Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/04-01/07**
Date: **11 March 2009**

TRIAL CHAMBER II

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

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

Public Redacted Version

Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute

Source: **Defence for Mr Germain Katanga**

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

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Mr Eric Macdonald, Senior Trial Lawyer

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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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Amicus Curiae

REGISTRY

Registrar
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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. The Defence of Germain Katanga ("the Defence") respectfully submits to the Trial Chamber a Motion challenging the admissibility of the case, as provided for in Article 19 (2) (a) of the Statute**.**

2. This challenge to admissibility is submitted at this juncture as it is only after the confirmation hearing that the Defence is in a position to know the charges with the required level of detail and is in a position to assess fully whether one of the grounds in Article 17 (1) is applicable. The Defence informed the newly constituted Trial Chamber of its intention to submit an admissibility challenge at the earliest opportunity.[1] Further Defence investigations in the DRC delayed the timing of this submission and we regret any delay this may have caused. The Statute allows the submission of a challenge to admissibility 'prior to or at the commencement of trial' and in exceptional cases even after the trial has commenced (Article 19 (4)). Normally, the person may only challenge the admissibility of his case once, making careful preparation vital.

3. The present challenge to admissibility is the first at the ICC. The Defence here raises a number of preliminary points.

4. First, Rules 58 and 59 govern the proceedings under Article 19. Pursuant to Rule 59 (2) the Trial Chamber is to decide on the procedure to be followed and may take appropriate measures for the proper conduct of proceedings. The Defence submits that it is appropriate for a hearing to be held, given the importance of the issue. It also submits that, contrary to the possibility mentioned in Rule 59 (2), the admissibility challenge should not be joined to the trial proceeding as that is likely to cause undue delay in determination on this issue. Furthermore, the admissibility challenge does not concern Mr. Ngudjolo who is to be jointly tried.

5. Second, our application builds, in part, upon previous decisions, communications and information which are confidential. The Defence has submitted this motion as a confidential and ex parte application and awaits the Trial Chamber instructions in respect of redacting various parts of our application and annexes thereto. The Defence is aware of the procedure provided for in Rule 58 (3) and recognizes the importance of swift communication of this application to the Prosecutor.

[1] T-53-ENG ET WT 28-11-2008 1-99 SZ T, p. 49.

6. Third, pursuant to Article 19 (3) of the Statute both the referring body and victims have a right to submit observations to the Court. Rule 59 (2) in this respect leaves it to the Registrar to provide a summary of the grounds set out in this challenge, in a manner consistent with protecting confidentiality of information, the protection of any person and the preservation of evidence. The Defence respectfully suggests that the summary by the Registrar is submitted for comments by the Defence and for approval to the Trial Chamber, as the participation of the referring State, the DRC, and victims might have important consequences in these proceedings and require supervision by the Chamber.

7. In addition to these points, the Defence submits the following. The admissibility challenge is aimed at ensuring that proper procedure is followed and that Mr Katanga will not be tried in violation of one of the cornerstones of the ICC Statute, namely the principle of complementarity. In order to make this challenge the Defence has, on the basis of evidence in its possession, to compare investigative and prosecutorial activities in both the DRC and the ICC. Though this will lead to discussion based on those suspicions or allegations that have arisen in both jurisdictions the Defence emphasises that no inferences can be drawn regarding the charges currently against Mr Katanga. The discussion is fully procedural in nature.

Procedural history and evidence of DRC investigations and prosecution

8. At an early stage in this case the Defence was concerned that Mr. Katanga was arrested and transferred to the ICC despite those investigations and prosecutions launched against him in the DRC. Assessing the admissibility of a case requires good intelligence of investigative and prosecutorial activities and intentions at both the national level and the ICC level. The Defence could only know the precise charges after the confirmation hearing. In respect of the DRC, the Defence has sought to obtain all available information and evidence regarding the investigative and prosecutorial activities concerning its client.

9. In the framework of disclosure by the Prosecutor, we have received a number of documents.

10. In order to verify these documents, and to ensure no gaps existed, the Defence has also sought to obtain the legal assistance from the DRC.

a. The Defence submitted a request to the DRC for legal assistance on 25 January 2008 and requested the DRC to respond within five days.[2]

b. By 26 February the Defence had not received a response. The Defence made a further request on 26 February and gave notice that if no meaningful response was received within 7 days of such further request then the Defence would apply to the Pre-Trial Chamber for assistance, pursuant to Article 57 (3) (b).

c. On 27 February 2008 the Defence received a response by letter[3] according to which:

- (i) the cooperation treaty concluded with the OTP only concerns cooperation with that particular organ;
- (ii) the DRC refuses on that basis categorically to comply with our request;
- (iii) it is permitted for the defence to collect answers to its questions and to try to obtain documents by its own means.

d. In light of the third element of the response, on 29 February 2009 Mr Logo, a resource person employed in the Defence team of Mr Katanga, submitted on 29 February 2008 a request to the *Procureur Général* of the DRC, seeking permission to have access to Mr. Katanga's case file[4].

e. As of 7 April 2007, no response had been received.

f. On 7 April 2008, the Defence filed the "Defence Application pursuant to Article 57 (3) (b) of the Statute to seek the Cooperation of the Democratic Republic of Congo (DRC)".[5]

g. On 17 April 2008, the Defence filed the "Revised Request for Cooperation".[6]

h. On 25 April 2008, the Chamber issued the "Decision on the 'Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)", granting in part the Defence request.[7]

[2] ICC-01/04-01/07-371-Conf-Exp-Anx2.
[3] ICC-01/04-01/07-371-Conf-Exp-Anx5.
[4] ICC-01/04-01/07-371-Conf-Exp-Anx6.
[5] ICC-01/04-01/07-371-Conf-Exp.
[6] ICC-01/04-01/07-406-Conf-Exp.
[7] ICC-001/04-01/07-443-Conf-Exp and its public redacted version ICC-01/04-01/07-444.

i. On 6 May 2008, the Defence filed the "Defence Application for Leave to Appeal the Decision on the "Defence Application pursuant to Article 57 (3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)"";[8] on the same day, the Defence filed the "Defence's Application for the Admission of its Late Filing"[9] but it was rejected by the Chamber on 15 May 2008, which thus rejected *in limine* the Defence Application for Leave to Appeal.[10]

j. [REDACTED]

k. [REDACTED]

l. [REDACTED]

m. [REDACTED]

11. As a result of the Prosecution's disclosure, the Registry's communications and Defence investigations, the Defence is now in possession of the following relevant evidence regarding Mr Katanga's arrest and detention in DRC and proceedings there against him.

a. '*Pro-Justicia Mandat d'arrêt*' against Mr Katanga, charged with '*Atteinte à la sureté de l'Etat*', dated 10 March 2005;[11]

b. 'Letter dated 21 March 2005 from the Permanent Representative of the Democratic Republic of Congo to the United Nations addressed to the President of the Security Council', S/2005/190, informing him that Mr Katanga is under arrest;[12]

c. Court document N° 0120, 0121 et 0122/NBT/05 dated 25 March 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[13]

[8] ICC-01/04-01/07-467-Conf-Exp.
[9] ICC-01/04-01/07-468-Conf-Exp.
[10] ICC-01/04-01/07-478.
[11] DRC-OTP-0138-780 disclosed on 29 January 2008 as incriminating evidence (Annex a); ICC-01/04-01-07-708-Conf-Exp-Anx2, p. 6.
[12] DRC-OTP-0154-0531 disclosed on 13 January 2008 as Rule 77 evidence (Annex b).
[13] DRC-OTP-1010-0385 disclosed on 28 February 2008 as Rule 77 evidence (Annex c1); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 8.

d. Letter from the Procureur Général of the DRC to the Auditeur Général of the 'Forces armées de la RDC' (FARDC) dated 20 January 2005, transmitting the case file RMP 0603/BKG in the case "Ministère Public contre Germain Katanga", which was sent by the Procureur de la République of Bunia in a letter dated 26 March 2005;[14]

e. Court document N°0120, 0121 et 0122/NBT/05 dated 25 April 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[15]

f. Court document n°0120, 0121 et 0122/NBT/05 dated 25 May 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[16]

g. Court document n°0120, 0121 et 0122/NBT/05 dated 25 June 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[17]

h. Court document n°0120, 0121 et 0122/NBT/05 dated 25 July 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[18]

i. '*Note synoptique sur état de la procédure-Dossier de l'Ituri, Réf RMP N° 0120, 0121 et 0122/NBT/2005'*, dated 10 August 2005 [REDACTED];

j. Court document n°0120, 0121 et 0122/NBT/05 dated 25 August 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[19]

k. Court document n°0120, 0121 et 0122/NBT/05 dated 25 September 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[20]

