

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/07 OA8**

Date: **31 July 2009**

THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko , Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Ekaterina Trendafilova
Judge Joyce Aluoch

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

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

Public Redacted Version

**Prosecution's Response to Document in Support of Appeal of the Defence for
Germain Katanga against the Decision of the Trial Chamber "*Motifs de la décision
oral relative à l'exception d'irrecevabilité de l'affaire*"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Counsel for the Defence of Germain Katanga

Mr David Hooper

Mr Andreas O'Shea

Counsel for the Defence of Mathieu Ngudjolo Chui

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Jean-Pierre Fofé Djovia Malewa

Legal Representatives of Victims

Ms Carine Bapita Buyangandu

Mr Joseph Keta

Mr Jean-Louis Gilissen

Mr Hervé Diakiese

Mr Jean Chrysostome Mulamba Nsokoloni

Mr Fidel Nsita Luvengika

Mr Vincent Lurquin

Ms Flora Mbuyu Anjelani

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Democratic Republic of Congo

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. Introduction

1. On 16 June 2009, Trial Chamber II issued the decision *“Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut)”* (the “Decision”).¹ In the Decision, the Chamber dismissed the challenge to the admissibility of the case presented by the Defence for Katanga (“the Appellant”).
2. The Appellant appealed the Decision asking that the Appeals Chamber overturn the Decision and declare that the case against him is inadmissible.
3. None of the arguments advanced by the Appellant shows the existence of an error invalidating the Decision. Pursuant to Article 17(1), a determination of admissibility must first consider whether a State is investigating or prosecuting the case. The Trial Chamber did look at whether the DRC authorities were investigating and prosecuting the case against the Appellant, and it correctly held that they were not – a finding amply supported by the evidence. The fact that the Trial Chamber labelled this finding as an additional form of “unwillingness”, or that it also went on to consider whether the DRC authorities were intending to prosecute the Appellant in the future, does not detract from the correctness of this core finding. In the absence of national proceedings, the formal definitions of unwillingness and inability in Article 17(2) and (3) do not come into consideration. The Appellant’s arguments based on these provisions are thus irrelevant, and cannot found any error capable of overturning the Decision.
4. The DRC authorities were not investigating the case against the Appellant – they made this clear to both the Prosecution and the Chamber on numerous occasions. The DRC authorities subsequently explained to the Trial Chamber that the 2 March 2007 document did not seize any domestic court with a case involving the attack on Bogoro, and that the detention of the Appellant (and

¹ *Prosecutor v. Katanga and Ngudjolo*, Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut), ICC-01/04-01/07-1213, 16 June 2009 (hereinafter, the “Decision”).

his domestic co-suspects) continued to be based on the killing of the nine peacekeepers.

5. These consistent statements are corroborated by the lack of any meaningful reference to the attack on Bogoro in the dossier involving the Appellant, over a period of two and a half years, and the absence of any investigative steps at all regarding this case at the national level.
6. As a result, under the terms of Article 17(1) the case is admissible. However the Appellant is asking this Chamber to ignore the fact that the DRC authorities were not investigating the case, and to declare that the case is inadmissible on a new ground not found in Article 17(1): namely that the State could or should have investigated; or that it has been able to investigate other crimes.
7. To allow the appeal would effectively involve the Court exercising a power, namely to judge the reasons why a State has not investigated a case, which is found nowhere in the Statute. Further, to exercise that power and declare the present case inadmissible, when the State has made it clear that it cannot and will not investigate the case, would effectively sanction impunity.

II. Procedural Background

8. On 2 July 2007, Pre-Trial Chamber I (“the Pre-Trial Chamber”) issued, under seal, a warrant for the arrest of the Appellant.² The Pre-Trial Chamber provided the reasons for the issuance of the warrant on 6 July 2007.³ The Pre-Trial Chamber considered that the case was admissible.⁴

² ICC-01/04-01/07-1.

³ “Decision on the Evidence and the Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga”, ICC-01/04-01/07-4.

⁴ *Ibid.*, para.20: “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”. See also para. 21. When assessing the admissibility of the case, the Pre-Trial Chamber referred to the concept of “case”

9. The warrant of arrest was notified to the competent DRC authorities on 18 September 2007.⁵ The Auditeur Général Militaire rendered his decision to surrender the Appellant on 17 October 2007 and the surrender to the International Criminal Court (“ICC”) took place on 18 October 2007.
10. The initial appearance of the Appellant took place before Pre-Trial Chamber I on 22 October 2007. On 1 October 2008, the Pre-Trial Chamber issued its public Decision on the confirmation of charges.⁶
11. On 10 February 2009, the Appellant filed its motion challenging the admissibility of the case before Trial Chamber II (“Admissibility Challenge”).⁷
12. On 19 March 2009, the Prosecution filed a Response to the Challenge (“Prosecution Response”).⁸ With leave of the Court, the Appellant filed a Reply on 30 March 2009 (“Defence Reply”).⁹
13. Three victims’ Legal Representatives¹⁰ and the Office of Public Counsel for Victims (“OPCV”), also acting as Legal Representative of victims,¹¹ filed their observations on 16 April and on 28 April 2009, respectively.
14. The Chamber held an oral hearing on 1 June 2009, during which the Appellant, Prosecution, victims’ representatives, OPCV and the authorities of

as defined by the same Pre-Trial Chamber (Pre-Trial Chamber I) in earlier decisions in the *Lubanga* case, i.e. “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”. See ICC-01/04-01/06-8-Corr, paras. 31, 37 and ICC-01/04-100-Conf-Exp-tEN, para.65.

⁵ The Registry informed the DRC authorities of the existence of a warrant of arrest on 3 July 2007. See ICC-01/04-01/07-497-Conf-Exp, Report of the Registrar issued on 22 May 2008. This report, originally *ex parte* only available to the Defence for Germain Katanga, was re-classified as available to the Prosecutor as well, pursuant to an order dated 15 July 2009. See ICC-01/04-01/07-1306. .

⁶ ICC-01/04-01/07-717.

⁷ ICC-01/04-01/07-891-Conf-Exp. This document was filed *ex parte only available to the Defence*. It was transmitted to the Prosecutor on 25 February 2009 after having been reclassified as confidential by the Registry at the request of the Chamber. A public redacted version of the Motion was filed on 11 March 2009: ICC-01/04-01/07-949.

⁸ ICC-01/04-01/07-968-Conf-Exp. A redacted public version was issued on 30 March 2009, ICC-01/04-01/07-1007.

⁹ ICC-01/04-01/07-1008-Conf-Exp. A redacted public version was issued on 1 April 2009, ICC-01/04-01/07-1015.

¹⁰ ICC-01/04-01/07-1058-Conf; ICC-01/04-01/07-1059-Conf; ICC-01/04-01/07-1060.

¹¹ ICC-01/04-01/07-1082. Note that the Registry appointed the Principal Counsel of the Office as Legal Representative of 52 victims on 6 March 2009 (ICC-01/04-01/07-945) and 9 March 2009 (ICC-01/04-01/07-947-Conf-Exp.Anxs 1-40).

the DRC presented their views and answered the Chamber's questions on the Admissibility Challenge.¹²

15. On 12 June 2009, the Chamber issued an oral decision, dismissing the Admissibility Challenge.¹³ On 16 June 2009, the Chamber issued the written reasons for that decision ("the Decision").¹⁴

16. The Appellant filed a notice of appeal on 22 June 2009¹⁵ and the document in support of the appeal on 8 July 2009 ("Appeal Brief").¹⁶ The Appellant raises five grounds in support of its appeal.

17. The Prosecution hereby files its response to the Appeal Brief pursuant to Regulation 64(4).¹⁷

III. Factual Background to the Admissibility of the Case

18. The present case against the Appellant before the ICC relates to crimes committed during an attack on the village Bogoro on 24 February 2003.

19. The Appellant was originally detained by the DRC authorities, on or about 9 March 2005, following the killing of nine Bangladeshi peacekeepers from the United Nations Mission in the Democratic Republic of Congo (MONUC) (also known as "the Ndoki killings").¹⁸

20. The Appellant was initially charged with "atteinte à la sûreté de l'état", and subsequently was placed under investigation based on allegations of genocide, crimes against humanity, murder, illegal detention and torture without references to any specific incident.¹⁹ However his detention continued to be linked with the Ndoki killings.²⁰

¹² ICC-01/04-01/07-T-65-ENG ET.

¹³ ICC-01/04-01/07-T-67-ENG ET.

¹⁴ ICC-01/04-01/07-1213.

¹⁵ ICC-01/04-01/07-1234.

¹⁶ ICC-01/04-01/07-1279.

¹⁷ The Prosecution filed a confidential version of this Response to the Appeal Brief on 30 July 2009.

