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Pénale
Internationale**



**International
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TRIAL CHAMBER II

Before: Judge Bruno Cotte, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Fumiko Saiga

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

***IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI***

**Public Redacted Version
of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of
the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)**

Source: Office of the Prosecutor

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

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I. Introduction

1. On 10 February 2009, the Defence for Germain Katanga (“the Defence”) submitted its motion (“the Motion”) challenging the admissibility of the case pursuant to Article 19(2) of the Rome Statute (“the Statute”).
2. On 25 February 2009, the Motion was notified to the Office of the Prosecutor (“OTP” or “the Prosecution”) after Trial Chamber II reclassified it as “Confidential – Ex Parte only available to the Office of the Prosecutor and both Defence teams”.
3. The Prosecution hereby files its Response and submits that the case is admissible under the relevant provisions of the Statute.¹ As the facts and arguments below will demonstrate, the Democratic Republic of the Congo (“DRC”) did not investigate Katanga (“the Accused”) for the crimes with which he is charged in this Court. Its proceedings, from the outset through the surrender of Katanga to this Court, never focused substantively on Bogoro, nor have its long-running inquiry into other crimes and other events progressed significantly. Thus, because the DRC authorities did not investigate or prosecute “the case” before the Court (see Art. 17(1)(a)), this case is admissible under the test for admissibility established, inter alia, in the *Lubanga* case.²
4. The Prosecution further disagrees with the Defence’s argument that the existing admissibility test should be rejected in favour of other less-clearly articulated alternatives. The current test - same defendant/same conduct - is consistent with the language, the drafting history, and the purpose of the Rome Statute. Similarly, it is appropriate to define “case,” as used in Article 17, in accordance with the ordinary meaning given to the term in its context and in the light of the object and purpose of the Statute. The tests proposed by the Defence, in contrast, and his preferred interpretation of the term “case” in Article 17 reflect alternative policy judgments that should be made by the Assembly of State Parties, not by the Chambers.

¹ The Response is filed on a confidential basis, ex parte available only to the Prosecution and the Defence teams, because the Motion was also classified at the same level of confidentiality and in light of the issues identified in the *Décision arrêtant la procédure à suivre au titre de l’article 19 du Statut* (règle 58 du Règlement de procédure et de preuve), ICC-01/04-01/07, 5 March 2009, paragraphs 6 and 8.

² ICC-01/04-01/06-8 US-Corr, paras.31, 37 and [REDACTED].

II. Procedural Background

5. On 2 July 2007, Pre-Trial Chamber I (“the Pre-Trial Chamber”) issued, under seal, a warrant for the arrest of the Accused.³
6. On 6 July 2007, the Pre-Trial Chamber rendered its “Decision on the Evidence and the Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga”.⁴ The Pre-Trial Chamber considered that the case warranted an initial determination of admissibility and endorsed the Prosecution’s submission that the case was admissible as follows:

“When, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a *conditio sine qua non* for such a finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court. In this regard, the Chamber finds that, on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against Germain Katanga in the DRC do not encompass the same conduct which is the subject of the Prosecution Application”.⁵

7. The warrant of arrest was notified to the competent DRC authorities on 18 September 2007. The Auditeur Général Militaire rendered his decision to surrender the Accused on 17 October 2007 and the surrender to the International Criminal Court (“ICC”) took place on 18 October 2007. The Accused arrived at the Court on 18 October 2007.
8. The first appearance hearing took place on 22 October 2007 and the Public Decision on the confirmation of charges was issued on 1 October 2008.⁶
9. When assessing the admissibility of the case, the Pre-Trial Chamber referred to the concept of “case” as defined by the same Pre-Trial Chamber (Pre-Trial Chamber I) in earlier decisions in the *Lubanga* case,⁷ i.e. “specific incidents during which one or

³ ICC-01/04-01/07-1.

⁴ ICC-01/04-01/07-4.

⁵ *Ibid.*, para.20. See also para. 21.

⁶ ICC-01/04-01/07-717.

⁷ ICC-01/04-01/06-8 US-Corr, paras.31, 37 and [REDACTED].

more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”.

10. Between 21 January 2008 and 13 March 2008, the Prosecution disclosed to the Defence a significant amount of relevant documents. On 21 January 2008, in its third pre-confirmation package of Rule 77 evidence, the Prosecution disclosed the “Letter from Mr Katanga dated 25 June 2007 to the President of the Haute Cour Militaire requesting his interim release”.⁸

11. On 4 February 2008, in its fifth pre-confirmation hearing package of incriminating evidence, the Prosecution disclosed the following documents:

- *Pro-Justicia Mandat d’arrêt* against Mr Katanga, charged with ‘*Atteinte à la sureté de l’Etat*’, dated 10 March 2005;⁹
- ‘*Pro-Justitia P.V. d’audition*’ of Mr Katanga by an Officer of the Ministère Public près de la haute Cour Militaire dated 20 January 2006 interviewing Mr Katanga;¹⁰
- ‘*Mémoire à la bienveillante attention de son excellence Monsieur le Ministre de la Justice et Garde des Sceaux*’ dated 31 January 2007 from Mr Katanga *et al.*, [REDACTED].¹¹
- ‘*Copie certifiée conforme*’ dated 24 May 2007 of the *Farde Parquet* indicating that Mr Katanga is accused of crimes against humanity by the Auditeur Général-Ministère Public.¹²

12. On 28 February 2008, in its fourth pre-confirmation hearing package of Rule 77 information, the Prosecution disclosed the following documents:

- Court document #0120, 0121 et 0122/NBT/05 dated 25 March 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;¹³

⁸ DRC-OTP-1013-0263.

⁹ DRC-OTP-0138-0780.

¹⁰ DRC-OTP-0155-0318.

¹¹ DRC-OTP-0172-0007.

¹² DRC-OTP-1010-0002.

¹³ DRC-OTP-1010-0385.

- Letter from the Procureur Général of the DRC to the Auditeur Général of the ‘Forces armées de la RDC’ (FARDC) dated 20 January 2005, transmitting the case file RMP 0603/BKG in the case “Ministère Public contre Germain Katanga”, which was sent by the Procureur de la République of Bunia in a letter dated 26 March 2005;¹⁴
- Court documents according to which Mr. Katanga is charged with crimes of genocide and crimes against humanity:
 - i. Court document #0120, 0121 et 0122/NBT/05 dated 25 April 2005;¹⁵
 - ii. Court document #0120, 0121 et 0122/NBT/05 dated 25 May 2005;¹⁶
 - iii. Court document #0120, 0121 et 0122/NBT/05 dated 25 June 2005;¹⁷
 - iv. Court document #0120, 0121 et 0122/NBT/05 dated 25 July 2005;¹⁸
 - v. Court document #0120, 0121 et 0122/NBT/05 dated 25 August 2005;¹⁹
 - vi. Court document #0120, 0121 et 0122/NBT/05 dated 25 September 2005;²⁰
 - vii. Court document #0120, 0121 et 0122/NBT/05 dated 25 October 2005;²¹
 - viii. Court document #0120, 0121 et 0122/NBT/05 dated 25 November 2005;²²
 - ix. Court document #0120, 0121 et 0122/NBT/05 dated 24 December 2005;²³
- Letters from Mr Katanga and others to the Auditeur Général of the FARDC dated 17 January 2006 requesting their interim release;²⁴

¹⁴ DRC-OTP-1010-0013.

¹⁵ DRC-OTP-1010-0384.

¹⁶ DRC-OTP-1010-0383.

¹⁷ DRC-OTP-1010-0382.

¹⁸ DRC-OTP-1010-0381.

¹⁹ DRC-OTP-1010-0380.

²⁰ DRC-OTP-1010-0379.

²¹ DRC-OTP-1010-0378.

²² DRC-OTP-1010-0377.

²³ DRC-OTP-1010-0376.

²⁴ DRC-OTP-1010-0027.

- Letter dated 18 January 2006 from Mr Katanga and others to the Auditeur Général of the FARDC, requesting their interim release, in particular in light of the arrest of the alleged organiser of the ambush which led to the murders of nine ‘casques bleus’;²⁵
- Court document #0120, 0121 and 0122/NBT/05 dated 24 January 2006 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;²⁶
- ‘*Décision de prorogation de la détention provisoire*’, RP/RMP N° 0121 et 0122/NBT/05, of Mr Katanga, charged with crimes against humanity, filed on 19 March 2006 by the Officer of the Ministère Public près la Haute Cour Militaire;²⁷
- Letter dated 4 April 2006 from the Counsel of Mr. Katanga to the Auditeur Général of de FARDC, requesting his release because of the overrun of the legal delay of preventive detention;²⁸
- ‘*Requête aux fins de prorogation de la détention provisoire*’ of Mr Katanga *et al.* dated 18 April 2006 from L’ Officier du Ministère Public près la Haute Cour Militaire, according to which Mr Katanga is accused of crimes against humanity for having committed in Ituri, during the period May 2003-December 2005, as part of systematic attacks against the population, one of the acts enumerated within Article 169 of the *Code Pénal Militaire Congolais*;²⁹
- ‘*Notification de date d’audience au Ministère Public*’ from the Registry of the Haute Cour Militaire dated 4 May 2006: following the Prosecution’s request to extend the provisional detention of Mr Katanga *et al.*, this case will be heard on 5 May 2006;³⁰
- ‘*Pro-Justitia Arrêt avant dire droit*’ dated 12 May 2006 from the Haute Cour Militaire suspending the proceedings regarding the extension of the

²⁵ DRC-OTP-1010-0023.

²⁶ DRC-OTP-1010-0375.

²⁷ DRC-OTP-1010-0452.

²⁸ DRC-OTP-1010-0029.

²⁹ DRC-OTP-1010-0361.