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[14] DRC-OTP-1010-0013 disclosed on 28 February 2008 as Rule 77 evidence (Annex d).
[15] DRC-OTP-1010-0384 disclosed on 28 February 2008 as Rule 77 evidence (Annex e); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/08-708-Conf-Exp-Anx2, p. 9.
[16] DRC-OTP-1010-0383 disclosed on 8 February 2008 as Rule 77 evidence (Annex f); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 10.
[17] DRC-OTP-1010-0382 disclosed on 28 February 2008 as Rule 77 evidence (Annex g); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 11.
[18] DRC-OTP-1010-0381 disclosed on 28 February 2008 as Rule 77 evidence (Annex h); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 12.
[19] DRC-OTP-1010-0380 disclosed on 28 February 2008 as Rule 77 evidence (Annex j); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 13.
[20] DRC-OTP-1010-0379 disclosed on 28 February 2008 as Rule 77 evidence (Annex k); DRC-OTP-0155-0414 disclosed on 13 February 2008 as Rule 77 evidence (Annex c2); ICC-021/04-01/07-708-Conf-Exp-Anx2, p. 14.

l. Court document n°0120, 0121 et 0122/NBT/05 dated 25 October 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[21]

m. Court document n°0120, 0121 et 0122/NBT/05 dated 25 November 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[22]

n. Court document n°0120, 0121 et 0122/NBT/05 dated 24 December 2005 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[23]

o. Letters from Mr Katanga and [REDACTED] to the Auditeur Général of the FARDC dated 17 January 2006 requesting their interim release;[24]

p. Letter dated 18 January 2006 from Mr Katanga, [REDACTED], to the Auditeur Général of the FARDC, requesting their interim release, in particular in light of the arrest of the alleged organiser of the ambush which led to the murders of nine 'casques bleus';[25]

q. '*Pro-Justitia P.V. d'audition'* of Mr Katanga by an Officer of the Ministère Public près la haute Cour Militaire dated 20 January 2006[26] interviewing Mr Katanga: [REDACTED]

r. Court document n°0120, 0121 et 0122/NBT/05 dated 24 January 2006 according to which Mr Katanga is charged with crimes of genocide and crimes against humanity;[27]

[21] DRC-OTP-1010-0378 disclosed on 28.02.08 as Rule 77 evidence (Annex l); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 15.
[22] DRC-OTP-1010-0377 disclosed on 28 February 2008 as Rule 77 (Annex m); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 16.
[23] DRC-OTP-1010-0376 disclosed on 28 February 2008 as Rule 77 (Annex n); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 17.
[24] DRC-OTP-1010-0027 disclosed on 28 February 2008 as Rule 77 evidence (Annex o).
[25] DRC-OTP-1010-0023 disclosed on 28 February 2008 as Rule 77 evidence (Annex p1); DRC-OTP-0155-0485 disclosed on 6 March 2008 as Rule 77 evidence (Annex p2).
[26] DRC-OTP-0155-0318 (Annex q1) and DRC-OTP-1016-0150 (Annex q2) disclosed on 29 January 2001 as incriminating evidence.
[27] DRC-OTP-1010-0375 disclosed on 28 February 2008 as Rule 77 evidence (Annex r); DRC-OTP-0155-0414 disclosed on 13 March 2008 as Rule 77 evidence (Annex c2); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 18.

s. '*Décision de prorogation de la détention provisoire'*, RP/RMP N° 0121 et 0122/NBT/05, of Mr Katanga, charged with crimes against humanity, filed on 19 March 2006 by the Officer of the Ministère Public près la Haute Cour Militaire;[28]

t. Letter dated 4 April 2006 of Me [REDACTED], Counsel of Mr Katanga, [REDACTED], to the Auditeur Général of de FARDC, requesting their release because of the overrun of the legal delay of preventive detention;[29]

u. '*Requête aux fins de prorogation de la détention provisoire'* of Mr Katanga *et al*. dated 18 April 2006 of the Officer of the Ministère Public près la Haute Cour Militaire,[30] according to which Mr Katanga is accused of crimes against humanity for having committed in Ituri, during the period May 2003-December 2005, as part of systematic attacks against the population, one of the acts enumerated within Article 169 of the *Code Pénal Militaire Congolais*;

v. '*Notification de date d'audience au Ministère Public'* from the Registry of the Haute Cour Militaire dated 4 May 2006: following the Prosecution's request to extend the provisional detention of Mr Katanga *et al*., this case will be heard on 5 May 2006;[31]

w. Notification on the 5 May 2006 of an hearing in the case of Mr Katanga to be held on 9 May 2006;[32]

x. Notification on 11 May 2006 of a hearing in the case of Mr Katanga on 12 May 2006;[33]

y. '*Pro-Justitia Arrêt avant dire droit*' dated 12 May 2006 from the Haute Cour Militaire suspending the proceedings regarding the extension of the detention of Mr

[28] DRC-OTP-1010-0452 disclosed on 28 February 2008 as Rule 77 evidence (Annex s); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 7.
[29] DRC-OTP-1010-0029 (Annex t1) and DRC-OTP-1010-0044 (Annex t2) disclosed on 28 February 2008 as Rule 77 evidence.
[30]DRC-OTP-1010-0361 disclosed on 28 February 20 as Rule 77 evidence (Annex u) and provided by our investigator in February 2008; ICC-01/04-01/07-708-Conf-Exp-Anx2 p. 24
[31] DRC-OTP-1010-0459 disclosed on 28 February 2008 as Rule 77 evidence (Annex v) & original communicated by our investigator in February 2008.
[32] Original communicated by our investigator in February 2008 (Annex w)
[33] Original communicated by our investigator in February 2008 (Annex x)

Katanga *et al.*, on the ground that the Court was not composed of enough judges with the required military rank;[34]

z. Notification on 24 November 2006 of a hearing in the case of Mr Katanga on 30 November 2006;[35]

aa. *'Ordonnance statuant en matière de prorogation de la détention préventive'* of Mr Katanga *et al.*, dated 1 December 2006, from the Haute Cour militaire:[36]

- Specifies that Mr Katanga, [REDACTED], are prosecuted for crimes against humanity; facts committed during the period May 2003-December 2005, [REDACTED];
- Affirms that the unlawful character of the detention raised by the detainees is unfounded;
- Authorises the extension of their provisional detention for 60 working days in light of the risk of escape and of the gravity of the alleged facts;

bb. '*Commission rogatoire N° AG/0742/RMP 0121-0138-NBT-05*' dated 15 December 2006 from the Auditeur Général and Officer of the Ministère Public près la Haute Cour Militaire:[37] [REDACTED]

cc. Letter dated 21 December 2006 from the Auditeur Militaire of the Garnison of Ituri, to the Auditeur Général of the FARDC, notifying the reception of the '*Commission rogatoire No AG/ /RMP. 0121-0138-NBT-05*' against Mr Katanga *et al.*, [REDACTED]

dd. Letter '*Demande de renseignements complémentaires'* from the Auditeur Général près la Haute Cour Militaire to the Prosecutor of the ICC dated 22 January 2007:[38] [REDACTED]

[34] DRC-OTP-1010-0052 disclosed on 28 February 2008 as Rule 77 evidence (Annex y1); DRC-OTP-0155-0250 disclosed on 6 March 2008 as Rule 77 evidence (Annex y2) & provided by our investigator in February 2008.
[35] Original communicated by our investigator in February 2008 (Annex z)
[36] DRC-OTP-1010-0369 disclosed on 28 February 2008 as Rule 77 (Annex aa1); DRC-OTP-0171-0359 disclosed on 6 March 2008 as Rule 77 (Annex aa2) & provided by our investigator; ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 27.
[37] DRC-OTP-1010-0061 disclosed on 28 February 2008 as Rule 77 evidence (Annex bb).
[38] DRC-OTP-0171-1773 disclosed on 13 March 2008 as Rule 77 evidence (Annex dd).

