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No. **ICC-01/04-01/07 OA 8**
Date: 25 September 2009

THE APPEALS CHAMBER

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

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

THE PROSECUTOR v. GERMAIN KATANGA
AND MATHIEU NGUDJOLO CHUI

Public document

Judgment
on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case

Decision/Order/Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
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Counsel for the Defence of Germain Katanga
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Ms. Carine Bapita Buyangandu
Mr. Joseph Keta
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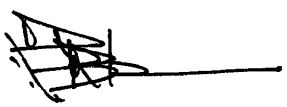
REGISTRY

Registrar
Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr. Germain Katanga against the oral decision of Trial Chamber II of 12 June 2009 on the admissibility of the case (ICC-01/04-01/07-T-67-ENG),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

The decision of Trial Chamber II of 12 June 2009 on the admissibility of the case is confirmed. The appeal is dismissed.

REASONS

I. KEY FINDINGS

1. Under article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability has to be considered only (1) when there are, at the time of the proceedings in respect of an admissibility challenge, domestic investigations or prosecutions that could render the case inadmissible before the Court, or (2) when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned.

2. Inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.

II. PROCEDURAL CONTEXT AND HISTORY OF THE PROCEEDINGS

A. Proceedings before the Pre-Trial and Trial Chamber

3. On 2 July 2007, Pre-Trial Chamber I issued a warrant of arrest in respect of Mr. Germain Katanga (hereinafter: "Appellant").[1] In the "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga"[2] the Chamber stated, *inter alia*, that it was "of the view that the circumstances of the [...] case warrant an initial determination of the admissibility of the case prior to the issuance of a warrant of arrest."[3] It went on to state:

> When, as in the present case, the existence of national proceedings is the sole reason for a possible finding of inadmissibility, it is a *conditio sine qua non* for such a finding that national proceedings encompass both the person and the conduct which is the subject of the case before the Court. In this regard, the Chamber finds that, on the basis of the evidence and information provided in the Prosecution Application, the Prosecution Supporting Materials and the Prosecution Response, the proceedings against Germain Katanga in the [Democratic Republic of the Congo (hereinafter: "DRC")] do not encompass the same conduct which is the subject of the Prosecution Application.[4]

4. The Appellant was transferred to The Hague on 18 October 2007.[5] By its decision dated 30 September 2008, Pre-Trial Chamber I confirmed the charges against him.[6] On 24 October 2008, the Presidency constituted Trial Chamber II and referred the case against the Appellant and Mr. Mathieu Ngudjolo Chui to that Chamber.[7]

5. On 10 February 2009, the Appellant filed the "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19 (2) (a) of the Statute"[8] (hereinafter: "Appellant's Motion").

6. On 5 March 2009, the Trial Chamber issued a decision under rules 58 and 59 of the Rules of Procedure and Evidence, setting out the procedure to be followed for the

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[1] "Warrant of Arrest for Germain Katanga", ICC-01/04-01/07-1, reclassified as public by decision ICC-01/04-01/07-24 of 18 October 2007.
[2] "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", ICC-01/04-01/07-4 (hereinafter: "Decision of 6 July 2007").
[3] Decision of 6 July 2007, para. 19.
[4] Decision of 6 July 2007, para. 20; footnotes omitted.
[5] See "Information to the Chamber on the execution of the Request for the arrest and surrender of Germain Katanga", 22 October 2007, ICC-01/04-01/07-40.
[6] "Decision on the confirmation of charges", ICC-01/04-01/07-717, dated 30 September 2008 and registered on 1 October 2008.
[7] "Decision constituting Trial Chamber II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui", ICC-01/04-01/07-729.
[8] ICC-01/04-01/07-891-Conf-Exp.

purposes of article 19 of the Statute.[9] In particular, the Chamber fixed time limits for the filing of observations by the DRC on the admissibility challenge.

7. The DRC did not file written observations. The Trial Chamber convened a hearing on the issue on 1 June 2009,[10] which was attended by the Appellant, the Office of the Prosecutor, Mr. Mathieu Ngudjolo Chui, representatives of the DRC and of the victims.[11] On 4 June 2009, the Registry filed in the record the DRC's written observations.[12]

8. On 12 June 2009, the Chamber held another hearing at which it "dismisse[d] the challenge to admissibility and [...] declare[d] that the case concerning [the Appellant was] admissible before the court"[13] (hereinafter: "Impugned Decision"). The Chamber stated that the reasons for its decision would "be presented in detail in a decision to which everyone [would] have access at the beginning of [the following] week".[14] On 16 June 2009, the Chamber filed the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)"[15] (hereinafter: "Reasons").

B. Proceedings on appeal

9. On 22 June 2009, the Appellant filed the "Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber '*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*'"[16] (hereinafter: "Notice of Appeal").

10. On 3 July 2009, the Presidency issued the "Decision replacing judges in the Appeals Chamber",[17] deciding "to temporarily attach Judge Ekaterina Trendafilova

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[9] "Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve", ICC-01/04-01/07-943-Conf.
[10] "Ordonnance aux fins de la convocation d'une audience (règle 58-2 du Règlement de procédure et de preuve)", 22 May 2009, ICC-01/04-01/07-1163.
[11] ICC-01/04-01/07-T-65-ENG (hereinafter: "Hearing of 1 June 2009").
[12] "Transmission par le Greffier des observations écrites des autorités congolaises telles que présentées à l'audience du 1er juin 2009", 4 June 2009, ICC-01/04-01/07-1189; "Observations of the Democratic Republic of the Congo on the Challenge to Admissibility made by the Defence for Germain Katanga in the case of the Prosecutor versus Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)", ICC-01/04-01/07-1189-Anx-tENG.
[13] Impugned Decision, p. 10.
[14] Impugned Decision, pp. 2-3.
[15] ICC-01/04-01/07-1213-tENG.
[16] ICC-01/04-01/07-1234.
[17] ICC-01/04-01/07-1266.

[...] and Judge Joyce Aluoch [...] to the Appeals Chamber for the purpose of the appeal".[18]

11. On 8 July 2009, the Appellant filed the "Document in Support of Appeal of the Defence of Germain Katanga against the Decision of the Trial Chamber '*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*'"[19] (hereinafter: "Document in Support of the Appeal").

12. In its decision of 10 July 2009 (registered on 13 July 2009), entitled "Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence"[20] (hereinafter: "Directions of 10 July 2009"), the Appeals Chamber issued directions setting time limits for the submission of observations by the DRC and by the victims and of the responses thereto.

13. On 17 July 2009, the legal representatives of victims a/0330/07 and a/0331/07 filed the "Observations of the Legal Representatives of Victims a/0330/07 and a/0331/07 on the Appeal of the Defence for G. Katanga under Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence "[21] (hereinafter: "Observations of victims a/0330/07 and a/0331/07").

14. On 21 July 2009, the Registrar filed a document, annexing a letter from the DRC[22] in which the DRC stated that its working language is French, that the Registry should notify the DRC of the French version of the Directions of 10 July 2009 and the Document in Support of the Appeal, and that the ten-day time limit for the filing of observations should be renewed as of the date of notification of these documents.[23]

15. On 29 July 2009, the legal representatives of victims a/0333/07 and a/0110/08 filed the "Observations of the Legal Representatives of victims a/0333/07 and a/0110/08 on the Appeal submitted by the Defence for G. Katanga pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence on

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[18] ICC-01/04-01/07-1266, p. 4.
[19] ICC-01/04-01/07-1279.
[20] ICC-01/04-01/07-1295.
[21] ICC-01/04-01/07-1318-tENG; the document was registered on 20 July 2009.
[22] "Transmission by the Registrar of a letter received from the DRC authorities", ICC-01/04-01/07-1326, filed on 21 July 2009 and registered on 22 July 2009.
[23] "Transmission by the Registrar of a letter received from the DRC authorities", ICC-01/04-01/07-1326-Anx1, filed on 21 July 2009 and registered on 22 July 2009.

the Motion Challenging the Admissibility of the Case filed by the Defence"[24] (hereinafter: "Observations of Victims a/0333/07 and a/0110/08").

16. On 30 July 2009, the Prosecutor filed confidentially the "Prosecution's Response to Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber '*Motifs de la décision oral relative à l'exception d'irrecevabilité de l'affaire*'"[25] (hereinafter: "Response to the Document in Support of the Appeal"). A public redacted version of the Response to the Document in Support of the Appeal was filed on 31 July 2009;[26] in this judgment, references are to the public redacted version.

17. On 31 July 2009, the Appeals Chamber gave further directions regarding the filing of observations by the DRC.[27]

18. On 6 August 2009, the legal representatives Jean-Chrysostome Mulamba, Carine Bapita and Hervé Diakese filed the "Joint Observations of the Legal Representatives of the Victims Represented by Mr Jean MULAMBA, Ms Carine BAPITA and Mr Hervé DIAKESE on the Appeal against the Decision on the Challenge to Admissibility Filed by the Defence for Germain KATANGA"[28] (hereinafter: "Observations of Three Legal Representatives").

19. On 13 August 2009, the Office of Public Counsel for victims (hereinafter: "OPCV") filed the "Observations by the OPCV on the Document in Support of the Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber on the Motion Challenging the Admissibility of the Case"[29] (hereinafter: "Observations of Victims Represented by the OPCV"); the document was registered on 14 August 2009.

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[24] ICC-01/04-01/07-1342-tENG.
[25] ICC-01/04-01/07-1346-Conf. The Appeals Chamber notes that the OPCV was notified of this document on 3 August 2009.
[26] ICC-01/04-01/07-1349.
[27] "Further directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence", ICC-01/04-01/07-1348.
[28] ICC-01/04-01/07-1354-tENG; the document was addressed to Trial Chamber I, it was transmitted to the Appeals Chamber on 14 August 2009.
[29] ICC-01/04-01/07-1369.