³⁰ DRC-OTP-1010-0459.

detention of Mr Katanga *et al.*, on the ground that the Court was not composed of enough judges with the required military rank;³¹

- ‘*Ordonnance statuant en matière de prorogation de la détention préventive*’ of Mr Katanga *et al.*, dated 1 December 2006, from the Haute Cour militaire;³²
- ‘*Commission rogatoire N° AG/0742/RMP 0121-0138-NBT-05*’ dated 15 December 2006 from the Auditeur Général and Officer of the Ministère Public près la Haute Cour Militaire;³³
- Letter ‘*Memo et 8 pièces*’ dated 31 January 2007 from Mr Katanga *et al.* to the Ministre de la Justice et Garde des Sceaux, transmitting their Mémorandum;³⁴
- ‘*Requête aux fins de prorogation de la détention provisoire*’ of Mr Katanga *et al.*, N°AG/0187/D5/2007, dated 2 March 2007, submitted by the Auditeur Général près la Haute Cour Militaire;³⁵
- ‘*Ordonnance statuant en matière de prorogation de la détention préventive*’, from the Haute Cour Militaire, dated 10 April 2007, authorising the extension of the detention of Mr Katanga *et al.* for 60 working days because, it has « *aucune garantie de la présentation des inculpés aux actes de procédure à venir* »;³⁶
- Letter dated 10 April 2007 from the Registry in chief of the Haute Cour Militaire to the Director of the Centre Pénitentiaire et de Réhabilitation de Kinshasa (“CPRK”) asking him to notify Mr Katanga *et al.* of the *Ordonnance statuant en matière de prorogation de la détention préventive*;³⁷
- Letter from the Director of the CPRK dated 16 April 2007 to the Registry in Chief of the Haute Cour Militaire informing it that the « *Ordonnance de prorogation de détention préventive Ministère Public contre Germain*

³¹ DRC-OTP-1010-0052.

³² DRC-OTP-1010-0369.

³³ DRC-OTP-1010-0061.

³⁴ DRC-OTP-1010-0031.

³⁵ DRC-OTP-1010-0364.

³⁶ DRC-OTP-1010-0461.

³⁷ DRC-OTP-1010-0460.

Katanga et consorts » has been notified to Mr Katanga *et al.*, while they refused to sign the ‘accusé de réception’ in the absence of their counsel;³⁸

13. On 5 March 2008, in its fifth pre-confirmation hearing package of Rule 77 evidence, the Prosecution disclosed the following documents:

- “*Note synoptique sur état de la procédure-Dossier de l’Ituri, Réf RMP N° 0120,0121 et 0122/NBT/2005*”, dated 10 August 2005;³⁹
- *Memo à l’intention de l’Aud Gén*’;⁴⁰
- Letter dated 21 December 2006 from the Auditeur Militaire of the Garnison of Ituri, to the Auditeur Général of the FARDC, notifying the reception of the ‘*Commission rogatoire No AG/ /RMP. 0121-0138-NBT-05*’ against Mr Katanga *et al.*;⁴¹
- Letter dated 14 February 2007 from the Prosecutor of the ICC to the Auditeur Général près la Haute Cour militaire (OTP/140207-DRC56/LMO-ptcc) following the letter of the Auditeur Général ‘*Demande de renseignement complémentaire date du 22 janvier 2007*’;⁴²

14. On 13 March 2008, in the seventh pre-confirmation hearing package of Rule 77 information, the Prosecution disclosed the following documents:

- ‘Letter dated 21 March 2005 from the Permanent Representative of the Democratic Republic of Congo to the United Nations addressed to the President of the Security Council’, S/2005/190, informing him that Mr Katanga is under arrest;⁴³
- Letter ‘*Demande de renseignements complémentaires*’ from the Auditeur Général près la Haute Cour Militaire to the Prosecutor of the ICC dated 22 January 2007;⁴⁴

³⁸ DRC-OTP-1010-0360.

³⁹ DRC-OTP-0118-0429.

⁴⁰ DRC-OTP-0118-0441.

⁴¹ DRC-OTP-0171-1786.

⁴² DRC-OTP-0182-0429.

⁴³ DRC-OTP-0154-0531.

⁴⁴ DRC-OTP-0171-1773.

III. Statement of Relevant Facts

15. In order to assist the Chamber, the Prosecution sets out below a comprehensive and chronological outline of the relevant facts. This will clarify the Prosecution's primary contention that the incident with which the Accused is charged at the International Criminal Court ("the Bogoro incident") was not at any stage subject to actual investigation in the DRC for the purpose of satisfying the conditions set out in Articles 17(1)(a), 17(1)(b) or 17(1)(c) of the Statute.⁴⁵
16. On 24 February 2003, *Force de la Résistance Patriotique en Ituri* (FRPI) and *Front de Nationalistes et Intégrationnistes* (FNI) combatants encircled and allegedly attacked the civilian population of the village of Bogoro. The attacks resulted in the killings of civilians, destruction of property, pillaging and sexual violence.⁴⁶
17. On 3 March 2004, the President of the DRC referred the Situation in the DRC to the Prosecutor of the ICC. In his letter of referral, the President of the DRC stated, *inter alia*, as follows:

"En raison de la situation particulière que connaît mon pays, les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale."⁴⁷
18. On 25 February 2005, nine Bangladeshi peacekeepers from the United Nations Mission in the Democratic Republic of Congo (MONUC) were killed near the town of Kafé, allegedly by the FNI in Ituri (also known as "the Ndoki killings").⁴⁸
19. On 2 March 2005, the President of the UN Security Council made a statement on behalf of the Council condemning the attack; identifying the FNI as the authors of the attack and calling upon "the Government of National Unity and Transition

⁴⁵ The Prosecution notes that some documents indicated below (and attached as Annexes E, G and I) are internal reports prepared in connection with the investigation and preparation of the case which were not disclosed pursuant to Rule 81 (1). The Prosecution has deemed necessary to attach these memoranda to the present filing in order to clarify some inaccuracies in the Defence allegations. The documents have been redacted with regard to those matters which are not relevant to the present case. Furthermore, in one of the documents from the DRC authorities, names of potential witnesses in the domestic proceedings have also been redacted.

⁴⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on confirmation of charges, ICC-01/04-01/07-717, 1 October 2008, paras. 403-407, 565-569, 574-576, 579-580.

⁴⁷ ICC-01/04-01/06-39-AnxB1, quoted in *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Appellant's application for an extension of the time limit for the filing of the document in support of the appeal and order pursuant to Regulation 28 of the Regulations of the Court, Separate opinion by Judge Georgios M. Pikis, ICC-01/04-01/06-129, para. 3, fn 4.

⁴⁸ See Annex B, Statement by the President of the Security Council on 2 March 2005, 17 February 2006, S/PRST/2005/10*.

immediately to take all necessary measures to bring to justice the perpetrators, sponsors and authors of this attack” and welcoming “the first arrests undertaken by the Government”.⁴⁹

20. Following the killings of the nine MONUC peacekeepers, the judicial authorities of the DRC arrested the Accused and several other members of the FNI-FRPI on or about 9 March 2005. From the “Pro-Justicia Mandat d’Arrêt” which was issued on 10 March 2005, it will be noted that the Accused was initially suspected of having committed an “atteinte à la sureté de l’état”.⁵⁰ By 19 March 2005, the Accused was under investigation based on allegations of genocide, crimes against humanity, murder, illegal detention and torture under the Military Criminal Code of the DRC, without reference to a specific incident.⁵¹
21. On 15 March 2005, in its Seventeenth Report on the United Nations Organization Mission in the Democratic Republic of the Congo, the UN Secretary-General recalled that, in response in particular to the Ndoki killings, “MONUC and CIAT (Comité International d’Accompagnement de la Transition) requested the Transitional Government to arrest the FNI leaders, in particular, its President, Floribert Njabu, its former military leader, Goda Sukpa, and its current military commander, Etienne Lona, as well as the head of UPC/L, Thomas Lubanga, its military commander, Bosco Ntaganda, and the head of the Front de résistance patriotique de l’Ituri (FRPI), Germain Katanga. [...]. While the Transitional Government appears to have taken certain measures to restrict the movement of some of these individuals by placing them under house arrest, their means of communication have not been restricted. MONUC has also requested that the Transitional Government send clear orders to the armed groups in Ituri that they must immediately join the disarmament process.”⁵²
22. On 21 March 2005, the Permanent Representative of the DRC to the United Nations addressed a letter to the President of the Security Council⁵³ reporting the arrest of Mr. Thomas Lubanga and recalling the recent detentions of Mr. Floribert Ndjabu, Mr.

⁴⁹ See Annex B.

⁵⁰ Motion, para. 11 (a) and attached as Annex a to the Motion. DRC-OTP-0138-780.

⁵¹ ICC-01/04-01/07-40-Conf-Exp-Anx3.6 22-10-2007 1/3 JT PT : Décision n° 001/2007 : « *Attendu que depuis le 19/03/2005, le prévenu Germain KATANGA fait à l’Auditorat Général l’objet d’une instruction préjudicielle sous RM P n° 0123/NBT/05 du chef de crimes de génocide, crimes contre l’humanité, meurtre, détention illégale et tortures, infractions prévues et punies par le Code pénal militaire congolais* ».

⁵² See Annex C, Seventeenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, 15 March 2005, S/2005/167, para. 17.

⁵³ Annex D, Letter dated 21 March 2005 from the Permanent Representative of the DRC to the UN addressed to the President of the Security Council, 22 March 2005, S/2005/190, DRC-OTP-0154-0531.

Goda Sukpa and the Accused (Katanga), as well as the surrender of Mr. Etienne Lona, pursuant to the Statement of the President of the Security Council on 2 March 2005, in response to the Ndoki killings.⁵⁴

23. The Accused's detention was thereafter extended by virtue of periodic decisions of the Auditorat Général Militaire in Kinshasa ("AGM")⁵⁵. These decisions were, for the most part, based on allegations concerning "*crimes de génocide*" and "*crimes contre l'humanité*" framed in general terms without reference to specific incidents and, in particular, without reference to the Bogoro incident.
24. In the "*Note synoptique sur Etat de la procédure dossier de l'Ituri*"⁵⁶ of 10 August 2005 ("Note Synoptique"), the AGM clarified his interest in exploring the responsibility of the Accused [REDACTED], none of which included the conduct in the pending ICC charges: [REDACTED].
25. As part of its ongoing admissibility assessment of potential cases that might arise from the investigation into the situation,⁵⁷ the OTP met with representatives of the AGM in Kinshasa during the second week of February 2006 [REDACTED].⁵⁸
26. On 18 January 2006, the Accused filed an application for provisional release on the basis that, after approximately 10 months of detention, he had still not been notified of the grounds for his arrest.⁵⁹
27. At this time it was the assessment of the OTP that despite various procedural steps taken by the AGM to extend the detention of the Accused throughout the year of 2006, no substantive progress had been made into the investigation against the Accused [REDACTED] as a whole, nor had the Bogoro incident been included within the scope of the investigation.
28. Following a decision of the Haute Cour Militaire in Kinshasa to extend the detention of the Accused for a further 60 working days from 1 December 2006, a renewed investigative effort was made in Ituri pursuant to a Commission Rogatoire dated 15

⁵⁴ See Annex B of the Response.

