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THE APPEALS CHAMBER

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

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

Public Document

**Observations by the OPCV on the Document in Support of Appeal of the Defence
 for Germain Katanga against the Decision of the Trial Chamber on the Motion
 Challenging the Admissibility of the Case**

Source: Office of Public Counsel for Victims

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

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I. Procedural Background

1. On 10 February 2009, the Defence for Germain Katanga (the “Defence”) filed a motion *ex parte*, only available to the Defence, challenging the admissibility of the case *sub-judice* pursuant to article 19(2)(a) of the Rome Statute (the “Motion”).¹ Said Motion was reclassified as confidential at the request of Trial Chamber II (the “Trial Chamber”) and transmitted to the Prosecutor on 25 February 2009.²

2. A public redacted version of the Motion was filed on 11 March 2009.³ The Prosecution filed its response on 19 March 2009 (the “Response”),⁴ and the Defence filed a reply to said Response on 30 March 2009 (the “Reply”).⁵

3. On 16 April 2009, the Legal Representatives of the victims submitted their observations concerning the Motion.⁶ After having been granted an extension of time to file its observations,⁷ the Office of Public Counsel for Victims (the “OPCV” or “Office”), also acting as Legal Representative of victims, filed its observations on 28 April 2009.⁸

¹ See the “Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19(2) of the Statute”, No. ICC-01/04-01/07-891-Conf-Exp, 10 February 2009.

² See the «*Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve)*», No. ICC-01/04-01/07-943-Conf, 5 March, 2009, par. 2.

³ See the “Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19(2) of the Statute”, No. ICC-01/04-01/07-949, 11 March 2009.

⁴ See the “Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)”, No. ICC-01/04-01/07-968-Conf-Exp, 19 March 2009. The public redacted version of the Response was filed on 30 March 2009, No. ICC-01/04-01/07-1007.

⁵ See the “Defence Reply to “Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19(2)(a)”, No. ICC-01/04-01/07-1008-Conf-Exp. The public redacted version of said Reply was filed on 1 April 2009, No. ICC-01/04-01/07-1015.

⁶ See “*Représentation concernant la requête sur l'exception d'irrecevabilité introduite par la défense de M. Germain Katanga (art.19 du Statut de Rome)*», No. ICC-01/04-01/07-1058-Conf, 16 April 2009; «*Représentation des victimes a/0333/07 et a/110/08 sur l'exception d'irrecevabilité déposée par la Défense de M. Katanga (Règle 59-3 du Règlement de procédure et de preuve)*», No. ICC-01/04-01/07-1059-Conf, 16 April 2009; “*Observations des victimes quant à l'exception d'incompétence soulevée par la Défense de Germain Katanga dans sa requête du 10/2/2009*”, No. ICC-01/04-01/07-1060, 16 April 2009.

⁷ See the “Decision on the Application by the OPCV to extend the time limit for the submission of observations with regard to the admissibility proceedings”, No. ICC-01/04-01/07-1019-Conf., 3 April 2009.

⁸ See the “Observations of the OPCV on the Defence for Germain Katanga’s Motion Challenging the Admissibility of the Case, with one confidential *ex parte* OPCV only Annex and three Public Annexes”, No. ICC-01/04-01/07-

4. On 1 June 2009, the Trial Chamber held a hearing on the issue of the admissibility of the case against Germain Katanga, during which time a delegation of the relevant government authorities of the Democratic Republic of Congo (the “DRC authorities” or the “DRC”) was present and submitted oral arguments regarding its official position on the matter.⁹ On 4 June 2009, and at the request of the Trial Chamber,¹⁰ the Registrar filed in the record of the case the written version of the observations made by the DRC authorities during the 1 June 2009 hearing.¹¹

5. On 16 June 2009, the Trial Chamber filed its « *Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)* » (the “Impugned Decision”).¹²

6. On 22 June 2009, the Defence filed its “Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*’ ”.¹³ On 8 July 2009, the Defence filed its Document in Support of the Appeal referenced above (the “Defence Appeal”).¹⁴

7. On 10 July 2009, this Chamber rendered its “Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules

1082, 28 April 2009; “*Observations du BCPV sur l'exception d'irrecevabilité de l'affaire de la Défense de Germain Katanga avec une annexe confidentielle ex parte réservée au BCPV et trois annexes publiques*», No. ICC-01/04-01/07-1083, 28 April 2009.