20. On 27 August 2009, the Appeals Chamber extended, at the request of the DRC,[30] the time limit for the submission of its observations to 1 September 2009, 4 pm.[31]

21. On 1 September 2009, the DRC filed the "Observations de la République Démocratique du Congo sur le mémoire d'appel soumis à la Cour pénale internationale par la défense de Germain Katanga"[32] (hereinafter: "Observations of the DRC"); the document was registered on 2 September 2009.[33]

22. On 7 September 2009, the Prosecutor filed the "Prosecution's Consolidated Response to the Observations of the Legal Representatives, OPCV and DRC on the Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire'"[34] (hereinafter: "Prosecutor's Response to Observations"). The Appellant did not file a response to the observations by the DRC or by the victims.

III. REJECTION OF THE OBSERVATIONS OF THREE LEGAL REPRESENTATIVES

23. The Appeals Chamber recalls that in its Directions of 10 July 2009, the Appeals Chamber directed the legal representatives Ms. Carine Bapita Buyangandu, Mr. Hervé Diakiese and Mr. Jean-Chrysostome Mulamba Nsokoloni to specify the pseudonyms of the victims and applicants whom they represent. This was because it was not apparent from the filing of the legal representatives before the Trial Chamber[35] which victims the three legal representatives were representing.

24. Despite the Appeals Chamber's directions, the legal representatives did not indicate in the Observations of Three Legal Representatives the victims they were representing. It is still unclear to the Appeals Chamber which victims or applicants the

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[30] See ICC-01/04-01/07-1427-Conf-Anx1-tENG.
[31] "Order extending the time limit for the submission of observations by the Democratic Republic of Congo", ICC-01/04-01/07-1432.
[32] ICC-01/04-01/07-1449-Anx.
[33] The Appeals Chamber notes that the Observations of the DRC were received by the Registry on 1 September 2009 at 4:47 p.m. The Appeals Chamber has decided to accept the document nevertheless. Given that the late filing was minimal and did not cause any delay in the disposal of the present appeal, it would not be in the interests of justice to reject the document under regulation 29 (1) of the Regulations of the Court.
[34] ICC-01/04-01/07-1459.
[35] See ICC-01/04-01/07-1060.

three legal representatives are representing in the present proceedings. In these circumstances, the Appeals Chamber considers it appropriate to reject the Observations of the Three Legal Representatives without considering the substance of their submissions.

IV. CONFIDENTIAL FILING OF THE RESPONSE TO THE DOCUMENT IN SUPPORT OF THE APPEAL

25. The Appeals Chamber notes that the Prosecutor filed the Response to the Document in Support of the Appeal confidentially. The only explanation for the confidential filing is found in footnote 17. The reasons given in this footnote are of a general nature and do not allow the Appeals Chamber to assess whether or not there is indeed a need to retain the existing classification of the Response to the Document in Support of the Appeal as confidential. In the public redacted version of the Response to the Document in Support of the Appeal, certain footnotes are redacted, but the Prosecutor has not explained to the Appeals Chamber why these redactions are necessary.

26. The Appeals Chamber reminds the Prosecutor of his obligations under regulation 23*bis* of the Regulations of the Court, pursuant to which participants who file documents marked "confidential" must "state the factual and legal basis for the chosen classification". The explanation provided by the participant must be so framed as to allow the Chamber to assess whether or not the classification chosen by the participant should be retained or altered. It is not sufficient merely to file a public redacted version of the document at a later stage. While the Appeals Chamber does not consider the non-compliance with regulation 23*bis* of the Regulations of the Court serious enough to vitiate the Prosecutor's Response to the Document in Support of the Appeal under regulation 29 (1) of the Regulations of the Court, the Appeals Chamber expects the Prosecutor to comply with the provision fully in the future.

V. MERITS OF THE APPEAL

A. First ground of appeal

27. The first ground of appeal is that "[t]he Trial Chamber erred in finding that the challenge to admissibility was filed out of time".[36]

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[36] Document in Support of the Appeal, para. 2.

1. Relevant part of the Impugned Decision

28. Before addressing the merits of the Appellant's challenge to the admissibility of the case, the Trial Chamber considered whether the challenge complied with the second sentence of article 19 (4) of the Statute, which provides that the "challenge shall take place prior to or at the commencement of the trial."[37] The Trial Chamber construed "commencement of the trial" in the context of article 19 (4) of the Statute to mean the point in time when the Trial Chamber is constituted and therefore concluded that the Appellant had filed the admissibility challenge out of time; the Trial Chamber found furthermore that there were no reasons excusing the late filing.[38]

29. Notwithstanding this interpretation of article 19 (4) of the Statute, the Trial Chamber decided to consider the merits of the admissibility challenge.[39] The Chamber noted that the provision regarding the time limit was ambiguous and that the Appellant might have been misled by certain statements of the Pre-Trial Chamber prior to the confirmation hearing. In the view of the Trial Chamber, the Appellant might therefore not have been aware that he filed the challenge out of time.[40]

2. Submissions of the Appellant

30. The Appellant argues that the Trial Chamber interpreted the term "commencement of the trial" in article 19 (4) of the Statute incorrectly.[41] He submits that this can be seen from "(1) the ordinary meaning of 'trial' in the context of the ICC legal instruments and the ICC jurisprudence; (2) the object and purpose of Article 19 in the context of the Statute and Rules as a whole".[42]

31. In relation to the actual raising of this "error" as a ground of appeal, the Appellant submits:

> 41. The Defence appreciates that it was not prejudiced by the Trial Chamber's erroneous interpretation of the time limit for filing an admissibility challenge pursuant to Article 19(4) of the Rome Statute because it reviewed the admissibility challenge on its merits. The Defence nonetheless requests the Appeals Chamber to review the Chamber's erroneous interpretation and correct

[37] See Reasons, paras 29-50.
[38] Reasons, para. 56.
[39] Reasons, para. 58.
[40] Reasons, para. 56.
[41] Document in Support of the Appeal, para. 14.
[42] Document in Support of the Appeal, para. 14.

it in accordance with Article 83(2)(a) of the Statute. The Trial Chamber's interpretation of the commencement of trial may have wider implications and creates confusion regarding the interpretation of other provisions relating to the commencement of trial. It is also important for future applicants that the Trial Chamber's error be corrected.[43]

3. Submissions of the Prosecutor

32. The Prosecutor notes that the Appellant acknowledges that he was not prejudiced by the Trial Chamber's alleged error and that regardless of the error, the "Decision that the case against the Appellant is admissible remains unaffected."[44] In the view of the Prosecutor, the finding of the Trial Chamber was an *obiter dictum*.[45]

4. Submissions of the DRC and of the victims and response thereto

33. The DRC submits that during the confirmation hearing, the Appellant pleaded guilty; the DRC raises the question as to why he is now challenging the power of the ICC to try him.[46] In the view of the DRC, it is logical that the Trial Chamber should have restricted the challenge of admissibility.[47]

34. Victims a/0333/07 and a/0110/08 and Victims a/0330/07 and a/0331/07 submit that the interpretation of the term "commencement of the trial" by the Trial Chamber was correct.[48] Victims a/0333/07 and a/0110/08 note in particular that the Trial Chamber, upon assignment of the case to it, had the charges read to the accused, which, under article 64 (8) (a) of the Statute, shall be done at the commencement of the trial.[49] In their submission, the Appellant could have informed the Trial Chamber at the first hearing of his intention to challenge the admissibility of the case.[50] The victims note that the Trial Chamber considered the merits of the admissibility challenge nevertheless; in their view, this was incorrect because the admissibility challenge should have been rejected without consideration of its merits.[51] The victims represented by the OPCV submit that they agree with the Prosecutor that the issue

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[43] Document in Support of the Appeal, para. 41.
[44] Response to Document in Support of the Appeal, para. 36.
[45] Response to Document in Support of the Appeal, para. 37.
[46] Observations of the DRC, pp. 2-3.
[47] Observations of the DRC, p. 3.
[48] Observations of Victims a/0333/07 and a/0110/08, pp. 6-7 and Observations of Victims a/0330/07 and a/0331/07, paras 7-13.
[49] Observations of Victims a/0333/07 and a/0110/08, p. 8.
[50] Observations of Victims a/0333/07 and a/0110/08, p. 8.
[51] Observations of Victims a/0333/07 and a/0110/08, p. 8.

raised under the first ground of appeal does not have an impact on the decision on the admissibility of the case.[52]

35. The Prosecutor does not make any specific submissions in response to the observations of the DRC and of the victims in relation to the first ground of appeal.