⁵⁵ Dated 25 March 2005, 25 April 2005, 25 May 2005, 25 June 2005, 25 July 2005, 25 August 2005, 25 September 2005, 25 October 2005, 25 November 2005, 24 December 2005, 24 January 2006. See Motion para.11 (c), (e), (f), (g), (h), (j), (k), (l), (m), (n), (r).

⁵⁶ DRC-OTP-0118-0429, disclosed as Rule 77 - Pre-confirmation hearing package #5. See also Motion, para.11 (i), Annex i.

⁵⁷ The Prosecution wishes to note for the Chamber's reference that in such meetings the OTP as a matter of policy makes inquiries of a general nature and does not indicate to local prosecutors the focus of its own investigative efforts or its case hypothesis in order not to in any way unduly influence national efforts or prejudice its own ongoing investigations.

⁵⁸ Annex E, Internal report [REDACTED].

⁵⁹ DRC-OTP-0155-0485, pre-confirmation package #5. See Motion, para.11 (p), Annex p2.

December 2006 (“Commission Rogatoire”) and addressed to the Auditorat Militaire de Garnison de l’Ituri (“the AMGI”).⁶⁰ [REDACTED]. It does not refer to the incident of Bogoro and does not link any of the potential accused with any specific incident.

29. On 22 January 2007, the AGM, through the Procureur-General of the DRC, sent an official request for assistance to the OTP in the matter of the Accused and his co-suspects.⁶¹ OTP received this letter on 1 February 2007.⁶² [REDACTED]; it did not seek information in respect of the Bogoro incident.⁶³
30. On 31 January 2007, in the course of preparing its application for the warrant for the Arrest of Germain Katanga and as part of its ongoing admissibility assessment, the OTP made an official request for assistance to the authorities of the DRC asking for access to the dossier referenced by the AGM in the Note Synoptique dated 10 August 2005.
31. On that same day (31 January 2007), the AMGI issued a *rapport partiel d’enquête* on the preliminary results of its investigation. [REDACTED]. No mention of the Bogoro incident was made therein.⁶⁴
32. In addition, on 31 January 2007, the Accused himself filed a petition with the Minister of Justice requesting that he be prosecuted by the ICC instead of the DRC judiciary, asserting that an ICC prosecution would provide a faster and more impartial procedure before a more legitimate and credible judicial institution.⁶⁵
33. On 6 February 2007, members of the OTP again met with representatives of the AGM as part of the ongoing admissibility assessment. In response to the OTP’s inquiries, the latter confirmed that the investigation for which the Accused was being detained was confined to the incidents mentioned in the Commission Rogatoire (which did not

⁶⁰ *Commission Rogatoire No AG/0742/RMP 0121-0138-NBT-05*, DRC-OTP-1010-0061. Disclosed as R77 on 27 February 2008 - Pre-Confirmation Hearing Package #4. See Motion, para.11 (bb), Annex bb.

⁶¹ DRC-OTP-0171-1773[REDACTED].

⁶² DRC-OTP-0171-1772.

⁶³ Thus, it is inaccurate to rely on this document for the proposition that “there is evidence that the DRC was keen on investigating this case at the national level...”. Contrast, Motion, para. 50 and fn. 107.

⁶⁴ Annex F, DRC-OTP-0171-1784. This document, as well as Annex H, are attached to this Response in order to provide a complete overview of the facts. These documents, which have been recently identified, do not form part of the dossier involving the Accused.

⁶⁵ *Memorandum a la bienveillante attention de son excellence Monsieur le Ministre de la Justice et Garde des Sceaux*, DRC-OTP-1010-0033 or DRC-OTP-0172-0005 and DRC-OTP-0172-0007. DRC-OTP-1010-0033 was disclosed as Rule 77 on 27 January 2008 - Pre-confirmation hearing package #4; see also Motion, para. 11, ee, Annex ee2. See also *La prospérité, Les Détenus Floribert Ndjabu et Consorts exigent leur comparution devant la CPI*, 16 February 2007, at Congo Forum: <http://www.congoforum.be/fr/nieuwsdetail.asp?subitem=1&newsid=24472&Actualiteit=selected>

include the Bogoro incident). The AGM representatives further noted that they had not made substantive progress into the investigation to date.⁶⁶

34. On 8 February 2007, the AMGI issued a *Réponse à la Commission Rogatoire* [REDACTED].⁶⁷

35. On 14 February 2007, the OTP replied to the DRC's 22 January request for assistance. In accordance with its obligations under Articles 54(3)(e) and 93 (10) of the Statute, the OTP noted its assessment that security, confidentiality and witness protection considerations prevented it from disclosing to the DRC authorities information derived from OTP investigative sources. As an alternative, and in the interests of supporting domestic efforts to the extent possible, the OTP offered to provide summaries of the information concerned subject to certain undertakings of confidentiality.⁶⁸ The DRC authorities did not respond.

36. On 2 March 2007, the AGM petitioned the Haute Cour Militaire for a further extension of the detention of the Accused. In the document supporting this petition entitled "*Requête aux fins de prorogation de la détention provisoire*"⁶⁹ ("Requête of 2 March 2007"), mention is made for the first time of Bogoro [REDACTED].

37. On 10 April 2007, the Haute Cour Militaire extended the Accused's detention for a further 60 days prompting a "*Requête de mise en liberté pour dépassement de délai legal de détention préventive*" filed by counsel for the Accused on 24 May 2007.⁷⁰

38. On 30 May 2007, another meeting was held between members of the OTP and the AGM as part of its ongoing admissibility assessment. [REDACTED].⁷¹

39. As a result of all such efforts by the OTP during the course of the year to obtain clarity on the the existence of relevant national investigations or proceedings with respect to the incident in Bogoro, the OTP concluded that the case arising from the conduct which formed the basis of its investigation would be admissible. Accordingly, on 25 June 2007, the Prosecution submitted to Pre-Trial Chamber I its application for the issuance of a warrant for the arrest of the Accused, [REDACTED].⁷² The Prosecution thoroughly assessed all relevant information and concluded that the case was admissible. This application was supplemented with additional information and

⁶⁶ Annex G, internal report, [REDACTED].

⁶⁷ Annex H, DRC-OTP-1010-0059.

⁶⁸ DRC-OTP-0182-0429: disclosed as Rule 77 on 5 March 2008- Pre-confirmation hearing package #5.

⁶⁹ DRC-OTP-1010-0364; disclosed to the Defence on 28 February 2008 and Annex hh to the Motion.

⁷⁰ DRC-OTP-1010-0461, Annex kk to the Motion.

⁷¹ Annex I, [REDACTED].

⁷² [REDACTED].

evidentiary materials on 27 June 2007 pursuant to an order of Pre-Trial Chamber I rendered on 26 June 2007.

40. As stated above,⁷³ the Pre-Trial Chamber found that the case against Katanga was admissible and fell within the jurisdiction of the Court. It further concluded that his arrest appeared necessary under Article 58 (1) (b) (i) and (ii) of the Statute.⁷⁴
41. Additionally, and prior to the surrender of the Accused to the ICC on 18 October 2007, the AGM brought the existence of the warrant of arrest and the request for surrender to the ICC to the attention of the Accused and issued a decision to transfer the Accused to The Hague. According to the same decision, the Accused acquiesced to this and, consequently, the AGM formally decided to close the investigation that had been opened on 19 March 2005 using the following language:

“Notifions ce jour au prévenu susnommé la requête de la CPI aux autorités judiciaires congolaises portant sur son arrestation, sa remise à la CPI ainsi que l'identification, la localisation, le gel et la saisie de ses biens et avoirs ;

A quoi le prévenu susnommé acquiesça.

PAR CES MOTIFS,

Décidons de déférer à la requête de la CPI tendant à obtenir l'arrestation de Monsieur Germain KATANGA, sa remise à la CPI ainsi que l'identification, la localisation, le gel et la saisie de ses biens et avoirs ;

Décidons en outre de clôturer la procédure judiciaire engagée à rencontre dudit prévenu par l'Auditorat Général afin de faciliter la jonction des poursuites au niveau de la CPI ainsi que la bonne application du principe « ne bis in ide »”.⁷⁵

42. Since the surrender of the Accused to the ICC on 18 October 2007, the OTP has maintained communication with the authorities of the DRC, by submitting requests for assistance in connection with the Bogoro incident, pursuant to Part 9 of the Statute. The authorities of the DRC never indicated to the OTP that they intend to investigate or prosecute this matter; nor have they sought to challenge the

⁷³ See above, paras. 6-7.

⁷⁴ ICC-01/04-01/07-4, paras. 21, 64.

⁷⁵ ICC-01/04-01-07-40-Conf-Exp-Anx 3.6.

admissibility of the case based on any prior investigative efforts. [REDACTED].⁷⁶
[REDACTED]⁷⁷ [REDACTED].⁷⁸ [REDACTED]⁷⁹ [REDACTED].⁸⁰

IV. Discussion

43. From the facts described above, the Prosecution submits that the case against Germain Katanga regarding crimes committed during the attack on Bogoro, was not being investigated by the DRC authorities. This conclusion is made on the basis of the absence of relevant national proceedings; it is not an assessment on the genuineness or lack thereof of any existing proceedings. The Prosecution therefore submits that this case remains admissible before the ICC.

44. The Defence admissibility challenge rests on three prongs:

- Factually, the Defence claims that at the time the arrest warrant was issued⁸¹ the DRC was not only willing and able to investigate and prosecute the Accused, but was in fact actively investigating the case. The Defence concludes that the DRC was demonstrably willing and able to conduct its own prosecution at the time it surrendered Katanga to this Court.
- On the law, the Defence contends that the test adopted by Pre-Trial Chamber I (“same conduct test”) is inappropriate and should be replaced by alternative constructs: a “comparative gravity test”, a “comprehensive conduct test”, or a “combined ‘comparative gravity/comprehensive conduct’ test”. This preferred test is purportedly better policy and would more faithfully serve the interests of States and the Court and would better protect the rights of the accused.⁸²

⁷⁶ See Annex J. [REDACTED].

