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TRIAL CHAMBER II

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR
v. Germain KATANGA and Mathieu NGUDJOLO CHUI

Public

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

Source: Office of Public Counsel for Victims

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

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Other

I. Procedural History

1. On 26 February 2009, Trial Chamber II (the "Chamber") rendered the "Décision relative au traitement des demandes de participation", in which the Chamber ordered the Registrar to appoint the Office of Public Counsel for Victims (the "OPCV" or the "Office") as legal representative of those applicants who do not have a legal representative, pending such time as the Chamber rules on their status or until they appoint another legal representative.[1]

2. On 5 March 2009, the Chamber rendered the "Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve)"[2], in which it acknowledged the receipt, on 10 February 2009, of a motion filed confidentially and *ex parte,* Defence for Germain Katanga only, challenging the admissibility of the case before the Court pursuant to article 19(2)(a) of the Rome Statute (the "Defence Motion").[3] On 25 February 2009, at the request of the Chamber, the Defence Motion was notified to the Prosecution and reclassified as confidential.[4]

3. In its 5 March 2009 Decision, the Chamber ordered, *inter alia,* 1) that the Defence for Mr. Katanga (the "Defence") file a public redacted version of its Motion, 2) that the Registrar inform the Democratic Republic of the Congo (the "DRC") authorities, the Legal Representatives of anonymous and non-anonymous victims, as well as those victims having communicated with the Court in the case, the last group *via* the OPCV's intervention, of the Defence Motion before 6 March 2009, 3) that the Registrar provide to the victims mentioned in rule 59(1)(b) of the Rules of Procedure

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[1] See the "Décision relative au traitement des demandes de participation", dated 26 February 2009 and notified on 27 February 2009, No. ICC-01/04-01/07-933, p. 20.

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

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

[4] See the "Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve)", *supra* note 2, p. 3. A public redacted version of the Defence Motion was filed on 11 March 2009, see the document No. ICC-01/04-01/07-949.

and Evidence (the "Rules") and to the DRC authorities by 26 March 2009 and pursuant to rule 59(2) of the Rules, a summary of the grounds upon which admissibility has been challenged by the Defence and 4) that, upon receiving the said summary, the concerned victims and the DRC authorities file their observations by 16 April 2009.[5]

4. On 6 March 2009, in accordance with the Chamber's Decision dated 26 February 2009[6], the Registrar appointed the Principal Counsel of the Office as the Legal Representative of victims a/0140/08, a/0142/08, a/0145/08, a/0148/08, a/0155/08, a/0210/08, a/0212/08, a/0213/08, a/0214/08, a/0216/08, a/0281/08 and a/0282/08.[7]

5. On 6 March 2009, the Registrar informed the Office, by way of a confidential memorandum, that the Defence had filed a submission challenging the admissibility of the case before the Court pursuant to article 19(2)(a) of the Rome Statute. Such memorandum has been filed in the record of the case.[8]

6. On 9 March 2009, in further compliance with the Chamber's Decisions of 26 February 2009 and of 5 March 2009, the Registrar appointed the Principal Counsel of the Office as the Legal Representative of victims a/0520/08, a/0524/08, a/0527/08, a/0053/09, a/0067/09, a/0068/09, a/0069/09, a/0070/09, a/0071/09, a/0072/09, a/0073/09, a/0074/09, a/0075/09, a/0076/09, a/0077/09, a/0078/09, a/0079/09, a/0080/09, a/0081/09, a/0082/09, a/0083/09, a/0084/09, a/0085/09, a/0086/09, a/0112/09, a/0113/09, a/0114/09,

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[5] *Idem*, pp. 6 - 7.

[6] See the "Décision relative au traitement des demandes de participation", *supra* note 1.

[7] See the "Désignation du Conseil principal du Bureau du conseil public pour les victimes pour représenter les victimes a/0140/08, a/0142/08, a/0145/08, a/0148/08, a/0155/08, a/0210/08, a/0212/08, a/0213/08, a/0214/08, a/0216/08, a/0281/08, a/0282/08", 6 March 2009, No. ICC-01/04-01/07-945.

[8] See the "Registrar's report on the notification of the information to the DRC authorities, the Legal Representatives of anonymous and non-anonymous victims and the OPCV of the submission of the "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute", 24 March 2009, No. ICC-01/04-01/07-984-Conf + Conf-Anxs.

a/0115/09, a/0116/09, a/0117/09, a/0118/09, a/0119/09, a/0120/09, a/0122/09, a/0123/09, a/0124/09, a/0125/09, a/0126/09, a/0127/09 and a/0128/09.[9]

7. On 19 March 2009, the Office of the Prosecutor (the "OTP" or "the Prosecution") filed on a confidential basis, *ex parte* available only to the Prosecution and the Defence teams, its response to the Defence Motion (the "Prosecution's Response"). On 30 March 2009, the Prosecution filed a public redacted version of the said Response.[10]

8. On 26 March 2009, the Registrar transmitted to the Office the confidential summary of the Defence Motion, in compliance with the Chamber's Decision of 5 March 2009 and pursuant to rule 59(2) of the Rules.

9. On 26 March 2009, the Defence filed an application for leave to reply to the Prosecution's Response[11], which was granted by the Chamber on 27 March 2009.[12] On 30 March 2009, the Defence filed a reply to the Prosecution's Response (the "Defence's Reply).[13]

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[9] See the "Désignation du Conseil principal du Bureau du conseil public pour les victimes pour répresenter les victimes a/0520/08, a/0524/08, a/0527/08, a/0053/09, a/0067/09 à a/0086/09, a/0112/09 à a/0120/09 et a/0122/09 à a/0128/09", 09 March 2009, No. ICC-01/04-01/07-947 + Conf-Exp-Anxs 1-40.

[10] See the "19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 30 March 2009, No. ICC-01/04-01/07-1007.

[11] See the "Defence Application for Leave to Reply to the Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 26 March 2009, No. ICC-01/04-01/07-994.

[12] See the "Décision sur la requête de la Défense de Germain Katanga aux fins de déposer une réplique (norme 24 du Règlement de la Cour)", 27 March 2009, No. ICC-01/04-01/07-1004. On 27 March 2009, the Prosecution filed the "Prosecution Response to the Defence's Application for Leave to Reply to the Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", which was notified only on 30 March 2009 (No. ICC-01/04-01/07-1006). In the said Response, the Prosecution had asked the Chamber to limit the scope of any reply filed by the Defence to annexes I and J of the Prosecution's Response, and that the Chamber deny the Application for Leave to Reply in all other respects.

[13] The public version of the Defence's Reply was filed on 1 April 2009. See the "Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 1 April 2009, No. ICC-01/04-01/07-1015.