5. Determination of the first ground of appeal

36. The Appeals Chamber notes that the Appellant himself acknowledges that he has not suffered any prejudice from the Trial Chamber's allegedly erroneous interpretation of article 19 (4) of the Statute and that the error, if any, had no bearing on the Trial Chamber's eventual decision on admissibility. The Appellant nonetheless urges the Appeals Chamber to deal with the issue in the instant proceedings because "[i]t is also important for future applicants that the Trial Chamber's error be corrected."[53]

37. In previous decisions, the Appeals Chamber has required that for a successful appeal, the error raised by an appellant must have materially affected the impugned decision. In its judgment of 13 July 2006 in relation to the appeal *Situation in the Democratic Republic of the Congo* OA[54] (hereinafter: "Judgment in DRC OA"), the Appeals Chamber stated that an error materially affected the impugned decision if the decision would have been "substantially different".[55] In its judgment of 13 October 2006 in relation to the appeal *Lubanga* OA 3,[56] the Chamber reversed a decision of the Trial Chamber because it "was based solely on the Pre-Trial Chamber's erroneous finding".[57] In the judgment on the appeal *Lubanga* OA 12 of 21 October 2008,[58] the Appeals Chamber reversed a decision of the Trial Chamber because it was "materially affected" by an error.[59] In the judgment of 23 February 2009 on the appeal *Situation*

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[52] Observations by Victims represented by the OPCV, para. 16.
[53] Document in Support of the Appeal, para. 41.
[54] ICC-01/04-169.
[55] Judgment in DRC OA, para. 84. It may be noted that in this judgment the Appeals Chamber declined to determine whether the standard of review established in article 83 (2) of the Statute applies to appeals under article 82 (1) (a) of the Statute, as "in any event, the appealed decision was materially affected by the error of law identified in the preceding section of the judgment" (para. 83).
[56] ICC-01/04-01/06-568.
[57] Para. 74 of that judgment.
[58] ICC-01/04-01/06-1487.
[59] Para. 44 of that judgment.

in Uganda OA,[60] the Appeals Chamber did not reverse an impugned decision even though it had identified an error, because "the error [...] was inconsequential and did not materially affect the correctness of the overall finding [...] that [the applicants for victim status] are victims".[61]

38. In the present case, the alleged error in relation to the time limit for an admissibility challenge cannot be said to have materially affected the decision on admissibility, because the Trial Chamber did not dismiss the admissibility challenge on the basis that it had not been made in time. Instead, the Trial Chamber considered the merits of the challenge and found the case to be admissible. Thus, even if the Appeals Chamber were to conclude that the Trial Chamber made an error in respect of its interpretation of the term "commencement of the trial" in article 19 (4) of the Statute, this error would not, in itself, be a reason to reverse the Trial Chamber's decision on the admissibility of the case. It is for these reasons that the Prosecutor correctly states that the findings of the Trial Chamber were mere *obiter dicta.* The Appeals Chamber considers it inappropriate to pronounce itself on *obiter dicta.* To do so would be tantamount to rendering advisory opinions on issues that are not properly before it.[62] In these circumstances, the Appeals Chamber does not consider it necessary to determine the merits of the Appellant's submissions under the first ground of appeal. The Appeals Chamber nevertheless wishes to stress that the fact that the Appeals Chamber is refraining from pronouncing itself on the merits of the issue raised under the first ground of appeal does not necessarily mean that the it agrees with the Trial Chamber's interpretation of the term "commencement of the trial" in article 19 (4) of the Statute.

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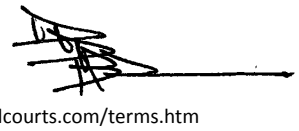
[60] ICC-02/04-179.
[61] Para. 40 of that judgment.
[62] See *Situation in the Democratic Republic of the Congo,* "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 24 December 2007", 30 June 2008, ICC-01/04-503, para. 30; *Situation in Darfur, Sudan,* "Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007", 18 June 2008, ICC-02/05-138, para. 19; *Prosecutor v. Thomas Lubanga Dyilo,* "Decision of the Appeals Chamber upon the Registrar's Requests of 5 April 2007", 27 April 2007, ICC-01/04-01/06-873.



B. Second ground of appeal

39. The second ground of appeal is that "[t]he Trial Chamber erred in finding that the Prosecutor was under no obligation to bring to the attention of the Pre-Trial Chamber the Bogoro and related documents".[63]

1. Relevant part of the Impugned Decision

40. In the proceedings before the Trial Chamber, the Appellant argued that there had been a defect in the initiation of the case against him because the Prosecutor, when submitting a request for the issuance of a warrant of arrest in respect of the Appellant to the Pre-Trial Chamber, failed to disclose to the Pre-Trial Chamber certain documents.[64] In the contention of the Appellant, had these documents been disclosed to the Pre-Trial Chamber, the Chamber would have declared the case inadmissible.[65] The Appellant submitted that for that reason, the Trial Chamber should assess the admissibility of his case at the time of the alleged error, namely the date of the application for a warrant of arrest.[66]

41. The Trial Chamber stated that it would address the Appellant's arguments in three steps: first, it would address whether the Prosecutor was required to provide the Pre-Trial Chamber with information regarding the admissibility of the case when applying for a warrant of arrest; second, if so, whether the documents identified by the Appellant should have been disclosed to the Pre-Trial Chamber; and third, whether these documents "would have led the Pre-Trial Chamber to exercise its discretion differently".[67]

42. As to the first step, the Trial Chamber noted the Appeals Chamber's Judgment in DRC OA, in which the Appeals Chamber explained that the admissibility of the case is not a prerequisite for the issuance for a warrant of arrest, but also acknowledged the power of the Pre-Trial Chambers under article 19 (1) of the Statute to determine on its own motion the admissibility of a case in appropriate

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[63] Document in Support of the Appeal, para. 2.
[64] Reasons, para. 59.
[65] Reasons, para. 59.
[66] Reasons, para, 59.
[67] Reasons, para. 60.

circumstances.[68] The Trial Chamber considered that it follows from this judgment that the Prosecutor "must provide all decisive information to the Chamber so that it may be in a position to exercise the discretion ascribed to it by the Appeals Chamber in case of well established jurisprudence, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review."[69]

43. Turning to the question of whether the Prosecutor should have provided the Pre-Trial Chamber with the documents to which the Appellant had referred, the Trial Chamber noted that one of these documents, a request dated 2 March 2007 for an extension of detention of seven suspects including the Appellant, referred to crimes committed in Bogoro,[70] the place where the crimes with which the Appellant is charged before the Court were allegedly committed on 24 February 2003. The Trial Chamber noted that there had been several attacks on Bogoro and that the Congolese authorities had assured the Prosecutor that the incident of 24 February 2003 was not under investigation.[71] The Chamber concluded that the document of 2 March 2007 did not contain "decisive information [...] which ought to have been brought to the attention of the Pre-Trial Chamber."[72] In light of this finding, the Trial Chamber did not consider whether this document would have led the Pre-Trial Chamber to exercise its discretion differently in assessing the admissibility of the case *proprio motu*.[73]

2. *Submissions of the Appellant*

44. The Appellant submits that "it will often be in the interest of the Court, the suspect and the State concerned to consider the question of admissibility in the course of the application for an arrest warrant". [74] He notes the Appeals Chamber's view that the Prosecutor has no duty to give "the necessary factual information to determine the admissibility of the case" when applying for a warrant of arrest, but submits that this view "is not in keeping with the principle of complementarity" and could lead to a waste of resources.[75] He argues that an accusing party should be required to disclose

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[68] Reasons, paras 61-65.
[69] Reasons, para. 65.
[70] Reasons, para. 68.
[71] Reasons, para. 69.
[72] Reasons, para. 72.
[73] Reasons, para. 73.
[74] Document in Support of the Appeal, para. 42.
[75] Document in Support of the Appeal, para. 42.

all relevant facts.[76] He submits that even if one accepted the standard of the Trial Chamber, requiring disclosure of only the "decisive" documents, the Trial Chamber erred when it found that the relevant documents did not meet this threshold.[77]

45. The Appellant submits that the Trial Chamber's test gives the Prosecutor too much discretion in determining which documents to disclose, and that the Pre-Trial Chambers will be deprived of effective supervision of the Prosecutor's assessment, potentially to the detriment of the suspect and of the State concerned.[78] He argues that "[g]iven the significance of the matter, [...] a test in which 'decisive' information to be provided to the Pre-Trial Chamber should at least include relevant national documents in relation to arrest and detention".[79] Referring to the document of 2 March 2007, the Appellant submits that a document relating to the detention of the suspect for alleged crimes that appear to be the same as the alleged crimes for which the Prosecutor seeks a warrant of arrest is necessarily of a decisive nature.[80] He states that although the Trial Chamber found that the document "did not appear to contain decisive information on the 'circumstances of the case'", the Pre-Trial Chamber may have come to a different conclusion.[81] In the Appellant's view, the Trial Chamber cannot substitute the Pre-Trial Chamber in its supervision of the Prosecutor during the early stages of the proceedings.[82]

46. The Appellant argues furthermore "that the Trial Chamber has erred in assessing the importance of the [document] by apparently requiring a certain degree of precision", stating that precision with regard to the time of commission and mode of liability is something that should not be required in relation to admissibility determinations.[83]

47. Third, he submits that the Trial Chamber only looked at the significance of the 'Bogoro document' although the Appellant also relied on many other documents in the Appellant's Motion.[84] He argues that "[t]he totality of these documents clearly suggests [...] that the DRC was investigating the alleged criminal conduct of [the

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[76] Document in Support of the Appeal, para. 42.
[77] Document in Support of the Appeal, para. 43.
[78] Document in Support of the Appeal, para. 45.
[79] Document in Support of the Appeal, para. 46.
[80] Document in Support of the Appeal, para. 46.
[81] Document in Support of the Appeal, para. 46.
[82] Document in Support of the Appeal, para. 46.
[83] Document in Support of the Appeal, para. 48.
[84] Document in Support of the Appeal, para. 49.

