give us an approximate date?

25 MR. MUNTAZINI MUKIMAPA (interpretation): When the authorities of

1 the DRC received a request and, in particular, the arrest warrant.

2 PRESIDING JUDGE COTTE (interpretation): So it was during the
3 year 2007, apparently, that you learned that the investigation on the
4 part of the OTP of the ICC was focusing on Bogoro. Fine.

5 As regards you yourselves, when the proceedings began before the
6 Military Supreme Court in the DRC, what were the reasons, and I may be
7 asking you to repeat yourself, but why was it that you excluded Bogoro
8 from the scope of your investigation, from your case? Did Bogoro play a
9 specific role? Why is it that those particular facts were not included
10 in that procedure before the Supreme Military Court?

11 MR. MUNTAZINI MUKIMAPA (interpretation): Perhaps I'm going to be
12 repeating myself.

13 PRESIDING JUDGE COTTE (interpretation): That doesn't matter.

14 MR. MUNTAZINI MUKIMAPA (interpretation): There was an inquiry,
15 an investigation on the part of the Auditoria General as regards the
16 Bogoro events. There was a case regarding the nine Blue Helmets from the
17 MONUC regarding this accused, and that procedure was justified by the
18 fact that after a period of 12 months of detention, the Auditeur
19 Militaire could not extend detention by simply handing down an order.
20 Therefore, it was necessary to call upon the Supreme Military Court in
21 order to be able to extend the detention of the accused.

22 Excluding Bogoro from this procedure was the result of the fact
23 that we were not investigating on Bogoro, and therefore we could not
24 obtain an extension for facts related to Bogoro, but we could as regards
25 the case of the nine Blue Helmets.

1 PRESIDING JUDGE COTTE (interpretation): Thank you very much.
2 You are a person of the law, and you're specialised in legal proceedings.
3 In the eyes of this Chamber, it's not very easy to understand why Bogoro
4 was set aside, whereas clearly the fact that the Supreme Military Court
5 was involved in a case shows clearly that there was a willingness to
6 prosecute these various crimes that were committed. So you do maintain
7 what you've just said. You did not include Bogoro in the scope.

8 MR. MUNTAZINI MUKIMAPA (interpretation): Yes, for a very simple
9 reason. This morning as we said, Bogoro, the name Bogoro appeared in the
10 case on the initiative of Mr. Katanga, in particular in a report drafted
11 by an NGO, and this is an exterior source from the military tribunal. So
12 Bogoro was never investigated by the Congolese military authorities.

13 PRESIDING JUDGE COTTE (interpretation): Thank you very much.
14 Now I have a question of a more procedural nature, which is perhaps
15 simpler.

16 We would like to ask you -- or perhaps ask you to confirm whether
17 there is any order for detention in the DRC. In other words, did his
18 surrender to the ICC put an end to his detention order, that is, after
19 February or March 2005; and if such is the case, that is, if there is no
20 longer any prosecution against him, how did you proceed? In other words,
21 did the OGM, the Auditoria General Militaire take a decision, the
22 decision which took place on October 18th, 2007? Was this a decision
23 taken by a Judge? Was there a decision to lift the proceedings? Was
24 there a decision on the part on the Supreme Military Court, first
25 question; and secondly, how did you put an end to the prosecution? Was

1 there a decision, that is, the decision referred to, dated 18th of
2 October, 2007, when he was surrendered? Was this in a way the
3 jurisdictional decision which relates to Mr. Katanga?

4 MR. MUNTAZINI MUKIMAPA (interpretation): There is no longer any
5 warrant or any order to detain Mr. Germain Katanga in the DRC. When he
6 was surrendered to the ICC, that automatically put an end to his
7 detention in the DRC.

8 PRESIDING JUDGE COTTE (interpretation): In other words, the --
9 the decision which was signed, I believe, by the Auditeur General, is the
10 decision, the legal decision which signifies the end of proceedings in
11 the DRC against Mr. Germain Katanga.

12 MR. MUNTAZINI MUKIMAPA (interpretation): Yes.

13 PRESIDING JUDGE COTTE (interpretation): Thank you.

14 JUDGE DIARRA (interpretation): Mr. Advocate General, in other
15 words, you are renouncing the idea of calling him to account for the
16 assassination of the Blue Helmets, the -- the nine Blue Helmets, whereas
17 here in the ICC, he's being prosecuted for other -- other crimes. And if
18 he's judged here, he will no longer have to account for his
19 responsibility in the killing of the nine Blue Helmets?

20 PRESIDING JUDGE COTTE (interpretation): I have something to add
21 to Judge Diarra's question. As regards the prosecution in the DRC, I
22 don't want us only to refer to the killing of the Blue Helmets, because I
23 believe that the prosecution, which started in 2005 in the DRC against
24 Mr. Katanga et al., related to a number of other attacks, and in
25 particular, the overall policy of systematic attacks, but I just meant

1 this as an add-on to the question that was just put forward by
2 Judge Diarra. If you would be so kind as to answer.

3 MR. LUZOLO (interpretation): Again the problems which explain
4 the fact that the Congolese legal system needs the help of the ICC.

