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THE APPEALS CHAMBER

Before: Judge Daniel David Ntanda Nsereko
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 Document

Observations of the Legal Representatives of victims a/0333/07 and a/0110/08 on the Appeal submitted by the Defence for G. Katanga pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence on the Motion Challenging the Admissibility of the Case filed by the Defence

Source: The Legal Representatives of Victims a/0333/07 and a/0110/08

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo
Ms Fatou Bensouda

Counsel for the Defence

Mr David Hooper
Mr Andreas O'Shea

Legal Representatives of Victims

Ms Carine Bapita Buyangandu
Mr Joseph Keta
Mr Jean Louis Gilissen
Mr Hervé Diakiesse
Mr Jean Chrysostome Mulamba
Mr Fidel Nsita Luvengika
Mr Vincent Lurquin
Ms Flora Mbuyu Anjelani

Legal Representatives of Applicants

Mr Jean-Pierre Kilenda Kakengi Basila
Mr Jean-Pierre Fofé Djfia Malewa

**The Office of Public Counsel for
Victims**

Ms Paolina Massida

The States Representatives

The Government of the Democratic
Republic of the Congo

REGISTRY

Registrar

Ms Silvana Arbia

1. Procedural History

On 10 February 2009, the Defence for Mr Germain Katanga submitted a motion to Trial Chamber II of the Court challenging the admissibility of the case as provided for in article 19(2) of the Statute.

This challenge was made in a motion, initially filed as “Confidential, *ex parte*, only available to the Defence for Mr Germain Katanga”.

This motion was transmitted to the Prosecutor on 25 February 2009, pursuant to rule 58(3) of the Rules.

The Registry reclassified the Defence motion as confidential at the request of Trial Chamber II.

On 5 March 2009, Trial Chamber II stayed the proceedings in accordance with article 19 of the Statute pursuant to rules 58 and 59 of the Rules.¹

In its decision, Trial Chamber II ordered the Prosecutor to present written submissions on the challenge to admissibility raised by the Defence (and to file a public redacted version thereof).

In its decision, Trial Chamber II also ordered the Registrar to transmit a summary of the challenge to admissibility both to the authorities of the Democratic Republic of the Congo (DRC) and to all the Legal Representatives of the victims, both anonymous and non-anonymous, and also to those victims who had already communicated with the Court.

¹ Decision of 5 March 2009, ICC-01/04-01/07-943

The Prosecutor submitted his response to the motion filed by the Defence for Mr Germain Katanga on 19 March 2009.²

On 30 March, having sought leave from Trial Chamber II in accordance with regulation 24(5) of the Regulations of the Court and having received leave from the Chamber permitted to file the reply sought,³ the Defence for Mr Germain Katanga filed a reply.⁴

All Representatives of the victims then submitted their observations on the motion challenging admissibility pursuant to the decision staying the proceedings and in accordance with rule 59 of the Rules.⁵

On 28 April 2009, the Office of Public Counsel for Victims then filed its observations on the challenge to admissibility raised by the Defence for Mr Katanga.⁶

After an initial hearing was convened for 18 May 2009, Trial Chamber II, by its decision of 22 May 2009, convened a fresh public hearing for 1 June 2009, clearly emphasising that it was vital for the authorities or Representatives of the authorities of the Democratic Republic of the Congo to attend.⁷

Having carefully listened to all the parties and Representatives of the authorities of the Democratic Republic of the Congo and the Representatives and counsel for the

² Office of the Prosecutor, Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to article 19(2)(a), 19 March 2009, ICC-01/04-01/07-968.

³ Decision on the Application of the Defence for Germain Katanga to file a Reply, 27 March 2009, ICC-01/04-01/07-1004

⁴ Defence for Mr Germain Katanga, Reply to prosecution response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, 30 March 2009, ICC-01/04-01/07-1008-Conf-Exp

⁵ Legal Representatives of victims a/0333/07 and a/0110/08, 16 April 2009, ICC-01/04-01/07-1059-Conf regarding the petitioners.