Appellant] and some of his co-detainees in the Ituri region including Bogoro".[85] He refers to 50 documents indicating that the Appellant and others were being investigated for criminal action in Bogoro and neighbouring villages stating that "it was completely inappropriate to withhold all that information from the Pre-Trial Chamber".[86] He argues that the totality of the documents, even if not each alone, should qualify as decisive.[87]

48. The Appellant argues that the Trial Chamber erred when it found that the Pre-Trial Chamber had determined the admissibility of the case on proper grounds. He submits that the Chamber may have determined the case to be inadmissible, had the Prosecutor provided the Pre-Trial Chamber with the relevant documents. He requests the Appeals Chamber to reverse "this part of the Decision pursuant to Article 83(2)(a)."[88]

3. Submissions of the Prosecutor

49. The Prosecutor contests the arguments of the Appellant under the second ground of appeal. He recalls that the Appeals Chamber established in its Judgment in DRC OA that a "high standard" must be met before a Pre-Trial Chamber should determine the admissibility of a case *proprio motu* in the context of arrest warrant proceedings; in his view, the Appellant has not presented any basis for departing from this jurisprudence.[89] The Prosecutor submits that the admissibility of a case should "in principle be determined as a result of a challenge by the suspect or State, and with submissions of all interested participants." He acknowledges that he is under an obligation to disclose documents relevant to a potential admissibility challenge to the defence and notes that although the Appellant was provided with all the relevant material, he did not file an admissibility challenge during the entire proceedings before the Pre-Trial Chamber.[90]

50. The Prosecutor also contests the Appellant's argument that the Trial Chamber concluded that the documents to which the Appellant had referred the Chamber

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[85] Document in Support of the Appeal, para. 49.
[86] Document in Support of the Appeal, para. 49.
[87] Document in Support of the Appeal, para. 49.
[88] Document in Support of the Appeal, para. 51.
[89] Response to the Document in Support of the Appeal, para. 40.
[90] Response to the Document in Support of the Appeal, para. 42.

should have been disclosed to the Pre-Trial Chamber.[91] He notes that only two of those documents mentioned crimes allegedly committed in Bogoro,[92] and that the Trial Chamber correctly examined all the circumstances.[93] In the contention of the Prosecutor, the Pre-Trial Chamber would have acted against the jurisprudence of the Appeals Chamber if it had ruled on the admissibility of the case on the basis of these ambiguous documents.[94]

51. The Prosecutor submits further that the Appellant fails to demonstrate how the "alleged error impacted on the substance of this Decision".[95] In his opinion, the Pre-Trial Chamber would not have determined that the case was inadmissible on the basis of the documents to which the Appellant had referred. The Prosecutor underlines that "any alleged error regarding what the Prosecution should have submitted to the Pre-Trial Chamber over two years ago has no impact on the Decision of the Trial Chamber or the admissibility of the case at this point."[96]

4. Submissions of the DRC and of the victims and response thereto

52. The DRC submits in relation to the second ground of appeal that it had always maintained that at the time of the issuance of the warrant of arrest in respect of the Appellant, the Congolese authorities had not carried out any investigations in relation to the incident at Bogoro. The DRC maintains that the document of 2 March 2007 was merely of procedural nature and aimed at extending the detention of the Appellant for alleged crimes other than the incident at Bogoro.[97] The DRC submits further that the Appellant has never submitted any proof demonstrating that the Prosecutor intentionally failed to disclose to the Pre-Trial Chamber information that indicated that the DRC was also conducting investigations in relation to the incident at Bogoro.[98]

53. Victims a/0333/07 and a/0110/08 as well as Victims a/0330/07 and a/0331/07 submit that the Trial Chamber correctly found that the Prosecutor was not under an

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[91] Response to the Document in Support of the Appeal, para. 43.
[92] Response to the Document in Support of the Appeal, para. 43.
[93] Response to the Document in Support of the Appeal, para. 46.
[94] Response to the Document in Support of the Appeal, para. 44.
[95] Response to the Document in Support of the Appeal, para. 39.
[96] Response to the Document in Support of the Appeal, para. 39.
[97] Observations of the DRC, p. 3.
[98] Observations of the DRC, p. 3.

obligation to submit the documents relating to the Bogoro incident to the Pre-Trial Chamber when applying for the issuance of a warrant of arrest.[99] In particular, Victims a/0333/07 and a/0110/08 note that the Appeals Chamber, in its Judgment in DRC OA, held that the Prosecutor does not have to submit documents relevant to the admissibility of a case when applying for a warrant of arrest.[100] They submit furthermore that the burden of proof is on the Appellant to establish that there are proceedings in the DRC that render the case inadmissible before the Court.[101] The victims represented by the OPCV concur with the submissions of the Prosecutor in respect of the second ground of appeal.[102]

54. In response to the observations, the Prosecutor notes that the DRC and the victims concur with him that the documents regarding the Bogoro incident were not of a decisive nature.[103]

5. Determination of the second ground of appeal

55. The Appeals Chamber notes that the Appellant submitted before the Trial Chamber that the question of admissibility must be determined on the basis of the factual situation as it existed at the time of the issuance of the warrant of arrest. In support of this submission, the Appellant argued that the Prosecutor had failed to disclose certain documents to the Pre-Trial Chamber when applying for a warrant of arrest and that these documents, had they been disclosed to the Pre-Trial Chamber, would have led that Chamber to declare the case inadmissible and to reject the Prosecutor's application for a warrant of arrest. In response, the Trial Chamber assessed whether or not the Prosecutor should have disclosed the relevant documents to the Pre-Trial Chamber. The Trial Chamber concluded that the Prosecutor was not obliged to do so. On appeal, the Appellant is challenging these findings of the Trial Chamber.

56. For the reasons summarised below, the Appeals Chamber does not deem it necessary to address the merits of the Appellant's submissions under the second

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[99] Observations of Victims a/0333/07 and a/0110/08, pp. 10 et seq.; Observations of Victims a/0330/07 and a/0331/07, paras 14 et seq.
[100] Observations of Victims a/0333/07 and a/0110/08, p. 10.
[101] Observations of Victims a/0333/07 and a/0110/08, p. 11.
[102] Observations of Victims Represented by the OPCV, para. 18.
[103] Prosecutor's Response to Observations, para. 13.

ground of appeal. The present appeal is brought under article 82 (1) (a) of the Statute against a decision with respect to admissibility. The purpose of an admissibility challenge and, by extension, an appeal under article 82 (1) (a) of the Statute, is to determine whether or not a case is admissible. Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and *vice versa.* Article 19 (10) of the Statute gives the Prosecutor the right to submit a request for a review of a previous decision that a case is inadmissible if he or she is satisfied "that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17." This right of the Prosecutor would be meaningless if the admissibility of a case would always have to be determined on the basis of the factual situation at the time the warrant of arrest is issued. Thus, the provision is clear evidence that the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory. Furthermore, the *chapeau* of article 17 (1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The *chapeau* requires the Court to determine whether or not the case *is* inadmissible, and not whether it *was* inadmissible.

57. The Appellant's argument that the Prosecutor failed to disclose relevant documents to the Pre-Trial Chamber when applying for a warrant of arrest does not present a cogent reason for the Appeals Chamber to depart from the above principle. His complaint relates to the decision of Pre-Trial Chamber I regarding the issuance of a warrant for his arrest. Indeed, he contends that had the Prosecutor disclosed to the Pre-Trial Chamber the documents in question, that Chamber would have decided that the case was inadmissible. That decision is, however, not the subject of the present appeal. Were the Appeals Chamber to consider the merits of the second ground of appeal, it would, in effect, be assessing the correctness of the Pre-Trial Chamber's decision on the warrant of arrest, and not of the decision that is the subject of the

present appeal. Additionally, the Appellant does not show how the alleged error by the Prosecutor during the arrest warrant proceedings materially affects the decision of the Trial Chamber that the case is admissible.

C. Third ground of appeal

58. The third ground of appeal is that "[t]he Trial Chamber erred in defining 'unwilling', in light of Article 17(2) and the principle of complementarity".[104]

1. Relevant part of the Impugned Decision

59. In the Reasons, the Trial Chamber stated that "according to the Statute, the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators."[105] Without analysing in detail the other elements of article 17 (1) (a) or (b) of the Statute, the Trial Chamber directly turned to the question of the unwillingness of the DRC to prosecute the Appellant. The Trial Chamber noted that the term "unwillingness" was defined in article 17 (2) of the Statute and referred to "unwillingness motivated by the desire to obstruct the course of justice".[106] The Trial Chamber found that there is also a "second form of 'unwillingness', which is not expressly provided for in article 17 of the Statute, [and which] aims to see the persons brought to justice, but not before national courts."[107] The Trial Chamber considered that this second form of unwillingness was fully in line with the principle of complementarity, which was "designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so".[108] Noting the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (sixth paragraph of the Rome Statute), the Trial Chamber considered that a State was still complying with its duties under the complementarity principle "if it surrenders a suspect to the Court in good time".[109] In the view of the Trial Chamber, a State may refer a situation to the Court "if it considers it opportune to do so, just as it may decide not to carry out

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[104] Document in Support of the Appeal, para. 2.
[105] Reasons, para. 74.
[106] Reasons, para. 77.
[107] Reasons, para. 77.
[108] Reasons, para. 78.
[109] Reasons, para. 79.

an investigation or prosecution of a particular case."[110] The Chamber noted that the unwillingness of the State is not sufficient to determine that a case is admissible because even in case of unwillingness, the grounds for inadmissibility in article 17 (1) (c) of the Statute *(ne bis in idem)* and in article 17 (1) (d) of the Statute (gravity) will have to be considered.[111]

60. Turning to the facts of the case, the Trial Chamber explained that in assessing the willingness of the DRC, it took into consideration the intention of the State that the person concerned be brought to justice.[112] The Trial Chamber noted the submissions of the DRC, which confirmed that the DRC had not initiated any investigations in relation to the Bogoro incident.[113] The Chamber recalled that the DRC had emphasised its commitment to the fight against impunity and had stated that the Chamber should reject the challenge, so as to be able to try the case.[114] On the basis of these statements, the Trial Chamber found that there was a "clear and explicit expression of unwillingness of the DRC to prosecute this case."[115] The Trial Chamber also noted that the DRC had not challenged the admissibility of the case and had immediately surrendered the Appellant to the Court.[116] In the view of the Trial Chamber, the DRC has therefore left it to the Court to "try [Germain Katanga] for the acts committed on 24 February 2003 in Bogoro."[117]

2. *Submissions of the Appellant*

61. The Appellant argues "that the Trial Chamber erroneously enlarged the definition of 'unwillingness' in a manner (1) not intended by the drafters of the Statute and not in compliance with its objective and purpose; and (2) contrary to the fundamental values underlying the complementary principle".[118]

62. As to the "[s]cope of unwillingness as foreseen in the Statute",[119] the Appellant argues that article 17 (2) of the Statute is an exhaustive list and that "[i]t is evident