5 Now, when an investigation is opened, it can be just -- it can be
6 just filed. There's just no case to answer, but a decision of that
7 nature is not included in the criminal code. A dismissal is similar to
8 what you might have in other systems where the procedure is stayed. So
9 in the Congolese criminal system, on the basis of the principle of
10 complementarity, if someone is being prosecuted or if he's wanted for
11 arrest for a reason other than that covered by the Prosecution under the
12 ICC - in the case we've mentioned the -- the Blue Helmets killing.
13 Now -- and he's wanted by the ICC for the Bogoro facts, whereas the case
14 is still open in the case of the Blue Helmets.

15 Now, what exactly takes place when you have a surrender? Well,
16 the only possibility under Congolese law is dismissal. So what this
17 means is that if because we removed Germain Katanga from the Blue Helmets
18 case because of his surrender, this means that under Congolese law
19 there's no clear definition of Germain Katanga's situation as regards
20 that procedure. If that person has been -- has been surrendered to the
21 ICC, the only solution on the part of the Congolese legal system is to
22 dismiss the case, that is, as regards the participation of Germain
23 Katanga in the Blue Helmet killing.

24 So what this means is that in this case, the case of the Blue
25 Helmets, the case is ongoing. The investigation is ongoing for the other

1 co-detainees. The investigation continues for the other co-detainees.

2 But in the case of Germain Katanga -- or, rather, the result of that case
3 will depend on the decisions taken by the Congolese legal system. And as
4 I said, the investigation is under way.

5 Now, as regards the request for surrender, the arrest warrant, et
6 cetera, the international arrest warrant as regards the first case, that
7 is the Blue Helmet case, that led to a dismissal. Now, would it be
8 normal that he no longer be prosecuted for those facts? This is a
9 practical question which must be dealt with by a country which has signed
10 the Rome Statute. Perhaps your decision will help us make progress here,
11 because even the implementation law of the Rome Statute provides
12 practical cases such as this one. It is something that will have to be
13 examined. And in the case of Bogoro, the risk is that there not be any
14 follow-up simply because there was no prosecution for those facts because
15 meanwhile there was an international arrest warrant and surrender, and
16 therefore, a Congolese judge will not be able to prosecute for the same
17 events.

18 PRESIDING JUDGE COTTE (interpretation): Thank you. I'd like to
19 come back to the situation of the other co-accused, because you mentioned
20 it yourself.

21 The Supreme Military Court which has been involved in this
22 procedure, are the other co-detainees still detained?

23 MR. MUNTAZINI MUKIMAPA (interpretation): Well, in fact the -- in
24 fact, it isn't the High Military Court that is involved in this
25 procedure. We're still upstream from that stage.

1 PRESIDING JUDGE COTTE (interpretation): Okay. Well, in other
2 words, are they still being detained on a preliminary basis?

3 MR. MUNTAZINI MUKIMAPA (interpretation): Yes.

4 PRESIDING JUDGE COTTE (interpretation): Can you give us some
5 sort of idea as to when this procedure, this trial, will be completed, or
6 is it still too uncertain? I know that you are a representative of the
7 Ministry of Justice and not the local -- the local authorities.

8 MR. MUNTAZINI MUKIMAPA (interpretation): It's very difficult to
9 have a clear understanding, because a lot depends on the military
10 justice. Of course there are security issues, demobilisation, a whole
11 range of things that we, in the military justice system, do not control.

12 PRESIDING JUDGE COTTE (interpretation): Thank you very much.
13 The procedure upstream is being pursued against the other accused.
14 Mr. Katanga isn't involved in this case anymore, so we do agree these
15 other accused have been charged not just with the murder of the Blue
16 Helmets in February 2005. They have also been charged with a certain
17 number of systematic attacks that were allegedly committed in other
18 areas.

19 I continue to refer to systematic attacks. You have noted this.
20 If I'm not mistaken, this is an issue that the Pre-Trial Chamber raised
21 in its decision on the confirmation of the charges. So we're not just
22 dealing with the Congo. There are attacks directed at other locations.
23 I won't mention them, but they are referred to in the procedural
24 documents and part of the annex on admissibility. So one isn't just
25 limited to the murder of the Blue Helmets.

1 MR. MUNTAZINI MUKIMAPA (interpretation): Well, the answer I
2 wanted to give isn't very different from the one I gave with regard to
3 Mr. Katanga and Bogoro. The reference to Bogoro and to other locations
4 is the result of an NGO report. It's not the result of an investigation
5 conducted by the Congolese judicial authorities. So with regard to the
6 other locations, one could say that the investigation advanced more than
7 the investigation into Bogoro. It's the same situation.

8 PRESIDING JUDGE COTTE (interpretation): However, having read a
9 certain number of procedural documents that you disclosed in a timely
10 fashion, it seems that this -- the scope of the Prosecution goes beyond
11 the case of the Blue Helmets that were killed.

12 MR. MUNTAZINI MUKIMAPA (interpretation): The public minister is
13 prosecuting crimes in a general term. Since the beginning of the
14 investigation, all possibilities are open, but it is one's duty when
15 carrying out an investigation to -- to see how one should proceed in the
16 light of the evidence gathered. This investigation has encountered many
17 difficulties and that is why we're now faced with this situation.