⁶ Registry, 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, 28 April 2009, ICC-01/04-01/07-1083

⁷ *Ordonnance aux fins de la convocation d'une audience*, 22 May 2009, ICC-01/04-01/07-1163

victims at the hearing of 1 June 2009, at the hearing on 12 June 2009 Trial Chamber II unanimously rendered a decision on the challenge to admissibility filed on 10 February 2009 by the Defence for Mr Germain Katanga.⁸

On 22 June 2009⁹, the Defence for Mr Germain Katanga submitted an appeal against the Decision of Trial Chamber II entitled “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case”.¹⁰

The Defence for Mr Germain Katanga, in the context of this appeal and pursuant to articles 19(6), 82(1)(a) and 83(2)(a) of the Statute, rule 154 and regulation 64(2), filed a procedural document in which it set out its arguments.¹¹

II. Admissibility of the Appeal:

An analysis of the proceedings and the relevant documents show that the appeal is admissible since it was submitted in the correct manner and in accordance with the time limits legally allowed therefor.

III. Purpose of the Appeal:

According to the clear line of argument of the Defence for Mr Germain Katanga, the appeal it submitted is based on the following:

- A. The Trial Chamber erred in finding that the challenge to admissibility was filed out of time;

⁸ Decision of 12 June 2009, oral decision, ICC-01/04-01/07-T-67-ENG ET WT

⁹ ICC-01/04-01/07-1234

¹⁰ ICC-01/04-01/07-1213, public document, 16 June 2009

¹¹ Defence for Mr Germain Katanga, Document in Support of Appeal of the Defence for Mr Germain Katanga against the Decision of the Trial Chamber “Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire”, 8 June 2009, ICC-01/04-01/07-1279

- B. The Trial Chamber erred in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber all the information and documents related to the events which occurred in Bogoro;
- C. The Trial Chamber erred in its interpretation of the term “*manque de volonté*” or “unwillingness” in light of article 17(2) of the Statute and the principle of complementarity;
- D. The Trial Chamber erred in confusing the concepts of “*manque de volonté*” or “unwillingness” and inability;
- E. The Trial Chamber’s erroneous interpretation of the concept of “*manque de volonté*” or “unwilling” has deprived Mr Germain Katanga of his real and effective right to challenge the admissibility of the case.

IV. Argument: in law and in fact:
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A. Regarding the first argument of the Defence for Mr Germain Katanga, whereby the challenge to admissibility was submitted within the prescribed time limits

The Defence for Mr Germain Katanga maintains that its challenge to admissibility was indeed submitted in accordance with and pursuant to articles 19(2)(a) and 19(4) of the Statute.

It is therefore especially appropriate to recall at this point that article 19(4) of the Rome Statute reads as follows:

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

It should be noted that the decision which has been appealed was mindful to emphasise that when a challenge to admissibility is at issue, the Statute provides a three-phase approach, that is, and respectively:

- During the first phase, which runs until the decision on the confirmation of charges has been filed with the Registry, the four grounds for admissibility stipulated in article 17(1) of the Statute (with the reservation stated in paragraph 20 of page 3 of the decision which is the focus of the appeal) may be raised;
- During the second phase, which runs from the filing of the decision on the confirmation of charges with the Registry to the constitution of the Trial Chamber, the Defence may submit challenges, although only on the basis of article 17(c) of the Statute relating to the principle of *ne bis in idem*.
- During the third phase, namely as soon as the Chamber has been constituted, a challenge to admissibility may only be based on the *ne bis in idem* principle in exceptional circumstances and with the leave of the Trial Chamber.

Consequently, the Chamber took care to stress that “after the decision on the confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged.”¹²

According to the Defence, the analysis of Trial Chamber II is not valid without a prior interpretation of the terms “prior to or at the commencement of the trial” used in article 19(4) of the Statute.

The Defence for Mr Germain Katanga, criticising the decision which is the focus of the appeal and the interpretation of the terms “commencement of the trial”, was mindful to include its own personal suggested interpretation of these terms in its procedural documents.¹³

¹² Impugned Decision, page 4, paragraphs 5 to 7.

¹³ See “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”, 8 June 2009, pages 5 and 6, points 12 to 14.

This being the case, it should be noted that the proposed definition of the concept of “commencement of the trial” suggested by the Defence takes no account of article 64(8)(a) of the Statute, which reads as follows:

“At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.”