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[110] Reasons, para. 80.
[111] Reasons, para. 81.
[112] Reasons, para. 90.
[113] Reasons, para. 93.
[114] Reasons, para. 94.
[115] Reasons, para. 95.
[116] Reasons, para. 95.
[117] Reasons, para. 95.
[118] Document in Support of the Appeal, para. 55.
[119] Document in Support of the Appeal, p. 18.

from the manner in which [it] is phrased that this is a self-contained regime leaving no room for discretion to rely on forms of unwillingness other than those described [therein]".[120] He submits that other phrasing would have been included had the States intended for the Chambers to interpret article 17 (2) more broadly.[121] He refers to various sources on the issue, and asserts that literature also supports his view that article 17 (2) is exhaustive.[122] He argues that "[m]oreover, Article 17 gives effect to the principle of complementarity, which is guiding principle in determining the admissibility of a case".[123] He also refers to literature to the effect that as the principle was already contained in article 17 of the Statute, delegations at the Rome Diplomatic Conference decided that it was no longer necessary to have further elaboration in the Preamble "and that the basic principle would suffice".[124] He states that "[a]ccordingly, and in line with the objective of the drafters of the Rome Statute who made the best effort to give the most precise and objective definition to the concepts of unwillingness and inability, Article 17 must be strictly interpreted".[125] He submits that "if the Appeals Chamber does not agree that 'unwillingness' can only be defined in terms of Article 17(2), then at the very least unwillingness must be justified on good grounds, or be similar to those set out in Article 17(2)".[126]

63. The Appellant argues further that the Trial Chamber's interpretation of the complementarity principle "violates paragraph 6 of the Preamble, as well as the fundamental values underlying the complementarity principle as inherent in the Preamble, Articles 1 and 17 of the Rome Statute".[127] He submits that "if States are granted an unconditional right not to prosecute, this would seriously jeopardize any encouragement of States to prosecute domestically and thereby endanger the correct application of the principle of complementarity"[128] and "would negate this persisting and primary responsibility for States to prosecute international crimes"[129]. He also submits that "[i]t would also violate Article 17 affirming the principle that able and

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[120] Document in Support of the Appeal, para. 57.
[121] Document in Support of the Appeal, para. 57.
[122] Document in Support of the Appeal, paras 58-59.
[123] Document in Support of the Appeal, para. 60.
[124] Document in Support of the Appeal, para. 60.
[125] Document in Support of the Appeal, para. 60, footnote omitted.
[126] Document in Support of the Appeal, para. 61.
[127] Document in Support of the Appeal, para. 64.
[128] Document in Support of the Appeal, para. 64.
[129] Document in Support of the Appeal, para. 66.

willing States should deal with cases concerning international crimes in their own jurisdiction".[130] Referring to the drafters of the Statute seeing the ICC as a court of last resort, and the views expressed by several commentators, he submits that

> [W]hen the duty on every State to exercise its jurisdiction over persons alleged to be responsible for international crimes is read in light of Articles 1 and 17 and viewed against the background of the intention of the drafters of the Rome Statute, it is clear that the Court may only exercise its jurisdiction over a case if a State is unwilling or unable genuinely to bring a person to justice, not if it simply prefers the ICC to take over the case.[131]

64. He submits that the Trial Chamber committed a legal error in its interpretation of "unwilling" in article 17 (2) of the Statute and that this "materially affected the decision".[132] He submits that "[i]f not for this error of law, the Trial Chamber would have come to a different conclusion on admissibility and found that the DRC was willing to prosecute Mr. Katanga in the DRC." He asks for "this part of the decision" to be reversed.[133]

3. Submissions of the Prosecutor

65. The Prosecutor's principal response to the issues raised by the Appellant under the third ground of appeal is that a textual analysis of article 17 (1) (a) of the Statute indicates that the question of unwillingness arises only if and when there are investigations or prosecutions in a State having jurisdiction.[134] In light of this line of argument, the Prosecutor submits that the correctness of the Trial Chamber's interpretation of "unwillingness" is irrelevant.[135]

66. In support of this contention, the Prosecutor refers the Appeals Chamber to the works of academic commentators on article 17 of the Statute,[136] as well as to the practice of the Pre-Trial Chambers.[137] The Prosecutor submits that "[a]lthough the Trial Chamber characterised its finding as a form of 'unwillingness', in substance the Chamber addressed whether the DRC was conducting an investigation or prosecution

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[130] Document in Support of the Appeal, para. 66.
[131] Document in Support of the Appeal, para. 71.
[132] Document in Support of the Appeal, para. 72.
[133] Document in Support of the Appeal, para. 72.
[134] Response to the Document in Support of the Appeal, para. 51.
[135] Response to the Document in Support of the Appeal, para. 84.
[136] Response to the Document in Support of the Appeal, paras 53-56.
[137] Response to the Document in Support of the Appeal, para. 57.

into the case at all; it considered the situation as one in which the State 'chooses not to investigate or prosecute a person in its own courts', i.e. a case of inactivity."[138] The Prosecutor contends that the factual findings of the Trial Chamber were correct and that they relate, in substance, to inactivity, and not to unwillingness.[139] In his view, the "fact that this analysis has been conducted under the rubric of an additional form of unwillingness does not alter the essential fact that the Chamber considered and found that the case was not 'being investigated or prosecuted by a State which has jurisdiction over it', i.e. the DRC."[140]

67. The Prosecutor submits furthermore that the Trial Chamber correctly focussed its assessment of admissibility on the case before it, implicitly acknowledging and applying the "same-conduct" test.[141] In his view, the Trial Chamber made no error in treating the submissions of the DRC and in giving them substantial weight.[142] He underscores the fact that the Court cannot force a State to open investigations or to prosecute a case and that the "admissibility provisions do not empower the Court to refuse to take up jurisdiction because it believes a State could or should have."[143] The Prosecutor acknowledges that:

> The preference [...] is for States to deal with these cases domestically. The Prosecution thus works with States to respect and encourage national proceedings. But the Statute imposes also the duty on the ICC to act when there is an absence of national proceeding[s] in relation to a particular case. The principle of complementarity can neither be applied to force national proceedings, nor can it be applied to effectively perpetuate impunity.[144]

4. Submissions of the DRC and of the Victims and responses thereto

68. The DRC submits that it is not necessary to address the question of the purported "unwillingness" of the DRC to investigate or to prosecute the incident at Bogoro with which the Appellant is charged before the ICC because in any event, this incident has never been investigated by the Congolese authorities.[145] The DRC further submits that the Bogoro incident was first mentioned by the Appellant himself in a

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[138] Response to the Document in Support of the Appeal, para. 58, footnotes omitted.
[139] Response to the Document in Support of the Appeal, paras 59-66.
[140] Response to the Document in Support of the Appeal, para. 65.
[141] Response to the Document in Support of the Appeal, paras 71-76.
[142] Response to the Document in Support of the Appeal, paras 77-82.
[143] Response to the Document in Support of the Appeal, para. 78.
[144] Response to the Document in Support of the Appeal, para. 82, footnotes omitted.
[145] Observations of the DRC, p. 4.

declaration and that there never were any significant investigative steps in this respect.[146] The DRC states that this was because of insufficient capacities to carry out investigations.[147]

69. Victims a/0333/07 and a/0110/08 submit that the Appellant has failed to establish that there were proceedings in the DRC in relation to the charges for which he is to stand trial before the Court that could render the case inadmissible.[148] For that reason, there is, in the view of the victims, no need to address the Trial Chamber's interpretation of "unwillingness" because in case of inaction, the question of unwillingness does not arise.[149] On that basis, the victims call into question the Appellant's interest in raising the Trial Chamber's interpretation of unwillingness.[150] The victims underline that the DRC clearly has the intention that the Appellant should be brought to justice, albeit not before the courts of the DRC, but before the ICC.[151]

70. Victims a/0330/07 and a/0331/07 submit that the Trial Chamber's interpretation of "unwillingness", and its application to the present case was correct.[152] They argue that while the domestic authorities should bear the principal responsibility for investigating and prosecuting crimes, the authorities of the DRC have not opened any investigations in respect of the charges before the ICC.[153]

71. The victims represented by the OPCV state that they agree with the submissions of the Prosecutor in relation to the third ground of appeal.[154] They submit furthermore that the Trial Chamber did not err when it identified a "second form of unwillingness", not expressly provided for in article 17 (2) of the Statute.[155] They submit that the list of article 17 (2) of the Statute is not exhaustive and note that in the *chapeau* of the provision, the verb "consider" is used, which indicates that the list is illustrative and only contains examples.[156] The victims also refer the Appeals Chamber to the drafting history of article 17 (2) of the Statute and to previous

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[146] Observations of the DRC, p. 4.
[147] Observations of the DRC, p. 4.
[148] Observations of Victims a/0333/07 and a/0110/08, p. 17.
[149] Observations of Victims a/0333/07 and a/0110/08, p. 18.
[150] Observations of Victims a/0333/07 and a/0110/08, pp.17-18.
[151] Observations of Victims a/0333/07 and a/0110/08, pp. 18-20.
[152] Observations of Victims a/033007 and a/0331/08, paras 18-23.
[153] Observations of Victims a/033007 and a/0331/08, para. 23.
[154] Observations of Victims Represented by the OPCV, para. 19.
[155] Observations of Victims Represented by the OPCV, para. 20.
[156] Observations of Victims Represented by the OPCV, para. 22.

jurisprudence of Pre-Trial Chamber II.[157] The victims argue furthermore that it would be logical to interpret the list in article 19 (2) of the Statute as not being exhaustive.[158] As to the more general submissions of the Appellant on the complementarity principle, the victims represented by the OCPV submit that contrary to the Appellant's submission, there is no reason to expect that States will automatically hand over all cases to the ICC.[159] They emphasise that the main reason for the complementarity principle is the protection of the sovereignty of States, and that throughout the drafting of the Rome Statute, it was contemplated that States could waive the admissibility requirements.[160] Finally, the victims represented by the OPCV submit that the application of the complementarity principle must not create a situation in which the Court is unable to carry out its "essential purpose".[161]