18 PRESIDING JUDGE COTTE (interpretation): The Chamber thanks you
19 for that.

20 If, and I do say if because we are now gathering information
21 here, but if this challenge to admissibility were granted, could you tell
22 us what sort of guarantees would be provided to Mr. Katanga if he were to
23 appear, in spite of all the difficulties that you have mentioned, before
24 the Supreme Military Court, if he were to be charged with crimes
25 committed in Bogoro before that court? Could you tell us when he might

1 appear before a court? What would the date be, and what sort of sentence
2 might he receive in the DRC for the crimes that were the subject of the
3 decision on -- in the confirmation hearing? This decision was taken by
4 Trial Chamber I last October.

5 MR. MUNTAZINI MUKIMAPA (interpretation): -- it's difficult for
6 me to envisage how long the trial would last if Mr. Katanga were to
7 return to the DRC. It's very difficult to do that. That's all the more
8 the case in that, as one has already said, the Congolese authorities
9 haven't really advanced much when it comes to the investigation into the
10 crimes committed in Bogoro. So it's difficult. I think it's even
11 impossible to tell you when Mr. Katanga would be taken to court if he
12 returned to the DRC.

13 As far as the sentence is concerned, the sentence that he might
14 receive for the crimes he allegedly committed, well, it's the military
15 code that would state that capital punishment should be meted out.

16 PRESIDING JUDGE COTTE (interpretation): Thank you for that.
17 You, or perhaps the Minister, this morning in the course of your general
18 presentations stated that the ability of the Congolese courts to function
19 in 2003 wasn't sufficient. It didn't allow one to prosecute. In the
20 letter of referral to the court, the president of the DRC stated -- it's
21 a public letter. Everyone has read it -- that given the particular
22 situation in this country, the competent authorities are unfortunately
23 not in a position to conduct investigations into the crimes referred to
24 above nor to institute the necessary proceedings without the
25 participation of the ICC.

1 This morning you referred to the current judicial situation in
2 the DRC since February 2003 and March 2004, and then July 2007, and since
3 then right up to now. Would it be possible to consider that the
4 situation has somewhat improved, or is that not the case? I'm putting
5 this question to you because in the challenge to admissibility the
6 Katanga Defence referred to the Lubanga case and, in particular, to a
7 decision of the Pre-Trial Chamber that I will now quote.

8 The Pre-Trial Chamber indicated that since March 2004, the
9 judicial system in the DRC has been changed to a certain extent, in
10 particular in the Ituri region where a Tribunal de Grande Instance has
11 been reestablished in Bunia, and the Chamber dealing with the Lubanga
12 case continued and said that the Prosecutor General said that the
13 judicial system in the DRC remains incapable of acting pursuant to the
14 provisions of A to C of paragraph -- the first paragraph of Article 17
15 of the Statute, but this is in fact no longer the case, they claimed. So
16 could you tell us very simply what the situation is with regard to the
17 judicial authorities, the judiciary. Are they able to deal with such
18 cases? Has the situation improved since 2003, 2004, 2007? It's the
19 1st of June, 2009. Or are you still faced with very serious obstacles?

20 MR. LUZOLO (interpretation): Thank you, your Honour. I believe
21 that when we deal with these descriptions in comparative terms, well, we
22 go from good, then we say better. We say not so good, better, quite
23 good. Well, on the other hand, when things are bad, I don't know whether
24 one says things are not going very well. It's not as bad, or it's worse.

25 So I'm referring to this comparative system, to these comparisons

1 in the French language in order to be able to assess the way in which the
2 situation for the judiciary has evolved in the Congo since 2003 up until
3 today.

4 We cannot now say that the judiciary in Congo is in the same
5 situation that it was in 2004 when the situation was referred to the ICC,
6 but one cannot say that although the situation is not identical, one
7 cannot say that the situation is better to such an extent that today the
8 procedure followed under the ICC Statute can simply be transposed or
9 delocalised and applied in the territory of Ituri. So no, that's not the
10 case.

11 I can claim with full responsibility that the government has
12 adopted the idea of a fair trial. We have made efforts since 2004 in the
13 Congo, but with regard to the criterion for fair trials, well, I'd say in
14 2004 the situation was worse. Today the situation is bad. We can't say
15 the situation is good. We cannot say that. So, there has been an
16 effort, there is a positive tendency, but a threshold has not yet been
17 reached which would allow one to meet international criteria, a criteria
18 that is supposed to be met by the ICC.

19 So I can say that we have done a lot since 2004, but there are
20 many things that remain to be done. We have tried to organise together
21 with the MONUC, to organise certain trials and to apply the Rome -- the
22 Statute. We tried to do this at Satonga (phoen), but it was difficult.
23 In Ituri, in the east of the DRC in particular, it's difficult. You can
24 follow on a day-to-day basis the damage that is caused, the persons who
25 are under the ICC, Ugandans, Joseph and consorts. You can see the drama

1 that this group is creating. You can see the sort of acts they're
2 committing in the north-east of the DRC, and in particular in Ituri.