ee. '*Mémorandum à la bienveillante attention de son excellence Monsieur le Ministre de la Justice et Garde des Sceaux*' dated 31 january 2007 from Mr Katanga *et al.*, recalling their arrest and detention in DRC and concluding by demanding *« l'accélération de la procédure devant une institution judiciaire légitime jouissant d'une crédibilité moins contestable, à l'occurrence la Cour Pénale Internationale »*;[39]

ff. Letter '*Memo et 8 pièces*' dated 31 January 2007 from Mr Katanga *et al.* to the Ministre de la Justice et Garde des Sceaux, transmitting their Mémorandum;[40]

gg. Letter dated 14 February 2007 from the Prosecutor of the ICC to the Auditeur général près la Haute Cour militaire (OTP/140207- DRC56/LMO-ptcc) following the letter of the Auditeur Général « *Demande de renseignement complémentaire datée du 22 janvier 2007 »*: [41]

- The Prosecutor has identified information potentially useful for the investigations of the Auditeur Général, concerning several events mentioned in his *Demande*, but it cannot forward them currently for reasons of confidentiality; it is nonetheless ready to submit summaries;

hh. '*Requête aux fins de prorogation de la détention provisoire'* of Mr Katanga *et al.*, N°AG/0187/D5/2007, dated 2 March 2007, submitted by the Auditeur Général près la Haute Cour Militaire;[42] [REDACTED]

ii. Notification on 29 March 2007 of a hearing in the case of Mr Katanga on 5 April 2007;[43]

jj. Notification on 29 March 2007 of a hearing in the case of Mr Katanga on 10 April 2007;[44]

[39]DRC-OTP-0172-0007 disclosed on 29 January 2008 as incriminating evidence (Annex ee1); DRC-OTP-1010-0033 disclosed on 28 February 2008 as Rule 77 evidence (Annex ee2) & provided by our investigator in February 2008.
[40] DRC-OTP-1010-0031 disclosed on 28 February 2008 as Rule 77 evidence (Annex ff1); DRC-OTP-0172-0005 disclosed on 21 April 2008 as incriminating evidence (Annex ff2) & provided by our investigator in February 2008.
[41] DRC-OTP-0182-0429 disclosed on 6 March 2008 as Rule 77 evidence (Annex gg).
[42] DRC-OTP-1010-0364 disclosed on 28 February 2008 as Rule 77 evidence (Annex hh); ICC-01/04-01/07-708-Conf-Exp-Anx2, p. 19.
43 Provided by our investigator in February 2008 (Annex ii).
44 Provided by our investigator in February 2008 (Annex jj).

kk. *'Ordonnance statuant en matière de prorogation de la détention préventive'*, from the Haute Cour Militaire, dated 10 April 2007, authorising the extension of the detention of Mr Katanga *et al.* for 60 working days because, it has *« aucune garantie de la présentation des inculpés aux actes de procédure à venir »*;[45]

ll. Letter dated 10 April 2007 from the Registry in chief of the Haute Cour Militaire to the Director of the CPRK asking him to notify Mr Katanga *et al.* of the *Ordonnance statuant en matière de prorogation de la détention préventive*;[46]

mm. Letter from the Director of the CPRK dated 16 April 2007 to the Registry in Chief of the Haute Cour Militaire informing it that the « *Ordonnance de prorogation de détention préventive Ministère Public contre Germain Katanga et consorts* » has been notified to Mr Katanga *et al.*, while they refused to sign the 'accusé de réception' in the absence of their counsel;[47]

nn. *'Copie certifiée conforme'* dated 24 May 2007 of the *Farde Parquet* indicating that Mr Katanga is accused of crimes against humanity by the Auditeur Général-Ministère Public;[48]

oo. Letter from Mr Katanga dated 25 June 2007 to the President of the Haute Cour Militaire requesting his interim release;[49]

pp. ICC Pre-Trial Chamber I's Warrant of Arrest for Germain Katanga, dated 2 July 2007;[50]

qq. Order on the execution of the warrant of arrest for Germain Katanga, dated 2 July 2007;[51]

rr. ICC Pre-Trial Chamber I's Request to the Democratic Republic of The Congo for the Arrest and Surrender of Germain Katanga, dated 06 July 2007;[52]

45 DRC-OTP-1010-0461 disclosed on 28 February 2008 as Rule 77 evidence (Annex kk).
46 DRC-OTP-1010-0460 disclosed on 28 February 2008 as Rule 77 evidence (Annex ll).
47 DRC-OTP-1010-0360 disclosed on 28 February 2008 as Rule 77 evidence (Annex mm).
48 DRC-OTP-1010-0002 disclosed on 29 January 2008 as incriminating evidence (Annex nn).
49 DRC-OTP-1013-0263 disclosed on 21 January 2008 as Rule 77 evidence (Annex oo) & provided by our investigator.
50 ICC-01/04-01/07-1-tENG.
51 ICC-01/04-01/07-2-Conf.

ss. ICC Pre-Trial Chamber I's Request to the Democratic Republic of Congo for the purpose of Obtaining the Identification, tracing, freezing and Seizure of the Property and Assets of Germain Katanga, dated 06 July 2007; [53]

tt. Request of transit of Mr Katanka in Corsica submitted by Marc Dubuisson to the attention of the Government of France on 16 October 2007;[54]

uu. [REDACTED]

vv. Letter from the Auditeur Général près la haute Cour Militaire to the Registrar of the ICC, dated 17 October 2007, forwarding the case file of Mr Katanga to the Registry of the ICC[55] and its annexes:

- A 'mandat d'extraction' of Mr Katanga delivered by the Officier of the Ministère Public of DRC on 17 October 2007;
- A report on the arrest;
- A document of judicial identification;
- [REDACTED]
- A manuscript note containing the Defence observations on the proceedings of notification;
- A *'PV'* of notification of the ICC request, from the Avocat Général of the Haute Cour Militaire, dated 17 October 2007
  - Specifying that since 19 March 2005, Mr Katanga is the object of an instruction RMP n° 0123/NBT/05, charged with crimes of genocide, crimes against humanity, murder, illegal detention and tortures, infractions punished by the Congolese Military Criminal Code;
  - Informing Mr Katanga of its decision to grant the ICC request for his arrest and surrender to the ICC and the identification, freezing and seizure of his property and assets;
- The Decision of the Auditeur Général près la Haute Cour Militaire dated 17 October 2007

52 ICC-01/04-01/07-6-tENG.
53 ICC-01/04-01/07-7-tENG.
54 ICC-01/04-01/07-40-Anx2.
55 ICC-01/04-01/07-40-Anx3.

- Specifying that since 19 March 2005, Mr Katanga is the object of an instruction RMP n° 0123/NBT/05, charged with crimes of genocide, crimes against humanity, murder, illegal detention and torture, infractions punished by the Congolese Military Criminal Code;
- Deciding to grant the ICC request;
- Deciding to close the proceedings opened against Mr Katanga by the Auditorat Général, in order to facilitate the joinder of the proceedings at the level of the ICC, as well as the application of the principle *ne bis in idem*;

o A '*P.V. d'audition'* of Mr Katanga by the Avocat Général près la Haute Cour Militaire dated 17 October 2007,[56] according to which:

- *"Q : La CPI nous a adressé une requête pour votre remise. Qu'en pensez-vous ?*
- *R : Je suis d'accord avec cette juridiction"*

ww. [REDACTED]

xx. Declaration dated 18 October 2007 of surrender of Mr Katanga to the ICC on 18 October 2007 at 0.45 am, signed by the representative of the ICC, the representative of the DRC, and the Counsel of Mr Katanga, Me Bertin Boki;[57]

yy. Report on the surrender and transfer of Mr Katanga dated 18 October 2007 signed by Marc Dubuisson and a representative of the Government of the DRC;[58]

zz. [REDACTED]

aaa. '*PV*' of notification dated 19 October 2007 from Dahirou Sant-Anna to Mr Katanga of the first appearance;[59]

bbb. Mail from the medical officer of the ICC certifying the good health of Mr Katanga, dated 22 October 2007;[60]

[56] ICC-01/04-01/07-40-Anx3.5.
[57] ICC-01/04-01/07-40-Anx5.
[58] ICC-01/04-01/07-40-Anx6.
[59] ICC-01/04-01/07-40-Anx9.
[60] ICC-01/04-01/07-40-Anx8.

ccc. ICC Registrar's Information to the Chambers on the Execution of the request for the arrest and surrender of Germain Katanga, dated 22 October 2007;[61]

ddd. Affidavit of Urbain Mutuale dated 17 April 2008 certifying that at the hearing of 10 April 2008 before the Haute Cour Militaire of DRC, the Prosecution argued that *« Si la fixation de cette cause devant la juridiction de jugement traîne encore, c'est parce que nous attendons encore certains éléments auprès de la CPI pour nous permettre d'étoffer notre instruction »*;[62]

eee. [REDACTED]

fff. '*Memo à l'intention de l'Aud Gén'* (without date or author), according to which:[63]