72. The Prosecutor submits that the observations of the DRC and of the victims reinforce his arguments that the case against the Appellant was never investigated or prosecuted in the DRC.[162] He also agrees with the submissions regarding the effect of inaction for the admissibility of the case.[163]

5. Determination of the third ground of appeal

73. As stated above at paragraph 59, the Trial Chamber in the Reasons addressed the purported unwillingness of the DRC to prosecute Mr. Katanga domestically, but failed to address in detail the other elements of article 17 (1) (a) and (b) of the Statute. The Appellant argues that the Trial Chamber's interpretation of the term "unwillingness" was incorrect and, in particular, that the list in article 17 (2) of the Statute is exhaustive.[164] On this basis, he urges the Appeals Chamber to declare the case inadmissible. The Appeals Chamber is not persuaded by the Appellant's arguments, because, for the reasons summarised below, the case against the Appellant is admissible, irrespective of the correctness of the Trial Chamber's interpretation of the

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[157] Observations of Victims Represented by the OPCV, paras 23-24.
[158] Observations of Victims Represented by the OPCV, para. 25.
[159] Observations of Victims Represented by the OPCV, para. 29.
[160] Observations of Victims Represented by the OPCV, paras 30-36.
[161] Observations of Victims Represented by the OPCV, para. 37.
[162] Prosecutor's Response to Observations, para. 11.
[163] Prosecutor's Response to Observations, para. 12.
[164] Document in Support of the Appeal, para. 57.

term "unwillingness" and irrespective of whether the list in article 17 (2) of the Statute is exhaustive.

(a) Interpretation of article 17 (1) (a) and (b) of the Statute

74. Article 17 of the Statute provides, in relevant part, as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> [...]
>
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

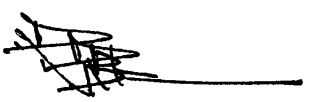
75. The Appeals Chamber agrees with the submission of the Prosecutor that according to the clear wording of article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible. Article 17 (1) (a) of the Statute covers a scenario where, at the time of the Court's determination of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction. This is expressed by the use of the present tense, "[t]he case *is being* investigated or

prosecuted by a State" (emphasis added). Article 17 (1) (b) of the Statute covers a similar scenario where a State having jurisdiction *has* investigated a case, but "has *decided not to prosecute* the person concerned" (emphasis added).

76. In both article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability is linked to the activities of the State having jurisdiction. Article 17 (1) (a) links the unwillingness or inability to the investigation or prosecution: "unless the State is unwilling or unable genuinely to carry out *the investigation or prosecution*" (emphasis added). The use of the definite article "the" instead of the indefinite "a" emphasises that reference is made to an investigation or prosecution that is actually ongoing. Similarly, in article 17 (1) (b), unwillingness and inability refer to the decision of a State, after investigation, not to prosecute the person concerned: "unless *the decision* resulted from the unwillingness or inability of the State genuinely to prosecute" (emphasis added).

77. This interpretation of article 17 (1) (a) and (b) of the Statute is confirmed by article 17 (2) of the Statute. Article 17 (2) (a) refers to "proceedings [that] were or are being undertaken at the national level". The same holds true with respect to sub-paragraph (b), which uses the verb "has been" in conjunction with the phrase "unjustified delay in the proceedings" to indicate that the test of unwillingness applies to proceedings that have already started. Finally, sub-paragraph (c) also speaks of "proceedings [that] were not or are not being conducted independently".

78. Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. This interpretation of article 17 (1) (a) and (b) of the Statute also finds broad support from



academic writers who have commented on the provision and on the principle of complementarity.[165]

79. The Appeals Chamber is therefore not persuaded by the interpretation of article 17 (1) of the Statute proposed by the Appellant, according to which unwillingness and inability also have to be considered in case of inaction.[166] Such an interpretation is not only irreconcilable with the wording of the provision, but is also in conflict with a purposive interpretation of the Statute. The aim of the Rome Statute is "to put an end to impunity"[167] and to ensure that "the most serious crimes of concern to the international community as a whole must not go unpunished".[168] This object and purpose of the Statute would come to naught were the said interpretation of article 17 (1) of the Statute as proposed by the Appellant to prevail. It would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless that State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so. Thus, a potentially large number of cases would not be prosecuted by domestic jurisdictions or by the International Criminal Court.[169] Impunity would persist unchecked and thousands of victims would be denied justice.

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[165] See Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', 7 *Max Planck Yearbook of United Nations Law* (2003), 591 at 601; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), at 91; William W. Burke-White, Scott Kaplan, 'Shaping the Contours of Domestic Justice/The International Criminal Court and the Admissibility Challenge in the Ugandan Situation', 7 *Journal of International Criminal Justice* (2009), 257 at 260; Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), at 161, 221, and 230; John T. Holmes, 'Complementarity: National Courts versus the ICC', in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (2002), 667 at 673; Jan Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), at 103 et seq.; Claus Kress, '"Self-Referrals" and "Waivers of Complementarity" – Some Considerations in Law and Policy', 2 *Journal of International Justice* (2004), 944 at 946; Hector Olásolo, *The Triggering Procedure of the International Criminal Court* (2005), 165; Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions/ The Principle of Complementarity* (2008), at 199 et seq.

[166] See Document in Support of the Appeal, para. 71; see also William A. Schabas, 'Article 17 – Issues of Admissibility', in: Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edition, 2008), 605 et seq., at margin number 23.

[167] Fifth paragraph of the Preamble of the Statute.

[168] Fourth paragraph of the Preamble of the Statute.

[169] Note, however, that not every inaction of States will automatically lead to proceedings before the Court; see, below, para. 85, *in fine*.

(b) Application of article 17 (1) (a) of the Statute

80. It is evident from the facts before the Appeals Chamber that article 17 (1) (a) does not render the case against the Appellant inadmissible before the Court. As previously explained at paragraphs 56 et seq., the admissibility of a case has to be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. Accordingly, the first issue to consider is whether at that time, there were ongoing investigations or prosecutions. In the instant case, the record does not indicate that at the time of the proceedings before the Trial Chamber, there were in the DRC any investigations or prosecutions of any crime allegedly committed by the Appellant, at Bogoro or anywhere else in the DRC. Any investigation that may have been ongoing regarding him was closed when he was surrendered to the Court in October 2007. On 17 October 2007, the *Auditeur Général près la Haute Cour Militaire* at Kinshasa decided to close the judicial proceedings by the *Auditeur Général* in respect of the Appellant in order to facilitate the joinder of all proceedings before the International Criminal Court.[170] In its "Observations of the DRC on the challenge to admissibility made by the Defence for Germain Katanga" of 14 March 2009, the DRC confirmed that there were no investigations to establish the alleged criminal responsibility of the Appellant.[171] For that reason alone, and irrespective of the willingness of the DRC to investigate or to prosecute the Appellant, the Appeals Chamber considers that article 17 (1) (a) does not present a bar to his prosecution before the International Criminal Court.

81. In light of the above, the Appeals Chamber does not have to address in the present appeal the correctness of the "same-conduct test" used by the Pre-Trial Chambers to determine whether the same "case" is the object of domestic proceedings.[172] This issue was argued by the parties before the Trial Chamber, but the

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[170] See ICC-01/04-01/07-40-Anx3.6, p. 3.
[171] ICC-01/04-01/07-968-Conf-Exp-AnxJ-tENG; see also ICC-01/04-01/07-T-65-ENG, p. 96.
[172] See Pre-Trial Chamber I, *Prosecutor v. Mathieu Ngudjolo Chui,* '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, ICC-01/04-02/07-3, para. 21; Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman,* 'Decision on the Prosecution Application under Article 58(7) of the Statute', 27 April 2007, ICC-02/05-01/07-1-Corr, para. 24; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga,* 'Decision on the evidence and information provided by the Prosecution for the arrest of Germain Katanga', 5 November 2007, ICC-01/04-01/07-55, para. 20; Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo,* 'Decision on the Prosecutor's Application for a warrant of arrest, Article 58', 10 February 2006, ICC-01/04-01/06-8-US-Corr, para. 31.

Trial Chamber expressly declined to rule on the correctness of this test.[173] In his Response to the Document in Support of the Appeal, the Prosecutor repeats some of his arguments on the matter. However, as stated above, at the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in respect of the Appellant. Hence, the question of whether the "same-conduct test" is correct is not determinative for the present appeal.

(c) Application of article 17 (1) (b) of the Statute

82. Article 17 (1) (b) of the Statute does not render the case against the Appellant inadmissible either. This provision comprises two cumulative elements that have to be fulfilled for a case to be inadmissible: the case must have been investigated, and the State having jurisdiction must have "decided not to prosecute". Even if one assumes, *arguendo*, that the same "case" as the case before the ICC was at some point in time the subject of investigations in the DRC,[174] such investigations would not render the case inadmissible under article 17 (1) (b), because the DRC did not make any decision *not to prosecute* the Appellant, as required by the provision. To the contrary, throughout the proceedings before the Trial Chamber, the representatives of the DRC emphasised that they wished that the Appellant be brought to justice. Although by virtue of the decision of 17 October 2007, referred to in paragraph 80, above, the *Auditeur Général* decided to close domestic proceedings against the Appellant, this decision was not a decision not to prosecute in terms of article 17 (1) (b) of the Statute. It was, rather, a decision to surrender the Appellant to the Court and to close domestic investigations against him as a result of that surrender. The thrust of this decision was not that the Appellant should not be prosecuted, but that he *should* be prosecuted, albeit before the International Criminal Court.

83. This application of 17 (1) (b) of the Statute to the present case is in line with the purpose of that provision, as well as with the overall purpose of the Statute. The purpose of article 17 (1) (b) of the Statute is to ensure that the Court respects genuine decisions of a State not to prosecute a given case, thereby protecting the State's

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[173] See Reasons, para. 95. Note, however, that the Prosecutor argues at para. 76 of the Response to the Document in Support of the Appeal that the Trial Chamber "implicitly acknowledged and applied the same-conduct test".