3 This group, which is linked to the person who is present here
4 through the mandate issued by the ICC, well, do you think that Joseph
5 Kony's group would think it a good idea to transfer an ICC case to the
6 DRC since the government, in collaboration with the government of Uganda
7 and Rwanda is carrying out operations and is encountering difficulties
8 when it comes to evacuating or removing Joseph Kony's group from Province
9 Orientale in Ituri, and it is in Ituri that Germain Katanga and others
10 operated, and they're all charged by the ICC. So this is a matter of
11 concern for the government. So we think that our judiciary is making
12 efforts but is not at the moment in a position to act. For security
13 reasons, a case cannot be transferred there.

14 The Prosecution came to see us in Kinshasa for a visit to Ituri a
15 while ago. We had cooperation when it came to opening a court in Bunia,
16 and this was through a European programme, REGISCO. We tried to initiate
17 this programme to open up a court in Ituri. This lasted for a year and a
18 half, but the system isn't functioning now. And in addition, the fact
19 that Joseph Kony's group is there and a warrant has been issued for him
20 by the ICC means that the government is fighting for security in ECC, but
21 we cannot institute proceedings. We cannot guarantee security. The
22 government, the Congolese government, cannot guarantee security.

23 PRESIDING JUDGE COTTE (interpretation): Thank you, Minister, and
24 I would like to thank all the representatives of the DRC for your
25 responses. The Chamber has put numerous questions to you to which you

1 have answered. We are somewhat behind schedule and I would like to
2 apologise to the interpreters.

3 Mr. Kilenda, as far as Mathieu Ngudjolo is concerned, you may
4 naturally take the floor perhaps to give us your team's opinion on what
5 one takes the definition of case to be, the beginning of a case, but
6 perhaps you could take up no more than ten minutes.

7 MR. KILENDA (interpretation): Thank you. Thank you, my learned
8 friends, Legal Representatives, members of the OTP. Thank you to the DRC
9 representatives. Thank you, Mr. Hooper.

10 Since this morning, your Honour, you have stated that we're here
11 to obtain information, so I will follow this idea and try to provide you
12 with certain elements that might help you to rule in a fully informed
13 manner.

14 First of all, I would like to remind you that the challenge to
15 admissibility that we are now examining is the first challenge to
16 admissibility that is being debated before the ICC but it's not the first
17 challenge to be raised. This part of judicial life at the ICC. On the
18 11th of February, 2008, I arrived at the ICC for the first time to defend
19 Mr. Ngudjolo, and on that occasion I raised the same issue, the same
20 challenge to admissibility. After having been reminded that this could
21 only be raised once, the Pre-Trial Chamber gave me a time limit to gather
22 evidence that should allow me to appear before the Chamber again in order
23 to support this challenge. I haven't returned to the issue since then.

24 On a number of occasions the press tried to obtain information
25 from me. They said that it was -- but I said that I had to convince the

1 Judges and not the journalists. So this is what my friend Mr. Hooper
2 decided a while ago to do, after having announced this in November. He
3 announced his intention to challenge admissibility.

4 On a number of occasions, you said since this morning, that we
5 are providing you with information. That's what you say. A while ago I
6 noted that you asked the DRC, and I'm quoting: "What are the reasons for
7 having excluded Bogoro from the scope of the prosecution?" And the DRC,
8 through the Advocate General, responded clearly and I quote: "There was
9 never an investigation by the Auditeur General into the crimes committed
10 in Bogoro."

11 However, my client who is present here in the courtroom believes
12 that the contrary is the case, and I would like to draw your attention to
13 the fact that on the 23rd of October, 2003, he was arrested in Bunia for
14 the murder of Mr. Lokana. On the 3rd of June, 2004, in Bunia, he was
15 acquitted, but he wasn't immediately released. On the 21st June, 2004,
16 he tells me, and he hasn't ceased repeating this for a year now, another
17 case was opened, the so-called Bogoro case. On the 13th of September,
18 2004, my client told me that there was an arrest warrant issued by the
19 Auditeur General which was asking for him to be transferred to the
20 penitentiary centre in Kinshasa. You can have a look at case
21 DRC-OTP-0118-4 -- 0484, Rule 17.

22 On the 14th of September, 2004, my client was transferred to
23 Kinshasa, to the Makala prison with 17 other detainees from Ituri, and on
24 the 24th of December, 2004, my client informed me that he was released
25 from the Makala prison by the prosecutor general of the republic. And

1 after having been released, he spent four months in Kinshasa in order to
2 take all the necessary steps to join or rejoin the armed forces of our
3 country. So that is the information I can provide you with.

4 When you review the information provided to you by the
5 Prosecution as part of its disclosure, you will note that there are
6 several national procedures that have been instituted.

7 JUDGE DIARRA (interpretation): (Microphone not activated)

8 MR. KILENDA (interpretation): Thank you. Thank you. So in
9 Kinshasa in the DRC, several national procedures were opened. There were
10 four cases that were identified. They are the following: With regards
11 to Mr. Ngudjolo, there's the case that concerns the murder of Lokana.
12 Second case, the Tribunal de grand instance in Bunia DRC0039002. The
13 third case the Auditeur General case at the Supreme Military Court, RMP
14 091/TP/04. And the fourth case still concerns the Auditeur General of
15 the high -- of the Supreme Military Court, AG/1072/D212005.