- The military justice has been seized of the murder of nine 'casques bleus', by the MONUC. The evidence against the persons under provisional detention are insufficient. The investigations are ongoing;
- The military justice, bound by the Acte d'Engagement dated 14 May 2004, rehabilitating former War Lords, encounters some difficulties concerning the opportunity to prosecute the persons who signed it, especially if the alleged facts are not posterior to 14 May 2004. The ICC, not bound by this agreement and the immunities, could investigate the facts anterior to 14 May 2004. The military justice is ready to collaborate with the ICC, in particular in light of the instruction of the Head of State conveyed to the Auditeur Général of the FARDC by the note n° 0699 emanating from the Director of the cabinet of the Head of State;

12. The results of the disclosure process and the cooperation-requests can be synthesised as follows:

a. Mr Katanga was arrested on 26 February 2005 but the oldest warrant of arrest in our possession is dated 10 March 2005. In this warrant of arrest he is charged with 'atteinte à la sureté de l'Etat';

[61] ICC-01/04-01/07-40-Conf-Exp.
[62] Annex ddd.
[63] DRC-OTP-0118-0441 disclosed on 6 March 2008 as Rule 77 evidence (Annex fff)

b. In Court Documents from 23 March 2005 till 24 December 2006, he is charged with crimes against humanity and genocide;

c. In the '*Note synoptique sur état de la procédure-Dossier de l'Ituri, Réf RMP N° 0120, 0121 et 0122/NBT/2005'*, dated 10 August 2005, he is charged with crime of genocide and crimes against humanity, for the period May 2003 - February 2005: [REDACTED]

d. In the 'Décision de prorogation de la détention provisoire', RP/RMP N° 0121 et 0122/NBT/05, dated 19 March 2006, he is charged with crimes against humanity;

e. In the 'Ordonnance statuant en matière de prorogation de la détention préventive' of Mr Katanga & all, dated 1st December 2006, he is charged with crimes against humanity; facts committed during the period May 2003-December 2005, having, as part of systematic attacks against the civilian population, committed deliberately one of the acts enumerated within Article 169 of the *Code pénal militaire*, in the current case murders;

f. In the '*Commission rogatoire N° AG/0742/RMP 0121-0138-NBT-05*' dated 15 December 2006, he is charged with

- crimes against humanity [REDACTED];

g. In the letter '*Demande de renseignements complémentaires'* from the Auditeur général près la Haute Cour Militaire to the Prosecutor of the ICC dated 22 January 2007, he is charged with crimes of genocide, war crimes and crimes against humanity;

h. In the 'Requête aux fins de prorogation de la détention provisoire', dated 2 March 2007, he is charged with crimes against humanity [REDACTED]

i. In a 'Copie certifiée conforme' dated 24 May 2007 of the Farde Parquet, Mr Katanga is accused of crimes against humanity;

j. In a 'PV' of notification of the ICC request, from the Avocat Général of the Haute Cour Militaire, dated 17 October 2007, and in the decision of the Auditeur Général près la Haute Cour Militaire dated 17 October 2007, it is said that since 19 March 2005, Mr Katanga is the object of an instruction RMP n° 0123/NBT/05, charged with crimes of genocide, crimes against humanity, murder, illegal detention and tortures, infractions punished by the Congolese Military Criminal Code;

13. In the Decision on the confirmation of charges dated 26 September 2008,[64] the Pre-Trial Chamber confirmed the charges of:

- murder constituting a crime against humanity within the meaning of article 7(l)(a) of the Statute;
- wilful killing as a war crime within the meaning of article 8(2)(a)(i) of the Statute;
- using children to participate actively in hostilities, as a war crime within the meaning of article 8(2)(b)(xxvi) of the Statute;
- intentionally directing attacks against the civilian population of Bogoro village, constituting a war crime within the meaning of article 8(2)(b)(i) of the Statute;
- pillaging constituting a war crime within the meaning of article 8(2)(b)(xvi) of the Statute;
- destruction of property constituting a war crime within the meaning of article 8(2)(b)(xiii) of the Statute;
- sexual slavery as a crime against humanity within the meaning of article 7(l)(g) of the Statute;
- sexual slavery as a war crime within the meaning of article 8(2)(b)(xxii) of the Statute;
- rape as a crime against humanity within the meaning of article 7(l)(g) of the Statute;
- rape as a war crime within the meaning of article 8(2)(b)(xxii) of the Statute;

14. It is also clear from the confirmation decision that the factual scope of the confirmed charges is confined to the alleged attack on Bogoro village, on 24 February 2003.[65]

[64] ICC-01/04-01/07-716-Conf.
[65] See ibid.

15. Having regard to both documents from the DRC related to proceedings against Mr. Katanga in the DRC and the Pre-Trial Chamber's decision confirming the charges, there is a significant and almost complete overlap. The intention in the DRC was clearly to prosecute for crimes against humanity and the factual charges include the alleged attack on Bogoro. The Defence is consequently concerned that this case was declared admissible.

The Defence submissions on complementarity

16. The conditions regarding admissibility of a case set out the mechanism to ensure the proper application of what is generally known as the principle of complementarity. Application of this principle seeks to ensure an effective and fair division of cases among national jurisdictions and the ICC. The fundamental starting point, the Defence submits, is that national courts enjoy primacy over the ICC. Consequently the ICC has a subsidiary role that arises when national investigations and prosecutions do not take place at all or are, in certain ways, 'defective'. This system is contrary to the relationship that the ICTY and ICTR have with national jurisdictions where the international tribunals may assert primacy.

17. Much has been written about the origin, purpose and proper interpretation of the principle of complementarity.[66] The importance of complementarity can be considered from various points of view, such as those of the States-parties, the ICC or the accused. To clarify the Defence submissions and in support of its argument as to the proper interpretation of admissibility-related provisions in the Statute the Defence submits the following observations on those points of view.

18. For the States that negotiated the Rome Statute, the principle of complementarity was, it is submitted, a vital aspect, because it was said to reflect the tension between State sovereignty

[66] Just some examples: M.M. El Zeidy, *The Principle of Complementarity in International Criminal Law - Origin, Development and Practice*, (Leiden: Martinus Nijhoff Publishers 2008); S.A. Williams and W.A. Schabas, 'Article 17', in O. Triffterer (ed.), *Commentary in the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (Second Edition) (München: Beck Verlag 2008), pp. 605 - 625; I. Tallgren, 'Completing the "International Criminal Order": The Rethoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', 67 Nordic Journal of International Law (1998); J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court - The Making of the Rome Statute: issues, negotiations, results* (Kluwer Law International, The Hague 1999), pp. 41 – 78; J.T. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court – A Commentary* (Oxford University Press, Oxford 2002), pp. 667 - 685; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, Oxford University Press 2008); in a recent volume of the Criminal Law Forum (Volume 19, no. 1, March 2008) the following authors have written on various aspects of complementarity: W.A. Schabas, M.E. El Zeidy, W.W. Burke-White, C. Stahn, J.Kyriakasis, C. Ryngaert.

and international justice.[67] A considerable number of States were concerned that the ICC could interfere with their national administration of justice, or that they had no means to prevent the ICC from exercising jurisdiction over their nationals or crimes committed on their territory;[68] the ensuing compromise was a strict admissibility threshold, in the tacit understanding that national investigations and prosecutions would be encouraged and used more frequently in the future.

19. In respect of States who have expressed concern -and continue to do so- that the ICC infringes too much on national sovereignty, the response tended to be that complementarity protects them against arbitrary or unduly interference by the ICC.[69] However, this response is only credible when the principle of complementarity receives the interpretation in accordance with its object and purpose, which is in a very large part based on protection of national sovereignty. The Defence submits hereafter that the current interpretation of the principle negates the concerns raised by States at the Rome conference, defeats the principle's object and purpose and turns it on its head; the current regime -as developed by the Court's early practice, not yet approved by the Appeals Chamber- is *de iure* one of complementarity, but *de facto* is nothing less than primacy of the ICC over national courts. Those States who expressed concern about the application of the principle in practice were thus arguably justified in having those concerns which contributed to the withholding of ratification.