⁹ See the Transcript of Hearing, No. ICC-01/04-01/07-T-65-ENG ET, 1 June 2009, p. 72, lines 3-25; pp. 73-80; p. 81, lines 1-20; p. 84, lines 4-9; p. 85; p. 86, lines 1-5, 22-25; p. 87, lines 1-22; p. 88, lines 7-25; p. 89, 1-17, 20-25; p. 90, lines 1-14; p. 93, lines 14-25; p. 94, lines 8-12; p. 96, lines 3-25; p. 97, lines 1-17, 23-25; p. 99, lines 1-7, 12-17; p. 100, lines 5-15; p. 101, lines 20-25; p. 102, p. 103, lines 1-22.

¹⁰ *Idem*, p. 84, line 11-17.

¹¹ See «*Transmission par le Greffier des observations écrites des autorités congolaises telles que présentées à l'audience du 1er juin 2009*», No. ICC-01/04-01/07-1189, 4 June 2009.

¹² See «*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire (article 19 du Statut)*» No. ICC-01/04-01/07-1213, 16 June 2009; «*Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)*», No. ICC-01/04-01/07-1213-tENG, 15 July 2009.

¹³ See the “Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*’”, No. ICC-01/04-01/07-1234, 22 June 2009.

¹⁴ See the “Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*’”, No. ICC-01/04-01/07-1279 OA8, 8 July 2009.

of Procedure and Evidence” (the “Directions”),¹⁵ wherein it ordered the DRC authorities, the Legal Representatives of Victims and the OPCV to file their observations to the Defence Appeal within ten days after notification of the Prosecution’s response thereto “*or, in the event that no response is filed, the effluxion of the time stipulated for that purpose.*”¹⁶ It further ordered that the Prosecution and Defence’s responses thereto be filed within four days of the notification of the last observations, or, if no or not all observations are filed, within the lapse of time given for that purpose.¹⁷

8. On 17 July 2009, the Legal Representatives of Victims a/0330/07 and a/0331/07 submitted their observations on the Defence Appeal.¹⁸

9. On 21 July 2009, the Registrar submitted a transmission to this Chamber¹⁹ of a letter the former received from the DRC authorities requesting that the Defence Appeal, the Impugned Decision, and this Chamber’s Directions, which had been previously notified to the DRC, be translated into French to enable the DRC authorities to submit their observations to the Defence Appeal.²⁰ Said letter also requests that the deadline for the submission of the DRC’s observations be changed to 10 days from the date of the DRC’s receipt of the above-mentioned documents in French.²¹ On 24 July 2009, the Registrar submitted a report to the Trial Chamber, notifying the latter of the transmission by the Registry to the DRC authorities of the original French version of the Impugned Decision.²²

¹⁵ See the “Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence”, No. ICC-01/04-01/07-1295 OA8, dated 10 July 2009 and notified on 13 July 2009.

¹⁶ *Idem*, par. 1(d).

¹⁷ *Idem*, par. 3.

¹⁸ See «*Observations des Représentants légaux des victimes a/0330/07 et a/0331/07 sur l’appel de la Défense de G. Katanga conformément à l’article 19(3) du Statut de Rome et la Règle 59(3) du Règlement de procédure et de preuve*», No. ICC-01/04-01/07-1318 OA8, dated 17 July 2009 and notified on 20 July 2009.

¹⁹ See the “Transmission by the Registrar of a letter received from the DRC authorities”, No. ICC-01/04-01/07-1326 OA8, dated 21 July 2009 and notified on 22 July 2009.

²⁰ *Idem*, Annex 1.

²¹ *Ibid.*

²² See «*Rapport du Greffier sur la notification des autorités de la RDC des « Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire (article 19 du Statut)*», No. ICC-01/04-01/07-1333, 24 July 2009, p. 4.

10. On 29 July 2009, the Legal Representatives for victim applicants a/0333/07 and a/0110/08 filed their "*Observations des Représentants légaux des victimes a/0333/07 et a/0110/08 sur l'appel de la Défense de G. Katanga conformément à l'article 19(3) du Statut de Rome et la Règle 59(3) du Règlement de procédure et de preuve, soit sur l'exception d'irrecevabilité déposée par la Défense*".²³

11. On 30 July 2009, the Prosecution submitted its "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*'" (the "Prosecution's Response").²⁴ The Prosecution's Response was notified to the OPCV on 3 August 2009.

12. On 31 July 2009, the Chamber issued further observations on the submissions of observations on the admissibility appeal, granting the DRC ten days from the notification in French of the Prosecution's Response to file its observations.²⁵

13. On 7 August 2009, the Legal Representatives for victims /0327/07, a/0329/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, 3/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08, a/0109/08, a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08, a/0035/08, a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, and a/0016/08, filed their « *Observations conjointes des*

²³ See «*Observations des Représentants légaux des victimes a/0333/07 et a/0110/08 sur l'appel de la Défense de G. Katanga conformément à l'article 19(3) du Statut de Rome et la Règle 59(3) du Règlement de procédure et de preuve, soit sur l'exception d'irrecevabilité déposée par la Défense*», No. ICC-01/04-01/07-1342 OA8, 29 July 2009.