⁷⁷ See Annex J, para. 4: [REDACTED].

⁷⁸ Annex J, para. 9. [REDACTED]

⁷⁹ *Ibid.*, see “III. Conclusion”.

⁸⁰ *Ibid.*, para. 8. [REDACTED].

⁸¹ In the context of this argument, the Defence contends that the significant point in time must be the date the arrest warrant was issued, and not whether the DRC currently is investigating or willing to prosecute the Accused. Contrast Motion, para. 28. The Prosecution addresses this legal contention separately in Section 2 (b) below.

⁸² See Motion, paras. 39-43 *inter alia*.

- Alternatively, the Defence argues that even under the legal test for admissibility previously articulated by Pre-Trial Chamber I, the case is inadmissible because “it appears that Mr. Katanga was charged in the DRC with participation in the attack of Bogoro, as a crime against humanity”.⁸³

45. The Prosecution submits that: (a) the arguments advanced by the defence on the ability and willingness of the DRC authorities are misconceived; (b) the admissibility test applied by the Pre-Trial Chamber is the proper test in law; and (c) based on the correct test and considering the facts described above, the case remains admissible.

A. The DRC authorities are unwilling or unable to prosecute this case

46. As Pre-Trial Chamber I has held, the determination of admissibility under article 17 must consider “national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(l)(a) to (c), 2 and 3 of the Statute.”⁸⁴

47. In its decision regarding the issuance of the warrant of arrest against the Accused, the Pre-Trial Chamber identified the case as one of inactivity. As such, it was not required to assess the unwillingness and inability of the DRC to genuinely investigate and prosecute the case as “the proceedings against Germain Katanga in the DRC do not encompass the same conduct which is the subject of the Prosecution Application”.⁸⁵ However, this does not imply that “there was no indication of unwillingness or inability in Mr. Katanga’s case when the Pre-Trial Chamber issued its decision on the application for the arrest warrant” nor that “... willingness and ability seem to have been tacitly accepted” as the Defence portrays. On the contrary, notwithstanding that it had detained the Accused during its investigation into other matters, the DRC promptly surrendered him to the ICC. Thus, it is clear that the DRC

⁸³ Motion, para. 53. The Defence submission erroneously relies on policy arguments to the effect that the Court – being a new institution – is interested in cases in its early years “which might not have aroused its interest – and thus may not have passed the admissibility test – at a later stage of its existence”. The Defence further contends that the Prosecution in this Court rather than in national systems hinders the accused’ rights to be tried in the appropriate *forum conveniens*, to receive a fair and speedy trial, and to meaningfully exercise his right to family life. See Motion, paras. 16-26 in particular.

⁸⁴ ICC-01/04-520-Anx2, paras. 29 and 64.

⁸⁵ *Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4, 6 July 2007, para.20.

authorities were not investigating or prosecuting the case before the Court - the Bogoro incident - and as such there was no finding of genuineness with regard to ability or willingness to be entered. Given the facts, the Pre-Trial Chamber was not required to inquire further into the DRC's capacity to pursue the Bogoro case.⁸⁶

48. Moreover, the referral of the situation by the DRC to the Prosecutor on 3 March 2004 to investigate the crimes allegedly committed in the Congolese territory was accompanied by a letter of the President indicating the inability of the Congolese authorities at that time to carry out the necessary activities.⁸⁷ The challenges to their domestic ability and capacity that provoked the initial referral continued during 2006, 2007 and are even present today. The relevant Congolese authorities have continued since then to confirm the challenges to their ability to investigate domestically.⁸⁸

49. The facts and documentary evidence corroborate the statements of the DRC authorities. The relevant facts and documents described in Section III of this Response and paragraph 11 of the Motion demonstrate the difficulties faced by the Congolese authorities to perform an actual investigation in relation to the Accused, as well as to other persons arrested at the same time and on the same bases as the Accused, and who remain in preventive detention in the DRC.⁸⁹ The Accused himself filed an application for provisional release on 18 January 2006 on the basis that, after approximately 10 months of detention, he had not been notified of the grounds for his arrest;⁹⁰ and requested, moreover, to be tried before the ICC on 31 January 2007.⁹¹

50. Finally, the Prosecution notes that since their initial referral back in 2004 till the present, the Congolese authorities have not expressed any desire to investigate the Bogoro incident – i.e. the “case” and conduct charged in this Court - nor have they sought to challenge the admissibility of the present case. [REDACTED].⁹²

B. The “same conduct” test is correct

1. The “same conduct” test and the alternative tests proposed by the Defence

⁸⁶ For the relevant facts demonstrating the lack of any national investigations and/or prosecutions pertaining to Bogoro, see Section III, Statement of Relevant Facts, and Annexes E to J.

⁸⁷ See above para. 17 of the Response. [REDACTED].

⁸⁸ See Annexes E, F, G, H, I and J. See also Section III above.

⁸⁹ The preventive detention was being renewed periodically. See para. 23 above and para. 11 (c), (e), (f), (g), (h), (j), (k), (l), (m), (n), (kk) of the Motion.

⁹⁰ See above para. 26.

⁹¹ See above para. 32.

⁹² See Annex J.

51. The “same conduct” test applied by the Chambers of this Court is the appropriate legal guide to determine admissibility under the Statute. The test is consistent with the rules of interpretation for treaties, is supported by ICC jurisprudence and authorities, and is consistent with the object and purpose and the drafting history of Article 17 and other relevant provisions of the Statute.⁹³

52. The admissibility of a case before the ICC is framed by the parameters set out in Article 17, which provides in paragraph 1:

“Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court”.

53. The first question that arises, thus, is how the term “case” should be interpreted for the purposes of the Statute, and Article 17 in particular.

54. As the Appeals Chamber has observed, the principal rule for the interpretation of the Statute should be that set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*, which provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁹⁴

⁹³ Constrast Motion, paras. 29-31.

⁹⁴ “The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969), specifically the provisions of Articles 31 and 32.” “The rule governing the interpretation of a section of law is its wording read in context and light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of a law as a whole read in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.” - *Situation in the DRC, Judgment on Extraordinary Review*, ICC-01/04-168 OA3, 13 July 2006, Para. 33. See also *Prosecutor v. Katanga & Ngudjolo, Judgment on Katanga’s Language Appeal*, ICC-01/04-01/07-522 OA3, 27 May 2008, Para. 39; *Prosecutor v. Katanga & Ngudjolo, Judgment on Joinder Appeal*, ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5; *Prosecutor v. Lubanga, Judgment on Victims’ Participation*, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, Para 55.

55. The obligation on all parties, and on the Chamber, therefore, is to apply the terms of the Statute in accordance with those rules of treaty interpretation, not to alter or re-define its provisions based on policy-related considerations.⁹⁵ As the Appeals Chamber has stated, Chambers of the Court must limit themselves to applying the letter of the Statute where “[n]o gap is noticeable in the Statute [...] in the sense of an objective not being given effect to by its provisions”.⁹⁶ As such, the Prosecution submits that the Defence cannot ask the Chambers to perform legislative tasks or to engage in policy based discussions which fall within the competence of the legislator. The tests proposed by the Defence⁹⁷ have no basis in the Statute and Rules. In contrast, the “same conduct” test which has been consistently applied by all Pre-Trial Chambers of this Court is firmly grounded in basic principles of statutory interpretation.

a. The ordinary meaning of the term

56. The starting point for the interpretation of the admissibility test in Article 17, as with any other provision of the Statute, is the ordinary meaning of the terms.

57. Although the Defence claims that the ordinary meaning of the word “case” “is difficult to establish”,⁹⁸ “case” has a well-settled ordinary meaning, especially in the judicial context, where it is based on the particular facts or conduct which is the subject of a dispute before a court.⁹⁹

i. The definition of “case”

58. The *Oxford English Dictionary* defines case as “[a] thing that befalls or happens to any one; an event”; and in the judicial context, “‘The state of facts juridically considered’ **a.** A cause or suit brought into court for decision. **b.** A statement of the facts of any matter *sub judice*, drawn up for the consideration of a higher court. [...] **f.** An incident or set of circumstances requiring investigation by the police”.¹⁰⁰ Legal

⁹⁵ Rastan R., “What is a ‘Case’ for the purpose of the Rome Statute?”, *Criminal Law Forum* Vol. 19 (2008), p. 440: “for all the intriguing questions it raises, the Chamber was correct in coming to the only determination available on a plain reading of the Statute; leaving the broader policy question of institutional development for the Assembly of States Parties to consider, as appropriate, in the context of their review functions over the Court’s legal instruments.”

⁹⁶ *Situation in the DRC, Judgment on Extraordinary Review*, ICC-01/04-168 OA3, 13 July 2006, para. 39.

⁹⁷ Motion, paras. 45-47.

⁹⁸ Motion, para. 43.

⁹⁹ See below Section IV, B, (1), (ii).

¹⁰⁰ Oxford English Dictionary on line (OUP 2009): http://dictionary.oed.com/cgi/findword?query_type=word&queryword=case

dictionaries confirm that a case refers to the actions or questions contested before a court, or the crimes under investigation.¹⁰¹ The term “case” should therefore be understood as being constituted by the underlying event, incident and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident.

59. The ordinary meaning of the term “case” is confirmed by the translation of the term in the other, equally authentic,¹⁰² texts of the Statute.

- The French text of the Statute uses the term “l’affaire”, which is defined in *Le petit Robert de langue Française* as “Procès, objet d’une débat judiciaire.”¹⁰³ French-English legal dictionaries confirm that “l’affaire” means a trial, case or lawsuit,¹⁰⁴ each of which are based on a particular set of facts placed before the court.
- The Spanish text of the Statute refers to “asunto”, which is defined in the legal dictionary as “Materia de que se trata; [...] causa (proceso criminal que se instruye de oficio o a instancia de parte), proceso judicial”,¹⁰⁵ i.e. the subject matter which is being dealt with; criminal proceeding, judicial proceeding.¹⁰⁶
- The term used in the Arabic text of the Statute (“دعوى”) has a similar sense, meaning “Litigation, case, allegation, alleging, pleading, plea, contention, lawsuit”.¹⁰⁷

60. A case before the ICC must thus be based on particular facts, incidents and conduct related to a crime within the jurisdiction of the Court. This constitutes the subject-matter before the Court. The ordinary meaning of the term given in Article 17 therefore requires the Court to determine whether that specific subject-matter is being investigated or prosecuted by national authorities.