[174] As stated above at para. 81, the Appeals Chamber sees no need in the context of the present appeal to determine the exact meaning of the word "case" in article 17 (1) of the Statute.

sovereignty. However, the provision must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity". If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a "decision not to prosecute", the peculiar, if not absurd, result would be that *because* of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the State nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute.[175] Thus, a "decision not to prosecute" in terms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.[176]

(d) Article 17 of the Statute and complementarity

84. The above interpretation and application of article 17 of the Statute is, in the Appeals Chamber's view, in accord with the complementarity principle.

85. The Appeals Chamber is not persuaded by the argument of the Appellant that it would be to negate the obligation of States to prosecute crimes if they were allowed to relinquish domestic jurisdiction in favour of the International Criminal Court. The Appeals Chamber acknowledges that States have a duty to exercise their criminal jurisdiction over international crimes.[177] The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to "put an end to impunity"[178] on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in. Moreover, there may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the "duty to exercise [its] criminal jurisdiction", as envisaged in the sixth paragraph of

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[175] It is merely speculative that in this scenario the State could decide to re-open proceedings.
[176] See also Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions/ The Principle of Complementarity* (2008), at 311 et seq., who states that "[a] national decision not to prosecute may reflect a preference for prosecution in another state or before the ICC. It is submitted that such decisions are outside the scope of article 17 as it is not a decision against prosecution as such. Indeed, the decision reflects the opinion that the person should be prosecuted, only not by that state. It is submitted that article 17(1) (b), read in this context, only regulates decisions reflecting the view that the person should not be prosecuted before any court."
[177] Sixth paragraph of the Preamble of the Statute.
[178] Fifth paragraph of the Preamble of the Statute.

the Preamble.[179] Be this as it may, however, the Appeals Chamber is mindful that the Court, acting under the relevant provisions of the Statute[180] and depending on the circumstances of each case, may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court.

86. In the Chamber's view, the *general* prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction. This is so because under the Rome Statute, the Court does not have the power to order States to open investigations or prosecutions domestically. It is purely speculative to assume that a State that has refrained from opening an investigation into a particular case or from prosecuting a suspect would do so, just because the International Criminal Court has ruled that the case is inadmissible. Thus, contrary to the arguments of the Appellant,[181] his interpretation of the complementarity regime would not necessarily lead to an increase in domestic investigations or prosecutions. It would, instead, intensify the risk of serious crimes going unpunished.

D. Fourth ground of appeal

87. The fourth ground of appeal is that "[t]he Trial Chamber erred in confusing the concepts of unwillingness and inability."[182]

1. Relevant part of the Impugned Decision

88. The part of the impugned decision that has been identified as being relevant to the third ground of appeal is also relevant to the fourth ground of appeal (see above, paragraphs 59 et seq.).

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[179] See Claus Kress, '"Self-Referrals" and "Waivers of Complementarity" – Some Considerations in Law and Policy', 2 *Journal of International Criminal Justice* (2004), 944 at 945. Kress notes that "it would be too rigorous a reading of the words 'exercise its criminal jurisdiction' in the sixth preambular paragraph to construe them to mean 'investigate, prosecute, and eventually punish at the national level'. In light of the overarching goal of the ICC Statute to end impunity, the territorial state should not be prevented from choosing a second option against impunity, namely to refer a situation to the ICC with a view to international investigation." See also Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), at 218 et seq.

[180] See, for instance, article 17 (1) (c) and (d), article 19 (1), and article 53 of the Statute.

[181] See Document in Support of the Appeal, paras 64 et seq.

[182] Document in Support of the Appeal, para. 2.

2. Submissions of the Appellant

89. The Appellant argues that the Trial Chamber confused the concepts of "unwillingness" and "inability",[183] and states that "[t]he Trial Chamber's examples of 'unwillingness' are given in error because following this logic would make any refusal amount to 'unwillingness'".[184] The Appellant submits that the question of inability, and not of unwillingness, was at issue in the proceedings before the Trial Chamber.[185] He states that the Prosecutor and the DRC have never questioned "the *substantive* willingness of the DRC to prosecute international crimes" and that the DRC said that it was not prosecuting the Appellant because of inability and not unwillingness.[186] The Appellant submits that the Trial Chamber should have addressed the question of inability, and not unwillingness, and states that the Chamber confused the two notions.[187] He argues that the wrong interpretation of unwillingness arose as the Chamber persisted in confusing "the absence of objection by the DRC and the lack of willingness".[188] In the Appellant's view, there is a difference between the decision of a State not to challenge the admissibility of a case and unwillingness in terms of article 17 (2) of the Statute.[189] He argues that there is a risk that the ICC will be "burdened with cases that could have been easily prosecuted elsewhere, thereby depleting the Court's resources for other cases".[190]

90. The Appellant states that inability "can be invoked only in very exceptional circumstances".[191] He submits that as far as the DRC is concerned, "such exceptional circumstances cannot be shown, given that the DRC has demonstrated to be perfectly able to try defendants of international crimes".[192] He argues furthermore that it is the Court, and not the State, that determines whether or not the State is unable to exercise jurisdiction.[193] Therefore, he submits that "it is not for the DRC to declare itself unable to prosecute and try the accused but it is for the Chamber to make such a

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[183] Document in Support of the Appeal, paras 73-79.
[184] Document in Support of the Appeal, para. 73.
[185] Document in Support of the Appeal, para. 75.
[186] Document in Support of the Appeal, para. 76.
[187] Document in Support of the Appeal, para. 77.
[188] Document in Support of the Appeal, para. 78.
[189] Document in Support of the Appeal, para. 78.
[190] Document in Support of the Appeal, para. 78.
[191] Document in Support of the Appeal, para. 82.
[192] Document in Support of the Appeal, para. 83.
[193] Document in Support of the Appeal, para. 84.

determination. Hence, contrary to what the Trial Chamber suggests, it is not decisive that a State considers itself unable to prosecute and try the case domestically".[194] He submits that if the Trial Chamber had properly "interpreted the notions of unwillingness and inability, it would have found that the DRC was both willing and able to exercise jurisdiction over Mr. Katanga to prosecute and try him in the DRC". He argues that the errors materially affected the decision and asks that the Chamber reverse "this part of the Decision".[195]

3. Submissions of the Prosecutor

91. In relation to the arguments raised under the fourth ground of appeal, the Prosecutor submits that it is irrelevant that the Trial Chamber did not consider whether the DRC was able to investigate or prosecute; as the DRC had decided not to investigate and not to prosecute domestically, and as it had requested the ICC to exercise jurisdiction, the question of ability did not arise.[196]

4. Submissions of the DRC and of the Victims and response thereto

92. The DRC states that its submissions in respect of the third ground of appeal apply also to the fourth ground of appeal.[197] The DRC submits furthermore that the criteria of "unwillingness" and "inability" are in the alternative and that it is sufficient to establish one of them; in the view of the DRC, it has been established in the present case that the domestic jurisdiction is unable, which renders the case admissible before the ICC.[198]

93. Victims a/0333/07 and a/0110/08 submit that the Trial Chamber did not confuse the concepts of "unwillingness" and "inability"; in their submission, the Trial Chamber merely noted that in order to explain its unwillingness, the DRC had submitted that there still were difficulties in respect of the capacity of the Congolese judiciary, but that the Trial Chamber did not decide whether this amounted to inability

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[194] Document in Support of the Appeal, para. 85; footnote omitted.
[195] Document in Support of the Appeal, para. 86.
[196] Response to the Document in Support of the Appeal, para. 85.
[197] Observations of the DRC, p. 5.
[198] Observations of the DRC, p. 5.

in terms of article 17 of the Statute.[199] Thus, in the view of the victims, the Chamber did not make any error in this respect.

94. Victims a/0330/07 and a/0331/07 submit in relation to the fourth ground of appeal that the criteria of "unwillingness" and "inability" are in the alternative and that, therefore, the unwillingness of a State does not have to be considered if the State is unable to prosecute.[200] They submit furthermore that it is evident that the DRC is still unable to prosecute.[201] The victims represented by the OPCV do not make any submissions directly related to the issues raised under the fourth ground of appeal.

95. The Prosecutor does not make any specific submissions in response to the observations of the DRC and of the victims in relation to the fourth ground of appeal.

5. Determination of the fourth ground of appeal

96. The Appeals Chamber notes that the submissions of the Appellant under the fourth ground of appeal comprise two lines of argument. First, the Appellant criticises the interpretation of "unwillingness" by the Trial Chamber, arguing that the Chamber confused "unwillingness" and "inability", thus continuing his arguments raised under the third ground of appeal. Secondly, the Appellant argues that the DRC was not "unable" to prosecute the Appellant, and that the Trial Chamber should have reached this conclusion.

97. As has been explained in relation to the third ground of appeal, the question of unwillingness or inability does not arise in the present case, because, at the time of the admissibility challenge, there were no domestic investigations or prosecutions against the Appellant; nor did the Congolese authorities, after investigation, decide not to prosecute him. For that reason, the Appeals Chamber sees no need to address the Appellant's arguments under the fourth ground of appeal.

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[199] Observations of Victims a/0333/07 and a/0110/08, pp. 21-22.
[200] Observations of Victims a/0330/07 and a/0331/08, para. 25.
[201] Observations of Victims a/0330/07 and a/0331/08, paras 26-28.