10. On 31 March 2009, the OPCV filed an application to extend the time limit for the submission of observations regarding the admissibility proceedings until 29 April 2009 in order to be able to contact the victims represented by the Office and obtain their views and concerns on the matter.[14]

11. On 3 April 2009, the Chamber granted the OPCV's application, extending the time limit to file the observations of the victims on the Defence Motion until 29 April 2009.[15]

12. On 16 April 2009, the Legal Representatives of victims a/0330/07 and a/0331/07, of victims a/0333/07 and a/0110/08, and of victims a/0327/07, a/0329/07, a/0038/08, a/0039/08, a/0043/08, a/0046/08, a/0050/08, 3/0051/08, a/0055/08, a/0056/08, a/0057/08, a/0060/08, a/0061/08, a/0066/08, a/0067/08, a/0070/08, a/0073/08, a/0076/08, a/0077/08, a/0078/08, a/0079/08, a/0080/08, a/0083/08, a/0085/08, a/0088/08, a/0090/08, a/0092/08, a/0095/08, a/0096/08, a/0100/08, a/0101/08, a/0103/08, a/0104/08, a/0108/08, a/0109/08, a/0015/08, a/0022/08, a/0024/08, a/0025/08, a/0027/08, a/0028/08, a/0029/08, a/0032/08, a/0033/08, a/0034/08, a/0035/08, a/0009/08, a/0010/08, a/0011/08, a/0012/08, a/0013/08, a/0015/08, and a/0016/08, filed their observations on the Defence Motion[16].

II. Preliminary Matter

13. On 7 April 2009, the Victims Participation and Reparations Section (the "VPRS") informed the OPCV *via* an internal memorandum that applicants a/0216/08,

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[14] See the "Application of the OPCV to extend the time limit for the submission of observations with regard to the admissibility proceedings", 31 March 2009, No. ICC-01/04-01/07-1011.

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

[16] See, respectively, the "Représentation concernant la requête sur l'exception d'irrecevabilité introduite par la défense de M. Germain KATANGA (art. 19 du Statut de Rome)", 16 April 2009, No. ICC-01/04-01/07-1058-Conf; the "Représentation des victimes a/0333/07 et a/110/08 sur l'exception d'irrecevabilité déposée par la Défense de M. Katanga (Règle 59-3 du Règlement de procédure et de preuve)", 16 April 2009, No. ICC-01/04-01/07-1059-Conf; the "Observations des victimes quant à l'exception d'incompétence soulevée par la défense de Germain Katanga dans sa requête du 10/02/2009", 16 April 2009, No. ICC-01/04-01/07-1060.

a/0527/08, a/0067/09, a/0070/09, a/0128/09, a/0068/09, a/0071/09, a/0072/09, a/0080/09, a/0081/09, a/0113/09, a/0122/09, a/0124/09, a/0126/09, a/0069/09, a/0073/09, a/0076/09, a/0077/09, a/0079/09, a/0085/09, a/0086/09, a/0123/09, a/0074/09, a/0078/09, a/0083/09, a/0084/09, a/0115/09, a/0116/09, a/0118/09, a/0119/09, a/0125/09, a/0127/09, a/0075/09, a/0140/08, a/0142/08, a/0145/08, a/0155/08, a/0210/08, a/0213/08, a/0212/08, a/0214/08, a/0281/08, and a/0282/08, for whom the Principal Counsel of the Office had previously been appointed[17] as legal representative, had appointed another legal representative, the name of the latter not having been disclosed in the memorandum.[18] The said memorandum is attached hereto as a confidential Annex, *ex parte* OPCV only.

14. Following the receipt of the said memorandum and in order not to jeopardise the prerogatives of the newly-appointed legal representatives and not to expose the concerned victims to security risks, which could arise from multiple contacts with different people acting on their behalf or different staff of the Court, the Office has ceased making efforts in contacting the victims who had appointed another legal representative.

15. The Office is not in a position to know whether the new legal representatives, appointed by the victims before the expiration of the deadline for the submission of their observations on the Defence Motion, have been informed by the Registrar of the said Motion. Therefore, the Office submits the following observations on the Defence Motion on behalf of victims a/0148/08, a/0520/08, a/0524/08, a/0053/09, a/0082/09, a/0112/09, a/0114/09, a/0117/09, and a/0120/09, who continue to be represented by the OPCV and, pursuant to the Chamber's instructions of 5 March 2009, generally on behalf of victims who have communicated with the Court in the case.[19]

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[17] See the "Décision relative au traitement des demandes de participation", *supra* note 1. See also the appointments of the OPCV, *supra* note 7 and note 9.

[18] See the Internal Memorandum by Fiona McKay, Head of VPRS, 7 April 2009, Ref. No. VPRS-A-2009-024-out.

[19] See the "Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve)", *supra* note 2, p. 6.

III. The burden of proof to establish that the case is inadmissible before the Court is on the Defence

16. The Office submits that the first determination that the Chamber needs to make in order to rule on the issue of admissibility of the case against Germain Katanga is to decide what party has the burden of proof with regard to providing the Chamber with sufficient evidence to establish the criteria of inadmissibility under article 17(1) of the Rome Statute. In the procedure for the issuance of a warrant of arrest or summons to appear, it is the Prosecution who carries the initial burden of providing the Chamber with sufficient information and evidence to establish reasonable grounds to believe that the person named in the application for a warrant of arrest or summons to appear committed the crimes alleged therein, and that the case is admissible at that time based on the information provided.[20]

17. After the issuance of a warrant of arrest or a summons to appear, however, the preparatory works related to article 17 of the Rome Statute show that the burden of proof for a challenge to the admissibility of a case before the Court[21] shifts from the Prosecution to the party bringing said challenge forward.

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[20] See, *inter alia*, the "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo", 24 February 2006, No. ICC-01/04-01/06-8-US-Corr, reclassified as public pursuant to the decision No. ICC-01/04-01/06-37. See the "Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005", 27 September 2005, No. ICC-02/04-01/05-53, para. 38; "Warrant of Arrest for Vincent Otti", 8 July 2005, No. ICC-02/04-01/05-54, para. 38; "Warrant of Arrest for Laska Lukwiya", 8 July 2005, No. ICC-02/04-01/05-55, para. 26; "Warrant of Arrest for Okot Odhiambo", 8 July 2005, No. ICC-02/04-01/05-56, para. 28; and "Warrant of Arrest for Dominic Ongwen", 8 July 2005, No. ICC-02/04-01/05-57, para. 26. See also the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant to arrest for Germain Katanga", 6 July 2007, No. ICC-01/04-01/07-4-US, reclassified as public pursuant to oral decision dated 12 February 2008.