¹⁰¹ “A question contested before a court of justice” – *The Cyclopedic Dictionary of Law* (Rothman & Co, 1987), p. 129; “A legal action or trial” – Curzon (ed.), *Dictionary of Law* (6th edition) (Longman, 2002); “A court action” – Martin (ed.), *Oxford Dictionary of Law* (5th edition) (OUP, 2003); “a possible crime and its investigation by the police” – *Collin’s Dictionary of Law* (4th edition) (Bloomsbury, 2004), p. 41.

¹⁰² Article 128 of the Statute.

¹⁰³ *Le petit Robert de langue Française* on line : <http://petitrobert.bvdep.com/frameset.asp?word=savoir>

¹⁰⁴ Harrap’s *Dictionnaire Juridique*, (Chambers Harrap Publishers Ltd., France 2004), p. 6; Baleyte J., *Dictionnaire économique et juridique Française/ Anglais* (5th ed.) (LGDJ, Paris 2000).

¹⁰⁵ <http://neoforum.iespana.es/neoforum/>. Diccionario Jurídico on-line.

¹⁰⁶ See further Louis A., *Dictionary of Legal Terms*, (Editorial Limusa, Mexico 1990), defining “asunto” as “matter, business, affair, subject, issue; “contencioso”, subject of litigation [...]”.

¹⁰⁷ <http://qamoos.sakhr.com/SearchResults.aspx>. Munir Baalbaki, *Dictionary Al-Mawrid* (Englisg–Arabic) (Lebanon, 2001), p. 156.

ii. Applicable ICC jurisprudence on the meaning of “case”

61. The interpretation of the term “case” as encompassing specific conduct is also consistently reflected in the jurisprudence of the ICC. The Pre-Trial Chambers have routinely adopted an interpretation of “case” consistent with the “same conduct” test, namely that a case constitutes “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”.¹⁰⁸

62. The Appeals Chamber has further confirmed that “[o]nce the charges in a case against an accused have been confirmed in accordance with article 61 of the Statute, the subject matter of the proceedings in that case is defined by the crimes charged”.¹⁰⁹ The charges in the ICC, in turn, encompass “the facts, including the time and place of the alleged crimes, which provide a sufficient basis to bring the person or persons to trial”.¹¹⁰ This necessarily includes the conduct of the suspect or accused.¹¹¹

63. The Prosecution submits this consistent interpretation of a given term, both across different provisions of the Statute and by different Chambers, should be maintained.¹¹²

¹⁰⁸ [REDACTED]; *Prosecutor v. Thomas Lubanga*, Under Seal Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06-8-US-Corr, 24 February 2006, para.21; *Prosecutor v. Ahmad Muhammad Harun* (“Ahmad Harun”) and *Ali Muhammad Ali Abd-Al-Rahman* (“Ali Kushayb”), Decision on the Prosecution Application under Article 58 (7) of the Statute, ICC-02/05-01/07-1-Corr, 27 April 2007, paras. 14, 24; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, 10 June 2008, paras. 16, 21; *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para.14.

¹⁰⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1432, 11 July 2008, para 62.

¹¹⁰ Regulation 52(b), emphasis added.

¹¹¹ Similarly, Article 74 indicates that the scope of the case to be decided by the Trial Chamber is defined by “the facts and circumstances described in the charges”, which thereby encompasses relevant conduct.

¹¹² In contrast to the Defence’s submission that “It would, furthermore, be a fallacy to assume that the drafters of the Rome Statute were at all times making consistent and uniform use of terminology” (Motion, para. 43), the Prosecution recalls that the rules of treaty interpretation require that identical terms in a treaty text should be presumed to carry identical meaning in the absence of manifest intention of the drafters to the contrary and unless a consistent interpretation would lead to absurd results. None of these exceptions apply here. To give the term “case” a different meaning in Article 17, as proposed by the Defence, would itself lead to absurd results, which would be inconsistent with the object and purposes of the Statute and contravene rules of treaty interpretation; see Jennings, R & Watts, A, *Oppenheim’s International Law* (9th ed., vol., 1 Longman, London 1996) 1273, referring to the case of *Ministry of Defence v. Ergilli*, Italy, Court of Venice, Judgment of 5 February 1958, 26 ILR (1958-II), 732-734.

iii. Commentaries on the meaning of “case” for admissibility

64. A conduct-specific interpretation of the term “case” finds support among commentators on the Statute:

“In order to determine whether the national proceeding pertains to the same case as the ICC Prosecutor considers dealing with, the national description of the *actus reus* should be compared with that on which the ICC Prosecutor bases his involvement. [...] The issue is whether the conducts described at the two levels are essentially the same with regard to time, place and alleged behaviour.”¹¹³

65. Other commentators have observed that “the notion of a case, [...] refers to proceedings regarding identified suspects for the commission of specific crimes”,¹¹⁴ and that “Generally, the term ‘case’ in the Statute refers to a specific case against an accused.”¹¹⁵ Also, when assessing the “inability” of a national system under Article 17 to proceed with a case, authors refer to “conduct”, so that “a national system should be considered ‘unavailable’ when its substantive provisions do not allow the conducts corresponding to the crimes provided for in the Statute to be punished in terms which adequately reflect their gravity, thus triggering the stepping in of the Court”.¹¹⁶

66. Furthermore, one of the commentators relied upon by the Defence in its Motion, Kleffner, prefers an approach in which a determination of admissibility vis-à-vis a “case” under Article 19 is “understood narrowly to encompass both the person and the conduct which is the subject of the case before the Court”.¹¹⁷ As the author elaborates:

¹¹³ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, (Martinus Nijhoff Publishers, The Netherlands, 2008), p.198.

¹¹⁴ Olasolo, H., “The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor”, *International Criminal Law Review*, Vol. 5, Number 1, (2005), p.125.

¹¹⁵ J.T. Holmes, “Complementarity: National Courts vs. the ICC”, in Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume I*. (OUP, Oxford: 2002), p.680, footnote 38 (contrasting this with the stage of an Article 15 determination where an investigation has yet to be launched, at which point the term ‘case’ should be construed as covering the potential investigations which could give rise to numerous cases.)

¹¹⁶ Gioia, F., “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court”, *Leiden Journal of International Law*, Vol. 19, Number 4 (2006), p. 1107.

¹¹⁷ Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (Oxford University Press, 2008), p. 198. This is to distinguish between “situations” and “cases” as the object of analysis. Thus, In contrast, a determination of admissibility vis-à-vis the former – understood as whole sets of circumstances – suffice for purposes of Articles 53(1)(b) and 18.

“[...] given that the specificity of proof under Article 19 requires admissibility to be assessed in relation to a ‘case’, the Court, those challenging admissibility, and the Prosecutor when s/he seeks a ruling regarding a question of admissibility, all will have specific information available on the domestic proceedings *vis-à-vis* a particular individual in respect of precise conduct. This would allow for a more concrete assessment of whether domestic proceedings have been, or are being, conducted in relation to that person and conduct, and whether or not they satisfy the complementarity requirements.”¹¹⁸

67. The ordinary meaning of the word, as confirmed by the commentators referred to above and the existing jurisprudence of the Court, makes it clear that “case” refers to particular facts (in this instance the conduct) which are the subject of the dispute before a court. It does not include, as the Defence argues, “similar” or other conduct. As a result, the test for admissibility must be the “same conduct” test, which has been consistently applied by the Pre-Trial Chambers.

b. The context of the provision

68. Consistent with the Vienna Convention on the Law of Treaties, the ordinary meaning given to the terms in Article 17 must also be interpreted in light of the Statute as a whole. The Prosecution agrees that “[t]he word ‘case’ [...] must be interpreted in the light of Article 17’s particular object and purpose”.¹¹⁹ However, it must also be interpreted in light of Article 17’s relationship with other relevant provisions of the Statute. In particular, consideration must be given to the manner in which Articles 17 and 20(3) operate together to implement the system of complementarity.¹²⁰

69. The Prosecution recalls that the provisions of the Statute must be interpreted in a manner which results in a coherent, rather than an internally inconsistent, system.¹²¹ Consideration of the relevant context confirms the proper interpretation of the term “case” and the correctness of the “same conduct” test for admissibility.

¹¹⁸ Kleffner, (OUP, 2008) ,at p.221 (emphasis added).

¹¹⁹ Motion, para. 43. While the object and purpose of Article 17 is relevant, the Prosecution stresses that the terms must also be interpreted in light of the object and purpose of the Statute as a whole.

¹²⁰ In this regard, the Prosecution strongly disputes the Defence’s submission that “case” must “not [be interpreted] in the light of, for example, the rationale underlying Article 20” (Motion, para. 43).

¹²¹ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, ICC-01/04-01/06-803-Ten, 29 January 2007, para. 284; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Adjourning the Hearing pursuant to Article 61 (7)(c) (ii) of the Rome Statute, ICC-01/05-01/08-388, paras. 34-36.

i. The relationship between Article 17(1) and Article 20(3)

70. Complementarity provisions, in particular Articles 17(1) and 20(3), must be viewed as a whole, and interpreted in such a fashion as to allow them to operate effectively.¹²²

71. Articles 17 and 20 are closely related:¹²³ Article 17(1)(c) incorporates Article 20(3), and the principle of *ne bis in idem*, into the scheme of admissibility.¹²⁴ Together they implement the principle of complementarity and deal with the possible grounds rendering a case inadmissible in a systematic, sequential manner.¹²⁵ “the three situations described in Article 17 *lit.* (a) to (c) cover a State’s complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgement, leaving no loopholes”.¹²⁶ These provisions, which have been described as the cornerstone of the Rome Statute,¹²⁷ must be read together systematically, so as to avoid leaving any ambiguity.

¹²² The fact that leading commentators, such as John T. Holmes, former coordinator of the Preparatory Committee refers to both provisions when addressing the principle of complementarity in the Rome Statute illustrates the close link between Articles 17 and 20. Holmes describes the principle of *ne bis in idem* enshrined in Article 20 as “an especial aspect of Complementarity”. See J.T. Holmes, “The Principle of Complementarity”, in Lee, R.S. (ed.), *The International Criminal Court: The Making of the Rome Statute: issues, negotiations, results* (Kluwer Law International, The Hague, London, Boston: 1999), pp.42, 44.