²⁴ See the "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*'", No. ICC-01/04-01/06-1346-Conf. OA8, 30 July 2009.

²⁵ See the "Further directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence", No. ICC-01/04-01/07-1348 OA8, 31 July 2009.

*représentants légaux des victimes représentées par Me Jean MULAMBA, Me Carine BAPITA, Me Hervé DIAKESE sur l'appel sur la décision d'exception d'irrecevabilité interjeté par défense de Germain KATANGA ».*²⁶

14. The OPCV, acting as legal representatives of victims a/0148/08, a/0520/08, a/0524/08, a/0053/09, a/0082/09, a/0112/09, a/0114/09, a/0117/09, a/0120/09, a/0158/09, a/0163/09, a/0164/09, a/0165/09, a/0166/09, a/0167/09, a/0168/09, a/0169/09, a/0202/09, a/0203/09, a/0205/09, a/0206/09, a/0207/09, a/0233/09, a/0250/09, a/0251/09, a/0252/09, a/0253/09, a/0255/09, a/0256/09, a/0257/09, a/0279/09, a/0280/09, a/0281/09, a/0282/09, a/0283/09, a/0284/09, a/0285/09, a/0286/09, a/0288/09, a/0290/09, a/0291/09, a/0297/09, a/0305/09, a/0308/09, a/0309/09, a/0343/09, a/0353/09, a/0359/09, a/0360/09, a/0361/09, a/0380/09, a/0389/09, and a/0393/09,²⁷ submits the following observations on the Document in Support of the Appeal lodged by the Defence for Germain Katanga against the Trial Chamber's decision "*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*".

²⁶ See «*Observations conjointes des représentants légaux des victimes représentées par Me Jean MULAMBA, Me Carine BAPITA, Me Hervé DIAKESE sur l'appel sur la décision d'exception d'irrecevabilité interjeté par défense de Germain KATANGA* », No. ICC-01/04-01/07-1354, 7 August 2009 which was filed before Trial Chamber II and should have been filed before the Appeals Chamber.

²⁷ See «*Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les victimes a/0140/08, a/0142/08, a/0145/08, a/0148/08, a/0155/08, a/0210/08, a/0212/08, a/0213/08, a/0214/08, a/0216/08, a/0281/08, a/0282/08* » ,No. ICC-01/04-01/07-945, 6 March 2009; «*Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les victimes a/0520/08, a/0524/08, a/0527/08, a/0053/09, a/0067/09 à a/0086, a/0112/09 a a/0120/09 et a/0122/09 à a/0128/09* » , No. ICC-01/04-01/07-947, 9 March 2009. The number of victim applicants appointed by the OPCV by the two previous decisions was later amended by the Registry in its "*Amendement à la désignation du Bureau conseil public pour les victimes pour représenter les demandeurs a/0140/08, a/0142/08, a/0145/08, a/0155/08, a/0210/08, a/0212/08, a/0213/08, a/0214/08, a/0216/08, a/0281/08, a/0282/08, a/0527/08, a/0067/09, a/0068/09, a/0069/09, a/0070/09, a/0071/09, a/0072/09, a/0073/09, a/0074/09, a/0075/09, a/0076/09, a/0077/09, a/0078/09, a/0080/09, a/0081/09, a/0083/09, a/0084/09, a/0085/09, a/0086/09, a/0113/09, a/0115/09, a/0116/09, a/0118/09, a/0119/09, a/0122/09, a/0123/09, a/0124/09, a/0124/09, a/0125/09, a/0126/09, a/0137/09, a/0128/09* » , No. ICC-01/04-01/07-1114, 7 May 2009; «*Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les demandeurs a/0158/09, a/0163/09, a/0164/09, a/0165/09, a/0166/09, a/0167/09, a/0168/09, a/0169/09, a/0202/09, a/0203/09, a/0205/09, a/0206/09, a/0207/09, a/0233/09, a/0250/09, a/0251/09, a/0252/09, a/0253/09, a/0255/09, a/0256/09, a/0257/09* », No. ICC-01/04-01/07-1113, 7 May 2009; «*Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les demandeurs a/0279/09, a/0280/09, a/0281/09, a/0282/09, a/0282/09, a/0284/09, a/0285/09, a/0286/09, a/0288/09, a/0290/09, a/0291/09, a/0297/09, a/0305/09, a/0308/09, a/0309/09* » No. ICC-01/04-01/07-1142, 18 May 2009; «*Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les demandeurs a/0343/09, a/0353/09, a/0359/09, a/0360/09, a/0361/09, a/0380/09, a/0389/09, et a/0393/09* » , No. ICC-01/04-01/07-1164, 22 May 2009.