¹⁸ See Prosecution Response, paras. 18-20.

¹⁹ See Prosecution Response, para. 20.

²⁰ See Prosecution Response, paras. 21-22.

21. The Detention of the Appellant was extended a number of times by periodic decisions of the Auditorat Général Militaire in Kinshasa ("AGM"), 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.²¹ On 10 August 2005, the AGM clarified his interest in exploring the responsibility of the Accused for [REDACTED] unrelated to the present case against the Appellant.²²
22. On 18 January 2006, the Appellant filed an application for provisional release claiming that he had still not been notified of the grounds for his arrest.²³ Throughout 2006, to the best of the Prosecution's knowledge no substantive progress had been made into the investigation against the Accused. Similarly, the Bogoro incident was not included within the scope of the investigation, and was not referred to in either the DRC *Commission Rogatoire* of 15 December 2006, the request from the DRC authorities to the Prosecution for assistance dated 22 January 2007, or the report of 31 January 2007 which emphasized the difficulties in carrying out an effective investigation.²⁴ Meetings between the Prosecution and the AGM, and a report of the Auditorat Militaire de Garnison de l'Ituri, in February 2007 further indicated the lack of progress in any investigation and that the basis for the detention or investigation of the Appellant was confined to the incidents mentioned in the Commission Rogatoire (which did not include the Bogoro incident).²⁵
23. In light of the nature and progress of the domestic investigation, on 31 January 2007, the Appellant himself filed a petition with the Minister of Justice requesting that he be prosecuted by the ICC instead of the DRC judiciary,

²¹ See Prosecution Response, para. 23.

²² [REDACTED]. See Prosecution Response, para. 24.

²³ See Prosecution Response, para. 26.

²⁴ See Prosecution Response, paras. 27-31.

²⁵ See Prosecution Response, paras. 33-34.

asserting that an ICC prosecution would provide a faster and more impartial procedure before a more legitimate and credible judicial institution.²⁶

24. On 2 March 2007, the AGM petitioned the Haute Cour Militaire for a further extension of the detention of the Appellant. The document supporting this petition ("Prorogation Document") mentioned for the first time of Bogoro among a list of incidents of attacks against civilian population.²⁷ In light of this document, on 30 May 2007 the Prosecution met with the AGM to discuss, inter alia, the scope of the ongoing domestic proceedings against the eight accused. The Directeur du Cabinet of the AGM stated that the information in its case-file relating to the Bogoro incident had been derived solely from an NGO report, that this information only constituted an allegation, and that in any event no further action had been taken as of that date and no such further action was planned at this stage.²⁸

25. On the basis of this evidence, the Prosecution concluded that the DRC authorities were not investigating or prosecuting this case, and that the case against the Appellant would be therefore admissible. The Prosecution thus proceeded to request a warrant of arrest against the Appellant.

26. Subsequent to the Appellant filing his Challenge to Admissibility on 10 February 2009, the DRC authorities have repeatedly confirmed that they never investigated the case against the Appellant. On 14 March 2009, the DRC authorities confirmed that at the time of his transfer to the ICC had never been the subject of any investigation or other proceeding related to the events in Bogoro; nor had any charges brought against him for those events.²⁹ The DRC authorities also clarified that the requests made by the *Auditorat Général* to the *Haute Cour Militaire* constituted a formal proceeding and cannot be assimilated to, or equated with, those relating to subject matter of the case before the

²⁶ See Prosecution Response, para. 32.

²⁷ See Prosecution Response, para. 36.

²⁸ See Prosecution Response, para. 38.

²⁹ Annex J to Prosecution Response, para. 8.

Court.³⁰ Its purpose was simply the extension of the provisional detention of the FNI-FRPI leaders, including the Appellant.³¹ The DRC authorities subsequently explained to the Trial Chamber that the 2 March 2007 document did not seize the pertinent domestic court with a case involving the attack on Bogoro, and that the detention of the Appellant (and his domestic co-suspects) continued to be based on the killing of the nine peacekeepers.³²

27. The DRC authorities also made extensive submissions to the Trial Chamber during the hearing on 1 June 2009.³³ At that hearing, the DRC authorities confirmed that “Bogoro was never investigated by the Congolese military authorities”,³⁴ “the case of Bogoro is not the subject of any prosecution initiated by the DRC, and it falls strictly within the jurisdiction of the ICC, and the judicial system of the DRC has not initiated any proceedings in that regard”.³⁵

28. The DRC authorities also explained that apart from a single NGO report “you won't find transcript of witness interview with regard to the Bogoro event anywhere. You won't find any transcripts of interviews of witnesses with regard to the Bogoro events. You won't find any interview of suspects with regard to Bogoro. You won't find any transcripts of the seizure or noting of facts with regard to Bogoro. There's nothing procedurally significant that has been established and that could support the allegations that were made”³⁶ and that “If in effect no investigations were carried out into the crimes committed

³⁰ Annex J to Prosecution Response, para. 7.

³¹ Annex J to Prosecution Response, para. 6.

³² ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 79, line 22 to p. 80, line 2; p. 85, line 1 to p. 86, line 3; p. 93, lines 22-25.

³³ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, pp. 72-103.

³⁴ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 94, line 12. This is consistent with the position taken by the representative of the DRC authorities at the beginning of this exchange, in which he stated that “Nous l’avons souligné ce matin, il n’y a jamais eu d’enquête menée par l’auditorat général sur les crimes commis à Bogoro” (emphasis added) - ICC-01/04-01/07-T-65-FRA ET, p. 84, lines 4-5. (The Prosecution notes that there appears to be an error in the transcript of the English interpretation, which suggests that the representative of the DRC authorities stated that “There was an inquiry, an investigation on the part of the Auditoria General as regards the Bogoro events” - ICC-01/04-01/07-T-65-ENG ET, p. 93, lines 14-16).

³⁵ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 81, lines 4-7.

³⁶ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 78, lines 11-19.

in Bogoro, it's understandable that it wasn't possible to prosecute anyone for these crimes.”³⁷

29. After the hearing, the DRC authorities filed written observations, which reiterated that “The Bogoro case has not been the subject of any proceedings opened in the DRC, and falls fully within the jurisdiction of the ICC, and the Congolese judicial authorities have to date taken no procedural step of any kind in regard to it.”³⁸

30. After considering the totality of the evidence and the submissions of the parties and the participants, the Trial Chamber found the case admissible. It first considered the threshold legal questions. Based on this Chamber’s prior judgment,³⁹ it concluded that the Prosecution is not ordinarily obliged to provide information regarding admissibility to the Pre-Trial Chamber when applying for an arrest warrant, unless it is “decisive information” that establishes that the case is inadmissible or that the Pre-Trial Chamber should initiate its own inquiry into admissibility.⁴⁰ In this instance, the Prosecution did not have information that the DRC was investigating; instead, it had only a single vague reference by DRC authorities to Bogoro, a reference in the DRC records that the Appellant himself had mentioned Bogoro, and a clarification from the DRC that it was not investigating the Bogoro incident.⁴¹

31. Addressing then the criteria for inadmissibility under Article 17, the Trial Chamber concluded that the failure to take steps to prosecute “must be considered as lacking the will referred to in article 17”.⁴² That absence of will to prosecute, the Chamber held, was sufficient to allow for prosecution by this

³⁷ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p, 79, lines 18-21.

³⁸ ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, p. 5. The DRC authorities also indicated that “all of these factors taken together show that the DRC was unable genuinely to investigate the crimes at Bogoro. Sadly, since then the situation has shown little improvement”; and that “if there was no investigation, it is self-evident that no prosecution could have been commenced.” (p. 4).

³⁹ *Situation in the DRC*, “Judgment 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, 23 September 2006.

⁴⁰ Decision, para. 65.

⁴¹ Decision, paras. 69-72.

⁴² Decision, para. 77.

Court. A State's voluntary relinquishment of its interest in prosecuting, moreover, does not unfairly deprive the accused of the right to challenge admissibility.⁴³ The Chamber also rejected, as irrelevant to the issue of admissibility, the Defence arguments that the accused person may have a natural preference to be tried in his national courts and that the ICC could not exercise jurisdiction if its prosecution would deny the person a fundamental human right.⁴⁴

32. Finally, on the facts presented, the Chamber found that the DRC (1) surrendered the Appellant without objection, (2) made no challenge to admissibility, (3) stated in Court that it had not initiated an investigation against him in relation to the Bogoro attack, and (4) urged as its "official position" that the ICC retain jurisdiction over the case and prosecute the Appellant.⁴⁵ It concluded that it "cannot but note the clear and explicit expression of unwillingness of the DRC to prosecute this case.... The Chamber concludes therefore that the DRC clearly intends to leave it up to the Court to prosecute Germain Katanga and to try him for the acts committed on 24 February 2003 in Bogoro."⁴⁶

⁴³ Decision , para. 86-88. The Chamber added that the accused may also challenge admissibility on gravity grounds or because the prosecution would violate *ne bis in idem*.