20. From the perspective of the ICC, strict interpretation of the admissibility conditions serves its direct interest in fair burden-sharing. Complementarity is a bulwark against allocation of numerous cases to a permanent and potentially universal court. The ICC is not in a position to process big numbers of cases and complementarity helps to reduce any unreasonable expectation as to what can and will be done by the ICC. This having been said, the dynamics of a new institution may be such that it is interested in cases in its early years which might not have aroused its interest -and thus may not have passed the admissibility-test- at a later stage of its existence. While one may be sympathetic to an 'evolving and dynamic' interpretation of admissibility conditions, the Defence submits that such a view should be firmly objected to.

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[67] See e.g. I. Tallgren, 'Completing the "International Criminal Order": The Rethoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court', 67 Nordic Journal of International Law (1998), p. 107; for an account of the drafting history, S.A. Williams and W.A. Schabas, *supra* note 76, pp. 605 - 613.

[68] Holmes in this regard states: '(...) the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases' (Holmes, in Cassese et al., *supra* note 76, p. 675)

[69] See G. Hafner, K. Boon, A. Rübesame, and J. Huston, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *European Journal of International Law* (1999), p. 118: 'The complementarity provision of the ICC treaty actually provides a safeguard to non-state parties that is not afforded by domestic judicial systems. Whereas a State on whose territory a crime has been committed may assert jurisdiction regardless of whether the state of nationality is willing and able to prosecute, the Court defers to the state of nationality's jurisdiction if this state genuinely prosecutes the case.'

There is no basis in the law for it and, from a policy perspective, it may do the ICC more harm than good. Not only do potential State-parties witness an interpretation of complementarity which defeats its object and purpose, but States may also get the impression that the ICC is prepared to take on a significantly heavier case load than it can reasonably discharge. This may jeopardise the encouragements for States to initiate national investigations, and also, on the basis of precedent, may overburden the Court in the future.

21. An aspect of complementarity which, in the Defence submission, is overlooked is the effect that being moved between (potential) trial fora has on an accused. One has to be careful in making generalisations, but a flexible interpretation of complementarity can produce highly adverse effects for the individual concerned.

22. The first problematic aspect the Defence submits is that prosecution by the ICC may take away an accused from his ' natural judge'. While the Defence is aware that the *ius de non-evocando* is not an absolute right,[70] it may affect negatively the position of an individual. He is brought to a legal and social culture which is not his own and which he may find difficult to understand and accommodate.

23. A further concern, the Defence submits, is that the physical relocation of individuals may deprive them of a meaningful exercise of the right to family life. The Chamber is aware of the difficulties met in arranging family visits for persons detained at the ICC. The difficulties are, ultimately, the product of what the Defence submits may be an arbitrary and unlawful assessment of the admissibility threshold in this case. Regarding the violations that may ensue, the Defence here cites from a recent publication:

Criticism has however been levelled by certain States Parties as to the need for such visits, their fear being that the standards upheld before the Court may impact also on their domestic standards. But does that really mean that depriving persons – who are moreover deemed to be innocent – of the right to see their family for years should be envisioned? Would that not be an infringement of the right to a family for children of detainees?[71]

[70] Cp. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić*, A. Ch., Case No. IT-94-1-AR72, 2 October 1995, paras. 61 - 64.
[71] M. Dubuisson, A-A Bertrand and N. Schauder, 'Contribution of the Registry to greater respect for the principles of fairness and expeditious proceedings before the International Criminal Court', in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court* (Leiden: Nijhoff Publishers 2009), p. 580.

In the footnote to this citation, reference is made to Articles 9 (3) and 10 of the International Convention on the Rights of the Child. The Defence observes that Mr Katanga is married and has two small children.[72]

24. Further, there may also be fair trial problems. The Defence refers to the ICTR Trial Chamber and Appeals Chamber decisions concerning the transfer of cases from the ICTR to Rwanda.[73] The Trial Chamber in the case of Mr. Kanyarukiga concluded that his case could not be transferred to Rwanda because it cannot be ensured that he will receive a fair trial in Rwanda. A significant factor was that witnesses residing outside Rwanda could not be compelled to testify before Rwandese courts, given the absence of subpoena powers to that end. This contributed to the situation where he would not be able to call witnesses residing outside Rwanda to the extent and manner that would ensure a fair trial.[74] This was confirmed on appeal.[75] Having regard to relevant factors surrounding admissibility, which include the possible adverse effects for accused physically moved to the ICC, these are disconcerting conclusions. If it is said that lacking the power to subpoena witnesses jeopardises the right to a fair trial, this directly concerns the ICC. The ICC lacks *fully* the power to compel the attendance of witnesses.[76] Rwanda at least has the power to compel witnesses in Rwanda to testify. In the Defence submission successive decisions at the ICC concerning admissibility have failed to give any or any proper weight to the adverse effects of admissibility for suspects.

25. A final observation concerns the expected length of proceedings at the ICC. The referral bench of the ICTY in the case of Rasevic and Todovic has frankly and openly recognized that the right to be tried without undue delay is often better respected at the national level than at the ICTY.[77] Again, these are relevant considerations for the effects a flexible interpretation of complementarity may produce for the accused.

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[72] Ibid.

[73] ICTR, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, T. Ch., 6 June 2008; ICTR, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, *Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78-R11bis, A. Ch., 30 October 2008.

[74] See Decision ICTR Trial Chamber, *supra* note 81, paras. 104 , 80 and 81.

[75] Decision ICTR Appeals Chamber, *supra* note 81, para. 34: 'would still face significant difficulties in securing the attendance of witnesses who reside outside Rwanda to the extent and in a manner which would jeopardize his right to a fair trial'.

[76] See G. Bitti, 'Article 64', in O. Triffterer (ed.), *Commentary in the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (Second Edition) (München: Beck Verlag 2008), p. 1213; also Kress and Prost: 'This [the principle of voluntary appearance, DH] constitutes a serious weakness within a system of international criminal justice wherein the Court lacks direct enforcement power, while being built upon the aspiration that the testimony of a witness at trial shall be given in person (article 69 para 2).' (C. Kress and K. Prost, 'Article 93', in O. Triffterer (ed.), *Commentary in the Rome Statute of the International Criminal Court - Observers' Notes, Article by Article* (Second Edition) (München: Beck Verlag 2008), p. 1576).

[77] ICTY, Decision on Referral of Case under Rule 11 bis with Confidential Annexes I and II, *Prosecutor v. Rasevic and Todovic*, Case No. IT-97-25/1-PT, Referral Bench, 8 July 2005, para. 101.

26. In the above the Defence have tried to sketch the background of the principle of complementarity and the important functions it serves, regarding States, the ICC and individuals concerned. The Defence submits that the interpretation and application of the principle in practice has not given the appropriate weight to these important functions and argue below that the interpretation given to the principle in ICC case law is flawed.

The admissibility-test applied in ICC case law (arrest warrant decisions)

27. The interpretation and application of the admissibility-test has so far only taken place only in the context of applications for arrest warrants, pursuant to Article 58. Only the Prosecutor and the Pre-Trial Chamber have pronounced themselves on it; a Trial Chamber and the Appeals Chamber have yet to give their views.

28. At the outset, the Defence submits that there is a shared agreement that in case of inaction at the national level a case is admissible at the ICC. The test of Article 17 is concerned with situations where national investigations are ongoing or have been conducted. This is the situation of Mr. Katanga. As follows from the evidence submitted by the Defence it is clear that Mr. Katanga was prosecuted in the DRC, and therefore the Chamber is concerned with the inadmissibility ground set out in Article 17 (1) (a). The Defence submits that for the admissibility determination what matters is the state of affairs at the time the arrest warrant was issued. It is thus not relevant whether at present Mr. Katanga is still being investigated or prosecuted in the DRC.

29. The currently prevailing admissibility test was developed in the Lubanga case. The Pre-Trial Chamber did not consider it necessary to perform an ability assessment in respect of the Congolese prosecution of Mr. Lubanga.[78] The Pre-Trial Chamber bluntly ruled that 'for a case arising from the investigation of a situation to be inadmissible, national criminal proceedings must encompass both the person and the conduct which is the subject before the Court.'[79] Since the charges in the DRC were considered not to be the same as the charges the ICC Prosecutor had formulated, the Pre-Trial Chamber considered, it would appear, the DRC 'inactive' in respect of these charges and confirmed the admissibility.

[78] ICC-01/04-01/06-8-US-Corr, 9 March 2006.
[79] Id., para. 37.