II. Observations on behalf of victims represented by the OPCV

15. The Defence raises five grounds in support of its appeal, to wit, 1) that the Trial Chamber committed error in interpreting the term “commencement of the trial” under article 19(4) of the Rome Statute and in finding that the challenge to admissibility by the Defence was filed out of time, 2) that the Trial Chamber committed error in finding that the Prosecutor should have brought to the attention of the Pre-Trial Chamber the Bogoro and other related documents, 3) that the Trial Chamber committed error in its interpretation of the term “unwillingness” pursuant to article 17(2) of the Rome Statute and the principle of complementarity, 4) that the Trial Chamber erroneously confused the concepts of “unwillingness” and “inability”, and 5) that the Trial Chamber's interpretation of “unwillingness” deprived the accused of a real and effective right to challenge admissibility.

16. The Office argues that none of the grounds that the Defence raised demonstrate the existence of an error mandating reversal of the Impugned Decision. The OPCV supports the arguments put forward by the Office of the Prosecutor in its Response and will provide additional arguments demonstrating that the appeal is unfounded and should be dismissed.

The first ground of appeal: the interpretation of the term “commencement of trial” and the finding that the admissibility challenge was filed out of time has no impact on the Impugned Decision

17. The Office concurs with the Prosecution’s argument that the first ground of appeal has no impact on the Impugned Decision, as the Defence concedes, and therefore it is not addressed in these observations.

The second ground of appeal: the Trial Chamber did not commit error in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents

18. The Office also concurs with the Prosecution's arguments on the second ground of appeal.

The third, fourth and fifth grounds of appeal: the finding on admissibility by the Trial Chamber was correct

19. The third, fourth and fifth grounds of appeal are strictly linked and relate to the finding on admissibility by the Trial Chamber. The Office concurs once again with the Prosecution's argument and it will address in these observations additional arguments demonstrating that the Trial Chamber's decision is not vitiated.

The Trial Chamber's interpretation of unwillingness is encompassed within Article 17 of the Rome Statute

20. One of the main findings by the Trial Chamber in its Impugned Decision²⁸ and that addresses the merits of the latter's admissibility challenge concerns a second form of "unwillingness" which, while not expressly listed in article 17 of the Rome Statute, is triggered when a State actively chooses not to investigate or prosecute a person before its national courts, *"but has nevertheless every intention of seeing that justice is done [. . .]"*²⁹

21. In its attempt to rebuke the Trial Chamber's finding, the Defence argues that article 17(2) of the Rome Statute, which lists three specific scenarios of unwillingness,

²⁸ See the "Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire'", *supra* note 14, paras. 52-61.

²⁹ See the «Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)», *supra* note 12, par. 77.

is an exhaustive list,³⁰ and it further cites some legal literature in support thereof.³¹ In particular, the Defence claims that *“it is evident from the manner in which Article 17(2) is phrased that this is a self-contained regime leaving no room for discretion to rely on forms of unwillingness other than those described in (a), (b), or (c) or Article 17(2).”*³²

22. The Office begs to differ from this textual interpretation. In analysing the wording of article 17(2)’s chapeau, it is significant that the drafters used the word “consider” when discussing the Court’s mandate *vis à vis* the three examples of unwillingness listed in sub-paragraphs (a) to (c).³³ The word “consider”, as opposed to “determine” or “find”, connotes a choice or discretion to be left to the person(s) contemplating the matter in question.³⁴ Furthermore, it is just as relevant that no limiting words and expressions such as “only”, “exclusively”, or “limited to” were used in the chapeau of article 17(2) of the Rome Statute as a prelude to listing said three examples of unwillingness. Indeed, *“the word ‘consider’ [. . .] has been interpreted as having been deliberately chosen in order not to tie the Court’s hands in respect to the criteria but to allow it to take other factors into consideration”*³⁵ (emphasis added). In particular, a member of the Canadian delegation who took part in the preparatory works for the Rome Statute has stated that *“the test arising from [the unwillingness provision in article 17(2)] is a rigorous one, although the list of criteria should not be interpreted as a closed list: the open-ended wording ‘shall consider whether’ was deliberately*

³⁰ See the “Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire’”, *supra* note 14, par. 57.

³¹ *Idem*, paras. 58-60.