16 Your Honour -- your Honours, having read through the two
17 decisions confirming the charges in the Lubanga case and in the case that
18 was joined, Ngudjolo and Katanga case, we have seen that the evidence
19 disclosed by the parties becomes the Court's property so to speak. So
20 when you withdraw to deliberate on this matter, if you are persuaded that
21 the evidence that has been presented to you, that has been commented on
22 demonstrates quite clearly that the Bogoro case had been investigated, we
23 believe that given the pre-eminence of the law you should apply the
24 principle of complementarity and affirm the primacy of the Congolese
25 judiciary system when it comes to putting the two accused on trial. One

1 shouldn't be told that the DRC is not capable of organising such a trial.
2 The DRC can organise itself. It has the means to judge these crimes in
3 an appropriate manner.

4 You are the impartial Judges. It is to you that the parties have
5 submitted all their evidence to demonstrate that the challenge to
6 admissibility should be dismissed or should be granted. So we have
7 confidence in you, and that's the situation.

8 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Kilenda.
9 You have no particular comments to make with regard to what was said this
10 morning?

11 MR. KILENDA (interpretation): We don't have any particular
12 comments to make. Our team doesn't have such comments, but this trial
13 started, we believe, after the confirmation of the charges. We were here
14 in the month of November. We put the question to the two accused. You
15 know the response. They pleaded not guilty. So we believe that it is as
16 of that point in time that the trial commenced.

17 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Kilenda.
18 Mr. Hooper, you now have 20 minutes to respond to what has been
19 said.

20 JUDGE DIARRA (interpretation): Your Honour, I have a minor
21 question for Mr. Kilenda.

22 PRESIDING JUDGE COTTE (interpretation): You have a question for
23 Mr. Kilenda.

24 JUDGE DIARRA (interpretation): Sir, you said that one couldn't
25 speak of the fact that the government in the DRC was incapable. It's a

1 question of willingness. But you -- you remember the Statute says
2 someone who can't or doesn't want to. So not to be willing to do
3 something is something that should also be taken into consideration, not
4 just the fact that one is technically incapable of instituting
5 proceedings. That's what I wanted to ask you about.

6 THE INTERPRETER: The interpreter notes that the microphone is
7 switched off.

8 MR. KILENDA (interpretation): That's my personal opinion. I
9 worked in Congo as a lawyer for about ten years, and I think that the
10 Congo has capable human and other resources to carry out or to implement
11 its justice, legal decisions. It's a question of willingness. You are
12 here to apply the texts. You are not here to take the place of the
13 parties and comment on what they have to say. You're here to implement
14 the texts.

15 JUDGE DIARRA (interpretation): Thank you.

16 PRESIDING JUDGE COTTE (interpretation): Mr. Hooper, I will give
17 you the floor once more. Don't forget that you have certain responses to
18 give us. You have to answer certain questions that give rise to
19 discussion with your client on certain contradictions that we noted in
20 his attitude. First of all, that he wanted to be brought before the ICC,
21 and today he's filing a motion challenging admissibility.

22 MR. HOOPER: Indeed. Can I come back in the course of my
23 summation --

24 PRESIDING JUDGE COTTE (interpretation): You have 20 minutes.
25 You have 20 minutes. We are listening to you.

1 MR. HOOPER: First of all, may I also congratulate the Democratic
2 Republic of the Congo for sending a strong delegation to this court. It
3 must be and is impressive and demonstrates, if I may say so, a sense of
4 will and capacity on the part of that State.

5 We are concerned here with an issue of admissibility. There are
6 some matters that have been raised, and I'll deal with them, I hope,
7 within certainly the 20 minutes allocated.

8 There were issues raised as to the timing of the submission, and
9 I've responded to your question, Mr. President, as to why it was done
10 when it was. The only other matters I'd wish to raise and not go into in
11 detail are Article 19(5) and Article 19(6) of the Statute.

12 Article 19(5) refers to a State referred to in paragraph 2(b) or
13 (c) shall make a challenge at the earliest opportunity. There is no
14 mention there of the individual challenger, the accused, who of course
15 has the right.

16 And 19(6): "Prior to the confirmation of the charges, challenges
17 to the admissibility of a case or challenges to the jurisdiction of the
18 court shall be referred to the Pre-Trial Chamber. After confirmation of
19 the charges, they shall be referred to the Trial Chamber." And that
20 would not make any sense unless of course you could be seized at this
21 time in respect of those matters.

22 Our position is unchanged, and my submissions don't gain strength
23 through repetition, and I'm not going to take up more time this
24 afternoon. There are extensive submissions in writing, and I've covered
25 our principal points and perhaps fine-tuned a few this morning.

1 Our submission here is that the decision that this case was
2 admissible and not inadmissible was wrong because the Pre-Trial Chamber
3 was misled in terms of the information that was provided it. In fact it
4 was provided with no other information other than wrong information,
5 because the information that was given to it was there was no such charge
6 in the Congo.