¹²³ Complementarity and *ne bis in idem* were recognised as related matters in the drafting – “Article 17” in Triffterer (2008), [9] and [10]. The 1995 Ad Hoc committee report “underlined the paramount importance of the concepts of admissibility and *non bis in idem* for implementing the principle of complementarity”, i.e. they must work together to effect complementarity; “The 1996 Preparatory Committee I discusses technical aspects of *non bis in idem* in the context of complementarity” - “Article 20” in Triffterer (2008), [18]. “Article 20 serves not only as an important guarantee of individual rights in criminal proceedings. Closely linked to questions of admissibility according to article 17, the provision has to primarily be seen in a jurisdictional context, distributing and balancing the competences of the ICC and those of national courts according to the principle of complementarity” - “Article 20” in Triffterer (2008), [49]; this link is further emphasised in “Article 20” in Triffterer (2008), [42].

¹²⁴ The link between *ne bis in idem* and Article 17, and the fact that a challenge based on *ne bis in idem* is indeed a challenge to admissibility under Article 17, is confirmed in “Article 20” in Triffterer (2008), [47]. Kleffner also emphasises the fact that Articles 17 and 20 together implement the principle of complementarity into the legal criteria to be applied. See Kleffner, Jann K., *Complementarity in the Rome Statute and National Criminal Jurisdictions*, (OUP: 2008), pp. 99, 102.

¹²⁵ Article 17(1)(a) addresses the scenario where the investigation or prosecution of the case is ongoing; Article 17(1)(b) addresses the situation where the investigation of the case has finished without a prosecution; and Article 17(1)(c) refers to the case that has finished with a prosecution. See also El Zeidy, M.M., *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers, (Leiden, Boston: 2008), p. 285. (quoting Bassiouni in fn 210) - “The principle of *ne bis in idem* is a ‘corollary’ of the principle of complementarity, mirrored in Article 17 [...] While Article 17 covers investigations and prosecutions, Article 20 covers cases that have already been tried. Article 20(3) sets the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC.” (emphasis added)

¹²⁶ “Article 20” in Triffterer (2008), [34].

¹²⁷ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para.34.

72. The principle of *ne bis in idem* relates to a very specific notion based on the same cause, same acts or same offence.¹²⁸ In context of the Court, this would be represented by the charges, which include the conduct that forms the basis of the crime for which the person is brought to trial.¹²⁹ Indeed both Article 17(1)(c) and Article 20(3) expressly refer to “the same conduct”.¹³⁰ The explicit link between Article 17(1)(c) and the provisions on *ne bis in idem*, thus, shows that a case must be based on the same conduct.

73. The Prosecution submits that all paragraphs of Article 17(1) must address the same subject matter. All govern “where the Court shall determine that a case is inadmissible”.¹³¹ One cannot have a different meaning and approach to a case for each of the subparagraphs of article 17(1). A “case” for the purposes of Article 17(1)(a) and (b) must mean the same thing as a case for the purposes of Article 17(1)(c), i.e. “the same conduct”.¹³²

74. It is thus clear that the system of admissibility, viewed as a whole, only works in a coherent manner under the “same conduct” test. This interpretation is further supported by a contextual reading of the relevant provisions.

ii. The context of other provisions of the Statute– Article 89 and related provisions

75. The Defence raises a series of speculative fears that the plain reading of the Statute, as adopted by the Pre-Trial Chambers, will lead to the ICC effectively exercising primacy over national investigations.¹³³ These arguments are legally unsupported.

76. First, the Defence confuses the issue of admissibility with the discrete one of primacy.¹³⁴ Under the Statute, while State parties retain primary responsibility for the investigation and prosecution of the crimes described in Article 5, once a case has been found admissible before the Court, the latter has primacy over concurrent

¹²⁸ “Article 20” in Triffterer (2008), [11]-[15].

¹²⁹ Regulation 52(b) of the Regulations of the Court.

¹³⁰ This is consistent with the object and purpose of Article 20(3). *Ne bis in idem* serves to protect both the person, and also the integrity of the judicial system by confirming the finality of penal judgements - “Article 20” in Triffterer (2008), [4]. However there is nothing to protect if the ICC is prosecuting different conduct.

¹³¹ Article 17(1), emphasis added.

¹³² Rastan R., “What is a ‘Case’ for the purpose of the Rome Statute?”, *Criminal Law Forum* Vol. 19 (2008), pp. 437-438. The same applies in the context of Article 17(1)(d) – an assessment of the gravity of a case cannot be properly made unless it is based on given conduct. See p. 447.

¹³³ See in particular Motion, para. 39.

¹³⁴ See also Motion, para. 16.

domestic proceedings with respect to that particular case, until determined otherwise by the Court.¹³⁵

77. Second, the Statute foresees and provides different mechanisms to deal with diverse scenarios, such as those raised by the Defence. For example, Articles 89(4) and 94 deal with those situations when a different case is being run at the national level. On the other hand, Article 90 regulates instances of competing requests among a third state and the Court with regard to the same case (i.e. “the same person for the same conduct which forms the basis of [a] crime...”).¹³⁶

78. Articles 89(4) and 94 *expressly* contemplate the potential for conflicts between the prosecution of one case in the Court and the prosecution of other cases at a national level. These provisions, incorporated in Part 9 of the Statute, reflect the position that “the Court should be given as much flexibility in as possible in its dealings with States”.¹³⁷ The arrangement gives neither side automatic priority, and presumes reasonableness on both sides.¹³⁸ Thus, if there is a conflict between national and ICC prosecutions of different crimes, it is to be resolved on a case by case basis between the Court and the State.

79. The prosecution of different cases by the ICC and by national courts is therefore not a matter which is dealt with through the provisions governing complementarity and admissibility.¹³⁹ Instead, articles 89(4) and 94 will apply. In contrast, where the cases

¹³⁵ *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, para.45. See also El Zeidy, M.M., *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers (Leiden, Boston: 2008), pp. 132-137, who traces four models of complementarity in the modern post-World War I period, with the complementarity model adopted under the Rome Statute distinguished for creating a *mandatory* regime that entrusts binding determinations of admissibility with the Court, while also allowing for consensual self-referrals by State Parties.

¹³⁶ Article 90 (1). Article 93(9)(a)(i) and (ii), dealing with competing requests from the Court and a third State, other than for surrender and extradition also refers to the principles set forth in Article 90.

¹³⁷ Harhoff F. & Mochochoko P., “International Cooperation and Judicial Assistance”, in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, (Transnational Publishers: 2001), p. 638.

¹³⁸ “Article 89” in Triffterer (2008), [46]. Consistent with the object of avoiding impunity, the question in Article 89(4) is not whether a person will be surrendered; rather it is a question of which order the trials by the domestic court and the ICC will take place - “Article 89” in Triffterer (2008), [45]. For determining priority (in the absence of an agreement), it is suggested that Art 90(7)(b) can give guidance, and that the nature of the offences charged is a critical factor (with priority to international crimes). Also suggests that Article 94 sets the outer limit (i.e. the completion of the investigation or prosecution) - “Article 89” in Triffterer (2008), [48].

¹³⁹ “Article 89” in Triffterer (2008), [42].

are the same, the issue would be resolved by application of Article 89 (2) in conjunction with Articles 17 et seq..¹⁴⁰

80. A close examination of the carefully constructed wording of the Statute reveals that the two scenarios and different procedures set forth in Articles 89(2) and 89(4) underscore that the conduct-specific usage of the term “case”, for the purposes of the Statute. If the national case is different, it will not be dealt through admissibility, but through Part 9. In particular, the two sub-paragraphs distinguish between conflicts raised by the principle of *ne bis in idem*, which are to be dealt with through admissibility, as reflected in Article 89(2), and those related to different cases, which are dealt with through Articles 89(4). Articles 94 and 95 reflect the same distinction.¹⁴¹

81. The submissions of the Defence also fail to take into consideration the manner in which Articles 89(4) and 94 allow the ICC and the national authorities to sequence the prosecution of different cases in order to resolve matters which may interfere with ongoing investigations or prosecutions.

82. The interests of States and rights of the Accused are thus not jeopardised by the interpretation of Article 17 as applied by the Pre-Trial Chamber,¹⁴² nor will this approach lead to the hypothetical fears forecast by the defence. Rather, the “same conduct” test ensures comprehensive accountability for all relevant criminal conduct in a manner which is consistent with the object and purpose of the Statute. The fact that a specific mechanism is established in Part 9 for dealing with situations relating to different cases demonstrates that the Statute’s admissibility provisions must relate to instances involving the same “case”, in the precise meaning of the term, i.e. the same conduct. Hence, the Defence’s submissions do not provide any basis for the Court to depart from the plain reading of the Statute.

c. The drafting history and object and purpose of the Statute

83. The drafting history of Article 17 indicates that the term “case” was uncontroversial and was not the subject of significant discussions. Indeed, States - from the draft Statute prepared by the International Law Commission (“ILC”), through the

¹⁴⁰ “Article 89” in Triffterer (2008), [44].

¹⁴¹ Under Article 94, where a request for judicial assistance would interfere with the investigation or prosecution of a different case, it may be postponed until the end of the domestic case – it is thus similarly a question of sequencing. This would not apply where it would involve the same case, which would be dealt with through a challenge to admissibility (article 95); *see* “Article 94” in Triffterer (2008), [1].

¹⁴² Motion, para. 44.

negotiations in the Preparatory Committee and in Rome – focused their deliberations on admissibility on everything other than the definition of the term “case” because the meaning of the term was well understood; thus, its ordinary meaning was that intended by the legislator.