³² *Idem*, par. 57.

³³ Article 17(2) of the Rome Statute states: *“In order to determine unwillingness in a particular case, the Court shall consider, [. . .] whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”*

³⁴ Oxford English Dictionary gives the following definition for the word “consider”: to view or contemplate attentively, to survey, examine, inspect, scrutinize. Available at the following address: http://dictionary.oed.com/cgi/entry/50047857?single=1&query_type=word&queryword=consider&first=1&max_to_show=10 (last visited 27 July 2009).

³⁵ See BENZING (M.), “The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity”, Max Planck UNYB 7 (2003), p. 604.

*chosen, as opposed to language imposing a fixed requirement (e.g. 'means' or 'must conclude that'), thus indicating that terms such as 'intent to shield' are illustrative."*³⁶

23. Turning to the drafting history of article 17 of the Rome Statute sheds further light on the reasons behind including the examples listed under article 17(2). Indeed, certain delegations argued for more stringent and objective criteria to be added to the text of the Rome Statute, such as "absence of good faith" and "unconscionable delay" in the conduct of the national proceedings, since they felt it would be a useful tool in providing more clarity to the Court's assessment of when said proceedings might be ineffective or for the purpose of shielding a person.³⁷ This drafting history thus points to an interpretation of the examples listed under article 17(2) of the Rome Statute not as limiting or exclusive in the determination of unwillingness, as the Defence would argue, but rather as clarifying and illustrative.

24. The Court's own jurisprudence is another source to examine with regard to the interpretation of "unwillingness" pursuant to article 17 of the Rome Statute. In granting the Prosecution's applications for the issuance of warrants of arrest for the leaders of the Lord's Resistance Army in the Uganda Situation, Pre-Trial Chamber II took cognizance of the Government of Uganda's 2004 letter of referral to the Court, in which the Government stated that it had not conducted and did not intend to conduct national proceedings against those individuals responsible for the alleged crimes of concern.³⁸ The Chamber granted the Prosecution's applications, stating that *"the case appear[ed] to be admissible"*,³⁹ without elaborating further.⁴⁰ It is thus fair to

³⁶ See ROBINSON (D.), "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", EJIL (2003), Vol. 14, No. 3, p. 500.

³⁷ See Summary of the Proceedings of the Preparatory Committee during the Period 25 March – 12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, p.33, par. 120.

³⁸ See the "Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005", No. ICC-02/04-01/05-53, unsealed on 13 October 2005, par. 37; "Warrant of Arrest for Vincent Otti", No. ICC-02/04-01/05-54, unsealed on 13 October 2005, par. 37; "Warrant of Arrest for Okot Odhiambo", No. ICC-02/04-01/05-56, unsealed on 13 October 2005, par. 27; "Warrant of Arrest for Dominic Ongwen", No. ICC-02/04-01/05-57, unsealed on 13 October 2005, par. 25; "Warrant of Arrest for Raska Lukwiya", No. ICC-02/04-01/05-55, unsealed on 13 October 2005, par. 25.

³⁹ *Idem*, paras. 38, 38, 28, 26, 26, respectively.

⁴⁰ In October 2008, Pre-Trial Chamber II initiated admissibility proceedings *proprio motu* under article 19, after an Annexure to the Agreement on Accountability and Reconciliation signed between the Government of Uganda

say that, when examining the warrant of arrest applications, Pre-Trial Chamber II assumed at face value the validity of the assertion expressed by the Government of Uganda that it was unwilling or unable to proceed with a prosecution against the suspects, and relied on the Government's declaration for a determination of admissibility.⁴¹ Therefore, there is already-established judicial precedent for the reliance by the Trial Chamber on the DRC's assertions regarding its unwillingness to proceed with a prosecution against Germain Katanga for the alleged attack on Bogoro on 24 February 2003.

25. Analysing the matter from a purely common sense perspective, the interpretation of the listed scenarios under article 17(2) of the Rome Statute as exemplary, rather than exhaustive, is also the most logical reading thereof. Said examples (sub-paragraphs (a) through (c)) all involve circumstances in which a State is attempting to shield a person from criminal liability, by conducting sham proceedings, by unjustifiably delaying those proceedings, or by compromising their impartiality. These scenarios can be said to be less than obvious because, on their face, they give the appearance that the State has taken steps to investigate or prosecute the individual accused of a crime otherwise within the jurisdiction of the Court. Therefore, it is reasonable that the Rome Statute would provide the Court with specific criteria in those circumstances to enable it to pierce through the State's veil in order to uncover a stealthy unwillingness by the latter to prosecute said individual.

and the Lord's Resistance Army/Movement on 19 February 2008 provided for the establishment of a special division of the High Court of Uganda, assigned the task of prosecuting those alleged to have committed serious crimes during the conflict in that country, thereby triggering the Chamber's initiation of admissibility proceedings. "Decision initiating proceedings under article 19, requesting observations and appointing counsel for the Defence", ICC-02/04-01/05-320, 21 October 2008, pp. 6-7. The Chamber eventually decided that the proceedings before the Court against all defendants in the *Kony et al.* case were admissible. See "Decision on the admissibility of the case under article 19(1) of the Statute", No. ICC-02/04-01/05-377, 10 March 2009.