⁴⁴ Decision, paras. 84-85.

⁴⁵ Decision, paras. 90-94.

⁴⁶ Decision, para. 95.

IV. The Grounds of Appeal Raised by the Appellant

33. The Appellant raises five grounds in support of his appeal:⁴⁷

- a. The Trial Chamber erred in finding that the challenge to admissibility was filed out of time;
- b. The Trial Chamber erred in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents;
- c. The Trial Chamber erred in defining “unwilling”, in light of Article 17(2) and the principle of complementarity;
- d. The Trial Chamber erred in confusing the concepts of unwillingness and inability; and
- e. The Trial Chamber’s erroneous definition of “unwilling” deprived the accused of a real and effective right to challenge admissibility.

34. None of the grounds of appeal raised by the Appellant demonstrates the existence of an error invalidating the impugned decision.⁴⁸ As the Appellant concedes, the First Ground of Appeal had no impact on the Decision. The Second Ground of Appeal is without merit: the Trial Chamber was correct in finding that the Prosecution was not obliged to place the relevant documents before the Pre-Trial Chamber as part of its Arrest Warrant Application; and in any event any error here also had no impact on the Decision as the Trial Chamber considered all of the documents and concluded that the case was admissible.

35. The arguments presented by the Appellant in the Third, Fourth and Fifth Grounds of Appeal are closely linked. However none of those arguments demonstrates that the Trial Chamber made any substantive error in finding

⁴⁷ Appeal Brief, para. 2.

⁴⁸ Appeals are of a corrective nature. Mere disagreement with the first instance Chamber, general arguments as to the state of the law with no bearing on the findings in the impugned decision, or purely hypothetical arguments, cannot constitute a proper basis for the exercise of the Appeals Chamber’s corrective jurisdiction. See e.g. *Prosecutor v Lubanga*, ICC-01/04-01/06-824 OA7, 13 February 2007, para. 71.

that the case was admissible. The findings in the Decision, albeit largely considered under the rubric of unwillingness, amply demonstrate that the Trial Chamber found that the DRC authorities were not investigating or prosecuting the case against the Appellant. The case is therefore admissible before this Court.

V. Submissions

The First Ground of Appeal: the finding that the Admissibility Challenge was filed out of time causes no prejudice to the Appellant

36. The Appellant recognises that he “was not prejudiced by the Trial Chamber’s erroneous interpretation of the time limit for filing an admissibility challenge pursuant to Article 19(4) [...] because [the Trial Chamber] reviewed the admissibility challenge on its merits.”⁴⁹ Thus regardless of whether the Trial Chamber erred in its interpretation of “the commencement of trial”, for the purposes of Article 19(4), the Decision that the case against the Appellant is admissible remains unaffected.

37. The Prosecution therefore submits that this finding of the Trial Chamber was obiter dicta and did not impact on the outcome of the Decision.

.

The Second Ground of Appeal: the Trial Chamber correctly found that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents

38. The Prosecution opposes the Second Ground of Appeal. The Appellant has not demonstrated any error in the Trial Chamber’s interpretation of the Appeals Chamber’s jurisprudence regarding the Pre-Trial Chamber’s

⁴⁹ Appeal Brief, para. 41.

authority to rule on admissibility when the Prosecution seeks an arrest warrant, or in its application of those principles to the facts of this case.

39. The Appellant has also failed to demonstrate how the alleged error impacted on the substance of this Decision. Even if the Appeals Chamber holds that the Prosecution should have submitted the documents to the Pre-Trial Chamber when seeking the warrant, that would not have led the Pre-Trial Chamber to a different conclusion on admissibility. On the contrary, the Trial Chamber, which did have before it all of the documents, along with the full submissions of the defence, still ruled that the case is admissible. Thus, any alleged error regarding what the Prosecution should have submitted to the Pre-Trial Chamber over two years ago has no impact on the Decision of the Trial Chamber or the admissibility of the case at this point.

(a) The Trial Chamber correctly applied the Appeals Chamber's jurisprudence on admissibility determinations at the arrest warrant stage

40. The Appeals Chamber has already set out the principles governing when and how admissibility should be considered as part of issuing an arrest warrant.⁵⁰ According to this jurisprudence - which was followed in the instant case by the Prosecution, the Pre-Trial Chamber, and the Trial Chamber - a Pre-Trial Chamber should generally not make a finding of admissibility when issuing an arrest warrant. The Appellant seeks to overturn this, by claiming that such findings will "often" be required,⁵¹ yet provides no basis for departing from this settled jurisprudence.

41. The Appeals Chamber has required that a high standard be met before making a *proprio motu* determination of admissibility as part of arrest warrant proceedings. Given that the proceedings are *ex parte*, without the participation

⁵⁰ *Situation in the DRC*, ICC-01/04-169, 13 July 2006, paras. 42-53.

⁵¹ Appeal Brief, para. 42.

of the suspect, victims, or the relevant state, it will only be in situations such as those where “uncontested facts [...] render a case clearly inadmissible or an ostensible cause impel[s] the exercise of proprio motu review”.⁵² This is the same standard applied by the Trial Chamber,⁵³ which held that these grounds could only be made out if the information in question was of a decisive nature.⁵⁴

42. Admissibility should in principle be determined as a result of a challenge by the suspect or State, and with the submissions of all interested participants. In this context, the Prosecution should not submit such documents to the Pre-Trial Chamber for an *ex parte* determination. Rather, they should be provided to the defence – as they were in this case – as relevant to its preparation⁵⁵ of a potential challenge to admissibility. There can be no prejudice⁵⁶ when the defence is able to make a full and prompt challenge to admissibility, if it considers that the totality of the documents (including the defence evidence) warrants one. In this case, the Prosecution notes that despite having the relevant material at its disposal, the Appellant did not file a challenge throughout the entire proceedings held before the Pre-Trial Chamber, but rather waited until the trial date had been set by the Trial Chamber to make the current challenge.⁵⁷ While the Prosecution does not argue that this invalidates the challenge, the Appellant cannot claim prejudice as a result of his own delays or decisions regarding timing.

⁵² *Situation in the DRC*, ICC-01/04-169, 13 July 2006, para. 52.

⁵³ See Decision, paras. 61-66.

⁵⁴ Decision, paras. 65-67.

⁵⁵ Rule 77.

⁵⁶ Contrast Appeal Brief, para. 45.

⁵⁷ The Defence Admissibility Challenge was filed on 10 February 2009.

(b) None of the documents were decisive in demonstrating inadmissibility and there was no error in the Prosecutor's failure to provide them with the Application for the arrest warrant.

43. The Defence claims that the Trial Chamber erred when it failed to consider “50 documents directly or indirectly indicating that Mr Katanga’s and others’ alleged criminal conduct in Bogoro and neighbouring villages was subject to investigations”,⁵⁸ that it submits should have been provided to the Pre-Trial Chamber. However, only two documents out of these 50 make any mention of Bogoro. The first reference was volunteered by Mr. Katanga himself in an interview. In this unsolicited reference he mentioned that his militia had conducted a defensive operation in Bogoro. The DRC authorities did not question him on this incident or follow up on this statement. This document was rightly disregarded by the Trial Chamber.⁵⁹ The second document, the Prorogation Document discussed in paragraph 24, above, constitutes a mere request for extension of provisional detention of a number of people in which a series of locations of possible crimes are listed.⁶⁰

44. The Appeals Chamber said that Pre-Trial Chambers should not rule on the nature and impact of ambiguous documents without submissions from the Defence and other participants.⁶¹ The Appellant’s argument that “submission of the Bogoro and related documents to the Pre-Trial Chamber at the relevant time would have at least enabled it to form an opinion on the nature of the [Prorogation] document”,⁶² urges that the Pre-Trial Chamber should have made a ruling in precisely the circumstance rejected by the Appeals Chamber.

45. In addition to these documents, the “totality” of the information also includes the specific clarification obtained by the Prosecution from the DRC authorities

⁵⁸ Appeal Brief, para. 49.

⁵⁹ Decision, para. 71.

⁶⁰ Decision, paras. 70-71.

⁶¹ *Situation in the DRC*, ICC-01/04-169, 13 July 2006, paras. 50-51.

⁶² Appeal Brief, para. 47.

that they were not investigating the attack on Bogoro, shortly before it requested the Arrest Warrant.⁶³ The DRC authorities confirmed that they were not investigating the attack on Bogoro to the Trial Chamber both orally and in writing.⁶⁴ If any piece of information is to be considered decisive in this regard, it would have been that statement,⁶⁵ the submission of which would only have confirmed to the Pre-Trial Chamber that the case was, at that stage, admissible.