84. In the original ILC draft, the admissibility provision (Article 35) established that a “case” would be inadmissible depending on the national investigations and proceedings with regard to the “crime”.¹⁴³ One commentator further refers indistinctively to the terms case and crime.¹⁴⁴ This lack of controversy over the concept of the term “case” continued during the Preparatory Committee, where the vast majority of participating delegations approved the draft article on complementarity resulting from the informal consultations as an acceptable formulation.¹⁴⁵ Finally, at the Rome Conference the main discussions related to the issue of admissibility were focused on the determination of “unwillingness” and “inability”.¹⁴⁶

85. The drafting history of other relevant provisions of the Statute further supports a narrow definition of the term “case”. First, the specific meaning of the term can be inferred in the discussions regarding the referral of situations to the Court and the

¹⁴³ Holmes, J.T., “The Principle of Complementarity”, in Lee, R.S., (ed.), *The International Criminal Court: The Making of the Rome Statute: issues, negotiations, results* (Kluwer Law International, The Hague, London, Boston: 1999), p.44. Article 35, Issues of Admissibility, of the ILC Draft Statute reads: “*The Court may, on application by the accused or at the request of an interested State at any time prior to the commencement of the trial, or of its own motion, decide, having regard to the purposes of this statute set out in the preamble, that a case before it is inadmissible on the ground that the crime in question: (a) has been duly investigated by a State with jurisdiction over it, and the decision of the State not to proceed to a prosecution is apparently well-founded; (b) is under investigation by a State which has or may have jurisdiction over it and there is no reason for the Court to take any further action for the time being with respect to the crime; (c) is not of such gravity to justify further action by the Court*”. Furthermore, under the ILC draft, all a State had to show was that it was investigating the crime that formed the basis of the case before the Court, and not that it was investigating the same person who is accused before the Court for these crimes. By contrast, article 42 of the ILC Draft Statute which enshrined the *ne bis in idem* principle conceptualised the exceptions to the application of the principle (the precursor to the test of “unwillingness” under article 17) by reference to proceedings against a specific person for particular acts.

¹⁴⁴ *Ibid*, p.44: Holmes adds that, although the Statute should provide criteria permitting the Court to intervene in cases even where the national authorities had acted or were acting, the criteria available to the Court proved deficient and occupied much of the negotiations.

¹⁴⁵ *Ibid*, pp.46-47. Holmes notes the main substantive issues discussed during the informal consultations which do not encompass the meaning of “case”: (i) reference to jurisdiction; (ii) whether the Court could act if the State was unable and unwilling to do so; and (iii) the definition of inability and unwillingness.

¹⁴⁶ *Ibid*, p.53. The main concerns regarding admissibility related to Article 15: (1) some delegations believed that para.2 of art.15 gave the Court too broad a discretion in determining unwillingness and no objective criteria on which the Court should base its determinations; (2) the phrase “undue delay” was criticized as being too low a threshold; (3) for the determination by the Court of inability, some delegations thought that the “partial collapse of the national judicial system” was insufficient for the Court to exercise jurisdiction.

initiation of investigations by the Prosecutor *proprio motu*.¹⁴⁷ There were differing views among the delegations as to whether the Security Council should refer “matters”, “cases” or “situations” to the Prosecutor. Delegates opted for the broadest notion (“situation”) which would allow the Prosecutor discretion in determining the attribution of individual criminal responsibility through the selection of specific cases for investigation and prosecution.

86. In relation to the Defence’s submission concerning the purpose and proper interpretation of the principle of complementarity, the Prosecution submits that the Court should consider the object and purpose of the Statute as a whole, rather than limiting itself to a fragmented consideration of each provision in isolation as proposed by the Defence. In this respect, the Prosecution notes that the preservation of State sovereignty in the exercise of a State’s own criminal jurisdiction cannot be claimed as the overriding and unique object and purpose of the Statute or the Court’s complementarity regime.¹⁴⁸ The Preamble confirms that the Statute and the complementarity regime aim at achieving a number of goals, including the ending of impunity, and a reaffirmation of the pre-existing obligations of States under international law; among other equally essential purposes.¹⁴⁹ Nor is it axiomatic that the conduct-specific test inhibits *per se* the exercise of a State’s sovereignty, as the Defence asserts. On the one hand, if a State’s interest is to guarantee the exercise of its domestic jurisdiction, there is no bar to the national authorities in question to bring an admissibility challenge in relation to the same case. On the other hand, a State may favour a sharing of responsibilities between the ICC and national authorities in response to a situation of mass atrocities. In this regard, one commentator has stated that complementarity should first and foremost be regarded as a device aimed at allowing the joint pursuance of universal objectives and the proper performance of obligations *erga omnes* (i.e., to investigate and prosecute the most serious crimes and to co-operate with the Court).¹⁵⁰

¹⁴⁷ See Yee, L., “The International Criminal Court and the Security Council: Articles 13 (b) and 16”, in Lee, R. S., *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague, London, Boston: 1999), pp.147-148. Also Fernandez de Gurmendi, S., “The Role of the International Prosecutor”, in Lee, R. S., *The International Criminal Court: The Making of the Rome Statute*, (Kluwer Law International, The Hague, London, Boston: 1999), pp. 175, 180.

¹⁴⁸ Motion, para.16.

¹⁴⁹ “Preamble” in Triffterer (2008), pp. 6-14.

¹⁵⁰ F. Gioia, “State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court”, *Leiden Journal of International Law*, Vol. 19, Number 4 (2006), p. 1115. Gioia further states that “the rules governing the complementarity regime and, more broadly, the

87. By contrast, the Defence puts forward its argument based on a flawed interpretation of the Statute and a misleading description of the Court's practice:¹⁵¹

- First, the requirements for admissibility do in fact serve to ensure that the Court is not overwhelmed by cases. Thus, the Prosecution will only investigate and the Chambers try admissible cases under the jurisdiction of the Court. Nevertheless, the Defence brings forward serious allegations challenging the mandate and integrity of the Court and the Prosecutor without any credible support.¹⁵²
- Second, the Defence arguments stating that the rights of the Accused are infringed should a case be tried at the ICC are without merit. The Defence describes speculative and hypothetical infringements which are unsupported and largely extraneous to the case at hand.¹⁵³
- Finally, the Prosecution stresses that in the present case, the DRC not only stated its inability to properly investigate and try the case, but also surrendered the Accused to the Court, and has at no time challenged the admissibility of this case.¹⁵⁴

88. The interests of the Accused are safeguarded first and foremost through the principle of *ne bis in idem*, found in Articles 17(1)(c) and 20 of the Statute. There is no suggestion that this right as well as the rights afforded to the Accused in Articles 66 and 67 have been violated in the present case. To the contrary, as indicated above, while detained in the DRC, the Accused and seven other detainees filed a petition with the Minister of Justice requesting that their case be prosecuted by the ICC instead of the national judiciary.¹⁵⁵ Furthermore, the Defence omits the many potential challenges that the DRC authorities would face if such cases are tried domestically, including security threats, possible intimidation and lack of cooperation of potential witness, length of the proceedings, conditions of detention, and access to

Statute as a whole can and should be read in such a way as to allow the effective achievement of the overarching objectives set forth in Preamble" (p.1122).

¹⁵¹ Motion, paras.17-26.

¹⁵² See Motion, para. 20. In particular, an alleged interest of the Court in trying cases regardless of their admissibility.

¹⁵³ Motion, paras. 21-25, 55.

¹⁵⁴ Constrast Motion, paras.18-19.

¹⁵⁵ *Memorandum a la bienveillante attention de son excellence Monsieur le Ministre de la Justice et Garde des Sceaux*, DRC-OTP-1010-0033 or DRC-OTP-0172-0005 and DRC-OTP-0172-0007; see also *La prospérité, Les Détenus Floribert Ndjabu et Consorts exigent leur comparution devant la CPI*, 16 February 2007, in *Congo Forum*: <http://www.congoforum.be/fr/nieuwsdetail.asp?subitem=1&newsid=24472&Actualiteit=selected>.

information.¹⁵⁶ The Statute provides for a high standard of protection for victims and witnesses. Article 68 and Rules 87 and 88, as well the Victims and Witnesses Unit, within the Registry, afford a wide range of measures and services which are not prejudicial to and inconsistent with the rights of the Accused.¹⁵⁷

89. Moreover, regarding non-compellability of witnesses,¹⁵⁸ Article 64(6)(b) could be interpreted as allowing the Chamber to issue an order requiring the attendance of a witness by obtaining, pursuant to Article 93(1)(l), the assistance of the State on whose territory the witness is located; unless, pursuant to Article 93(1)(l) and 93(1)(3), this would be prohibited by the law of the requested State.¹⁵⁹

d. The alternative tests proposed by the Defence have no basis in the Statute, and would lead to absurd or inconsistent results

90. In contrast to the “same conduct” test, which is grounded in the language of the Statute, the alternatives conceived by the Defence have no basis in the law. The Defence proposes that “one could imagine a ‘comparative gravity-test’” or “one can conceive a ‘comprehensive conduct-test’”.¹⁶⁰ However, as stated above, one must interpret and implement the terms of the Statute – not imagine or conceive of new provisions where there are no lacunas.¹⁶¹ Further, the Defence does not explain how the proposed tests relate to the concept of a “case” – the term used in Article 17(1)(a), pursuant to which the Defence asks the Chamber to declare the case inadmissible.

91. The vague nature of the alternatives proposed by the Defence conflict, moreover, with the drafting history of the Statute. In contrast to the well-settled meaning of the term “case”, these proposals would require the Chamber to engage in speculative assessments that fall beyond the range of criteria spelt out in the letter of the Statute.

¹⁵⁶ As indicated above, the Accused was in detention for over two years without charges being filed, while charges have to be filed against the remaining detainees. See Annexes E to J.

¹⁵⁷ “Article 68” in Triffterer, [15].

¹⁵⁸ Contrast Motion, para. 24.

¹⁵⁹ Rastan R., “Testing Co-operation: The International Criminal Court and National Authorities”, *Leiden Journal of International Law*, Vol. 21, Number 2 (2008), pp. 435-436.

¹⁶⁰ Motion, paras. 46 and 47 (emphasis added). See also para. 45 (“the Defence submits that one can conceive of two tests which would correspond to the complementarity principle’s object and purpose”). The uncertainty and lack of statutory basis is further demonstrated by the fact that the Defence considers that “The tests could be applied alternatively or jointly.”

¹⁶¹ See above para. 55.