⁴¹ See SCHABAS (W.), *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press (3rd ed.), 2007, p. 180.

26. However, when a State's unwillingness to investigate or prosecute an individual is obvious, as for example, when the State refers the matter to the Court and makes assertions that it will not be pursuing an investigation or prosecution against an individual for a crime under the jurisdiction of the Court, it would be an illogical conclusion to rule the case inadmissible before the Court simply because the unwillingness by the State is evident, as opposed to covert. As the Prosecution's Informal Expert Paper explained, "*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.*"⁴²

27. Furthermore, one can argue that national government assertions of unwillingness, as opposed to inability, are more apt to being taken at face value, as was the case in Pre-Trial Chamber II's Warrant of Arrests Decisions in the *Kony et al* case,⁴³ since willingness is *a priori* a subjective, sometimes policy-based governmental decision, the capacity to determine the presence of which is best in the hands of the referring national authorities themselves. As the Trial Chamber correctly stated, "[t]he Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute in a particular case"⁴⁴ (emphasis added).

The Trial Chamber's interpretation of unwillingness is in line with the Complementarity Principle

28. According to the Defence, the Trial Chamber erred in finding that its interpretation of unwillingness under article 17 of the Rome Statute adheres to the drafters' intention to put an end to impunity as well as to the principle of complementarity, because, "*if States are granted an unconditional right not to prosecute,*

⁴² See Informal Expert Paper, The Principle of Complementarity in Practice, p. 18, par. 59, available at the following address: <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> (last visited 31 July 2009).

⁴³ *Supra* note 38.

⁴⁴ See the «Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)», *supra* note 12, par. 78.

*this would seriously jeopardize any encouragement for States to prosecute domestically and thereby endanger the correct application of the principle of complementarity.”*⁴⁵

29. The Office respectfully submits that the Defence’s apprehension that States will all automatically opt not to prosecute their own criminal cases in order to refer these to the Court is wholly unfounded, and underestimates the plethora of reasons - political, diplomatic, judicial, and social - that national authorities have to seek justice at home for their own people. Moreover, the Defence’s fears discount other admissibility prongs that must still be met under article 17(1) of the Rome Statute in order for a case to be admissible before the Court, such as the gravity of the alleged crimes and the “*ne bis in idem*” principle.

30. The Trial Chamber emphasised in the Impugned Decision that the complementarity principle “*is designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so. As a holder of this right, the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge.*”⁴⁶ Thus, the primary right of a State to prosecute its own nationals, when it wishes to do so, remains intact within the framework of the Trial Chamber’s interpretation of “unwillingness” and the complementarity principle.

31. The Trial Chamber’s reasoning that a State has a right to waive its own jurisdiction and a challenge to the admissibility of a case before the Court is not a new concept, and in fact was discussed during the Preparatory Committee of August 1997.⁴⁷ The possibility of waiver was not considered at the Rome Conference because

⁴⁵ See the “Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire*’”, *supra* note 14, par. 64.

⁴⁶ See the «Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, *supra* note 12, par. 78.

⁴⁷ See 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*, The Hague/London/Boston: Kluwer Law International, 1999, p. 78.

many delegations felt it should be addressed in the Rules of Procedure and Evidence.⁴⁸ It was, however, included in a footnote to the Draft Statute, as follows:

Article 35

Issues of admissibility

[On application of the accused or at the request of [an interested State] [a State which has jurisdiction over the crime] at any time prior to [or at] the commencement of the trial, or of its own motion],¹ the Court shall determine whether a case before it is inadmissible.²

[. . .]

[Footnote] 2 The present text of article 35 is without prejudice to the question whether complementarity-related admissibility requirements of this article may be waived by the State concerned.⁴⁹

(emphasis added)

32. The following statements made during the preparatory works and meetings leading up to the Rome Statute echo the Trial Chamber's conclusion that a decision by a State to refer a case to the Court "*if it considers it opportune to do so*"⁵⁰ or if it "*decide[s] not to carry out an investigation or prosecution of a particular case*"⁵¹, is a valid one that should be sufficient to waive admissibility challenges on grounds of willingness.