30. The Pre-Trial Chamber did not examine inability on the part of the DRC, which was the basis for admissibility in the Prosecutor's application for the arrest warrant.[80] The Pre-Trial Chamber mentioned, however, that contrary to the Prosecutor's position the DRC judicial system could no longer be regarded as 'unable', in the sense of Article 17 (1) (a) to (c).[81] It then applied the already mentioned 'same person, same conduct-test'.

31. The Pre-Trial Chamber's ruling in the Lubanga arrest warrant application-decision is in the Defence submission a vital, but flawed, precedent, that has had a powerful influence on subsequent case law. It is unclear where the Pre-Trial Chamber found its particular analysis of Article 17 and where it found authority for the 'same conduct-test'. There is no analysis of the drafting history of Article 17, nor any consideration for or discussion of the underlying notions, object and purpose of the principle of complementarity.

32. The Defence is also concerned as to the degree that the Pre-Trial Chamber tried to engage in a dialogue, via the Prosecutor, with the investigating/prosecuting State, the DRC. It follows from the informal expert paper on complementarity submitted to the ICC's Prosecutor that the experts regarded dialogue and partnership as a vital component of complementarity.[82] It implies, the Defence submits, a duty incumbent on the Prosecutor to assist States like the DRC in their investigations and prosecutions, especially if they concentrate on crimes against humanity, instead of taking over the case. At a bare minimum, the Prosecutor carries the burden to convince the Pre-Trial Chamber, in the framework of the application for an arrest warrant, that it has taken all the steps that could have been reasonably expected to assist the State in its national investigation/prosecution. The Defence submits that this is what complementarity should be about and is its object and purpose. All the arrest warrant decisions are silent as to what has been the standard set for the Prosecutor regarding its partnership/dialogue-relationship with States.

33. Given, the Defence submits, the poorly reasoned precedent created in the Lubanga case, both as to the substantive and procedural aspects surrounding complementarity, it is disconcerting that this 'same conduct-test' has been copied so uncritically in subsequent case law. In the present case, the arrest warrant decision against Mr. Katanga was predicated on exactly the same approach, with its absolute requirement of identical charges. Exactly the

[80] See id., para. 34.
[81] Id., para. 36.
[82] Informal expert paper: The principle of complementarity in practice (used to be available on ICC OTP website, now on file with Defence). The experts stated that complementarity should be approach on the basis of two 'guiding principles', partnership and vigilance. As to the partnership-side, the experts set out a list of modalities for the Prosecutor to encourage and assist states in national investigations and prosecutions (pp. 5 - 7).

same language was copied from the Lubanga case.[83] The Pre-Trial Chamber even referred to the 'same person, same conduct-test' as a 'conditio sine qua non' for inadmissibility.[84] An additional problematic issue is that one cannot infer from the reasoning of the Pre-Trial Chamber where the charges proposed by the ICC Prosecutor differed from the suspicion/accusations underlying the investigations in the DRC. Broad reference is made to information and evidence, but this is information and evidence from the Prosecutor only,[85] and it would have been appropriate to consult the DRC. This is especially the case, since the Defence has succeeded, by its own efforts, to obtain documents indicating that the DRC appeared to have been investigating the alleged Bogoro attack. Both the Prosecutor and Pre-Trial Chamber have either failed in their investigative duties or have failed to offer reasoning as to why the efforts undertaken in DRC did not encompass the same conduct, or should otherwise be regarded as 'insufficient'.

34. In respect of Mr. Ngudjolo identical expressions were used and the same test applied.[86]

35. As to the Uganda arrest warrant decisions, the matter of admissibility was not examined in detail; the Pre-Trial Chamber simply ruled that on the basis of the evidence the cases against Kony and others 'appear admissible'.[87]

36. In the Darfur situation, Mr. Ali Kushayb -whose arrest was requested by the Prosecutor- was in detention in Sudan and the situation did not appear to be one of inaction. Article 17 had to be applied. The Lubanga 'same conduct-test' was copied again.[88] No analysis was conducted in respect of the question whether Sudan was genuinely investigating Mr. Kushayb for crimes within the jurisdiction of the ICC.

37. In these decisions there is an emphasis on the charges being practically identical, as embodied by the 'same conduct' test. The Defence, while obviously accepting the same person-test, respectfully takes issue with the 'same conduct' test. The 'same conduct' test departs from the natural and proper interpretation of Article 17 if viewed in the light of its object and purpose. Further, what is the evidentiary basis upon which a Pre-Trial Chamber compares and assesses ICC and State investigations? In particular, how can it be determined, with a reasonable degree of certainty, the scope of State investigations, especially when this is

[83] ICC-01/04-01/07-4, para. 20.
[84] Ibid.
[85] Ibid.
[86] ICC-01/04-01/07-262, Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui, 6 July 2007, para. 21.
[87] ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor's Application for warrants of arrest under Article 58, 12 July 2005, p. 2.
[88] ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, para. 21.

a dynamic process? Finally, the Pre-Trial Chamber has offered an interpretation of the case, in the sense of Article 17, which raises new and unanswered questions, namely; what does the Pre-Trial Chamber mean by 'conduct', and to what degree does it have a factual and legal component?

38. The Defence submits that even if the 'same conduct' test is applied it cannot result in a finding of admissibility as the evidence demonstrates that the DRC was investigating and prosecuting Mr. Katanga for the Bogoro attack, and charged him with crimes against humanity.

Turning complementarity into primacy - why the 'same conduct' test is wrong

39. The Defence submits that the 'same conduct' test as developed and applied by the ICC Pre-Trial Chamber is the wrong test. It amounts to primacy. The following example helps demonstrates the point. Suppose an individual is accused of participating in unlawful attacks on ten villages, and each attack amounts to crimes against humanity. Under the currently prevailing test he could be investigated and prosecuted at the national level for his part in the attacks on villages one to nine; the ICC Prosecutor could then commence an investigation for village number ten which would be regarded as admissible under Article 17 as it is not the same conduct as features in the national proceedings. This would be, the Defence submits, inconsistent with the drafters' intentions. It is also 'primacy' because, given scarce investigative resources and the extent of international crime, a selection in investigation and prosecution is inevitable. The ICC Prosecutor could, in many instances, be in a position to put an end to serious investigations and prosecution at the national level, and for what reason? There would be no functional reason as it would merely substitute bona fide national proceedings for investigations which are just as selective - in some cases, even more selective. It is to be noted that in the present case the accused was investigated for a far wider range of alleged events.

40. The literature offers support for rejection of the 'same conduct' test. Kleffner says the following:

(...) in furtherance of the overall feature of complementarity to serve as a catalyst for domestic proceedings, rather than to discourage them, it is submitted that the Prosecutor would be better advised to grant States a certain margin of appreciation in selecting crimes. If he/she is of the opinion that the crimes charged in domestic proceedings are insufficient, a first step

should be to consult with the State concerned to amend domestic charges instead of frustrating bona fide efforts to conduct criminal proceedings.[89]

41. Regarding the effects that can be produced by the 'same conduct-test', it is worth quoting Schabas:

Commenting on the Lubanga arrest warrant in a press statement, Prosecutor Moreno Ocampo said '[f]orcing children to be killers jeopardises the future of mankind'. But arguably, the justice system of the Democratic Republic of Congo was doing a *better* job than the Court itself, because it was addressing crimes of greater gravity. Certainly genocide and crimes against humanity might also be said to 'jeopardise the future of mankind'.[90]

42. In a forthcoming piece on complementarity Nouwen expresses the following concern:

In all these instances the Pre-Trial Chambers have, or seem to have, chosen to argue that the domestic proceedings did not concern the same 'case' as the OTP's, rather than admitting that there were domestic proceedings and then going into question whether the relevant domestic authorities were able and willing genuinely to conduct these proceedings. This evasion of politically sensitive questions has resulted in a strict definition of a 'case' that could entirely undermine complementarity. This is even more apparent if the definition includes the requirement cited by the Prosecutor in *Kushayb* that the domestic case must concern not only the same 'conduct' and 'person', but also the same 'incident' for it to be the same case. As a consequence, national prosecutors wishing to avoid ICC intervention are bound to select the person, conduct and incident that the ICC would prosecute. By contrast, the ICC Prosecutor has in practice total discretion as to which person, conduct and incident he decides to prosecute. (...) While the ICC Prosecutor has total discretion as to which person, conduct and incident he decides to prosecute, national prosecutors who wish to avoid ICC intervention are bound to select the person, conduct and incident that the ICC would prosecute. Even if national prosecutions encompassed persons with greater responsibility, different and arguably more serious crimes and different incidents, the OTP's case would still be admissible. If complementarity is to mean that states have the first right to investigate and prosecute, other Chambers might well consider deviating from this early case law.[91]