As things stand, in the current proceedings, article 64(8)(a) of the Statute has been applied since after the confirmation of the charges carried out by the Pre-Trial Chamber in the context of the procedure provided for in article 61 of the Statute and the constitution of a Trial Chamber by the Presidency for the next phase of the proceedings, Mr Germain Katanga was read the charges confirmed by the Pre-Trial Chamber when he appeared before Trial Chamber II and then, having been invited to do so, entered his plea.

Consequently, and clearly, the impugned decision was correct to hold that [TRANSLATION] “in this case, the admissibility challenge raised by the Defence for Mr Germain Katanga is not based on the *ne bis in idem* principle but on subparagraphs (a) and (b) of article 17(1) of the Statute. It follows therefore that the challenge should, in the present case, normally be declared inadmissible.”

It should also be pointed out that at the first hearing held by the Trial Chamber constituted by the Presidency, the Defence for Mr Germain Katanga could have made clear its intention to challenge the admissibility of the case or the jurisdiction of the Court.

This was not the case, even though it must be emphasised that it is only logical that a trial commences as soon as the first hearing is held before the Trial Chamber.

Moreover, it should be emphasised that the Statutes of the various international criminal tribunals have all been careful to separate the period during which preliminary challenges can be raised – the chosen criteria being, in one form or another, precisely that of the commencement of the trial.

The petitioners feel that the Statute offered no margin for error and that, even though the fact that the Defence never had any intention to file its challenge out of time cannot be called into question, it remains the case that the disqualification prescribed by the basic legal texts instruments is established.

It is only in exceptional circumstances (article 19(4) of the Statute uses the terms “*In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial*”) that a Chamber of the Court is called upon to rule that an accused person or State is not disqualified pursuant to article 19(4) of the Statute.

The Legal Representatives wonder whether the “exceptional circumstances” specified in article 19(4) of the Statute can truly be considered to be met given that the Defence of an accused person was [TRANSLATION] “never aware nor intended to submit its challenge out of time” and whether such a subjective analysis can genuinely be considered to be based on exceptional circumstances which could allow a challenge to be brought more than once or at a later stage of the trial.

Consequently it should be confirmed that since the challenge filed by the Defence for Mr Germain Katanga is not based on the *ne bis in idem* principle but on subparagraphs (a) and (b) of article 17(1) of the Statute, this challenge must be declared inadmissible.

Similarly, but only if the Court considers that “exceptional circumstances” within the meaning of article 19(4) have been met, the interpretation of article 19(4) of the Statute set out in decision which is the focus of the appeal should be confirmed and it should be stated that the term “trial” or “commencement of the trial” must be taken to have the same meaning as in articles 62, 63, 64 and 67 of the Statute.

B. Regarding the second argument of the Defence for Mr Germain Katanga that the Prosecutor was to have disclosed some relevant evidence regarding the admissibility of the case to the Pre-Trial Chamber and that he failed to do so, thus making the proceedings flawed

According to the Defence, all the documents regarding the judicial approach to the events in Bogoro that the Prosecutor intended to submit to the Court should have been disclosed to the Pre-Trial Chamber which, also according to the Defence, would have certainly led the Pre-Trial Chamber to adopt the opposite attitude to the one it did adopt.

According to the Defence also, the failure of the Prosecutor (who thus failed to file all the documents he should have disclosed when the application to issue a warrant of arrest was made) invalidates the entire proceedings which would have therefore been declared inadmissible by the Pre-Trial Chamber.

Regarding this point, it is necessary to recall the contents of the impugned decision, and, more specifically, the judgment rendered by the Appeals Chamber on 13 July 2006, in which it finds that the Prosecutor is not required to provide to the Pre-Trial Chamber *“the necessary factual information to determine the admissibility of the case”* when seeking the issuance of a warrant of arrest, unless certain incontrovertible facts clearly render a case inadmissible or unless an ostensible cause requires the exercise of a *proprio motu* review of admissibility.

It is therefore quite logical that the decision which is the focus of the appeal held that the issue raised in the present case is whether the information mentioned by the Defence, which the Prosecutor is criticised for not mentioning to the Pre-Trial Chamber, forms part of what should have been brought to the attention of the Pre-Trial Chamber and which the Prosecutor should have disclosed to the Pre-Trial Chamber.

As it happens, according to the Defence it is now established that the authorities of the Democratic Republic of the Congo were conducting an investigation into the events in Bogoro on 24 February 2003 and that the Prosecutor therefore erred in not disclosing this information to the Pre-Trial Chamber.