46. The Trial Chamber examined all of the circumstances: that only one reference is made to Bogoro in a court document (the Prorogation Document); that this reference is vague, was made in the context of an extension of detention, and does not constitute an investigative act;⁶⁶ that no investigative acts were carried out regarding Bogoro subsequent to this isolated mention; and that the Prosecution confirmed that no investigation was ongoing or planned in relation to the attack on Bogoro.⁶⁷ The Trial Chamber's conclusion was correct and the Appellant has demonstrated no error.

⁶³ Annex I to Prosecution Response; see also para. 24, above, and authorities cited therein.

⁶⁴ ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, pp. 4-5; see also paras. 26-29, above, and authorities cited therein.

⁶⁵ Annex I to Prosecution Response.

⁶⁶ Decision, para. 71: "The Chamber can therefore but note the significantly vague nature of the document in question, which is after all simply a request to extend provisional detention. It is worth reiterating that during the period mentioned in the document, i.e. between 2002 and 2005, Bogoro was attacked several times. Moreover, the contents of the document are not supported by any of the other material that was in the Prosecutor's possession".

⁶⁷ Decision, para. 69; Annex I to Prosecution Response. The DRC authorities expressly and unequivocally stated that the Accused had not been kept in detention for facts related to Bogoro (ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 86, lines 1-5), and further specified that "[t]he Bogoro case has not been the subject of any proceedings opened in the DRC [...] and the Congolese judicial authorities have to date taken no procedural step of any kind in regard to it" (ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, p. 5. See also ICC-01/04-01/07-T-65-ENG, 1 June 2009, p. 85, lines 10-14, p. 91, lines 20-24; p. 93, line 22 to p. 94, line 12). As recognised by the Trial Chamber, this clarification deprived the Prorogation Document of any decisive value which could have impelled the exercise of *proprio motu* review of admissibility (Decision, para. 69, 73).

**The Third, Fourth and Fifth Grounds of Appeal: the Trial Chamber's finding
that the case is admissible is correct; and the Appellant demonstrates
no error which materially impacts on this Decision.**

47. The third, fourth and fifth grounds of appeal raised by the Appellant are interconnected. Each ground relates to the Chamber's application of the complementarity principle, in particular its interpretation of unwillingness, and many of the Appellant's arguments across these three grounds overlap. The Prosecution will therefore address the core of these three grounds jointly, before dealing with the residual arguments relating to individual grounds.

(a) The Third, Fourth and Fifth Grounds of Appeal raised by the Appellant

48. In his Third Ground, the Appellant challenges the Chamber's purported finding of a "second form of unwillingness" in those cases of a "State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its own jurisdiction over him or her".⁶⁸ The Appellant argues that this definition of unwillingness falls outside the scope of Article 17(2), and infringes the principle of complementarity as it disregards paragraph six of the Preamble of the Statute and the duty of every State to exercise its criminal jurisdiction.⁶⁹

49. In his Fourth Ground, the Appellant argues that the Trial Chamber confused "unwillingness" with "inability".⁷⁰ Then, the Appellant attempts to show that the DRC authorities were "able" to prosecute the Accused⁷¹ and notes that it is not for the DRC to declare itself unable.⁷²

⁶⁸ Decision, paras. 77-78: The Trial Chamber considered that this form of unwillingness to be in line with the object and purpose of the Statute as it respects the drafters' intention to put an end to impunity, as stated in the fifth paragraph of the Preamble. It also considered this interpretation to respect the principle of complementarity by protecting the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so.

⁶⁹ Appeal Brief, para. 72.

⁷⁰ Appeal Brief, paras. 73, 77. The Appellant refers to para. 80 of the Decision to support this contention.

⁷¹ Appeal Brief, paras. 82, 83, 86.

⁷² Appeal Brief, paras. 84-86.

50. In his Fifth Ground, the Appellant misinterprets the Chamber's findings by stating that it erred in law "by ruling that human rights [...] are not relevant factors in admissibility proceedings".⁷³ The Appellant also submits that the Chamber's "interpretation of unwillingness leads to a deprivation of the right of the accused to effectively challenge the admissibility of the case".⁷⁴ None of the arguments advanced by the Appellant shows the existence of an error invalidating the Decision.

(b) The nature of a determination of admissibility under Article 17

51. The starting point for any analysis of admissibility must be the language of the Statute.⁷⁵ Article 17(1), the key provision at issue in the Admissibility Challenge, provides that "the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution".

52. Thus, the first question when determining the admissibility of a case is whether that case is being investigated or prosecuted by the national authorities. It is only after this determination is made that the Court may go on to consider whether the state is unwilling or unable: these are factors which are used to override a *prima facie* finding that a case is inadmissible because a national proceedings is underway.

53. This basic principle - that any consideration whether a case is inadmissible before the ICC requires, as a threshold matter, that the case is being, or has

⁷³ Appeal Brief, para. 90. See the arguments in paras. 87-89.

⁷⁴ Appeal Brief, para. 101. See arguments in paras. 91-100.

⁷⁵ The principal rule for the interpretation of the Statute is 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." See *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.

been, investigated or prosecuted domestically⁷⁶ - is widely supported in the commentaries to the Rome Statute, including those relied upon by the Appellant. Indeed the Appellant does not dispute this point, having submitted at the 1 June 2009 hearing that “Article 17 [says] that the Court shall determine a case is inadmissible where the case is being investigated or prosecuted by a State unless there are particular exceptions, and they're very limited exceptions.”⁷⁷

54. The Appellant relies on the views of experts, but in fact those experts do not support his position. For example, in his detailed analysis of admissibility, Olásolo confirms that:

“the ICC’s competent organ will have to look first at whether there is any investigation, prosecution, decision not to prosecute or final judgment of the State concerned. And if the answer is affirmative, it will have then to analyse whether the national proceedings: a) do not follow the principles of due process recognized by international law; b) are carried out with unjustifiable delay; c) are not conducted independently and impartially; and d) are conducted for the purpose of shielding the person concerned from criminal responsibility or in a manner which is inconsistent with the intention to bring the person concerned to justice.”⁷⁸

⁷⁶ Or if the “case is not of sufficient gravity to justify further action by the Court.” - Article 17(1)(d).

⁷⁷ ICC-10/04-01/07-T-65-ENG ET, 1 June 2009, p. 15, lines 17-25. The exceptions referred to by the Appellant are where despite an apparent national investigation or prosecution the State is nevertheless unwilling or unable to genuinely bring the person to justice.

⁷⁸ Olásolo, H.: *The Triggering Procedure of the International Criminal Court* (Martinus Nijhoff Publishers: Leiden, 2005) (cited in Appeal Brief, paras. 59, 70, 82), p. 165. Professor Olásolo also observes that “the principle of formal primacy of national jurisdictions is based on the premise that the action of the States concerned over the crimes allegedly committed in a given situation precludes the triggering of the Court’s dormant jurisdiction” (p. 149); that States “shaped the ICC as an *ultima ratio* jurisdiction that be activated only when national jurisdictions are inactive, unwilling or unable” (p. 156), and repeatedly refers to the ICC needing “to decide on the inaction, unwillingness or inability of the States concerned” (p. 156, see also pp. 164-165) (emphases added).

M. El Zeidy, also makes it clear that “the admissibility assessment under Article 17(1)(a) – (c) is twofold. Firstly, there is a requirement to check, as mentioned above, whether the State has taken action in relation to a certain situation or case that satisfies Article 17(1)(a) – (c). ... a negative answer [i.e. that the State is not investigating or prosecuting the case] will render the situation or case inadmissible under the plain meaning of Article 17 as none of the criteria set out in sub-paragraphs (a) – (c) has been met. Accordingly, there is no need to delve into an examination of the State’s ‘unwillingness’ or ‘inability’ under Article 17(2) and (3).” – M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, (Martinus Nijhoff Publishers: Leiden, 2008), p. 161.

55. Similarly, Holmes explains that “the Court will not act where national criminal jurisdictions have acted or are acting”.⁷⁹ In subsequent commentary, Holmes analyses Article 17, and explains that:

“It proved relatively easy to find broad agreement among delegations that the Court should defer to States if: (i) ‘the case is being investigated or prosecuted’; (ii) ‘has been investigated ... and the State has decided not to prosecute’; (iii) ‘the person concerned has already been tried’ (*ne bis in idem*); or (iv) ‘the case is not of sufficient gravity to justify further action by the Court’. In the first three of these instances (and, possible, even in the fourth), the national jurisdiction was or had been exercising its jurisdiction and a putative investigation or prosecution by the Court would have led to a conflict. [...] The difficult aspect of the negotiations was to develop the criteria setting out the circumstances when the Court should assume jurisdiction even where national investigations or prosecutions had occurred. Two broad concepts emerged: unwillingness and inability.”⁸⁰

56. A report submitted by twelve experts set out the interpretation of Article 17 in clear terms:

“17. Although it is common to emphasize the “unwilling or unable” test in Article 17, the Article in fact deals with three logically distinct circumstances.