7 We submit that there was an investigation, and for all the
8 assistance that one's received and we're grateful for from the
9 representatives of the republic, my submission really is that you only
10 have to look at the prorogation documents of the 2nd of March, 2007, to
11 appreciate in black and white on those pages that there was an
12 investigation by any use of that word. I've referred to that this
13 morning. And the importance of that document isn't merely that it refers
14 to Bogoro and a whole sequence of other places, of course, scattered
15 throughout Ituri, but that it also looks forward to the future, to an
16 adjournment of a further two months in order to re-examine suspects,
17 plainly to collect evidence, and finally, because the republic had a firm
18 expectation, having met the Office of the Prosecutor, that there was
19 evidence being assembled that would help, and that against the
20 background, of course, of continued detention of Mr. Katanga in the
21 prison.

22 Looking at that document, it has not been confronted, in our
23 submission. It's there. It stands relatively or entirely unmolested by
24 what we've heard today. Unfortunately, the Pre-Trial Chamber was not
25 informed.

1 Questions have been asked as to why it was that Bogoro was
2 omitted. Well, one well appreciates that -- the thrust of that question,
3 and it just does not make sense to say that there would be any kind of
4 inquiry into events within Ituri, and for some reason those inquiries
5 would and did step over Bogoro entirely throughout those investigations.
6 It is just not a reasonable or realistic response.

7 We found out today that the Prosecution knew of this document in
8 May of 2007. I'm not saying there was a deliberate, by any means,
9 attempt here to mislead the court. I want to make that plain. That is
10 not my suggestion at all. It was perhaps a question of a Prosecutor here
11 having decided for something like perhaps a year to focus as part of this
12 focused investigation on one place, and then just as he comes up and
13 finds this document right before he goes before the Court for the
14 warrant, feeling the whole thing is going to be dished from his hands,
15 and perhaps it was all done more in -- more in hope than, in fact, in
16 common sense.

17 How could it be that with knowledge of that document of the 3rd
18 of -- the 2nd of March, 2007, and what it states and what it looked
19 forward to in terms of further time, how is it possible that a Prosecutor
20 could not be moved to share that information with the Pre-Trial Chamber?

21 So we say there was an investigation in any normal sense of the
22 word and that had the Pre-Trial Chamber known that, there's no way it
23 would have granted or found a finding of admissibility in this case.

24 Today, 1st of June, 2009, the position seems to have changed, and
25 though there is still an effort to suppress the fact that Bogoro was

1 being prosecuted, there has been quite plainly a purposeful, perhaps,
2 intent to raise inability, essentially for the first time, as a
3 foundation for admissibility. At least that seems to be the drift of
4 what's happened today.

5 We say that in fairness to Mr. Katanga, the decision of June,
6 July 2007, that's what we're concerned with. That's what we're
7 challenging today.

8 The DRC we say, in any event, did have ability, and I've referred
9 to the Advocats Sans Frontieres document. We invite you, if you haven't
10 yet had the opportunity, to look at that, at particularly the last
11 closing pages, the Annex, in fact, that's attached. With respect to pay
12 particular attention to the nature of the cases and where they are, and I
13 touched on that this morning, and in particular, the allegation and the
14 trial concerning Chief Kahwa in Ituri and other cases, too, in Ituri.
15 That is a functioning judicial state. It's not a question of looking or
16 maintaining that that's the position today. The Defence maintain that
17 that's an historic document because it stretches back over the last
18 several years during the time which Germain Katanga was brought here and
19 has been detained here, and so, it is a reflection of the background, the
20 active background that was going on at the time.

21 Those are my submissions in respect of essentially the overview.

22 Can I just touch on the Ndoki killings. In early 2005, there
23 were the most dreadful murder of eight, I think it was, MONUC officers or
24 soldiers in the area north of Bunia. Very soon afterwards the Security
25 Council put immense pressure on the still -- on the Kinshasa government

1 to bring someone to book. There was then a political arrest or arrests,
2 among them Germain Katanga. It had absolutely nothing to do with the
3 Ndoki killings. And in the four years of investigations, as we've heard,
4 there hasn't been a scrap of evidence led against him. Instead he, with
5 others including Thomas Lubanga, who, as you know, was his opposite
6 contender, really, in terms of -- or allegedly in terms of events in
7 Ituri. They're all arrested, all swept up and all thrown into prison.
8 That's position. That was a political arrest, a political decision and
9 he was arrested in February of 2005 and it's interest to note that the
10 first official warrant that we have is back in March, a month later, for
11 an "atteinte" of the State.

12 I mention this because, far from there being an unsuccessful
13 prosecution, the man responsible for the murder of the MONUC troops is in
14 prison. His name is Koliba, and he's in Kinshasa prison. He's Mai-Mai,
15 nothing to do with Germain Katanga, nothing to do with the FRPI, nothing
16 to do with the FNI, and the Democratic Republic of Congo knows this.

17 The -- instead, Mr. Katanga at the time those soldiers were slain
18 was 3.000 miles away from Ituri, in Kinshasa, having been selected by his
19 president to go there, receive the nomination of brigadier-general and
20 was looking forward to an active life in the armed forces of the
21 republic.