It should be emphasised that if the Defence for Mr Germain Katanga was to have produced evidence of the existence of such an investigation by the DRC authorities, this would be a vital piece of information which would clearly have legal consequences.

It should however be emphasised that the Defence's assertions and arguments cannot be analysed without first recalling that the Prosecutor took care to explain the reasons why he failed to inform the Pre-Trial Chamber of the existence of the documents on which the Defence for Mr Germain Katanga is basing its challenge to admissibility.

The Prosecutor was careful to point out that he had checked with the DRC authorities in good time whether any investigation into the events in Bogoro on 24 February 2003 was being conducted.

Thus the Prosecutor pointed out that the competent authorities in the DRC had informed him that there was no investigation of these events, an assertion confirmed moreover by the representatives of the Democratic Republic of the Congo who appeared at the hearing of 1 June 2009.¹⁴

Consequently, in these circumstances it is difficult to identify the source which allegedly forced the Prosecutor to bring to the attention of the Pre-Trial Chamber the information which the Defence for Mr Germain Katanga accuses him of failing to submit to the Chamber.

This observation must be particularly emphasised given that the Defence for Mr Germain Katanga criticises the Prosecutor for failing to provide the contested

¹⁴ Transcript of the hearing of 1 June 2009, ICC-01/04-01/07-T-65, pages 69 and 70.

information to the Pre-Trial Chamber when he applied for the issuance of a warrant of arrest.

At this stage it appears that the Prosecutor in fact had no document on which the inability or lack of jurisdiction of the Pre-Trial Chamber to exercise the powers conferred upon it by the Statute and the Rules of Procedure and Evidence could be based.

Moreover, the analysis of the information in the record shows that the Defence for Mr Germain Katanga cannot prove, either in fact or law, that there was any error or negligence by the Prosecutor since the analysis of the documents on which the arguments of the Defence are based completely fails to establish that the competent authorities of the Democratic Republic of the Congo at any time conducted an investigation into the events in Bogoro on 24 February 2009, that is the evidence submitted to the jurisdiction of the Pre-Trial Chamber.

It should moreover be noted that the application to extend the provisional detention of Mr Germain Katanga (and of seven other persons), which was submitted on 2 March 2007 before the High Military Court [*Haute Court Militaire*] in Kinshasa, that is the document which appears to form the cornerstone of the Defence argument, does not refer to the acts committed in Bogoro on 24 February 2003.

Similarly, it must be pointed out that although the name of this village is indeed mentioned, along with ten other localities in which persons were allegedly killed during systematic attacks against the civilian population, it should be recalled that the village of Bogoro was the focus of several attacks and numerous assaults before and independently of the events of 24 February 2003 (facts which are actually quite unique in the criminal sense).

Furthermore, emphasis must be given to the document entitled "*Observations de la République Démocratique du Congo sur l'exception d'irrecevabilité soulevée par la Défense de Monsieur Germain Katanga*" dated 14 March 2009. This document was issued by the Director of the Immediate Office of the Chief Prosecutor of the High Military Court of the Congo [*Auditeur Général près la Haute Cour militaire*], in which the person

authorised to represent the Democratic Republic of the Congo stated that the Military Prosecuting Authority [*Auditorat Général*] had not initiated any investigation against Mr Germain Katanga in respect of the facts referred to the Court, namely the attack on Bogoro on 24 February 2003.

In these circumstances, and in accordance with the rules governing the matter, it becomes apparent that the Defence for Mr Germain Katanga has not provided any evidence nor demonstrated that the judicial authorities of the Democratic Republic of the Congo were conducting or had conducted an investigation into the facts about which the Court is seized, that is, the events for which the Prosecutor asked the Pre-Trial Chamber to issue a warrant of arrest, events which occurred on 24 February 2003.

The argument which was raised in the context of a motion filed by the Defence for Mr Germain Katanga should be recalled in this regard, whereby the burden of proof falls on the Defence, which, in concrete terms, means that the Defence bears the risks inherent in the failure to provide the evidence to support its argument.