[21] In its "Decision on the Admissibility of the Case under article 19(1) of the Statute", Pre-Trial Chamber II held that "*considered as a whole, the corpus of these* [admissibility] *provisions delineates a system whereby the determination of admissibility is meant to be an ongoing process throughout the pre-trial phase, the outcome of which is subject to review depending on the evolution of the relevant factual scenario.*", 10 March 2009, No. ICC-02/04-01/05-377, p. 16.

18. During the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court (the "Preparatory Committee"), Human Rights Watch, recommended, in its analysis of the admissibility provision of the Statute, that "*the burden of proof as to inadmissibility* [should] *lie* [...] *with the state or individual making the challenge* [. . .]."[22] Human Rights Watch further highlighted that "[i]*t must be for the challenging state or person to furnish the Court with sufficient information as to the steps taken in such an investigation or prosecution for the Court to reach its decision, binding on state and the parties, as to the admissibility of the case.*"[23] The analysis went on to explain that "*for the ICC to ascertain whether any such* [investigative or prosecutorial] *measures have been taken, and whether they satisfy the* [admissibility] *test, would firstly impose a prohibitively onerous burden on the Court. Moreover, to give the ICC such a role would violate the principle that the ICC's function is not to investigate the functioning of national legal systems.*"[24]

19. The admissibility articles proposed by France during the Preparatory Committee meetings also echo the necessity for this shift in the burden of proof from the Prosecution to the party making a challenge on admissibility at a time subsequent to the pre-trial chamber's determination for purposes of issuing a warrant of arrest or a summons to appear.[25] Indeed, France's proposed article 36 (Verification of Jurisdiction) stated that "[a]*ny State Party competent to institute proceedings in connection with all or part of the acts brought before the Court and any person named in the document of submission to the Court may challenge the jurisdiction of the Court.*"[26] France's article 39 on challenges of submissions to the Court further stated that "[i]*n every case, the State or person challenging a submission to the Court* [. . .] *shall provide all information concerning the conduct of the investigations and the judicial procedures which may support a*

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[22] See the Human Rights Watch Commentary for the December 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court, p. 45.
[23] *Idem.*
[24] *Ibid.*
[25] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, Compilation of Proposals, U.N. Doc. A/51/22, 13 September 1996, pp. 154 - 155, 157 - 158.
[26] *Idem*, p. 154.

finding of inadmissibility in the case submitted to the Court."[27] France's proposed article 116 on Challenge Procedure further proposed that "[i]*f the Court allows the defence of inadmissibility, it shall declare the case inadmissible and the trial initiated in accordance with this title may not proceed."*[28] Thus, it is clear that France's proposals in the matter envisioned the burden of proof for admissibility challenges to be placed squarely on the party bringing such motions to the attention of the Court. This approach was shared by other delegations.[29]

20. Another instance where the burden of proof on admissibility challenges was discussed was in the recommendations made by Amnesty International to the United Nations Diplomatic Conference of Plenipotentiaries for the Establishment of an International Criminal Court (the "Diplomatic Conference"), wherein it proposed that "[s]*tate challenges* [under article 17] [...] [should] *fully address state concerns, since if the state can demonstrate that the court lacks jurisdiction or that the case is inadmissible because it is able and willing to conduct a prompt, vigorous, thorough and fair investigation, then the suspect or accused and any evidence seized can be transferred to the state"* (*emphasis* added).[30] The Lawyers Committee for Human Rights, in its International Criminal Court Briefing Series of February 1998, also saw the need to place the burden of proof on the party or State challenging the admissibility of a case when it stated that "[s]*tates who wish to challenge the competence of the court* [should] *have the earliest possible occasion to establish their ability and willingness to investigate the case in their own national systems."*[31]

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[27] *Ibid.*

[28] *Ibid.*, p. 157.

[29] See, for instance, the proposals of Austria and Switzerland and the Spring Session Preparatory Committee on draft article 34 (Challenges to Jurisdiction), in the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II, Compilation of Proposals, U.N. Doc. A/51/22, 13 September 1996, p. 158

[30] See AMNESTY INTERNATIONAL, *The International Criminal Court – Making the Right Choices, Part V, Recommendations to the Diplomatic Conference,* 1 May 1998, p. 37, available at http://www.iccnow.org/documents/AIMakingRightChoicesPart5.pdf (last visited 27 April 2009).

[31] See LAWYERS COMMITTEE FOR HUMAN RIGHTS, "The Accountability of an *Ex Officio* Prosecutor", *International Criminal Court Briefing Series*, vol. 1, No. 6, 1 February 1998, p. 14.

21. As can be surmised from the above commentaries and proposals, the burden of proof to establish the criteria for admissibility under article 17 of the Rome Statute was intended to fall on the party or State alleging the case's inadmissibility before the Court. Placing the burden of proof on the party claiming that the case is inadmissible, after the Prosecution has satisfied its initial burden of establishing admissibility before the Court for purposes of article 58(1) of the Rome Statute, is not only consistent with the universally-accepted principle of fairness in criminal proceedings, but it also avoids putting an otherwise onerous burden on the Court to obtain information about national investigations or proceedings that it may not be privy to. Furthermore, placing the burden of proof on the party raising the challenge of admissibility is supported by the widely-accepted legal principle that the party raising a motion before a court should provide the proof upon which his/her motion is based. It is relevant for the Chamber to consider this principle, known as *actori incumbit probatio* in Latin[32], since article 21 of the Rome Statute allows the Court to apply general principles of law derived from national and international law. This principle is a basic burden of proof rule which states that it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute.[33] The rule of *actori incumbit probatio* has been upheld before international courts such as the Iran-United States Claims Tribunal, the European Court of Justice, the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia (the "ICTY").[34] In particular, the ICTY held in the case of *The Prosecutor v. Zejnil Delalic* that, although the burden of proving the allegations in an indictment against an accused rests on the Prosecution, "*there are situations in a case where the accused himself makes allegations or denies the accepted situation* [...]."[35] The ICTY went on to

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[32] See TRAYNER (J.), *Latin Phrases and Maxims*, Harvard University, 1861, p. 15.

[33] See KAZAZI (M.), *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, Kluwer Law International, 1996, pp. 221-222.

[34] *Ibid.* See also KOKOTT (J.), *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems*, Kluwer Law International, 1998, p. 149.