22 So that's the position. It was a fit-up, we say in English, a
23 put-up job, a wholly, wholly political arrest.

24 Can I come to the few -- just a few questions that you asked, and
25 that is turning first of all to the issue of case. Case is difficult --

1 thank you very much. I'm on time I believe. Case is a difficult word to
2 define, and I've touched on that this morning. It's difficult to define
3 because it's used in so many contexts, both in daily life, in general,
4 and also in different ways within the Statute such as Article 20.

5 The Triffterer reference I referred to today was the concept of
6 case, it says, would seem to imply that an individual or individuals had
7 been or were targeted during an investigation of a situation. We suggest
8 there is a useful area to examine here, and that is that the words that
9 are used, a hierarchy, really, of words. From "situation" to -- to
10 "case," to "conduct," to "charge." Those are the four, as it were, we
11 say ranking and specifically different circumstances -- or words.

12 "Case" has to be, we submit, defined in terms of the section
13 that you find it. You don't get with a word like "case," a one size fits
14 all. You're not going to get it. We're going to have, in our
15 submission, to define "case" in terms of the purpose and object of the
16 particular article that it's placed in as a word, and in the context of
17 Article 17, it has to reflect the object and person -- purpose of
18 complementarity. If it doesn't do that, the definition fails.

19 We submit the Lubanga use of the word fails. It's over-precise
20 and has, in fact, been reduced to being synonymous, as we can see in the
21 Lubanga case, with the word "charge," and this cannot be right.

22 We've noticed also, as we heard this afternoon from
23 Mr. MacDonald, or this morning, that the Prosecution is highly selective
24 when it comes to investigating events. So that's all the more reason for
25 a definition of "case" that more accurately reflects the issues of

1 complementarity to the nature and wideness and discretion of a State to
2 investigate, the nature of -- temporally and geographically the nature of
3 those matters. Any test that fails, in fact, and is too narrow, fails
4 the object of Article 17.

5 "Trial" clearly means, in our submission, as has already been
6 reflected in decisions taken by courts at the ICC, an effective
7 procedural step of the case actually opening, marked by Prosecutor's
8 opening, with the prospect of witnesses being called.

9 Can we draw your attention to Article 61(9) which deals with the
10 word "case" in another context. And it reads: "After the charges are
11 confirmed and before the trial has begun, the Prosecutor may, with the
12 permission of the Pre-Trial Chamber and after notice to the accused,
13 amend the charges."

14 So that's after confirmation, and it just can't stand and make
15 sense unless "trial" is seen as something quite distinct in that context.
16 And also from time to time, as you know, there are orders for disclosure
17 in this case that are expressed 45 days before trial, 30 days before
18 trial, and there is no doubt that that reflects everyone's common
19 perception that the trial is the day -- at the moment that we have
20 written in our calendar, I think the 24th of September, and that's what
21 we're all working to in the normal and common sense of the word.

22 As for the charges being read earlier, we would submit and the
23 point is made -- raised by one of the victim's representatives,
24 Mr. Gilissen, one of the victim's representatives, in respect of
25 Article 64(8)(a). It may be that those charges shouldn't have been put

1 at that time, but what we do say is it cannot be said that when the
2 charges are put defines when the trial starts. It's the other way round.
3 The trial determines when the charges should be put, and our recollection
4 is, Mr. President, that you were quite particular when those charges were
5 put in making it plain that this was really a look-see, an ab initio
6 position, and that the final opportunity, the real opportunity, was going
7 to be given later at the start of the trial. So we support the decisions
8 that have been referred to and taken so far by the Lubanga Trial Chamber.

9 Can I finally come to --

10 PRESIDING JUDGE COTTE (interpretation): Mr. Hooper, if I may,
11 you've been referring to a decision. Could you please give us the
12 references. If you can't do so just now, please do give them to us at
13 the end of the hearing, please. Regarding the trial.

14 MR. HOOPER: Yes. This is Lubanga case. That's 0106-1084,
15 paragraph 39, tenth line, and it's also in Trial Chamber Lubanga
16 0106-1084. That's the same -- the same document, of course, at
17 paragraph 41, on the fifth line, or fourth line. Those are the
18 references. And I think those are the same references as referred to by
19 my friend - thank you very much - this morning.

20 I can pass that up actually. May I take the opportunity of doing
21 that, because it's -- it's there and I regret in English, but we can get
22 the page sent to you tout de suite in French.

23 PRESIDING JUDGE COTTE (interpretation): The Prosecutor must also
24 give us a few references. Please don't forget.

25 You may continue, please, Mr. Hooper.

1 MR. HOOPER: Thank you, Mr. President. I'm coming now to the
2 questions that -- that you asked this morning, and as I recall, they were
3 essentially three. The question was: Is it not contradictory that
4 Mr. Katanga asked to come here and now says -- and now challenges the
5 admissibility of the case? Can I just pause there and say, without going
6 into great detail, that the circumstances in which that apparent
7 agreement or agreement indeed was -- was made were in difficult and
8 thwart circumstances, and one shouldn't read over much into what you see
9 there.

10 The other question was: Will he be tried more expeditiously or,
11 I suppose, better in the Congo than here? I'm going to be, I hope,
12 entirely frank with the Court. In a fact, I see it as my duty in these
13 circumstances to be frank. The challenge today is to the admissibility
14 of the case. It is not -- which is quite distinct to jurisdiction. It's
15 not a question of a trial here or a trial there.