18. First, the most straightforward scenario is where no State has initiated any investigation (the inaction scenario). In such a scenario, none of the alternatives of Arts. 17(1)(a)-(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17.”⁸¹

⁷⁹ J. T. Holmes, “The principle of complementarity”, in R. Lee (ed.) *The International Criminal Court- The making of the Rome Statute* (1999) (cited in Appeal Brief, paras. 59, 60, 81), p. 74.

⁸⁰ Holmes, “Complementarity: national courts versus the ICC”, in Cassese et al (eds) *The Rome Statute of the ICC: a commentary*, vol. 1 (1999), pp. 672-673.

⁸¹ *Informal expert paper: the principle of complementarity in practice* (2003) (“Expert Paper”), prepared by Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmschurst, and Andreas Zimmermann (the participants contributed in their individual capacity and therefore the views reflected therein do not necessarily reflect those of their respective organisations or of the OTP). This paper is available at <http://www.icc-cpi.int/iccdocs/doc/doc656350.PDF>, and was filed as an annex to the Defence Reply in these proceedings (ICC-01/04-01/07-1015-Anx, 1 April 2009).

57. This same approach has been consistently taken by Pre-Trial Chambers: (i) a Chamber first considers whether the national authorities are acting in relation to the case before the ICC; (ii) if they are not, the case is admissible; (iii) only if the national authorities are acting will the Chamber go on to consider whether the State is nevertheless unwilling or unable genuinely to investigate or prosecute. Thus Pre-Trial Chamber I ruled that it must look at national proceedings concerning the case and that “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.”⁸² As a result of this analysis, which follows the language and structure of Article 17, Pre-Trial Chamber I identified the present case as one of inactivity.⁸³ In its decision on admissibility in the *Kony* case, on which the Appellant purports to rely,⁸⁴ Pre-Trial Chamber II also concluded that the case remained admissible on the basis that the situation remained one of “inaction on the part of the relevant national authorities”.⁸⁵
58. Finally, in the present proceedings whether the DRC authorities had been investigating the case against the Appellant,⁸⁶ and what constituted the “case”

The Expert Paper goes on to describe the next two stages of admissibility determinations as follows:

“19. Second, it is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Articles 17(1)(a)-(c) are engaged.⁷ In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established.”

20. Third, this inadmissibility is displaced where it can be shown that the proceedings are not genuine, because the State is either unwilling or unable to carry out genuine proceedings. Thus, the issues of “unwilling”, “unable” and “genuine” only arise where a State purports to be handling the matter, but there are reasons to believe that a genuine proceeding will not result.”

⁸² ICC-01/04-520-Anx2, para. 29 (emphasis added).

⁸³ As such, there was no need 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” - *Prosecutor v. 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. The Prosecution notes that this position has been consistently maintained by the Prosecution (Prosecution Response, paras. 3, 15, 43, 47, 49-50, 109-110; ICC-01/04-01/07-T-65-ENG, 1 June 2009, pp. 43-44, 46-49, 60) and by the DRC authorities (Annexes I and J to the Prosecution Response; ICC-01/04-01/07-T-65-ENG, 1 June 2009, pp. 78-81, 85-86, 90, 93-94; ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009, p. 5).

⁸⁴ Appeal Brief, para. 84.

⁸⁵ *Prosecutor v Kony et al*, ICC-02/04-01/05-377, 10 March 2009, para. 52.

⁸⁶ The Appellant devoted the first 24 pages of his Admissibility Challenge to setting out the nature of the investigative activities of the DRC authorities; see also Admissibility Challenge, paras. 7, 15, 49-50, 53; Prosecution Response, paras. 3, 15, 43-45, 47, 49-50, 109-110; Defence Reply, paras. 1-8, 9-10, 14-16; I CC-

for the purposes of that assessment,⁸⁷ was always at the core of the debate between the parties before the Trial Chamber. Although the Trial Chamber characterised its finding as a form of “unwillingness”, in substance the Chamber addressed whether the DRC was conducting an investigation or prosecution into the case at all.⁸⁸ It considered the situation as one in which the State “chooses not to investigate or prosecute a person in its own courts”,⁸⁹ i.e. a case of inactivity.

(c) The findings of the Trial Chamber in this instance were correct

59. The Appellant has demonstrated no error in the findings of the Trial Chamber which would warrant the Appeals Chamber overturning the Decision that the case against the Accused is admissible.

(i) In substance, the findings of the Trial Chamber relate to inactivity

60. Throughout the Decision, the Trial Chamber makes clear that the DRC was not investigating or prosecuting this case. When a State, in the language of the Trial Chamber, does “not wish to exercise its own jurisdiction over” a person, when it “chooses not to investigate or prosecute a person”,⁹⁰ or when it “decide[s] not to carry out an investigation or prosecution of a particular case”,⁹¹ then the Court is faced with a situation in which the State is not investigating or prosecuting the case. Thus, a case of inactivity.

01/04-01/07-T-65-ENG, 1 June 2009, pp. 16-18, 21-22, 110-111 (Appellant); 43-44, 46-49, 60 (Prosecution); 63 (OPCV); 77-81, 85-86, 90, 93-94 (DRC Authorities).

⁸⁷ Admissibility Challenge, paras. 28-47, 51; Prosecution Response, paras. 3-4, 43-45, 51-96, 107-108; Defence Reply, paras. 1, 20-23; ICC-01/04-01/07-T-65-ENG, 1 June 2009, pp. 24-26, 113-115 (Appellant); 42-45, 59-60 (Prosecution).

⁸⁸ The Trial Chamber arguably went further than it needed to, considering not only whether the State was investigating or prosecuting but also confirming whether there was any prospect that they would investigate or prosecute. However this additional inquiry does not undermine the essential factual basis of the finding that the State was not investigating or prosecuting the case, i.e. that this was a case of inactivity, albeit under a different title.

⁸⁹ Decision, para. 77.

⁹⁰ Decision, para. 77.

⁹¹ Decision, para. 80.

61. The Appellant's Brief reflects this, recognising that the Trial Chamber was considering a situation in which a State "chooses not to investigate or prosecute a person in its own jurisdiction". The Appellant argues instead that this type of voluntary inactivity does not appear to fall within "unwillingness" as defined in Article 17(2).⁹² The Appellant criticises the findings of the Trial Chamber on the basis that "following this logic would make any refusal amount to 'unwillingness'".⁹³ However a refusal to exercise jurisdiction over a case means that the case is not being investigated or prosecuted, and is accordingly the case is admissible.⁹⁴

62. Further, in opening the oral hearing on 1 June 2009, the Presiding Judge of the Trial Chamber set out the parameters of the hearing and the admissibility determination that the Chamber was required to make, namely that "according to this Statute, the International Criminal Court may exercise its jurisdiction only when national legal systems fail to act, including in a case where such a system claims to have acted, whereas in reality it hasn't the willingness or is unable to fully carry through prosecution."⁹⁵ The Presiding Judge also indicated that one of the purpose of the hearing was to obtain "very precise information on the exact nature of the proceedings initiated against [the Appellant] in the Democratic Republic of the Congo."⁹⁶

63. When analysing the facts of this case, the Trial Chamber considered that it "must in the first place take into consideration the express declarations of the DRC", and that the DRC had "unequivocally stated that the *Auditorat Général* had not initiated any investigation against Mr Katanga in relation to the attack on Bogoro of 24 February 2003."⁹⁷ Therefore, the Trial Chamber held that

⁹² Appeal Brief, paras. 52-54.

⁹³ Appeal Brief, para. 73.

⁹⁴ Indeed, this scenario presents the clearest example of admissibility under the Statute, without resort to the considerations of willingness or inability – Experts Report, pp. 18-20, paras. 59 and 62.

⁹⁵ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 7 lines 6-10 (emphasis added).

⁹⁶ ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 9, lines 16-17.

⁹⁷ Decision, paras. 92-93.

there was no national investigation or prosecution. If anything, the Trial Chamber not only made the necessary findings for establishing inactivity, and thus admissibility, but went further than required: not only did it hold that the DRC was not and is not investigating or prosecuting, but also found that the DRC does not intend to investigate or prosecute this case in the future.⁹⁸

64. The Trial Chamber's implicit consideration and acceptance that the DRC authorities were inactive in relation to the case is also evidenced by its reasoning on whether the documents in the possession of the Prosecution were "decisive" and thus should have been presented to the Pre-Trial Chamber as part of the Application for a Warrant of Arrest.⁹⁹ The Chamber considered the Prorogation Document to be vague,¹⁰⁰ and significantly that the only other potentially relevant document "does not constitute evidence to the effect that the judicial authorities of the DRC were conducting an investigation into the events under consideration by the Pre-Trial Chamber."¹⁰¹ The Trial Chamber thus considered that there had been no obligation on the Prosecution to put the documents before the Pre-Trial Chamber as they did not indicate that the DRC authorities were investigating the case before the ICC; i.e. they could not have led to any conclusion other than inactivity.