[35] See ICTY, *The Prosecutor v. Zejnil Delalic*, Case No. IT-96-21-T, Trial Judgment, 16 November 1998, p. 212.

explain that "[w]*here the obligation of either party at trial is to satisfy the requirement of a rule of law that a fact in issue be proved or disproved, either by a preponderance of the evidence or beyond reasonable doubt, there is a legal burden on such party* [and further that] [i]*t is a fundamental requirement of any judicial system that the person who has invoked its jurisdiction and desires the tribunal or court to take action on his behalf must prove his case to its satisfaction*" (*emphasis* added).[36] It is therefore not only appropriate but indeed necessary for the Chamber to require the Defence to present proof that the criteria under article 17 of the Rome Statute have been established in order for the latter to rule the case against Germain Katanga inadmissible before the Court.

22. As to the question of the evidentiary threshold that must be met by the party raising the challenge of admissibility after the initial determination by the Chamber upon the issuance of a warrant of arrest or summons to appear, the Chamber may find it relevant to once more turn to the preparatory works for the Rome Statute for guidance, since article 17 does not specify any particular standard of proof to be met. In 1995, when the Sixth Committee considered the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court (the "*Ad Hoc* Committee"), the delegation of Italy commented on the subject of the evidentiary standard for admissibility proceedings that "[i]*t was important to safeguard the primacy of national jurisdiction legitimately exercised, and also to prevent the jurisdiction of the international criminal court from becoming merely residual and virtually irrelevant to national jurisdictions. Placing excessively stringent conditions on the exercise of the court's jurisdiction would impede its ability to fill in gaps in national judicial systems.*"[37] The delegation of the Kingdom of Lesotho to the Diplomatic Conference further highlighted that "*attempts to use the complementarity principle to obstruct justice and stall*

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[36] *Idem.*

[37] See the Statement by Lorenzo Ferrarin, Delegate of Italy, in "*Committee is told proposed International Criminal Court should be complementary to national jurisdictions*", U.N. Press Release GA/L/2876, 30 October 1995, p. 9, available at http://www.un.org/News/Press/docs/1995/19951030.gal2876.html (last visited 27 April 2009).

ICC investigations" should be avoided.[38] In June 1998, the delegation of Switzerland likewise stressed that "[the complementarity principle] *should not be formulated in a way that would encourage impunity.*"[39] The Lawyers Committee for Human Rights similarly opined that "[the complementarity regime] *must not be used as a means of marginalising the court* [by providing] *states with an opportunity to obstruct justice and to delay interminably ICC investigations.*"[40]

23. Further bolstering this general position, the Informal Expert Paper for the Office of the Prosecutor entitled "*The principle of complementarity in practice*" (the "Expert Paper") describes the standard of proof to be applied by the Court in deciding admissibility issues in the following manner:

> [due to the fact that] *the issue in complementarity is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is the simple balance of probabilities* [. . .].[41]

24. Thus, the Office respectfully submits that it is a balancing test of multiple factors, in light of the drafting history of article 17 of the Rome Statute as described above, that the Chamber should engage in to determine whether the Defence has

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[38] See the Statement by M.V. Raditapole, Delegate of the Kingdom of Lesotho to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June 1998, available at http://wwan.cn/icc/speeches/615les.htm (last visited 02 April 2009).

[39] See the Statement by Jakob Kellenberger, Delegation of Switzerland, in "*Use of Weapons of Mass Destruction should be Included in Criminal Court's Definition of War Crimes, Say several*", U.N. Press Release L/ROM/14, 18 June 1998, available at http://www.un.org/icc/pressrel/lrom14.htm (last visited 27 April 2009).

[40] See LAWYERS COMMITTEE FOR HUMAN RIGHTS, "*Establishing an International Criminal Court – Major Unresolved Issues in the Draft Statute*", 1 May 1998, p. 19, available at http://www.iccnow.org/documents/LCHRUnresolvedIssues.pdf (last visited 02 April 2009). See also Statement by Thomas S. Masuku, Delegation of Swaziland, in "*Debate on Proposed International Criminal Court Continues in Sixth Committee*", U.N. Press Release GA/L/2880, 2 November 1995, p. 9.

[41] See the Informal Expert Paper for the Office of the Prosecutor, "*The Principle of complementarity in practice*", May 2003, par. 52, available at http://www2.icc-cpi.int/iccdocs/doc/doc656350.pdf (last visited 27 April 2009).

provided it with sufficient evidence to show that the case against Germain Katanga is inadmissible before the Court.

IV. Definition of "investigation" or "prosecution" for purposes of article 17 of the Rome Statute

25. After assuring that the burden of proof is properly placed on the party carrying it in accordance with the intent of the drafters of article 17 of the Rome Statute, as well as the principles of law discussed above, the Chamber next needs to determine whether the Defence has submitted enough evidence to establish that Germain Katanga is being investigated or prosecuted by the DRC authorities for purposes of article 17(1)(a) of the Rome Statute. For that purpose, the OPCV submits that the Chamber would need to define what objective actions or steps taken by national authorities are legally sufficient to constitute an investigation or prosecution under the said article. Because the terms "investigation" and "prosecution" are not given an express definition in the Rome Statute, it is once more relevant to look at the preparatory works for the drafting of article 17 in order to ascertain the definition and scope intended to be given to these terms by the drafters thereof. Indeed, even the Defence concedes in its Motion that an analysis of the drafting history of article 17 of the Rome Statute would be useful in understanding the article as well as the notions, object and purpose of the principle of complementarity.[42]

26. In August of 1997, the Canadian Delegation to the Preparatory Committee was asked by the Chairman to coordinate informal consultations to develop a consolidated text on the issue of the Court's complementarity with national jurisdictions. This culminated in the text proposed under article 35 of the Draft Statute for an International Criminal Court.[43] A member of the Canadian delegation

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[42] See the "Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19 (2) (a) of the Statute", 11 March 2009, *supra* note 3, p. 23.

[43] See ROBINSON (D.), *"Progress on Issue of Complementarity"*, in The International Criminal Court Monitor – The Newsletter of the NGO Coalition for an International Criminal Court – Special Edition,

to the Preparatory Committee wrote in an article published in "The International Criminal Court Monitor" that, although there was general agreement during the consultations among the delegations that a case would be admissible before the Court where national authorities had completely failed to carry out any investigation whatsoever, *"the more difficult question was whether a case could be admissible* [...] *where national authorities were in fact carrying out an investigation or prosecution."*[44] Significantly, the phrase *"where the case is being investigated or prosecuted by a State with jurisdiction, unless the State is unable or unwilling genuinely to carry out the investigation or prosecution"* in the draft article 35, which was the precursor to the adopted article 17 of the Rome Statute, was understood by the delegations to require more than just *"the bare trappings of a criminal proceeding* [...]."[45] Furthermore, the Summary of the Proceedings of the Preparatory Committee during the period of 25 March through 12 April 1996 noted the observations by some of the participants that article 35 indicated a crime under investigation as a ground for inadmissibility, *"without taking into account the circumstances under which a crime was investigated and the possibilities of ineffective or unavailable procedures* [...]."[46]

27. Therefore, an investigation *per se*, without looking into the circumstances or effectiveness thereof, was considered insufficient by the delegations to render a case

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52nd General Assembly, 1 December 1997, pp. 5, 10. See also Preparatory Committee on the Establishment of an International Criminal Court, Working Group on Complementarity and Trigger Mechanism, A/AC/249/1997/WG.3/CRP.2, 13 August 1997, available at http://www.iccnow.org/documents/IssuesofAdmissibility.pdf (last visited 29 March 2009).