16 Mr. Katanga didn't ask to be brought here. He was brought here
17 by the Prosecutor. Now he's here on Dutch soil and subject to the
18 European Court of Human Rights. It is not his intention to go back to
19 the Congo, and indeed there will be a motion shortly in respect of
20 unlawful conduct that he was subjected to, some of which I think we've
21 heard has been indicated today in respect of his stay in the Congo. And
22 in saying all that, I stress one thing: He's pleaded, as you know, not
23 guilty, and he still maintains that he's not guilty. This Statute gives
24 him a right to challenge the admissibility. That's the issue today. The
25 consequence of your decision, in our respectful submission, has nothing

1 to do with that finding. So that's our position. Rightly, may I say,
2 anticipated by a -- the ever-watchful Ms. Bapita, but that is our
3 position.

4 Thank you.

5 PRESIDING JUDGE COTTE (interpretation): Thank you, Mr. Hooper.
6 The Chamber has heard your arguments, and before you finished you
7 referred to unlawful conduct that Mr. Katanga was the victim of. You
8 mentioned a motion. When do you intend to file that motion, because
9 don't forget, time is running.

10 MR. HOOPER: We appreciate, fully appreciate, that that's the
11 case. We have been occupied, as you know, with other matters and other
12 things. I'm not complaining about that. We hope to have that motion
13 before the Court by the end the month. If we can do it sooner, we'll do
14 it sooner.

15 PRESIDING JUDGE COTTE (interpretation): Don't forget that every
16 time there's a motion filed there's a response, additional recourse, and
17 that the trial is begin at the end of September in the interest of the
18 accused themselves.

19 Do either of my colleagues, Judge Diarra or Judge Kaul want to
20 ask any questions to Mr. Hooper before we conclude?

21 JUDGE DIARRA (interpretation): No, your Honour.

22 PRESIDING JUDGE COTTE (interpretation): Thank you.

23 Now, as regards that motion, it would have been more expeditious
24 to file that motion earlier. I would really like to emphasise the fact
25 that our schedule is extremely tight at this point in time. The Chamber

1 would like to thank the parties and the participants.

2 Mr. Hooper, did you have something to say?

3 MR. HOOPER: Just one thing. We had thought of it, but we felt
4 that it was appropriate to wait until we heard what the representatives
5 of the democratic republic would say, and I think having heard what has
6 been said this afternoon, Mr. President, I hope you can see the sense of
7 that, but may I say I've heard what you said, and we will do our utmost
8 to get this motion before you really as soon as we can.

9 PRESIDING JUDGE COTTE (interpretation): Well, then, do your best
10 even more.

11 The Chamber would like to thank the parties, the participants,
12 and in particular the delegation of the Democratic Republic of the Congo,
13 delegation which has come from very far away and has accepted to answer
14 our questions, some of which were rather difficult, and you did so with
15 great conviction and very conscientiously, so we would like to thank you
16 for providing this information to the Chamber. We would also like to
17 thank all those who enable us to do our job here, on both sides upstairs
18 in the booths.

19 I see that the Prosecutor has some references to give us. Go
20 ahead.

21 MR. MacDONALD (interpretation): To come back to the decision
22 regarding the beginning of the trial, this morning there was a reference
23 to a transcript in the Lubanga hearing. I would like to repeat the
24 reference to be absolutely certain that we all have the same reference.
25 It's in English, ICC-01-01-06, and it's transcript 106 -- 105, 105, dated

1 January 22nd, 2009, page 24. That is the transcript reference 105, dated
2 January 22nd, 2009. Page 24.

3 I would also like to give you the references to the decisions
4 regarding Article 53(2) that I mentioned this morning. I mentioned
5 Article 52 this morning but, in fact, I meant 53(2). There are two
6 decisions in the Congo situation as follows: ICC-01/04-399, dated
7 September 26th, 2007; and there was a previous one, again in the
8 situation of the Congo, ICC-01/04-373, dated August 17th, 2007.

9 In the Darfur situation, lastly, we have ICC-02/05-185, dated
10 February 5th, 2009.

11 And lastly, I would also like to submit the full report that the
12 Defence mentioned, the Katanga Defence mentioned report drafted by
13 Advocats Sans Frontieres, Lawyers Without Borders. I believe the Defence
14 counsel has referred to the annexes, but I believe it would be of use for
15 the Chamber to examine the entire report that presents a number of
16 interesting conclusions. Here you are.

17 PRESIDING JUDGE COTTE (interpretation): The Court Officer will
18 include this in the file.

19 Have you finished? Yes, please do record it.

20 COURT OFFICER: Thank you, your Honour. The document will have
21 the number ICC-01/04-01/07-HNE-12, and the document from the Prosecution
22 will be ICC 01/04-01/07-HNE-13, and the two will be included in the file.

23 PRESIDING JUDGE COTTE (interpretation): Thank you very much. I
24 would like to thank the court reporters and the interpreters. The
25 hearing is adjourned.

1 The hearing ends at 4.53 p.m.

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