65. The fact that this analysis has been conducted under the rubric of an additional form of unwillingness¹⁰² does not alter the essential fact that the Chamber considered and found that the case was not "being investigated or prosecuted by a State which has jurisdiction over it", i.e. the DRC. The

⁹⁸ The Prosecution submits that this additional finding may have been prompted by an exchange between the Chamber and the DRC representatives at the hearing on 1 June 2009, in which the DRC representatives clarified that the surrender of the Appellant to the ICC had put an end to any legal basis to detain or proceed against the Appellant in the DRC: see ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, pp. 94-97.

⁹⁹ Appealed Decision, paras. 70-73. In these paragraphs, the Chamber assesses whether the document dated 2 March 2007 requesting a prorogation of the provisional detention can be considered as an investigative action on the crimes before the Court by the DRC authorities, since that would imply activity in the domestic jurisdiction.

¹⁰⁰ "the significantly vague nature of the document in question, which is after all simply a request to extend provisional detention", Decision, para. 71.

¹⁰¹ Decision, para. 71.

¹⁰² Decision paras. 77-78; Appeal Brief para. 53.

Decision refers to the “fact that a State is ‘unwilling’, as described above”,¹⁰³ yet the nature of the “unwillingness” “described above”¹⁰⁴ is precisely when a State chooses not to investigate a particular case – i.e. this “unwillingness” is inactivity. The first limb of Article 17(1)(a) was thus not made out. Consequently, the case is admissible, and there was no need to go on to consider whether “the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

66. In this context, the Appellant misrepresents the focus of the debate before the Trial Chamber. The Appellant asserts that “the alleged inability of the DRC”, rather than “willingness”, was at the core of the debate.¹⁰⁵ This is not correct. The debate did not focus on whether the DRC was unable. Rather, it focussed on whether the DRC authorities were conducting any investigation or prosecution of the crimes which form the case before the ICC,¹⁰⁶ i.e. “the events under consideration by the Pre-Trial Chamber”.¹⁰⁷ While the participants (in particular the DRC authorities) did discuss why there had been no investigation of the Accused in relation to this case, this was in the context of explaining the absence of any investigation of the case, not arguing why an existing investigation should be considered insufficient due to the State being “unwilling or unable genuinely to carry out the investigation or prosecution”.

¹⁰³ Decision, para. 81.

¹⁰⁴ In paras. 77-80 of the Decision.

¹⁰⁵ Appeal Brief, para. 75.

¹⁰⁶ See para. 58 and filings and transcript referred to in footnotes 83 and 86, above.

¹⁰⁷ Decision, para. 71.

(ii) The Trial Chamber's finding that the case was admissible, as the DRC authorities were not investigating or prosecuting the Appellant for the attack on Bogoro, is factually correct

67. In making its findings, the Trial Chamber considered that it “must first take into consideration the explicit statements of the DRC authorities themselves”. The statement which the Chamber relied upon in this regard was “a document dated 14 March 2009 [where] the private secretary of the *Auditeur Général près de la Haute Cour Militaire*, unequivocally stated that the *Auditorat Général* had not initiated any investigation against Mr Katanga in relation to the attack on Bogoro of 24 February 2003”.¹⁰⁸

68. These findings are further supported by other consistent statements of the DRC authorities. Prior to the Prosecution applying for an arrest warrant, it checked the status of any investigation with the DRC authorities, who confirmed the scope of their domestic investigation and clarified that they were not investigating and did not intend to investigate the Bogoro incident.¹⁰⁹ The DRC authorities re-confirmed this fact after the Defence Admissibility Challenge¹¹⁰ and at the hearing held on 1 June 2009.¹¹¹ Furthermore, after the hearing, the DRC authorities filed a written record of their position, which states that “all of the factors taken together show that the DRC was unable genuinely to investigate the crimes at Bogoro [...] Thus if there was no investigation, it is self-evident that no prosecution could have been commenced”. The DRC concluded, “The Bogoro case has not been the subject of any proceedings opened in the DRC, and falls fully within the jurisdiction

¹⁰⁸ Decision, para. 93.

¹⁰⁹ Annex I to Prosecution Response.

¹¹⁰ Annex J to Prosecution Response.

¹¹¹ See paras. 27-28, above. See further ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, pp. 78-81, 85-86, 90, 93-94.

of the ICC, and the Congolese judicial authorities have to date taken no procedural steps of any kind in regard to it.”¹¹²

69. The Trial Chamber also provided reasons for considering that the only two documents in the dossier which mentioned Bogoro did not displace these clear statements and demonstrate that the DRC authorities were indeed investigating the case. When assessing the relevance of the Prorogation Document of 2 March 2007,¹¹³ the Chamber considered that it was not decisive on the basis of “the significantly vague nature of the document in question, which is after all simply a request to extend provisional detention”.¹¹⁴ The only other document to mention Bogoro, a passing reference volunteered by the Appellant in a record of interview, “does not constitute evidence to the effect that the judicial authorities of the DRC were conducting an investigation into the events under consideration by the Pre-Trial Chamber.”¹¹⁵ The Appellant has not demonstrated an error in the Trial Chamber’s assessment of this evidence.

70. These findings of the Trial Chamber, supported by ample and clear evidence, show that the Chamber was correct in concluding in substance that the DRC authorities had not investigated the case against the Appellant, and that therefore the case was admissible.

(iii) The Trial Chamber correctly based its finding of admissibility on the case before it

71. The Prosecution notes that on a number of occasions the Appellant attempts to dissociate the question of admissibility from the specific case before the Court (or indeed any case in particular), and attempts to present these concepts in the abstract. The Appellant argues, for example, that “the DRC was both

¹¹² ICC-01/04-01/07-1189-Anx-tENG, 16 July 2009.

¹¹³ Decision, paras. 70-72.

¹¹⁴ Decision, para. 71.

¹¹⁵ Decision, para. 71.

willing and able to exercise jurisdiction over Mr. Katanga to prosecute and try him in the DRC”.¹¹⁶ However the question in relation to admissibility is not whether a State can exercise jurisdiction over an accused person in general terms. Rather, the language of Article 17(1) makes it clear that a determination of admissibility is based on whether “[t]he case is being investigated or prosecuted” (emphasis added); not what the national authorities may be doing in relation to other matters.

72. As the Prosecution explained in its submissions to the Trial Chamber, “case” in Article 17(1) must be interpreted in a consistent manner. The Statute explicitly links the admissibility of a case with the same conduct test, through Article 17(1)(c) and the conduct-specific requirements of *ne bis in idem* (article 20(3)).¹¹⁷

73. In accordance with this reasoning, the Chamber considered whether the case before this Court was being investigated or prosecuted by the DRC authorities, as required by the Statute.¹¹⁸ Although the Trial Chamber stated that there was no need to formally rule on the “same conduct test”,¹¹⁹ the reasoning and findings of the Chamber show that in practice it accepted and applied that test - consistent with the jurisprudence of the Court.¹²⁰

¹¹⁶ Appeal Brief, para 86. See also paras 72, 79, 102

¹¹⁷ See Prosecution Response, paras. 68-74. As the Prosecution argued (Prosecution Response, paras. 71, 73), the definition of a ‘case’ must be applied consistently throughout article 17, since the concept of what is a case cannot change under each limb of the provision. To interpret “case” as meaning something different in Article 17(1)(a) and (b), as opposed to Article 17(1)(c), would lead to inconsistent, even absurd, results. Any other interpretation to “case” would mean that if a person has been investigated, but not prosecuted, for different but similar conduct (see Admissibility Challenge, paras. 44-47; Prosecution Response, paras. 90-92) then the Court could be prevented from exercising its jurisdiction as the case could be inadmissible under Article 17(1)(b); however if the person had actually been tried for such similar conduct, then the case could be admissible (as it is not the “same conduct”, as required by Articles 17(1)(c) and 20(3)). The Rules also confirm that the focus of an admissibility determination must be the same conduct being tried before the ICC – Rule 51 provides an express and limited role for the Court to consider the investigation and prosecution of similar conduct. National cases regarding similar conduct are only relevant to provide the context in which the Court determines whether national proceedings regarding the case before it are genuine. The investigation of other conduct, albeit similar, cannot render a case inadmissible in its own right.