Accordingly, it becomes clear that the decision which is the focus of the appeal does not contain any error, either of fact or law, when it emphasises that the application to extend the provisional detention of Mr Germain Katanga and seven other persons, which was submitted on 2 March 2007 to the High Military Court of Kinshasa does not appear to contain any decisive information regarding the “circumstances of the case” or information which would have warranted being brought to the attention of the Pre-Trial Chamber by the Prosecutor.

Similarly, and logically, it appears that the decision which is the focus of the appeal contains no error in law when it asserts that in these circumstances it is unnecessary to respond to the question raised by the Defence as to whether the document in question would have led the Pre-Trial Chamber to exercise its discretionary powers to conduct a *proprio motu* review of the admissibility of the case differently.

Under these circumstances it appears that the impugned decision rightly concluded that there was no irregularity invalidating the issuance of the warrant of arrest against Mr Germain Katanga.

C. Regarding the third argument of the Defence for Mr Germain Katanga that the Trial Chamber, in the decision which is the focus of the appeal, committed an error in interpreting as it did the term “unwillingness” as found in article 17(2) of the Statute

At this stage it is appropriate to recall the wording of article 17(2) of the Statute:

“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exists, 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.”*

Thus it turns out that the interpretation of the word “unwillingness” as used in article 17(2) of the Statute cannot be determined without interpreting the whole of article 17 of the Statute, insofar as this article deals with the issues of the admissibility of a case before the Court just as, and in parallel, such an interpretation cannot be made without reference to the sub-paragraph (10) of the Preamble to the Statute and article one thereof.

These provisions, as highlighted in the decision which is the focus of the appeal, govern one of the fundamental principles of the Statute, but also the *raison d’être* and the functioning of the Court itself, in other words the complementary nature of the Court in respect of national criminal jurisdictions.

Sub-paragraph 10 of the Preamble of the Statute reads as follows:

“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

And this in light of the fact that article 1 of the Statute is drafted as follows:

“An International Criminal Court (‘The Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”

At this stage it is useful to recall that the drafting of the Preamble to the Statute was largely derived from the draft produced by the United Nations International Law Commission and that, with regard to the assertion of the principle of complementarity of the jurisdiction of the International Criminal Court with regard to national jurisdictions, a broad consensus emerged when drafting the preamble regarding the willingness and even the need to state this principle in the preamble to the Statute.

As a result, it appears that the States sought to insist on and reiterate the subsidiary nature of the jurisdiction of the Court, which is the opposite to the principle on which the jurisdiction of the ad hoc tribunals is based.

In asserting this principle, the States were also mindful to reiterate that the establishment of the International Criminal Court should not be considered a pretext for a State to interfere in the affairs of another State.

Thus it would not be too bold to assert that the adoption of the Statute of the ICC was made possible only through the assertion of the principle of complementarity of the jurisdiction of the Court as compared with that of national courts with criminal jurisdiction.

Thus the principle of complementarity requires that the Court not seek to replace national jurisdictions which, *a priori*, have the most authority, and held to have the most legitimacy, to instigate prosecutions against their nationals presumed responsible for the international crimes, set out in article 5 of the Statute.

Article 17 of the Statute was thus adopted in application of the principle of complementarity since this article states that the jurisdiction of the Court applies only when a State fails to prosecute or investigate in the proper manner.

As this principle had been asserted, it was therefore appropriate to examine the various scenarios which might occur; this is in fact the purpose and basis of article 17 of the Statute.

Article 17 of the Statute is therefore a substantive provision thereof and gave rise to many prolonged discussions prior to its adoption.

It should therefore be emphasised that a full and comprehensive understanding of article 17 of the Statute is not possible without reading it in conjunction with articles 18 and 19 of the Statute, in that these two articles have expressly granted States genuine freedom of action with regard to the attitude they are permitted to adopt regarding the outcome and admissibility of certain cases which are or could be referred to the Court.

From this discussion, which is linked to the analysis of the basic texts and the conditions under which they were adopted, it appears that although article 17 of the Statute reasserts the complementarity principle, its real purpose is to consider and settle various types of likely case scenarios and situations which could raise issues regarding the admissibility of a case before the Court.

It should also be pointed out that the scenarios provided for in article 17 are merely exceptions (and were designed as such by the drafters of the Statute).