[44] See ROBINSON (D.), *op. cit. supra* note 43, p. 5.

[45] *Ibid.* The 5 August 1997 Canadian-German draft proposal of article 35 (Issues of Admissibility) stated that *"the Court shall* [...] *decide that a case before it is inadmissible if: (a)* [...] *the investigation or prosecution is being diligently undertaken* [...]", available at http://www.icc-cpi.int/NR/rdonlyres/A6F4DE82-BB8D-4198-A4B6-B0428E8D4B83/273452/32530.PDF (last visited 27 April 2009).

[46] See the Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court for the period of 25 March – 12 April 1996, U.N. Doc. A/AC.249/1, 7 May 1996, pp. 32-33. In the Summary of Observations by the Representatives of the United Kingdom of Great Britain and Northern Ireland for the *Ad Hoc* Committee on the Establishment of an International Criminal Court, the United Kingdom suggested that article 35(a) should be redrafted so that a case would be inadmissible if it has been duly investigated by a state. See Press Release No. 32/95, 3-6, 7 April 1995, p. 6, available at http://www.icc-cpi.int/NR/rdonlyres/6A356DC3-C70C-4D9D-87F9-ABC7F1E03307/241631/19239.PDF (last visited 27 April 2009).

inadmissible before the Court. To that effect, the representative of Slovenia also pointed out during the April 1996 Preparatory Committee that *"it was hardly possible for any prosecutor to play the role normally played by police in pre-criminal trial investigations in order to start a prosecution."*[47] Thus, as the Chamber may surmise from the above observations and comments, the delegations foresaw that preliminary local police investigations at the national level, such as police reports, arrest warrants, witness interviews, victim statements, etc., would not by themselves, without more, rise to the level of an investigation or prosecution that would render a case inadmissible before the Court pursuant to article 17 of the Rome Statute, when the balance of the evidence points to the fact that the national authorities are unable or unwilling genuinely to carry out the investigation or prosecution. In fact, if routine, preliminary investigations by local police were legally sufficient to render a case inadmissible for purposes of article 17 of the Rome Statute, then the Court's jurisdiction could almost never be established, either at the inception of a case or later on by a motion raised by the Defence, since it would be the exception rather than the rule that local police would not have taken at least some investigative steps in the aftermath of the commission of a serious crime. This is precisely the kind of legal absurdity that the drafters of the Rome Statute were admonishing against when discussing the principle of complementarity.

V. The Defence has not proven that the case is inadmissible before the Court: the evidence show that the DRC authorities are unwilling or unable genuinely to carry out an investigation or prosecution against Germain Katanga

28. As mentioned earlier, the terms and provisions of article 17 of the Rome Statute are the results of substantial negotiations organised by the International Law

[47] See the *"Preparatory Committee on Establishment of International Criminal Court Discusses Power to be given to Prosecutor"*, U.N. Press Release L/2778, 4 April 1996, available at http://www.iccnow.org/documents/ProsecutorPower4Apr96.pdf (last visited 2 April 2009).

Commission[48] (the "ILC"), which was in charge of preparing a draft statute.[49] The approach to the complementarity question taken by the ILC was that the Statute should provide clear guidelines allowing the Court to intervene even in cases where the national authorities had acted or were acting.[50] At the end of the discussions, the *Ad Hoc* Committee came up with a complementarity principle wherein the Court's jurisdiction would be triggered when national judicial systems are "unwilling" or "unable" to investigate or prosecute the crimes covered under the Rome Statute.[51]

29. The assessment of the inability by a national jurisdiction to investigate or prosecute a case was imputed by the delegations with objective evaluation criteria in order to measure whether inability had been proven for purposes of admissibility.[52] That is, the national authorities' inability to investigate or prosecute should be examined by the Chamber through objective indicators against the factual circumstances of the case.[53] Indeed, the drafters of the Statute seem to have focused on three factual criteria determinative of a state's inability to investigate or prosecute. The first criterion is the factual existence of a national judicial institution that is functioning, operating, or carrying out investigations or prosecutions.[54]

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[48] See BOS (A.), *From the International Law Commission to the Rome Conference*, in CASSESE (A.), GAETA (P.) & JONES (J.R.W.D.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, 2002, pp. 25-66.

[49] See the Draft Statute for an International Criminal Court with Commentaries, Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, U.N. Doc. A/49/10, 1994, p. 27.

[50] See HOLMES (J.T.), *The Principle of Complementarity*, in Lee, R.S., The International Criminal Court – The Making of the Rome Statute, Issues, Negotiations, Results, Kluwer Law International, 1999, p. 44.

[51] *Idem*, pp. 48-49. See also the Comments by United States of America, Comments received pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court; Report of the Secretary-General, Addendum, U.N. Doc. A/AC.244/1/Add.2, 31 March 1995, p. 10; and the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, U.N. Doc. A/50/22, 6 September 1995, p. 8.

[52] See HOLMES (J.T.), *op. cit. supra* note 50, p. 74.

[53] See the Summary of the Proceedings of the Preparatory Committee during the Period of 25 March – 12 April 1996, *supra* note 46, p. 32.

[54] *Idem*, p. 30. See also the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, *supra* note 54, p. 9; the Statement by Hisashi Owada, Delegation of Japan, "*Diplomatic Conference Begins Four Days of General Statements on Establishment of International Criminal Court*", U.N. Doc. L/ROM/15, 18 June 1998, pp. 4-5; and the Statement by Hisashi Owada, Head of Delegation of Japan to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June 1998, p. 2, available at http://www.icc-

30. Another way this factually-driven criterion was phrased was that, if the national judicial system is "not in a position" to investigate or prosecute the perpetrators, then the case would be admissible before the Court. This concept of "not being in a position" to conduct an investigation or prosecution was echoed by several delegations involved in the drafting of the Rome Statute, for instance, the delegation of Botswana, which in June 1998, during the Diplomatic Conference, pointed out that the prosecution should be able to act in its own right when a national court is "*in no position*" to bring perpetrators of serious crimes to justice.[55] Similarly, the Minister of Foreign Affairs of Finland remarked during the Diplomatic Conference that "[the] *concept* [of the exercise of jurisdiction by the Court] *is based on the acknowledgement that the Court and the national courts serve* [...] *the same objective and that the Court will act only in cases where the State is neither in a position nor willing to conduct national criminal proceedings.*"[56]

31. The second prong relating to the issue of a national jurisdiction's inability to investigate or prosecute is the existence of legislation criminalising the conduct identified as a crime under the Rome Statute.[57] According to the Expert Paper, "*the lack of substantive or procedural penal legislation, amnesties* [or] *immunities* [may render a] *system 'unavailable.'*"[58] Furthermore, the drafters seem to have intended that the availability of the national judicial system be examined on a case-by-case basis in relation to the particular circumstances thereof,[59] with the referral of a situation by

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cpi.int/NR/rdonlyres/DF88A50C-A824-495E-B5F6-B6EF67AB8628/270628/27851.PDF (last visited 27 April 2009).