33. In its General Arguments Relating to an International Criminal Court, the International Law Commission (the "ILC") stated that "[s]ituations where an international trial system might prove useful include the following: [. . .] cases where the

⁴⁸ *Ibid.*

⁴⁹ See Working Group on Complementarity and Trigger Mechanism, Preparatory Committee, UN Doc. A/AC.249/1997/WG.3/CRP.2, 13 August 1997, p. 1, footnote 2. See also Decisions Taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, UN Doc. A/AC.249/1997/L.8/Rev.1, 14 August 1997, p. 10 footnote 17; Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 41, footnote 53; Draft Statute for the International Criminal Court Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, 2 April 1998, p. 31, footnote 36; Draft Statute for the International Criminal Court, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 40, footnote 38.

⁵⁰ See the « Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute) », *supra* note 12, par. 80.

⁵¹ *Ibid.*

alleged criminals, who were formerly members of the Government of a particular State, committed the alleged offences in that capacity, and the successor Government is unwilling or unable to try them, for whatever reason, or would prefer an international trial because of its greater legitimacy in the circumstances"⁵² (emphasis added). The ILC also noted that "it should be enough for the State lodging the complaint about a crime to be able to express its readiness to hand the presumed perpetrator to the court, which would be free to engage in proceedings or not."⁵³ The International Commission of Jurists also maintained in their Third ICJ Position Paper that, "where States parties have consented to the subject-matter jurisdiction in questions, they should be able to submit their complaints with no further prerequisites"⁵⁴ (emphasis added). The Lawyers Committee for Human Rights analogously advised that "[the state complaint mechanism] [. . .] *should be simplified. In keeping with the proposed regime of inherent jurisdiction, any state party to the statute should be able to lodge a complaint alleging that one of the three core crimes has been committed. No further conditions should be imposed.*"⁵⁵ The Prosecution's Informal Expert Paper also contemplated "situations where the admissibility issue [would be] further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation or prosecution."⁵⁶

34. Describing these concerns in a broader context, a commentator wrote that, "it would seem inconceivable for any court to create procedures which effectively tie its hands

⁵² See Report of the Working Group on the Question of an International Criminal Jurisdiction, Yearbook of the International Law Commission, Vol. II, Part II, UN Doc. A/CN.4/SER.A/1992/Add.I, 1992, p. 62, par. 28.

⁵³ See Draft Statute for an international criminal tribunal and commentaries thereto, Yearbook of the International Law Commission, Vol. II, Part II, UN Doc. A/CN.4/SER.A/1993/Add.I, 1993, p. 17, par. 69.

⁵⁴ See International Commission of Jurists, Third ICJ Position Paper, 1 August 1995, p. 39, available at the following address: <http://www.iccnw.org/documents/1PrepCmt3rdPositionPaperICJ.pdf> (last visited 7 August 2009).

⁵⁵ See Lawyers Committee for Human Rights, The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor, 1 July 1997, p. 5, available at the following address: <http://iccnw.org/documents/LCHRTTriggerMechanism.pdf> (last visited 7 August 2009). See also Lawyers Committee for Human Rights, "Establishing an International Criminal Court – Major Unresolved Issues in the Draft Statute, wherein the Lawyers Committee stated that, "[h]aving in mind the proposed narrowing of the court's subject-matter jurisdiction to the three core crimes and the suggested elimination of the state consent regime, [it] recommends that the trigger mechanism be accordingly simplified. Any state party to the statute should be able to file a complaint alleging that a crime within the court's jurisdiction has been committed if the court is to be an effective mechanism for dispensing justice." 1 May 1998, p. 31, available at the following address: <http://www.iccnw.org/documents/LCHRUNresolvedIssues.pdf> (last visited 7 August 2009).

⁵⁶ See Informal Expert Paper, *supra* note 42, p. 18, par. 59.

and prevent it from fulfilling the objectives for which it was created.”⁵⁷ He went on to warn that “if the complementarity regime proves to be an insurmountable hurdle in bringing perpetrators to justice, then changes to the Rules, perhaps, even the Statute, will have to be considered and implemented. The flexibility built into the Statute and the Rules will, hopefully, make this scenario unnecessary.”⁵⁸