The interpretation of article 17 of the Statute must therefore, and in all cases, in view of the succinctness of the Statute (and specifically in light of articles 18 and 19 of the Statute) but also in view of the very general nature of the terms used, emphasise the status which the drafters of the Statute intended to give to both the role and the willingness of the States.

In order to be convinced of this, one need simply recall that paragraph 1(a) of article 17 of the Statute emphasises that a case is considered inadmissible by the Court when

“the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”
(emphasis added by the petitioner)

Similarly, it should be pointed out that paragraph 1(b) of article 17 of the Statute adds that a case must be considered inadmissible by the Court when *“the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”*

It is thus independently of any subjective analysis of the willingness of a State and the goals pursued by that State that the Court must give full and genuine effect to article 17(1)(a).

A case which should, *a priori*, be deemed inadmissible by the Court on the grounds that the facts of the case are being investigated or prosecuted by a State having jurisdiction in the matter, must be considered admissible if the Court finds that the State is unwilling to conduct the investigation or prosecution (or, *a fortiori*, is unable to do so).

The Court must therefore not judge the causes and reasons for such unwillingness on the part of a State (interfering in this way, wrongfully, in the sovereignty of a State) but must draw the consequences of an established situation (the purpose of seeking the reason for such unwillingness in fact and law being only to satisfy itself that this will is genuine and that its nature is well grounded).

It is appropriate to recall here that the Defence never established that the facts submitted to the Court and which are the focus of the “case” were investigated or prosecuted by a State with jurisdiction in the matter (namely, the Democratic Republic of the Congo).

Similarly, and no doubt especially, in the present case, it should be emphasised that, irrespective of whether an investigation which might have involved the facts of the case in the past was actually conducted, the competent authorities of the Democratic

Republic of the Congo clearly indicated on several occasions that they were unwilling to prosecute and try Mr Germain Katanga, in particular because it was not possible for them to form a legally constituted bench.

In any case, and even assuming that the challenge to admissibility could still be filed by the Defence when it in fact was, the fact that the Democratic Republic of the Congo was unwilling to investigate, prosecute and judge Mr Katanga is manifest.

Thus and in light of the foregoing, there seems to be no clear interest here for the Defence for Mr Katanga to raise the issue inherent in the interpretation of article 17 of the Statute, in whole or in part.

The Defence for Mr Germain Katanga must put forward its argument on this point and demonstrate its interest in raising this issue in light of the actual evidence and facts but also, and no doubt especially, of the stage of the proceedings.

In any case and even assuming the interest of Mr Germain Katanga in raising the issue of the definition of the term “unwillingness”, it seems necessary to recall first that the Democratic Republic of the Congo referred the situation regarding its own territory to the Court without, at any point, attempting or even demonstrating the slightest desire of wanting to come back on or challenge the jurisdiction of the Court.

Similarly it appears necessary to recall that the authorities of the Democratic Republic of the Congo were not opposed to the surrender of Mr Germain Katanga and never raised a challenge of any sort to admissibility.

It also appears necessary to emphasise, as in the impugned decision, the quality of the cooperation of the DRC authorities with the Court including in the case involving Mr Germain Katanga specifically.

Therefore and clearly, there can be no doubt that the intention of the Democratic Republic of the Congo is to allow persons suspected of committing crimes on DRC territory for which the Court has jurisdiction to be brought to justice.

As set out above, this observation is further strengthened by the declarations that the authorities of the Democratic Republic of the Congo have always and invariably made including, and in particular, in the present case.

It does not appear superfluous at this stage to recall that the Director of the Immediate Office of the Chief Prosecutor of the High Military Court of the DRC, in the aforementioned document dated 14 March 2009, informed the Prosecutor that the Military Prosecuting Authority had not opened an investigation against Mr Germain Katanga regarding the acts committed in Bogoro on 24 February 2003 and also that the representatives of the Democratic Republic of the Congo, explicitly asserted at the hearing before Trial Chamber II on 1 June 2009 that the DRC had no intention of prosecuting Mr Germain Katanga, adding, on the contrary, that the DRC authorities did however want Mr Germain Katanga to be tried by the ICC.

It is clear that the willingness of the Democratic Republic of the Congo in the present case cannot be disputed because, in addition to its having been clearly and unambiguously expressed on 1 June 2009, this has been confirmed by the steps taken by the officials of the Democratic Republic of the Congo and by the entire history and proceedings inherent in and intrinsic to the case at hand.