[55] See "*UN Conference on Establishing International Criminal Court Concludes Four Days of General Statements*", U.N. Press Release L/ROM/15, 18 June 1998, p. 9.

[56] See the Statement by Tarja Halonen, Minister for Foreign Affairs of Finland, at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 June 1998, p. 2, available at http://www.icc-cpi.int/NR/rdonlyres/E357E6A5-1F01-4E2E-8255-218FD5A2DF0F/270636/27859.PDF (last visited 27 April 2009).

[57] See WOMENS' CAUCUS FOR GENDER JUSTICE, *Gender Justice and the ICC*, 15 June 1998, pp. 24-25.

[58] See the Informal Expert Paper for the Office of the Prosecutor, *supra* note 41, p. 21.

[59] See the Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, *supra* note 51, p. 9.

the national authorities themselves being a factor to be considered in making this determination.[60]

32. A third prong of inability, provided under paragraph 3 of article 17 of the Rome Statute (the State is unable to otherwise carry out its proceedings), grants the Court *"some latitude to determine admissibility where unforeseen circumstances block national proceedings* [...] *if other defect*[s] *in the national proceedings would impair a genuine investigation and prosecution."*[61] Lastly, the word "genuinely" was included by the Preparatory Committee in the final text of the admissibility provision in order to put the words "unable" and "unwilling" into a more objectively-qualified context.[62]

33. In examining the factual circumstances of the case at hand, the Office respectfully submits that the arrest and detention of Germain Katanga by the DRC authorities, as laid out by the Defence Motion,[63] do not rise to the level of an investigation or prosecution as those terms were intended to be defined by the delegations during the drafting of the Rome Statute, nor do they reach the evidentiary threshold required to tip the balance in favour of inadmissibility vs. admissibility. Although the OPCV is not privy to a substantial amount of the confidential documents submitted to the Chamber by the Defence and by the Prosecution concerning the investigative undertakings by the DRC authorities into the alleged crimes committed by Germain Katanga from 2003 to 2005, the Office submits that the documents and evidence at its disposal, as well as the evidence that *does not exist*, portray a clear picture of a State that is not able genuinely to carry out

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[60] See German Delegation non-paper, Unofficial Document, 1 April 1996, p. 3, available at http://www.icc-cpi.int/NR/rdonlyres/095FC74B-A7B7-4EC1-94C0-1D15AEB8D7D7/267136/19414.PDF (last visited 27 April 2009).

[61] See HOLMES (J.T.), *Complementarity: National Courts versus the ICC,* in CASSESE (A.), GAETA (P.), & JONES (J.R.W.D.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, 2002, p. 678.

[62] See HOLMES (J.T.), *op. cit. supra* note 50, p. 49. See also the Informal Expert Paper of the Office of the Prosecutor, *supra* note 41, par. 23.

[63] See the "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute", *supra* note 3, pp. 4-17.

an investigation or prosecution against this individual, and which therefore referred the matter to the Court.

34. Firstly, and as noted in the Prosecution's Response, the 2004 referral letter sent by the President of the DRC to the Prosecutor, wherein he referred the Situation in the DRC to the Court, expressly acknowledged that the relevant authorities of that country were not in a position to conduct investigations of the crimes mentioned therein or to conduct the necessary proceedings.[64] As stated above, a State's referral to the Court is in fact, contrary to the Defence's assertions,[65] a factor in and of itself to be taken into consideration by the Chamber. Additionally, "not being in a position" to conduct criminal proceedings, as was admitted to be the case by the DRC authorities in their referral of the situation to the Court, is one of the factual prongs evidencing that the national authorities were unable genuinely to carry out an investigation or prosecution against Germain Katanga at the time of the issuance of a warrant of arrest against him by the Court. The Chamber should further conclude that the DRC remains unable at present to do so based on a lack of substantial change in the circumstances thereof.

35. All that Germain Katanga's incarceration in the DRC from March 2005 to October 2007 culminated in was the lengthy local detention of a suspect without any formal proceedings being held against him by the national authorities. Had an investigation been *duly* conducted into the alleged crimes for which Germain Katanga was held in the DRC, thereby demonstrating the State's ability genuinely to carry out the investigation or prosecution, it would be reasonable to expect that a formal proceeding would have been initiated against Germain Katanga during this two and a half year period. Instead, his lengthy detention ended with his transfer to the Court, without having to face a proceeding in a national court of law. As

[64] See the "19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", *supra* note 10, p. 10.
[65] See the "Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19 (2) (a) of the Statute", *supra* note 3, p. 32.

previously noted, the delegations which participated to the drafting of the admissibility article of the Rome Statute contemplated a ruling of inadmissibility by the Court when a national investigation or prosecution involves more than simply *"the bare trappings of a criminal proceeding"*.[66]

36. Regarding the second and third prongs that go to determining the ability, or lack thereof, of a State to carry out an investigation or prosecution, there are numerous recent public reports on the state of the judicial system in the DRC which further bolster the current veracity of the statements made by the Congolese President at the time of the referral of the Situation to the Court in 2004, and concerning the country's inability to investigate or prosecute crimes. In particular, the 2008 Amnesty International Report describes the country's judicial system as widely unfair, and notes that "[t]*here were frequent instances of political and military interference in the administration of justice.*"[67] The Report also cites examples of individuals who had been held in unlawful pre-trial detention since September 2004, and to date of the Report, had not appeared before a court or been allowed to challenge the lawfulness of their detention.[68] As recently as 2007, moreover, criminal cases that were actually tried before Congolese military courts were reported by international non-governmental organisations as having been plagued by obstruction and political interference and have been categorised as not conforming to international standards for a fair trial,[69] thereby also putting into question whether judicial proceedings in the DRC can meet the criterion of article 17(1)(a) of the Rome

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[66] See ROBINSON (D.), *op. cit. supra* note 43, p. 5.