Such an approach would contradict efforts of the drafters to establish objective and clear criteria for the Court's admissibility determinations.¹⁶²

92. Moreover, the vagueness of these tests entails that if applied, certain cases will remain unpunished as they will be prosecuted neither at domestic level nor at the ICC. This would counter a key objective of the Statute¹⁶³ - and of the principle of complementarity¹⁶⁴ to end impunity. Such an interpretation would violate the rules of treaty interpretation set out above.
93. Furthermore, the commentaries cited in the Motion¹⁶⁵ fail to address the arguments advanced by the Defence.¹⁶⁶ For instance, Kleffner advocates for the application of a certain margin of appreciation by the Prosecutor towards States in the selection of cases, rather than one to be applied by the Chambers as part of the admissibility scheme.
94. With regard to the position expressed by Schabas, the author does not adequately take into account the facts pertaining to the case at hand. In particular, in the context of the criminal procedure followed in the DRC, there is a considerable difference between the recording of an allegation in a dossier and the launching of specific investigative steps.¹⁶⁷ With particular regard to the offences of crimes against humanity and genocide noted by Schabas – whose commentary referred to *Lubanga* but apply equally to the present case - the Prosecution observes that the mere inclusion of allegations in a *dossier* does not entail that specific and effective investigative measures have or will be undertaken.¹⁶⁸ Moreover, the fact that a person has been held in custody by domestic authorities does not indicate in and of itself whether an

¹⁶² Holmes J.T., "Complementarity: National Courts vs. the ICC", in A. Cassese et al. (eds.) *The Rome Statute of the International Criminal Court- A Commentary* (Oxford University Press, Oxford 2002), pp.673-674.

¹⁶³ See e.g. Preamble to the Statute, para. 5.

¹⁶⁴ *Maria Castellana*, *La cooperazione tra stati e tribunali penali internazionali*, (Bari – Carlucci Editore: 2002), pp. 235-236.

¹⁶⁵ Motion, paras. 40-42.

¹⁶⁶ Motion para.39-40, the Defence argues that the 'same conduct' test amounts to primacy.

¹⁶⁷ This difference can be inferred from the AGM letter. See Annex J.

¹⁶⁸ For instance, in the ICC context, the mere registration by the Office of the Prosecutor of information on crimes received pursuant to Article 15 of the Rome Statute and its subjection to preliminary examination does not mean that an actual investigation will be initiated with respect to that allegation which is the subject of the complaint: see "Article 15" in Triffterer (2008) [10] : "The Prosecutor may conduct a preliminary examination to determine whether there is reasonable basis to proceed with an investigation. Only when the Pre-Trial Chamber has judicially approved a prosecutorial request to proceed may a full investigation be launched" (emphasis added).

actual investigation has been undertaken. In relation to the specific allegations relating to the Bogoro attack recorded in the *dossier*, [REDACTED].¹⁶⁹ [REDACTED].

95. With regard to the priority noted in the forthcoming chapter by Nouwen that “states have the first right to investigate and prosecute” where they are prosecuting different conduct,¹⁷⁰ the Prosecution recall the procedure contemplated by Article 89(4) and 94 where, as appropriate, a State can request a sequencing of domestic and international proceedings in relation to a different case.

96. In conclusion, the Prosecution submits that the tests proposed by the Defence imply a departure from the ordinary meaning to be given the terms of the Statute in their context and in the light of its object and purpose.

2. Additional arguments raised by the Defence

97. The Defence puts forward several arguments that are extraneous to their challenge to the admissibility of the case and the ‘same conduct’ test applied by the Chambers.

a. There is no duty on the Prosecutor to assist states in their investigations.

98. Contrary to the submission of the Defence,¹⁷¹ the Prosecutor is not obliged to consult and assist States in their investigations and prosecutions, and it bears no burden “to convince the Pre-Trial Chamber [...] that it has taken all steps that could be reasonably expected to assist the state in its national investigation/ prosecution”. The Defence puts forward this unsubstantiated “procedural duty” despite acknowledging that the Statute does not impose this obligation and that Pre-Trial Chambers have never required the Prosecution to prove a certain level of assistance to the national authorities before issuing arrest warrants.¹⁷²

99. Instead, the decision on the application for a warrant of arrest is limited to consideration of the factors expressly prescribed in Article 58: if those criteria are fulfilled, the Pre-Trial Chamber “shall” issue the warrant or summons.¹⁷³ As the

¹⁶⁹ See Annex I, and Annex J, para. 8.

¹⁷⁰ Motion, para. 42.

¹⁷¹ Motion, paras. 32 and 48.

¹⁷² Contrast Motion paras.32 and 48.

¹⁷³ *Situation in the DRC*, ICC-01/04-169-US-Exp, 13 July 2006, paras. 43-45 (unsealed pursuant to ICC-01/04-538, 22 September 2008); *Situation in Darfur*, ICC-02/05-185, 5 February 2009, paras. 23-24).

Appeals Chamber has stated, parties cannot alter competencies when there is no gap or lacuna in the Statute with regard to a particular matter.¹⁷⁴

100. There are, moreover, substantial reasons based on the object and purpose of the Statute for why such a burden, even if remotely conceivable under the statutory language, should be avoided. The ICC was not created to be an international investigative bureau with resources to support national authorities. It is instead a judicial body with jurisdiction over the most serious crimes of international concern and established to be complementary to national criminal jurisdictions.
101. Furthermore, Article 93(10), which addresses requests for cooperation from States to the Court, does not impose an obligation on the ICC to render assistance to States. Compliance with a request is discretionary and dependent of the fulfilment of the factors listed therein, including considerations of witness protection and the principle of originator consent.¹⁷⁵
102. That said, the Prosecution has not refused cooperation or assistance to the DRC. Contrary to the defence allegations;¹⁷⁶ the Prosecution agreed to transmit relevant information in an appropriate manner to the Congolese authorities, subject to statutory requirements imposed upon it related to confidentiality and protection. To date, the DRC authorities have not replied to the OTP's proposals.¹⁷⁷ Moreover, as the Defence is aware, the above cooperation request of DRC to the OTP did not contain any reference to the Bogoro incident. Thus, the contention that the DRC authorities were keen on investigating the case, that they requested information on the case from the OTP, and that the OTP failed to respond, is not supported by the facts.¹⁷⁸

¹⁷⁴ *Situation in the DRC*, [Judgment on Extraordinary Review](#), ICC-01/04-168 OA3, 13 July 2006, paras. 21,22 in relation to para. 33.

¹⁷⁵ "Article 93" in Triffterer (2008), [61].

¹⁷⁶ See Motion, para.49: "... Was it the case that the Prosecutor was so keen on having this case at the ICC that he acted in a way irrespective of the proper and most effective interpretation of the principle of complementarity? ...".

¹⁷⁷ The Defence was aware of this exchange as it was disclosed by the Prosecution and annexed to their Motion Contrast Motion, para. 50 with para.11 (gg), Annex gg, where the Defence attached both, the DRC's request and the Prosecutor's response.

¹⁷⁸ Motion, para 50.

b. Admissibility assessment in the framework of an Application for an Arrest Warrant

103. The Defence further challenges the Appeals Chamber ruling according to which the *proprio motu* review of admissibility in the framework of the application for an arrest warrant should be exercised by the Pre-Trial Chamber in only exceptional circumstances.¹⁷⁹
104. The Prosecution notes that the issues raised by the Defence have been the object of authoritative determinations by the Appeals Chamber which should only be revisited by that Chamber if cogent reasons so justify. As the Appeals Chamber stated, Article 58 (1) stipulates two substantive pre-requisites for the issuance of a warrant of arrest, of which admissibility does not form a part.¹⁸⁰ As the Appeals Chamber held, any discretionary *proprio motu* determination of admissibility at this stage should be exercised “only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect.” Such circumstances were held as appropriate where, based on the established jurisprudence of the Court, uncontested facts would render a case clearly inadmissible or an ostensible cause would impel the exercise of *proprio motu* review.¹⁸¹ In the present case, no ostensible cause or self evident factor manifestly impelled the exercise of *proprio motu* review.
105. Furthermore, the Pre-Trial Chamber’s finding on admissibility was rendered “without prejudice to any subsequent determination on jurisdiction or admissibility concerning this case pursuant to article 19(1), (2) and (3) of the Statute.”¹⁸²
106. The Defence further seeks to impugn the fact that the Pre-Trial Chamber’s findings were made on the basis of information and evidence from the Prosecutor only.¹⁸³ This is inevitable in the context of an application for a warrant of arrest, which is essentially an *ex parte* proceeding in which the Prosecution requests the issuance of

¹⁷⁹ Motion, paras. 54-57, referring to *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ICC-01/04-169, 13 July 2006.

¹⁸⁰ *Ibid.*, paras. 43-45.

¹⁸¹ *Ibid.*, para.52.

¹⁸² *Prosecutor v. Germain Katanga*, Under-Seal Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4, 6 July 2007, para.21.

¹⁸³ Motion, para. 33.

the warrant.¹⁸⁴ Furthermore, the additional information indicated in the Motion does not provide new grounds that justify the challenge at such late stage.

C. The case against Germain Katanga is admissible before the ICC

107. The approach taken by the Pre-Trial Chamber to the admissibility of this case, both in terms of the standard applied and the application of that standard were correct.¹⁸⁵
108. As stated above,¹⁸⁶ the same-conduct test and the definition of “case” adopted by the Pre-Trial Chamber is consistent with the rules of interpretation of treaties, relevant ICC jurisprudence and authorities, as well as with the object and purpose of the Statute and the drafting history of the relevant provisions.
109. From the factual background described in Section III, it can be concluded that an actual investigation was not undertaken by the DRC authorities into the Bogoro incident, nor into the other incidents listed in the case file of the AGM. Indeed, Bogoro is only mentioned twice: (i) in one document dated 2 March 2007 where the AGM requested the *Haute Cour Militaire* for a further extension of the detention of the Accused; and (ii) [REDACTED].¹⁸⁷ In Annex I, the AGM clarifies that decisions on extensions of detention are considered procedural matters and do not imply any decision into the substance of the issue.
110. In conclusion, investigations were not undertaken with regard to the Bogoro incident by the DRC authorities. Furthermore, [REDACTED]¹⁸⁸

¹⁸⁴ This was recognised by the Appeals Chamber in *Situation in the DRC*, ICC-0/04-169-US-Exp, 13 July 2006, paras. 49, see also para. 54 (unsealed pursuant to ICC-01/04-538, 22 September 2008).

¹⁸⁵ *Prosecutor v. Germain Katanga*, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, ICC-01/04-01/07-4, 6 July 2006, para.20.

¹⁸⁶ See Section B.

¹⁸⁷ Annex I. See also Annex J, para. 8.

¹⁸⁸ See Annex J.

V. Conclusion

111. For the reasons set out above, the Prosecution respectfully requests that the Chamber dismiss the Defence Challenge to Admissibility and declare that the case against Germain Katanga is admissible.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal red line.

Luis Moreno-Ocampo,
Prosecutor

Dated this 30th day of March 2009
At The Hague, The Netherlands