43. These citations reflect what the Defence submits is a widely-shared concern regarding the interpretation of the admissibility threshold by the ICC Pre-Trial Chamber. The Defence now

[89] Kleffner, *supra* note 76, p. 201.
[90] W.A. Schabas, "Complementarity in Practice': Some Uncomplimentary Thoughts', 19 *Criminal Law Forum* (2008), p. 25.
[91] S. Nouwen, 'Fine-tuning Complementarity', to be published in B. Brown (ed.), *Research Handbook on International Criminal Law* (Edward Elgar, forthcoming 2009), on file with the Defence for Mr. Katanga.

refers to views that may lend some support to the interpretation of a 'case' by the Pre-Trial Chamber, as meant in Article 17. Rastan appears to support a strict interpretation of 'case' as mentioned in the Statute on the basis of a uniform and consistent interpretation wherever appears the word 'case' in the Statute, for example in Articles 17, 20, 89 and 94.[92] But the Defence submits that a uniform and consistent interpretation of the word 'case' throughout the Statute is inconceivable; the word has, for example, a very different connotation when used in the context of Article 17 and when used in the context of Article 20 (ne bis in idem). Rastan in this respect says the following:

It might be said that a narrow interpretation of the Court's admissibility provisions could negatively impact on the purposeful design of the Statute -which was meant to encourage domestic proceedings- by requiring national authorities to meet a very stringent test for any complementarity challenge to succeed. Such a view, however, appears to be supported primarily by policy guided considerations rather than strict legal interpretation.[93]

The Defence submits that the author is wrong here in the appropriate method of interpretation. The word 'case', the ordinary meaning is difficult to establish, must be interpreted in the light of Article 17's particular object and purpose, and not in the light of, for example, the rationale underlying Article 20. It would, furthermore, be a fallacy to assume that the drafters of the Rome Statute were at all times making consistent and uniform use of terminology. In determining Article 17's object and purpose, policy considerations are highly relevant for legal–interpretation because one has to discern the intentions of the drafters to some degree. Neither the Prosecutor nor the Pre-Trial Chamber has attempted to analyse the drafting history of Article 17 with a view to a better understanding of the word 'case'.

Application of the proper test in relation to Mr. Katanga's case

44. It follows from the above that the Pre-Trial Chamber erred in its interpretation of Article 17 of the Statute. There is no basis in law for the developed 'same conduct' test. It is inconsistent with the principle of complementarity and jeopardises the interests of the States, of the ICC and of suspects protected by the principle of complementarity.

45. The question then, the Defence submits, is what is an appropriate interpretation of 'case' and, more concretely, what test should be applied? With a view to assist the Trial Chamber in

[92] See R. Rastan, 'What is a 'Case' for the purpose of the Rome Statute?', 19 *Criminal Law Forum* (2008), p. 440
[93] Ibid.

its approach to this complex matter, the Defence submits that one can conceive of two tests which would correspond to the complementarity principle's object and purpose. The tests could be applied alternatively or jointly.

46. First, one could imagine a 'comparative gravity-test'. This test would amount to comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor. Only when the scope of investigations by the ICC Prosecutor would significantly exceed in gravity the scope of national investigations, would the admissibility threshold be met. In this respect one can think especially of the legal component of charges. For example, when at the national level the scope of investigations/prosecution is confined to war crimes, but the ICC Prosecutor envisages investigations for genocide, this could be a basis for admissibility.

47. Second, one can conceive a 'comprehensive conduct-test'. According to this test one has to compare the factual scope of investigations. Only when the ICC Prosecutor's scope of investigation is significantly more comprehensive than the scope of national investigations, would there be a basis for admissibility. Although no mathematic formula can be provided, one can again refer to the example of allegations that the accused was involved in attacks on ten villages. The admissibility threshold under the ‘comprehensive conduct’ test could then lie in the national investigations covering three villages while the ICC investigations covers seven villages. But when national investigations cover the same or only slightly less than the ICC investigations, an admissibility-determination should in the view of the Defence not be sustained.

48. While not directly required by the ICC Statute, the Defence submits that there is a strong procedural duty incumbent upon the Prosecutor, as a relevant precondition for the substantive admissibility test. A meaningful regime of complementarity, with strong encouragement for national investigations, entails a duty on the part of the ICC Prosecutor to consult and assist. If national trials are meant to be the rule, rather than the exception, the Prosecutor should consult when national proceedings take place with a view to a) informing national investigative and prosecutorial authorities of problems the Prosecutor might see from a 'complementarity-perspective', and b) assisting the national authorities in accommodating these concerns. As a concrete example; when according to the Prosecutor a national investigation does not include an important incident it should inform the national authorities. The latter may explain their position, for example - a lack of evidence. Should the Prosecutor possess the relevant evidence then the mechanism of Article 93 (10) of the Statute allows for sharing that evidence with national authorities. These 'consulting mechanisms' lie, in our

respectful submission, at the heart of 'effective complementarity' and have, with good reason, occupied an important place in the advice of the 'Expert Group' to the ICC Prosecutor[94] as well as finding support in authoritative literature.[95]

49. The Defence is concerned to question whether there has been genuine and appropriate consultation between the Prosecutor and the DRC in the present case. Was it the case that the Prosecutor was so keen on having this case at the ICC that he acted in a way irrespective of the proper and most effective interpretation of the principle of complementarity? The Defence is unaware of evidence that demonstrates that the Prosecutor has informed the DRC of concerns regarding national prosecutions in 'complementarity terms', or assisted the DRC in accommodating these concerns, for example by sharing evidence.

50. The Defence goes one step further. There is evidence that the DRC was keen on investigating this case at the national level and has submitted a request for legal assistance to the Prosecutor, making use of the mechanism in Article 93 (10).[96] The Defence is unaware of the fate of that request.

51. The Defence submits that the appropriate admissibility test to be applied is a combined 'comparative gravity'/'comprehensive conduct' test and that when applied to the case of Mr. Katanga the admissibility threshold has not been met. The evidence produced by the Defence demonstrates that the investigations in the DRC were of the same or greater gravity as the charges alleged by the ICC Prosecutor. They were also as comprehensive compared to both the intended charges of the ICC Prosecutor and the charges confirmed by the Pre-Trial Chamber. As was previously mentioned, the Defence disputes these allegations but what matters is the intention in the DRC.

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[94] See *supra* note 90.
[95] Kleffner, *supra* note 76, p. 201.
[96] See:
- Letter '*Demande de renseignements complémentaires'* from the Auditeur général près la Haute Cour Militaire to the Prosecutor of the ICC dated 22 January 2007, DRC-OTP-0171-1773, mentionned at para. 11, dd (Annex dd);
- Affidavit of Urbain Mutuale dated 17 April 2008, mentionned at para. 11, ddd (certifying that at the hearing of 10 April 2008 before the Haute Cour Militaire of DRC, the Prosecution argued that *« Si la fixation de cette cause devant la juridiction de jugement traîne encore, c'est parce que nous attendons encore certains éléments auprès de la CPI pour nous permettre d'étoffer notre instruction »*.) (Annex ddd)
- Letter dated 14 February 2007 from the Prosecutor of the ICC to the Auditeur général près la Haute Cour militaire (OTP/140207- DRC56/LMO-ptcc) following the letter of the Auditeur Général « *Demande de renseignement complémentaire datée du 22 janvier 2007 »,* DRC-OTP-0182-0429, mentionned at para. 11, gg (according to which the Prosecutor has identified information potentially useful for the investigations of the Auditeur Général, concerning several events mentionned in his *Demande*, but it cannot forward them currently for reasons of confidentiality; it is nonetheless ready to submit summaries.) (Annex gg)
- '*Requête aux fins de prorogation de la détention provisoire'* of Mr Katanga *et al.*, N°AG/0187/D5/2007, dated 2 March 2007, submitted by the Auditeur Général près la Haute Cour Militaire;[96] DRC-OTP-1010-0364, mentionned at para. 11, hh (according to its preliminary response, the Office of the Prosecution of the ICC is currently trying to gather evidence which could assist in the consolidation of the facts under instruction) (Annex hh).