[67] See AMNESTY INTERNATIONAL, *"Amnesty International Report 2008 - Democratic Republic of the Congo"*, 28 May 2008. UNHCR Refworld, available at http://www.unhcr.org/refworld/docid/483e2786c.html, p. 4 (last visited 29 April 2009).

[68] *Idem.*

[69] See GLOBAL WITNESS, *Victims of Kilwa Massacre Denied Justice by Congolese Military Court*, 17 July 2007, available at http://www.globalwitness.org/media_library_detail.php/562/en/victims_of_kilwa_massacre_denied_justice_by_congol (last visited 27 April 2009). See also Human Rights Watch, *"DR Congo: Avert Blatant Miscarriage of Justice"*, 18 May 2008, available at http://www.hrw.org/en/news/2008/05/18/dr-congo-avert-blatant-miscarriage-justice (last visited 27 April 2009).

Statute concerning the possibility of carrying out "genuine" proceedings at the national level.

37. Finally, the Office agrees with the arguments put forward by the Prosecution in its Response on the issue[70].

VI. The "same conduct" test is rooted in the Rome Statute and, as such, is the correct test to apply in determining admissibility

38. Another argument raised by the Defence in its Motion[71] is that the Chamber should consider devising alternative comprehensive "gravity" and/or "conduct" tests *in lieu* of the "same conduct" test applied by other Chambers of the Court in determining the issue of admissibility.[72]

39. Contrary to the Defence's proposed admissibility tests, the "same conduct" test did not arise from conjecture and policy considerations, but instead is complementary to and in line with article 20(3) of the Rome Statute, which prohibits the prosecution of a person who has been tried by another court for *the same conduct*. In fact, many delegations during the drafting process for the Rome Statute argued that the provisions of article 42, the precursor to article 20 of the Rome Statute, should be included in one article on admissibility, since the legal concept of *ne bis in idem* is grounds for the Court to find a case inadmissible.[73] Therefore, the "same conduct" test approved and applied by the Chambers is firmly rooted in the Rome Statute.

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[70] See the "19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", *supra* note 10, paras. 46- 50.
[71] See the "Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19 (2) (a) of the Statute", *supra* note 3, p.28.
[72] *Idem*.
[73] See the Summary of the Proceedings of the *Ad Hoc* Committee during the period 3-13 April 1995, U.N. Doc. A/AC.244/2, 21 April 1995, p. 14.

40. What is more, the fact that several Chambers have adopted the "same conduct" test to determine the admissibility of a case before the Court[74] is yet another factor that *should* be considered by the Chamber in dismissing the Defence's proposals for alternative admissibility tests. Sub-paragraph 3(b) of article 31 of the Vienna Convention on the Law of Treaties[75] states that, with regard to general rules of interpretation, there shall be taken into account, together with the context, any subsequent practice in the application of a treaty which establishes the agreement regarding its interpretation. Hence, the Office submits that the decisions and practice of the other Chambers of the Court on the legal test to be applied to a determination of admissibility can and should, by application of this principle of treaty interpretation, be duly considered by the Chamber.[76]

41. As for the policy arguments advanced by the Defence in favour of its proposed alternative admissibility tests, the International Court of Justice has time and again held that a court cannot legislate and cannot, *"by way of interpretation, derive from* [an international treaty] *a general rule* [. . .] *which it does not contain."*[77] As reiterated in the International Court of Justice's Advisory Opinion of 8 July 1996, "[a]

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[74] See the "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo", 24 February 2006, No. ICC-01/04-01/06-8-US-Corr, reclassified as public pursuant to decision No. ICC-01/04-01/06-37. See also, the "Decision on the Evidence and Information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui", No. ICC-01/04-01/07-262; and the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", No. ICC-01/04-01/07-4.

[75] See the Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, 1980, p. 332.

[76] The International Law Commission explained in the context of the draft articles on the law of treaties that *"the importance of* [...] *subsequent practice in the application of treaty, as an element of interpretation is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is in the jurisprudence of international tribunals."* See International Law Commission, Yearbook of the International Law Commission, 1966, vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1, pp. 221-222. An Advisory Opinion by the International Court of Justice also stated that the constituent instruments of international organizations are also treaties of a particular type and that the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties. See, ICJ, Advisory Opinion, on the *"Legality of the Use by a State of Nuclear Weapons in Armed Conflict"*, 8 July 1996, I.C.J. Reports 1996, p. 75.

[77] See ICJ, *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of 27 August 1952, I.C.J. Reports 1952, p. 199.

[c]*ourt cannot legislate"*; rather, it *"states the existing law* [...]."[78] The ICTY has also addressed this issue in case of *The Prosecutor v. Zejnil Delalic et al.*, wherein the Trial Chamber held that *"penal statutes must be strictly construed,"* which requires that *"the language of a particular provision* [...] *be construed such that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment."* [79]

42. As mentioned above, the "same conduct" test is firmly grounded in the Rome Statute and is further supported by the legislative intent of the relevant provisions thereof. The Office submits that the Defence's invitation to the Chamber to devise other admissibility tests based on policy, and not statutory, foundations is in essence a request that the Chamber step outside the parameters of its judicial mandate for legal construction and interpretation of the Rome Statute.

43. In contesting the "same conduct" test, the Defence also raised several times in its Motion and Reply the "nine out of ten" villages example in order to justify its invitation to the Chamber to deviate from applying the "same conduct" test relied upon by other Chambers of the Court.[80] The Office submits that what the Defence is effectively doing by this is challenging the Prosecution's ability, or discretion, to choose certain investigations or prosecutions and not others. Said challenge ignores the authority of the Prosecution under article 53(1) of the Rome Statute to evaluate information available and to initiate an investigation if it considers that all the criteria delineated under that article are met - namely, that the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, that the case is or would be admissible under article

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[78] See ICJ, Advisory Opinion, on the *"Legality of the Threat or Use of Nuclear Weapons"*, 8 July 1996, I.C.J. Reports 1996, par. 18.

[79] See ICTY, *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21, Trial Judgment, 16 November 1998, par. 408.

[80] See the "Motion Challenging the Admissibility of the Case by the Defence for Germain Katanga, pursuant to Article 19 (2) (a) of the Statute", *supra* note 3, pp. 25, 28. See the "Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", *supra* note 13, pp. 7-8.