35. In yet other commentaries of those involved with the drafting of the Rome Statute, it appears that their main concern *vis à vis* States’ referrals was to ensure that sufficient information was provided in a referring State’s complaint to indicate that an investigation by the Court was warranted and met a certain threshold of jurisdictional basis.⁵⁹ In fact, their commentaries indicate that they were mainly concerned with the qualification of State referrals in terms of situations of general abuse of the referral process. For instance, the International Law Commission stressed that, *“given the personnel required for and the costs involved in a criminal prosecution, the jurisdiction [of the Court] should not be invoked on the basis of frivolous, groundless or politically motivated complaints.”*⁶⁰ Similarly, the Preparatory Committee reported in September 1996 that, *“as regards the initiation of investigations, various suggestions were made for providing a minimum threshold, a screening mechanism or a judicial filter to distinguish between well-founded complaints of sufficiently serious crimes and frivolous or vexatious complaints.”*⁶¹

⁵⁷ See HOLMES (J.T.), “Complementarity: National Courts versus the ICC” in CASSESE (A.), GAETA (P.) & JONES (JOHN R.W.D) (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 685.

⁵⁸ *Ibid.*

⁵⁹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), UN Doc. A/51/22, 13 September 1996, p. 48, paras. 216-17; See also Proposal by United States Delegation, Preparatory Committee on ICC Proposed Amendments Pertaining to the Trigger Mechanism ILC Draft Statute for the International Criminal Court, 1 April 1996, p. 2, available at the following address: <http://www.iccnw.org/documents/USTriggerMechanisms.pdf> (last visited 7 August 2009); Summary of the Proceedings of the Preparatory Committee during the Period 25 March-12 April 1996, UN Doc. A/AC.249/1, 7 May 1996, p. 108; Working Paper submitted by Australia and The Netherlands, Draft set of Rules of Procedure and Evidence for the International Criminal Court Preparatory Committee, A/AC.249/L.2, 26 July 1996, pp. 29-30; Report of the Informal Group on Procedural Questions, Fair Trial, and Rights of the Accused, Preparatory Committee, UN Doc. A/AC.249/CRP.14, 27 August 1996, p. 4, par. 3.

⁶⁰ See Draft Statute for an International Criminal Court with Commentaries, Yearbook of The International Law Commission, Vol. II, Part II, UN doc. A/CN.4/SER.A/1994/Add.I, 1994, p. 46, par. 5.

⁶¹ See Report of the Preparatory Committee on the Establishment of an International Criminal Court, *supra* note 59, p. 49, par. 224. See also Summary of observations made by the Representative of the United Kingdom of Great

36. Lastly, there are good reasons why the Court's approach to the complementarity principle should be practical and not overly exacting. An author explained them quite aptly when he stated that,

[i]f the object of the exercise [of complementarity] is to address impunity, the fact that an offender is being held accountable for serious crimes should satisfy the requirements of international law [. . .] [and] a conviction for murder or rape of [. . .] [victims'] loved ones ought to be enough to quench their thirst for justice. This is not to excuse the lethargy of legislators within States Parties, but the Court ought to take a realistic approach to the subject. Even where States have actually incorporated the Rome Statute crimes within national law, they will not always proceed against alleged offenders under the international criminal law provisions, even for reasons of expediency. Why would a national prosecutor complicate matters by attempting to establish the complex threshold requirements of genocide or crimes against humanity when he or she can more easily obtain a conviction for murder and the several penalty likely to accompany it?⁶²

37. And yet, the continued quest to prosecute the most heinous crimes known to the international community is vital to the survival and further development of international criminal law and the global fight against governmental impunity. Thus, it is of paramount importance that, when considering the complementarity principle, the Court's ability to carry out its mandate as stated in the Preamble of the Rome

Britain and Northern Ireland on 3, 4, 5, 6 and 7 April 1995, Ad Hoc Committee, 7 April 1995, p. 6, available at the following address: <http://www.legal-tools.org/en/search-the-tools/record/lttdetails/46906/65cbd2dcfb9591dbeb9bbade528e744b297be75ea140c86632ed9a1db74768b7/> (last visited 7 August 2009); Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN doc. A/50/22, 6 September 1995, pp. 24-25, par. 109.

⁶² See SCHABAS (W.), *supra* note 41, p. 183.

Statute⁶³ is not stifled by legal semantics which could result in the miscarriage of justice and unwittingly defeat the Court's essential purpose.

Therefore, for the reasons set out above, the Principal Counsel respectfully requests that the Appeals Chamber reject the Defence's Appeal on its merits and that it confirm the Trial Chamber's Decision on the Motion Challenging the Admissibility of the Case pursuant to article 19 of the Rome Statute.



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Dated this 13 August, 2009

At The Hague, The Netherlands

⁶³ The Preamble states, *inter alia*, that the States Parties to the Statute are “resolved to guarantee lasting respect for and the enforcement of international justice”.