In the present case, the unwillingness of the DRC to prosecute Mr Germain Katanga itself cannot be disputed just as, in parallel, it cannot be disputed that the Democratic Republic of the Congo intended and still intends for Mr Germain Katanga to be prosecuted by the Prosecutor and tried by the Court for his alleged role and responsibilities in the acts committed in Bogoro on 24 February 2003.

It should be pointed out that this willingness includes instigating and undertaking an investigation involving Mr Germain Katanga.

In conclusion, the petitioners maintain that as Mr Germain Katanga was not the focus of any investigation or prosecution by the DRC regarding the acts committed in Bogoro on 24 February 2003, he has no interest in calling for a definition of the term “unwillingness” used in article 17(2) of the Statute since such an interpretation is of no advantage in his specific case (as under no circumstances can the case be deemed

inadmissible in view of these particulars) whereas, in parallel, the willingness of the DRC regarding not trying Mr Germain Katanga and its willingness to ensure that he is tried by the Court are clear and cannot be disputed.

As a result, the application itself of the principle of complementarity would indicate that the Court has jurisdiction in the present case.

D. Regarding the fourth argument of the Defence for Mr Germain Katanga that the analysis of the impugned decision does not appear to allow any confusion of the sort objected to by the Defence for Mr Germain Katanga

The Trial Chamber in fact was careful to emphasise in its oral decision that: *“Thus, according to the Statute, the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators. [...] as these criteria form the limbs of an alternative, it is not bound to ascertain whether the second criterion has also been met should it consider one of them to be met.”*

After formulating this observation the Trial Chamber focused on the criteria of being *“unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators”*, continuing by its analysis to establish the willingness of the DRC in this case.

It is in this regard that the Trial Chamber emphasised that it could not discern the real motives of a State when it expresses its desire not to prosecute in a given case, given that on one of these occasions a State can, without ignoring the principle of complementarity, decide to refer a situation involving its own territory to the Court.

As stated in the foregoing, it is the very principle of complementarity which does not allow the Court to interfere in the internal affairs of a State, including and in particular to determine whether the motivation for its intentions or the willingness of its authorities are warranted.

However, the Court and its Chambers can of course seek the basis for the action or statements of the State to determine whether the willingness which may be displayed is in fact genuine.

In doing so, the Chamber with the necessary jurisdiction will merely ensure the effectiveness of article 17 of the Statute and, more specifically, paragraph 1(a) thereof.

Accordingly, in this case, with regard to the analysis of the basis for the willingness expressed by the authorities of the Democratic Republic of the Congo and the reasons for the statements of its representatives at the hearing, the Trial Chamber held that one of the reasons for not completing an investigation and, if appropriate, not prosecuting, a suspect but preferring to refer the case to the Court might be based on the fact that the authorities of a State feel that they are unable to conduct a fair and expeditious trial or on the fact that the authorities of the country consider that there is a risk regarding the effective nature of such investigations or the fairness of a trial.

In making this observation, the Trial Chamber in no way confused the criteria set out in paragraph 2 of article 17 of the Statute (unwillingness of a State) or those in paragraph 3 of the same article (inability of a State), but simply noted that in this case the unwillingness of a State to conduct an investigation and/or a prosecution might be based subjectively on the feeling, rightly or wrongly, that conducting an investigation, prosecution and trial in an expeditious and fair manner was not possible.

Thus and precisely, it seems that the Trial Chamber took care to avoid any confusion of the criteria in paragraphs 2 and 3 of article 17 of the Statute, whilst at the same time emphasising that it had noted and taken care to weigh the assertions of the DRC authorities regarding the genuine manifold difficulties they were faced with in the present case, difficulties which led them to consider that they need not instigate an investigation and the prosecution of Mr Germain Katanga and prefer that he be tried by the Court.

Thus as things stand it cannot be possible to consider that the Trial Chamber asserted, directly or indirectly, that the Democratic Republic of the Congo was in any way unable to conduct an investigation or prosecution.

It is therefore appropriate to note the absence of any confusion in the impugned decision between the criteria of “unwillingness” and “inability” of a State and to declare that the argument set out by the Defence for Mr Germain Katanga is unfounded.