52. On this basis, the Defence submits that the case against Mr. Katanga be declared inadmissible.

Application of the 'same conduct-test' to Mr. Katanga's case

53. As submitted earlier, even if the 'same conduct-test' is applied the result remains the same - the case is not admissible. From the evidence submitted in support of this motion it appears that Mr. Katanga was charged in DRC with participation in the attack on Bogoro, as a crime against humanity. The charges confirmed by the Pre-Trial Chamber are identical. They do not differ sufficiently to justify admissibility of the case at the ICC.

54. If this evidence was not in the possession of both the Prosecutor and the Pre-Trial Chamber, the question arises as to what degree they have properly investigated and compared DRC investigations and the ICC Prosecutor's intended charges. It might be argued that the procedure concerning the application of an arrest warrant is not the appropriate moment for a full scale investigation and that the decision is without prejudice to later admissibility challenges, but this is hardly convincing. In this respect, the Defence refers to the Appeals Chamber's ruling in the Ntaganda case, according to which the *proprio motu* review of admissibility in the framework of the application for an arrest warrant is at the discretion of the Pre-Trial Chamber. The Appeals Chamber also pointed out some possible elements of risks when the review takes place in that particular context.[97] It appears that *proprio motu* review of admissibility in the context of Article 58-proceedings should not take place where (a) admissibility is not raised by the Prosecutor in his application, (b) the review was ex parte without participation of suspect, victims and entities concerned, and (c) no ostensible cause or self-evident factor was manifest impelling the exercise of *proprio motu* review.[98] The Defence submits, however, that the arrest warrant application is a vital stage of the proceedings with serious consequences when no admissibility analysis is conducted or where such analysis is flawed.

55. The most obvious and most serious consequence of absent or defective admissibility-analysis is that, in the present case, it has resulted in the arrest and transfer of Mr Katanga to the ICC. His fate has thereby become the full responsibility of the Court. While the Defence appreciates the Appeals Chamber concern that the suspect has not participated in these arrest

[97] ICC-01/04-169, 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", 13 July 2006.
[98] Id., para. 53.

warrant-proceedings and that this requires caution,[99] the consequences of absence of or flawed admissibility-analyses are far more damaging to the suspect. The Defence raises concerns with the Appeals Chamber analysis whereby the impediment of the interests of the suspect in initial admissibility determination are not outweighed by its benefits.[100] The Appeals Chamber, the Defence submits, does not give sufficient weight to the consequences for an individual of being physically brought in the power of the ICC, especially when, following ICTR jurisprudence, it may be established that the ICC will be incapable of respecting Mr. Katanga's right to a fair trial (see further paragraph 24 above).

56. Another dimension of the arrest warrant proceedings which the Defence submits appears not to have been given sufficient weight by the Appeals Chamber approach to initial and *proprio motu* admissibility determinations is the following. The positive decision regarding admissibility in the framework of the application for an arrest warrant has undeniably led to significant expense and use of resources. It may affect the taking of other and more suitable choices of persons to be prosecuted at the ICC.

57. Finally, the Defence submits that a proper and thorough admissibility analysis is necessary from a very early stage, with a view to avoiding unnecessary delays and rupture in national criminal proceedings.

Why the DRC cannot be regarded as unable or unwilling

58. The question of whether the DRC was 'unwilling or unable genuinely to carry out the investigation or Prosecution', as per Article 17 of the Statute of the ICC, has not been addressed. The Pre-Trial Chamber did not consider the matter at all, applying the 'same conduct' test. In the Lubanga case the Pre-Trial Chamber was generally positive as to the state of the justice system in the DRC. There was no indication of unwillingness or inability in Mr. Katanga's case when the Pre-Trial Chamber issued its decision on the application for the arrest warrant. It has not been raised by the Prosecutor nor has it been addressed *proprio motu* by the Pre-Trial Chamber. It would not appear to be an issue and willingness and ability seem to have been tacitly accepted.

59. However, to the degree the matter may be relevant to these proceedings, the Defence submits the following observations.

[99] Id., para. 50.
[100] Id., para. 51.

60. Firstly, the fact that the DRC has triggered the jurisdiction by means of self-referral is no longer relevant for the determination of admissibility. It is true that, in its referral letter, the DRC said that '(...) les autorités compétentes ne sont malheureusement pas en mesure de mener des enquêtes sur les crimes mentionnés ci-dessus ni d'engager les poursuites nécessaires sans la participation de la Cour Pénale Internationale'.[101] But this general reference can, in and of itself, not be a basis for admissibility.

61. Furthermore, in its Decision in the Lubanga case the Pre-Trial Chamber expressed its confidence in the ability of the DRC's justice system to prosecute international crimes:

In the Chamber's view, when the President of the DRC sent the letter of referral to the Office of the Prosecutor on 3 March 2004, it appears that the DRC was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002 (...). However, for the purpose of the admissibility analysis of the case against Mr Thomas Lubanga Dyilo, the Chamber observes that since March 2004 the DRC national justice system has undergone certain changes, particularly in the region of Ituri where a *Tribunal de Grande Instance* has been re-opened in Bunia. This has resulted *inter alia* in the issuance of two warrants of arrest by the competent DRC authorities for Mr Thomas Lubanga Dyilo in March 2005 for several crimes, some possibly within the jurisdiction of the Court, committed in connection with military attacks from May 2003 onwards and during the so-called Ndoki incident in February 2005. Moreover, as a result of the DRC proceedings against Mr Thomas Lubanga Dyilo, he has been held in the *Centre Pénitentiaire et de Rééducation de Kinshasha* since 19 March 2005. Therefore, in the Chamber's view, the Prosecution's general statement that the DRC national judicial system continues to be unable in the sense of article 17 (1) (a) to (c) and (3) of the Statute does not wholly correspond to the reality any longer.[102]

The Defence subscribes to this analysis and sees no reason why in respect of Mr. Katanga the DRC was unable or unwilling to prosecute him. All signals indicated otherwise; Mr Katanga was detained for crimes within the ICC jurisdiction, as confirmed by various documents.

62. The Defence is aware that the DRC will be heard in these proceedings. It might be the case that the DRC will declare itself at present unable to investigate and prosecute Mr. Katanga's case. This 'renewed waiver of complementarity' would meet with a number of objections.

[101] Cited in Schabas, *supra* note 98, pp. 10-11.
[102] ICC-01/04-01/06-8-US-Corr, paras. 35 - 36.

63. First, given the close ties between the DRC and the ICC Prosecutor, evidenced by the cooperation agreement from 2004 between the DRC and the Prosecutor, there is at least the appearance that any declaration of inability serves the interests of the Prosecutor in the current case and is not the result of independent and autonomous analysis of the DRC's justice system.

64. Secondly, any declaration of inability at the present stage cannot have retro-active effect. The Chamber will have to determine whether this case has been initiated on a proper basis and whether Mr Katanga has been deprived of his liberty on a proper basis. What matters is, the Defence submits, the admissibility of the case at the time of the arrest warrant application. There is no evidence that the Pre-Trial Chamber's observations as to ability and willingness expressed in the Lubanga case were and are no longer valid. It is therefore improper to proceed on the basis of speculations or on the basis of a renewed assessment of DRC's ability to prosecute the case. Clearly, in our view, such renewed assessment would serve no other purpose than to maintain the status quo and pursue Mr. Katanga's case before the ICC.

65. Thirdly, the DRC has never challenged the admissibility of Mr Katanga's case at the ICC. However, this should not be indicative of 'inability'. A State can have a multitude of reasons not to challenge admissibility; one of them could be that it is quite convenient and cost effective to have the ICC prosecute cases. There may be a political incentive to do so, both in respect of the person transferred or, by supporting such transfer, evading the possible transfer and investigation of others. Clearly, this is a method of burden-sharing which directly contravenes the object and purpose of the principle of complementarity.

The consequences of a successful admissibility challenge

66. The Defence reserves its position as to what should happen with Mr. Katanga in the event of a finding of inadmissibility of his case. The question before the Trial Chamber is whether, in law, there is an appropriate basis to declare this case admissible. Given the importance of the principle of complementarity for the operation of the Court and its position in the international legal order, this question should be addressed in its own right. The Defence therefore respectfully requests the Chamber, in the event of a ruling of inadmissibility, to allow for an exchange of submissions and a further and separate hearing as to the consequences for Mr Katanga.

Conclusion

67. The Defence respectfully requests the Trial Chamber

a. To declare the case against Mr. Katanga inadmissible;

b. To allow for submissions and a hearing regarding subsequent steps to be taken in relation to Mr Katanga.

Respectfully submitted,

David HOOPER

Dated this 11 March 2009
At The Hague