17 of the Statute, and that, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

44. Further support for the Prosecution's inherent discretionary power in selecting which matters to investigate or prosecute can be found in the preparatory works of the Rome Statute. In the September 1996 Report of the Preparatory Committee, for example,

> [a]*ttention was drawn to the need to consider further and clarify the standard to be applied by the Prosecutor in deciding whether to initiate an investigation or to file an indictment.*
>
> [...]
>
> *There was some question as to whether* [...] [a] *State or an appropriate judicial body should be entitled to initiate a review of* [...] [the Prosecutor's] *decision and the manner in which the complainant State should submit its views. It was suggested* [. . .] *that the judicial review should be based on a specific legal standard, such as that of manifestly inappropriate, which would defer to the appropriate exercise of prosecutorial discretion* [...].[81]

45. Furthermore, a Declaration on the position of the prosecutor of a permanent international criminal court was issued jointly by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Max Planck Institute for Foreign and International Criminal Law, wherein it was remarked that "[w]*ithin the jurisdiction of the court, the prosecutor should have full discretion in the initiation* propio motu *and conduct of investigations and prosecutions,*

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[81] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. I, Proceedings of the Preparatory Committee during March-April and August 1996, U.N. Doc. A/51/22, 13 September 1996, p. 50.

including the selection of appropriate individuals to be indicted and the charges to be brought."[82]

46. Similarly, when the British delegation at the Diplomatic Conference issued its proposal on the issue of complementarity of the Court, it stated that "[i]*f the prosecutor concludes that a case is inadmissible under article 35 or that there is no sufficient basis for a prosecution or that a prosecution would not be in the interests of justice, and decides not to file an indictment, the Prosecution 'shall so inform the Presidency'* [...]." It went on to explain that "*the reference to 'in the interests of justice' is intended to reflect a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, eg if* [...] *there were good reasons to conclude that a prosecution would be counter-productive."*[83]

47. Hence, when article 53 and the Preamble of the Rome Statute are read in conjunction with the relevant preparatory works for the Court's texts, as highlighted above, the Defence's "nine villages out of ten" scenario can be dismissed as misguided and irrelevant, since the Prosecution has the inherent discretionary power to select which investigations or prosecutions it wishes to pursue, so long as it is in compliance with the guiding criteria of article 53 of the Rome Statute for its determination thereof.

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[82] See the Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court, the International Workshop on "*The Independence and Accountability of the Prosecutor of a Permanent International Criminal Court*", Freiburg im Breisgau, issued jointly by the ICTY, ICTR, and Max Planck Institute for Foreign and International Criminal Law, 28-29 May 1998, p. 2., available at http://www.icc-cpi.int/NR/rdonlyres/586B503C-256D-4169-9566-7D9493F9C0F4/273755/40632.PDF (last visited 27 April 2009).

[83] See the Proposal on Complementarity by the United Kingdom, 25 March 1996, p. 14, available at http://www.icc-cpi.int/NR/rdonlyres/31EFB10D-77FC-4929-A345-74D28734096D/267678/21046.PDF (last visited 27 April 2009). See also the Statement by the Honorable Bill Richardson, United States Ambassador to the United Nations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, wherein the U.S. delegate stated that "*the prosecutor should be free to investigate the situation within the context of the overall referral. This would ensure that the prosecutor has the necessary backing to get the job done and the necessary independence to do it.*", 17 June 1998, p. 4, available at http://www.icc-cpi.int/NR/rdonlyres/63CF934C-687D-45C5-9343-A1DFE06CC861/270612/27835.PDF (last visited 27 April 2009).

48. Finally, the Office agrees with the arguments put forward by the Prosecution in its Response on the issue[84].

VII. Specific views and concerns of the victims represented by the OPCV

49. Victims of the atrocities committed in the DRC have a right to truth and to justice. As put forward by the Single Judge in her "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case," "*when* [the victim's right to truth] *is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth.*"[85] Moreover, the victims' rights to justice, namely, to "*have those who victimised them prosecuted, tried convicted, and subject to a certain punishment,*"[86] is to be differentiated from the victims' right to reparations.

50. Victims in the DRC, through local non-governmental organisations assisting them, have already expressed support for the role of the International Criminal Court in addressing the most serious crimes, as well as satisfaction and hope as a result of the transfer of Germain Katanga to the Court, noting that "*compared to the charges levelled against Lubanga, that are very limited, the ones against Katanga are broader*".[87] Furthermore, "[v]*ictims welcome the message sent to other warlords that the time for accountability has come.*"[88]

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[84] See the "19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", *supra* note 10, par. 51

[85] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victi, at the Pre-Trial Stage of the Case", (Pre-Trial Chamber I, Single Judge), 15 May 2008, No. ICC-01/04-01/07-474, par. 34.

[86] *Idem*, par. 37.

[87] See "*Voices from the ground on Katanga's transfer*", in Access - Victims' rights before the International Criminal Court, Victims' Rights Working Group Bulletin, Issue 10, Winter 2007/8, pages 1-2.

[88] *Idem*.

51. Regarding the specific views of victims represented by the OPCV, the Office has provided directly to most victims having communicated with the Court, through the assistance of individuals in the field, an explanation on the admissibility proceedings. To this end, a written explanation and a questionnaire prepared by the Office was distributed to such individuals in order to gather the views and concerns of victims in the most efficient and fast way.

52. Due to the security situation in the region and the logistical difficulties, the Office has received to date only three questionnaires. However, the Office had the opportunity to speak over the telephone with some others of the victims concerned. The Office hereby provides a summary of the main views and concerns of the victims and attaches the questionnaires received as Annexes to the present submission. The Office respectfully requests in advance that the Chamber authorise the former to file the other questionnaires in the event that the same are received before the decision on the matter is rendered by the Chamber.

53. The victims voiced several concerns and they all favour an international trial since, according to them, it is the only way for the world to know what happened to them and to ensure impartiality of the proceedings. Indeed, victims have doubts as to the impartiality of national courts and their ability to properly administer justice, and they further believe that the Court is the only one able to prosecute the main perpetrators due to its lack of political influence or interests in the DRC.

54. Victims also argued that the case should not be tried in the DRC because it entails serious crimes which the national jurisdiction is not equipped to deal with. Moreover, they expressed concerns as to the possibility of participating in an effective way in the national proceedings, since they consider that the national legislation does not provide enough guarantees for their participation and for subsequent reparations. Finally, victims think that national authorities cannot

provide for the security of victims who will participate in the national proceedings and therefore, most of them will not be encouraged to participate.

For the reasons set out above, the Principal Counsel of the Office respectfully requests that the Chamber dismiss the Defence's Motion Challenging the Admissibility of the Case against Germain Katanga and that it declare that the case is admissible before the Court.

Paolina Massidda

Principal Counsel
Office of Public Counsel for Victims

Done in English and French, the English version being authoritative.

Dated this 28 April 2009

At The Hague, The Netherlands