¹¹⁸ Article 17(1) provides that “the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted” (emphasis added). See further Prosecution Response, paras. 60-74.

¹¹⁹ Decision, para. 95.

¹²⁰ See e.g. *Prosecutor v. Lubanga*, Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-

74. The Trial Chamber primarily relied on the DRC authorities' confirmation that they "had not initiated any investigation against Germain Katanga in relation to the attack on Bogoro on February 2003".¹²¹ The Trial Chamber also dismissed the relevance of the *audition* in which the Appellant himself referred to Bogoro, explaining that it "does not constitute evidence to the effect that the judicial authorities of the DRC were conducting an investigation into the events under consideration by the Pre-Trial Chamber":¹²² That statement again linked its assessment to the events or conduct that constitute this case. The Prorogation Document of 2 March 2007 was similarly dismissed in part because it did not specify which one of multiple attacks on Bogoro it might relate to.¹²³ The Trial Chamber further recalled that the Prosecution had verified the significance of this document with the DRC authorities, who had "assured [the Prosecution] that they were not investigating the Bogoro incident of 24 February 2003" and that this was "confirmed by the representatives of the DRC at the hearing of 1 June 2009".¹²⁴

75. The Chamber finally referred a number of times to whether the DRC authorities were investigating "this case" or "a particular case".¹²⁵ As the Prosecutor demonstrated in its submissions before the Trial Chamber, "case"

01/06-8-Corr, 24 February 2006, para. 21; *Prosecutor v. Harun and 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. Bemba*, 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. Kony et al*, 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.

¹²¹ i.e. in relation to the same conduct which forms the basis of this case. Decision, paras. 92-93 (emphasis added).

¹²² Decision, para. 71 (emphasis added).

¹²³ Decision, para. 71. This conclusion was reached despite the Chamber's finding that the document did refer to the Accused and to attacks in Bogoro during the relevant time period. Nevertheless, the Chamber considered that it was too vague and that Bogoro was attacked several times between 2002 and 2005. Considering the lack of corroborating evidence, it is reasonable to conclude that the Chamber found that the document did not refer to the attack allegedly led by the Accused on 24 February 2003, i.e. the same person and the same conduct.

¹²⁴ Decision, para. 69 (emphasis added).

¹²⁵ Decision, paras. 90, 95. The Trial Chamber does examine the potential general implications of its ruling in para. 88: "Even assuming that investigations had been underway in a State against an accused person for crimes wholly identical to those which are the subject of a warrant". However, the fact that this is contemplated only in the hypothetical demonstrates that it was not the case in the present proceedings.

has a well settled meaning, and can only mean the person charged for the conduct in question.¹²⁶

76. The Trial Chamber thus implicitly acknowledged and applied the same conduct test. This test is well founded in both the language and the object and purpose of the Statute, as the Prosecution has already demonstrated.¹²⁷ It has also been applied consistently and successfully by all Pre-Trial Chambers of this Court, as well as by the Trial Chambers (either implicitly or explicitly). There was no error in its decision.

(iv) The Trial Chamber's treatment of the declarations of the DRC authorities is consistent with the language of Article 17 and the object and purpose of the Statute

77. Considering the nature of the Trial Chamber's findings – that the assessment was in substance whether the State was conducting any investigation or prosecution of the case – it was entirely appropriate for the Chamber to give substantial weight to the DRC's unambiguous declaration that it was not investigating or prosecuting the Appellant for the attack on Bogoro.

78. The Prosecution agrees that the Court makes the ultimate determination of whether or not a case is admissible, and that "it cannot be in the hands of the State to determine its willingness".¹²⁸ The Court may look at the motives and capabilities of domestic proceedings to ensure that non-genuine proceedings do not result in substantive impunity. However the Court can neither force a State to investigate or prosecute, nor can it create national proceedings. The admissibility provisions do not empower the Court to refuse to take up jurisdiction because it believes a State could or should have.

79. Thus if a State claims that it is investigating or prosecuting the case, and the Chamber is called upon to determine whether that State is nevertheless

¹²⁶ See Prosecution Response, paras. 50-96.

¹²⁷ See Prosecution Response, paras. 56-67, 83-86.

¹²⁸ Appeal Brief, para. 92.

unwilling or unable to do so, a Chamber may choose not to show deference to the submissions of the State regarding its willingness. However, that is not the scenario which faced the Trial Chamber in this case. While the State is not the final arbiter of whether it is genuinely willing or able, the Court must give substantial weight to a declaration by a State that no domestic proceedings exist. While such a declaration might not be conclusive in the situation where clear evidence proves that domestic proceedings were underway,¹²⁹ in this case the statements of the national authorities were corroborated by facts and documentation showing a lack of activity by the DRC authorities,¹³⁰ as well as by the lack of any challenge to the admissibility of this case by the DRC.¹³¹

80. An ICC refusal to take up jurisdiction because it concludes that a State could or should have investigated or prosecuted could lead to a stand-off: both the State and the ICC refusing to prosecute; the suspect enjoying impunity; and victims being denied justice.¹³² This is just the kind of situation the Statute is designed to avoid. As noted by the Trial Chamber, the scenario whereby the Court acts if the State is not addressing the case¹³³ “fully respects the drafters’ intention ‘to put an end to impunity’”.¹³⁴

81. Furthermore, the Decision does not, as the Appellant argues, allow a State to “transfer cases to the ICC” in order to avoid its responsibilities to prosecute international crimes.¹³⁵ While a State may refer a situation, it may not refer or transfer specific cases. Furthermore, situations and cases are selected by the Prosecution in accordance with the statutory scheme. The fears which the

¹²⁹ See e.g. Expert Paper, para. 64.

¹³⁰ See e.g. Prosecution Response, paras. 3, 15, 49-50, 109.

¹³¹ Contrast Appeal Brief, para. 78.

¹³² The Appellant tries to cast this as an “unconditional right not to prosecute” (Appeal Brief, para. 64). This is simply not correct. Regardless of whether a decision by a State not to prosecute when the ICC is proceeding complies with its other obligations to bring to justice perpetrators of international crimes, this could only apply in those limited cases that the ICC does take up, and could never absolve the State of the obligation to prosecute cases generally.

¹³³ Unless, as noted by the Chamber, the person has already been tried or the case is not of sufficient gravity – see Decision, para. 81.

¹³⁴ Decision, para. 77-78.

¹³⁵ Appeal Brief, para. 66.

Appellant seeks to create are thus misplaced. Rather, the manner in which the Statute operates is that if the State is not investigating a case the ICC may take action, regardless of the reasons for the inactivity of the domestic authorities.

82. The preference in accordance with the statutory scheme is for States to deal with these cases domestically¹³⁶ The Prosecution thus works with States to respect and encourage national proceedings. But the Statute imposes also the duty on the ICC to act when there is an absence of national proceeding in relation to a particular case. The principle of complementarity can neither be applied to force national proceedings, nor can it be applied to effectively perpetuate impunity.¹³⁷ To allow the admissibility provisions to operate in the manner suggested by the Appellant would run contrary to the object and purpose, as well as the plain terms, of the Statute.

(d) The remaining arguments raised by the Appellant are irrelevant and disclose no error in the Decision

83. Given that in substance, the admissibility of this case is based on the fact that it was not being investigated or prosecuted by the DRC authorities, any alleged error in the definition of unwillingness or the approach to inability is not “material”:¹³⁸ the ultimate finding of admissibility would have been the same. To the extent that the Trial Chamber went beyond the findings which were strictly necessary for the determination that the case was admissible, then even if the Appellant demonstrated an error, this would be a harmless one, incapable of impacting on the outcome of the Decision.

¹³⁶ Appeal Brief, para. 66-67.

¹³⁷ As Holmes states, the system of complementarity may have been intended to “reinforce the primary obligation of States to prevent and prosecute [international crimes]”, but “[a]t the same time, the system would create a mechanism through a permanent international criminal court, to fill the gap where States could not or failed to” address crimes domestically. J. T. Holmes, “The principle of complementarity”, in R. Lee (ed.) *The International Criminal Court- The making of the Rome Statute* (1999), pp. 73-74.

¹³⁸ Appeal Brief, para. 72.

(i) The interpretation of “unwilling” and “unable” in Article 17(2) and (3) are irrelevant to the case at hand (Third and Fourth Grounds of Appeal)

84. The Prosecution submits that the Appellant’s contention that the Trial Chamber misinterpreted Article 17(2)¹³⁹ is irrelevant. As noted above, the case was found inadmissible because it was not being investigated or prosecuted by the national authorities.¹⁴⁰

85. Nor does the Appellant’s claim that the Trial Chamber should have considered the case as one of inability,¹⁴¹ and that the case does not fulfil the inability criteria in Article 17(3),¹⁴² demonstrate any error in the Decision. Inability was not (and should not have been) the basis for the Decision.¹⁴³ Thus, given the DRC’s decision not to investigate or prosecute and its affirmative request that the ICC exercise jurisdiction, it is completely irrelevant whether the DRC system was able to prosecute the Appellant.¹⁴⁴ The Prosecution further notes that the report relied upon by the Appellant to illustrate the capacity of the DRC authorities does not, in any event, support his argument.¹⁴⁵

¹³⁹ e.g. Appeal Brief, para. 78; also Appeal Brief paras 54-59.