E. Regarding the fifth argument of the Defence for Mr Germain Katanga, that the Chamber’s allegedly erroneous interpretation of the concept of “unwillingness” has deprived Mr Germain Katanga of his real and effective right to challenge the admissibility of the case

Before analysing the Defence’s arguments as set out in its procedural documents, the petitioners, whose Legal Representative supported the forfeiture of Mr Germain Katanga’s right to submit a challenge to admissibility at the time he did so, are surprised by the Defence’s assertion that the Trial Chamber deprived Mr Germain Katanga of his right and/or the effectiveness of his challenge to the admissibility of the case.

The petitioners must recall that, even when the Defence for Mr Germain Katanga submitted an admissibility challenge which should be declared inadmissible, the Trial Chamber held that the Defence for Mr Germain Katanga should benefit from the recognition of exceptional circumstances and agree to lift the disqualification which applied to the Defence.

Having said this and whatever the case may be, the subject of the appeal lodged by Mr Germain Katanga involves a specific aspect and specific complaints which his defence did in fact set out in its arguments, complaints which generically involved the violation of his fundamental rights and which are inherent in the situation which

allegedly emerged from the recognition of the Court's jurisdiction by the Trial Chamber.

Apart from the issue of the burden of proof and the actual assertion by the Defence for Mr Germain Katanga that his fundamental rights have been gravely infringed as a result of the attitude or the decision of the Trial Chamber, it is appropriate to emphasise that at this stage of the proceedings the Defence is responsible for establishing the interest of such an assertion.

One must accept that the assertion that the fundamental rights of Mr Katanga have been violated, as stated by his Defence, does not appear to be a factor to be taken into account in the context of a challenge to the jurisdiction of the Court or the admissibility of a case before it.

Thus the Trial Chamber's confluence of the Defence for Mr Katanga's argument and the analysis of the actual basis for this argument was groundless at this stage of the proceedings and in the context of the analysis of the admissibility of the case before the Court.

It should moreover be emphasised that it is difficult to see how the unwillingness of the Democratic Republic of the Congo to conduct an investigation, prosecution or a trial would in any manner whatsoever have deprived Mr Germain Katanga of his actual and effective right to challenge the admissibility of the case before the Court in accordance with article 17 of the Statute.

In fact, the argument of the Defence for Mr Germain Katanga seeks to add to the content of article 17 of the Statute criteria of admissibility and inadmissibility which it does not contain and which the States Parties did not intend to include when they established the International Criminal Court.

Once again, it is necessary to point out the difficult circumstances in which the Preparatory Commission issued a compromise text that by the fact of its putting an end to the discussions between States made it possible to draft and adopt article 17 of the Statute.

Under these circumstances it must be emphasised that when article 17 of the Statute was drafted, several States felt the need firmly to reiterate that the International Criminal Court should not be established as an international court of human rights in the strict and technical sense of the term but rather as a truly complementary jurisdiction called on to act if the national criminal courts fail to do so.

Once again, the Defence argument and the interpretation it is attempting to make of certain articles of the Statute violate the spirit which inspired its drafting and, ultimately, the complementarity principle itself.

The legal representatives of victims a/0333/07 and a/0110/08 feel that it is necessary to emphasise how the Defence for Mr Germain Katanga's understanding of the principle of complementarity results in an overly narrow interpretation of that principle and a disembodied legal vision which fails to take into account either the actual willingness of States or the attitude they may be required to adopt as a result of the concrete situations they face on their territories.

The Legal Representatives deem it necessary to make these observations because, in their view, they explain and inform the attitude of the Defence for Mr Germain Katanga and do so even at the risk of distorting the provisions of the Statute and the complex process which made it possible to draft that Statute and establish the Court itself.

As a result, the addition of criteria of admissibility and inadmissibility to those already included in article 17 of the Statute cannot be accepted without violating both the spirit and the letter of the Statute.

FOR THESE REASONS**MAY IT PLEASE THE APPEALS CHAMBER:**

To dismiss the appeal of the Defence for Mr Germain Katanga and to uphold all the provisions of the decision of Trial Chamber II with the sole possible amendment of declaring Mr Germain Katanga stripped of his right to submit a challenge to admissibility.

Dated this 29th day of July 2009 at Seraing.

[signed]

Mr Jean-Louis GILISSE

On behalf of the Legal Representatives