¹⁴⁰ Unwillingness and inability, as defined in Articles 17(2) and (3), only come into play when the Court is assessing whether existing purported national proceedings are genuine. Thus, regardless of the Trial Chamber’s approach to Article 17(2) and (3), the case would still have been found admissible as the case was not being investigated or prosecuted by the national authorities: there were no national proceedings which the State could be judged as willing or able in relation to. Thus, in contrast to the submission of the Appellant, on the basis of the evidence before it the Trial Chamber could not possibly “have come to a different conclusion on admissibility and found that the DRC was willing to prosecute Mr Katanga in the DRC” in relation to this case – Appeal Brief, para. 72.

¹⁴¹ Appeal Brief, paras. 77, 79.

¹⁴² Appeal Brief, paras. 80-86.

¹⁴³ As the Prosecution set out above, the Appellant misrepresented the situation when it asserted that the core of the parties’ debate was the inability, rather than the unwillingness, of the State. Appeal Brief, para. 75; see para. 66, above.

¹⁴⁴ As the DRC authorities expressly stated at the hearing, in fact “the DRC was unable genuinely to investigate the crimes at Bogoro”. They also acknowledged that certain structural deficits in its judicial system which underlay the referral of the situation to the Court continue to exist and present challenges to the effective investigation and prosecution of war crimes related cases in Ituri. ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, pp. 73 (lines 11-13), 78-79, 85-87, 88-89, 98 (lines 4-11); ICC-01/04-01/07-1189-Anx-tENG. The Appellant himself cited significant defects in the judicial process in the DRC as the basis for his recent request for a stay of the proceedings, *Prosecutor v Katanga*, ICC-01/04-01/07-1263, 2 July 2009, paras. 61-77.

¹⁴⁵ The report of *Advocats Sans Frontières* does not show that “the DRC has demonstrated to be perfectly able to try defendants of international crimes.” (Appeal Brief, para. 83). While the ASF report notes that some progress has been made in selected instances with respect to the prosecution of Rome Statute related offences, it

(ii) The Decision does not deny the Appellant the ability to challenge admissibility
(Fifth Ground of Appeal)

86. The Appellant's claim that the Trial Chamber's approach deprives the Accused of his right to effectively challenge admissibility is incorrect.¹⁴⁶ The Appellant retained and exercised his full rights to challenge admissibility.¹⁴⁷ There is a distinction, however, between the right to challenge and the certainty of prevailing. The Appellant did not succeed in this instance simply because the DRC was not investigating the case, and will not do so.

87. The Appellant asserts that as a result of the Trial Chamber's approach "when a State is unwilling to prosecute the accused, the latter can no longer substantively challenge admissibility (when it concerns 17(1)(a) and (b))."¹⁴⁸ This interpretation is not correct. The accused may still challenge admissibility if he wishes to do so. However, if the State is not investigating or prosecuting the case (or has not investigated it), then a challenge under Article 17(1)(a) or (b) will necessarily fail. This is not an interference with or a diminution of the rights of the accused. It is because a fundamental element for a successful challenge to admissibility has not been made out.

88. The Appellant cannot create a domestic investigation for the purposes of an admissibility challenge by asserting that there should be one. While the Appellant is correct that "it cannot be in the hands of the State to determine its willingness",¹⁴⁹ it certainly is exclusively in the hands of the State to initiate a national investigation or prosecution.

concludes that there is no consistent practice and that many serious challenges and deficiencies remain with respect to the capacity of the domestic judiciary to deal with these types of cases.

¹⁴⁶ Appeal Brief, para. 101.

¹⁴⁷ Pursuant to Article 19(2) in accordance with the relevant provisions such as articles 17, 19(4) and (6), 20, among others.

¹⁴⁸ Appeal Brief, para. 91.

¹⁴⁹ Appeal Brief, para. 92.

89. In attempting to substantiate his position, the Appellant misrepresents the content of the *Informal Expert Paper on the Principle of Complementarity in Practice* (“Expert Paper”) and its conclusions in respect of “burden sharing”.¹⁵⁰ The *Expert Paper* supports the approach taken in the Decision. It confirms that a State may decline to exercise its jurisdiction over a case, and that if it does so in favour of a prosecution by the ICC then this is consistent with the letter and spirit of the Rome Statute. The *Expert Paper* also affirms that when the State has not investigated or prosecuted the particular case, no finding of unwillingness or inability is required; the case is admissible before the ICC.¹⁵¹
90. Analysis of the comparative fairness of proceedings in domestic courts and international courts is irrelevant to the issue of admissibility. As the Appeals Chamber has ruled, the Court is not a global human rights monitoring body.¹⁵² The parameters of admissibility, set out in Article 17, are based on whether the national courts are acting and, if so, whether they are doing so genuinely. If the case does not fall within one of these provisions, it remains admissible before the Court. These assessments are not based on a strict comparison of national proceedings and those before the ICC. Nor is it relevant – or accurate

¹⁵⁰ Appeal Brief, paras. 95-97.

¹⁵¹ “In cases where no State has initiated an investigation, it will be clear on the facts that none of the criteria of Article 17(1)(a)-(c) are satisfied, and that the case is admissible. Thus, even if a challenge were raised, the outcome would be clear. There may even be situations where the admissibility issue is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution.” (*Informal expert paper: The principle of complementarity in practice* (“Expert Paper”), Annexed to the Defence Reply, ICC-01/04-01/07-1015-Anx, 1 April 2009, para. 59). While the *Expert Paper* correctly recognises that a self-referral or burden sharing does not deprive the suspect of his or her procedural right to challenge admissibility, it does not suggest that this would form the basis for a challenge to the notion of burden sharing itself: “For greater clarity, it may be reiterated that such arrangements do not purport to remove the procedural right of the accused to raise challenges to admissibility. However, in the clear absence of any investigation or prosecution by a State, an admissibility challenge on the grounds of complementarity would not have any merit.” (Expert Paper, para. 64).

“Article 17 does not require any branding of the State as “unable”, since there would be an absence of investigations and thus clear admissibility under Article 17” (Expert Paper, para. 61).

“it may be appropriate for the State concerned to simplify the admissibility proceedings by expressly acknowledging that it is not investigating or prosecuting particular cases, in favour of ICC jurisdiction. This does not entail any re-writing or alteration of the jurisdictional and admissibility regime of the Statute. Article 17 clearly provides for admissibility where a State is not investigating or prosecuting, and the express acknowledgement of the State merely simplifies the factual determination. Of course, such an acknowledgement cannot prejudice the principle of *ne bis in idem*.” (Expert Paper, para. 62).

¹⁵² ICC-01/04-01/06-772 OA4, 14 December 2006, para. 41.

– for Appellant to claim that his rights were violated by being brought before the ICC. They are also contrary to his previous position, expressed in January 2007 when he requested that the DRC authorities transfer his case to the ICC.¹⁵³

VI. Conclusion

91. The Prosecution submits that the Appellant has failed to demonstrate any error in the findings of the Trial Chamber which would warrant the Appeals Chamber to overturn the Decision and find that the case against the Accused is admissible. The Trial Chamber spoke of the “unwillingness” of the DRC authorities but in substance it found that the DRC authorities were not taking any action against the accused in relation to this case.

VI. Relief Requested

92. For the reasons set out above, the Prosecution respectfully requests that the Appeals Chamber uphold the Trial Chamber’s finding that the case against the Accused is admissible and dismiss the Grounds of Appeal.

93. As the Appellant himself concedes, the First Ground of Appeal caused no prejudice and did not impact on the outcome of the Decision in any way. The Appellant also has failed to demonstrate any error on the part of the Trial Chamber in relation to the Second, Third, Fourth and Fifth Grounds of Appeal. The Trial Chamber found that the DRC authorities were not investigating or prosecuting the Appellant for the crimes committed in the February 2003 attack on Bogoro, i.e. for the case which is before this Court. In light of the unequivocal statements of the DRC authorities, and the absence of

¹⁵³ Prosecution Response, para. 32, fn. 65; Admissibility Challenge, para. 11, ee, Annex ee2: *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.

any indication of investigative activities relating to Bogoro, this finding is unimpeachable.



Luis Moreno-Ocampo,
Prosecutor

Dated this 31st day of July 2009

At The Hague, The Netherlands