E. Fifth ground of appeal

98. The fifth ground of appeal is that "[t]he Trial Chamber's erroneous definition of 'unwillingness' has deprived the accused of a real and effective right to challenge admissibility".[202]

1. Relevant part of the Impugned Decision

99. In the Reasons, the Trial Chamber dismissed the claims of the Appellant that he was a victim of "burden sharing" between the DRC and the Office of the Prosecutor and that the DRC should not be allowed to waive complementarity. The Trial Chamber noted that the "conditions under which the trials are conducted before this Court [...] are not relevant to the issue of admissibility."[203] The Trial Chamber noted that, with the exception of grounds based on the *ne bis in idem* principle, the violation of an accused person's human rights is not a ground for the inadmissibility of a case, referring the Appellant to potential "other means of redress".[204] The Chamber explained that all States Parties to the Rome Statute have accepted that their nationals may be tried before the Court, far away from their home country, and that it is inherent in the nature of the Court that the proceedings would be different from those in that State.[205]

100. As to the claim of the Appellant that a "waiver of complementarity" will render his right to challenge the admissibility of the case "theoretical and illusory", the Trial Chamber noted that any such waiver can only be based on article 17 (1) (a) and (b) of the Statute; the right to challenge admissibility on the basis of *ne bis in idem* or gravity cannot be affected.[206] The Chamber explained that a challenge to admissibility can only be made "within the scope of the expression of the sovereignty of the State in question. Even assuming that investigations had been underway in a State against an accused person for crimes wholly identical to those which are the subject of a warrant issued for his or her arrest before the Court, the expression of the

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[202] Document in Support of the Appeal, para. 2.
[203] Reasons, para. 84.
[204] Reasons, para. 85.
[205] Reasons, para. 84.
[206] Reasons, paras 86-87.

unwillingness of the State to bring the accused to justice before its own courts can be such that it can only result in the Court declaring the case admissible."[207]

2. Submissions of the Appellant

101. The Appellant argues that "the Trial Chamber takes a minimalist approach to the Defence's rights in the admissibility process and has misconstrued and misapplied the applicable law".[208] In his submission, "unwillingness" and "inability" must be established by comparing domestic proceedings with proceedings before the ICC.[209] He submits that therefore "[t]he Trial Chamber [...] erred in law by ruling that human rights, such as the right to a fair trial, are not relevant factors in admissibility proceedings".[210]

102. The Appellant argues that it would render the "full and unconditional"[211] right to challenge admissibility meaningless if it were "exclusively in the hands of the State to determine its willingness".[212] He states that if the State can decide willingness "without the need to justify or explain its lack of willingness, consensual burden-sharing between the ICC Prosecutor and the national jurisdiction would bind the Court and the accused; nothing the Defence would submit could alter this or put such burden-sharing into question".[213]

103. The Appellant argues that the Trial Chamber erred in interpreting articles 19 (2) (a) and (17 (2) together and that "[t]he starting point must be that the drafters intended to provide the accused with rights which are real and effective rather than theoretical and illusory", the latter arising if a challenge "would substantively be made conditional upon the absence of a State's sovereign and willing 'transfer' of the case to the ICC".[214] He submits that with regard to admissibility proceedings, the accused person should be allowed to "raise any violation of the Court's applicable law which could render a case inadmissible."[215] The Appellant submits that "the accused is

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[207] Reasons, para. 88.
[208] Document in Support of the Appeal, para. 87.
[209] Document in Support of the Appeal, para. 89.
[210] Document in Support of the Appeal, para. 90.
[211] Document in Support of the Appeal, para. 94.
[212] Document in Support of the Appeal, para. 92.
[213] Document in Support of the Appeal, para. 93.
[214] Document in Support of the Appeal, para. 96.
[215] Document in Support of the Appeal, para. 98.

entitled to raise prejudices and violations of rights that would ensue from any consensual burden sharing."[216]

104. The Appellant submits further that if the ICC does not "inquire into the reason why the State is unwilling to investigate or prosecute, it will have the effect of encouraging the current practice of the DRC to simply keep detainees in detention indefinitely until the ICC decides whether or not it wants to prosecute them."[217]

105. He argues "that the Trial Chamber's interpretation of 'unwillingness', leading to a deprivation of the right of the accused to effectively challenge the admissibility of the case, constitutes a legal error which has materially affected the Decision" and he asks "the Appeals Chamber to reverse this part of the Trial Chamber's Decision".[218]

3. Submissions of the Prosecutor

106. The Prosecutor refutes the Appellant's arguments under the fifth ground of appeal. In his submission, the Appellant's claim that he cannot challenge the admissibility of the case effectively is incorrect, noting a distinction between the "right to challenge and the certainty of prevailing."[219] The Prosecutor submits that an admissibility challenge cannot succeed if the State is not investigating or prosecuting.[220] The Prosecutor stresses the fact that it is for the State, and not for the Appellant, to decide whether or not to investigate or to prosecute.[221] The Prosecutor submits furthermore that the "comparative fairness" of proceedings is irrelevant to the question of admissibility. Admissibility does not require a strict comparison of international and domestic proceedings, but is based on the parameters stipulated in article 17 of the Statute.[222] The Prosecutor challenges the Appellant's submission that his rights have been violated and recalls that the selfsame Appellant requested the DRC authorities to transfer his case to the Court.[223]

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[216] Document in Support of the Appeal, para. 99.
[217] Document in Support of the Appeal, para. 100.
[218] Document in Support of the Appeal, para. 101.
[219] Response to the Document in Support of the Appeal, para. 86.
[220] Response to the Document in Support of the Appeal, para. 87.
[221] Response to the Document in Support of the Appeal, para. 88.
[222] Response to the Document in Support of the Appeal, para. 90.
[223] Response to the Document in Support of the Appeal, para. 90.

4. Submissions of the DRC and of the Victims and response thereto

107. The DRC submits that the fifth ground of appeal should be rejected. The DRC recalls that the Appellant, while still in detention in the DRC, sought his surrender to the ICC and, in the course of the confirmation hearing before the ICC, indicated his readiness to be tried by the Court.[224] The DRC notes that the Appellant challenged the admissibility of the case just when the hearing of the merits was about to commence, which, in its view, indicates that he is merely trying to delay the proceedings and to escape punishment, to the detriment of the victims.[225]

108. Victims a/0333/07 and a/0110/08 submit that the burden is on the Appellant to establish that his rights have been violated, but that his submissions have remained very general.[226] In their view, the Appellant seeks to introduce criteria for the admissibility of a case that are not found in article 17 of the Statute. In the submission of the victims, the arguments of the Appellant distort the complementarity principle.[227] Victims a/0330/07 and a/0331/07 submit that the Trial Chamber was correct in not mentioning a violation of human rights as one of the reasons for which a case could be declared admissible and express their general agreement with the reasoning of the Trial Chamber.[228]

109. The victims represented by the OPCV do not make any submissions on the issues raised under the fifth ground of appeal.

110. The Prosecutor does not make any specific submissions in response to the observations of the DRC and of the victims in relation to the fifth ground of appeal.

5. Determination of the fifth ground of appeal

111. The Appeals Chamber is not persuaded by the Appellant's arguments under his fifth ground of appeal. His main contention is that if a State were allowed to transfer cases to the Court, the accused person would be deprived of the right to challenge the admissibility of his or her case effectively. The Appellant's argument is

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[224] Observations of the DRC, p. 5.
[225] Observations of the DRC, p. 5.
[226] Observations of Victims a/0333/07 and a/0110/08, pp. 22-24.
[227] Observations of Victims a/0333/07 and a/0110/08, pp. 23-24.
[228] Observations of Victims a/0330/07 and a/0331/07, paras 30-31.

misconceived. Pursuant to article 19 (2) (a) of the Statute, an accused person has the right to challenge the admissibility of a case. Whether or not a case is admissible is determined by the Court, which assesses the relevant facts against the criteria of article 17 of the Statute. As stated above under the third ground of appeal,[229] an important element of article 17 (1) (a) and (b) is the behaviour of the State in question. If, at the time of the admissibility challenge, the State is investigating or prosecuting a case, or has investigated a case and decided not to prosecute, the case will be inadmissible before the Court, subject to the exceptions provided for in article 17 (1) (a) and (b). However, as the Prosecutor correctly notes, an accused person does not have a "right" under the Statute to insist that States or organs of the Court behave in a manner that would render a case inadmissible. The admissibility of the case must be determined on the basis of the facts as they *are*, not on the basis of how they, in the view of the Appellant, *should be*. While he has the right to challenge admissibility, he has to accept that the Court will determine the admissibility on the basis of facts as they present themselves.

112. The Appeals Chamber is also not convinced by the Appellant's argument that he should be allowed to raise, in the context of admissibility proceedings, an alleged violation by the DRC of its obligation, under international law, to prosecute international crimes. To start with, it is questionable whether the Appellant is entitled to raise a purported breach of the State's "duty to prosecute" him. His reliance on the case law of the International Criminal Tribunal for the Former Yugoslavia[230] is unconvincing. In the *Tadic* case, the defence was arguing that the establishment of the International Criminal Tribunal for the former Yugoslavia by the Security Council of the United Nations was in breach of the sovereignty of the States of the former Yugoslavia and that he should not be tried by a tribunal established in breach of State sovereignty. In the present case, the Appellant is arguing that he should not be prosecuted before the Court because the DRC, supposedly in breach of international law, has failed to prosecute him. The argument of the defence in *Tadic* called into question the legality of the forum before which he was to be tried; in contrast, the argument of the Appellant does not affect the legality of the establishment of the Court or the proceedings before it.

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[229] See paras 73 et seq.
[230] Document in Support of the Appeal, para. 98.

113. Furthermore, the Appeals Chamber is not convinced that the Appellant, in the context of the admissibility challenge, should be allowed to raise arguments of "prejudices and violations of rights that would ensue from any consensual burden sharing"[231] and that the Trial Chamber erred when finding at paragraph 88 of the Reasons that "the conditions under which trials are conducted before the Court [...] are not relevant to the issue of admissibility." A challenge to admissibility under article 19 (2) (a) of the Statute is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process. It is a limited procedure that triggers the relevant Chamber's powers to determine the admissibility of the case under article 17 of the Statute. Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.

VI. APPROPRIATE RELIEF

114. The Appellant argues that the errors committed by the Trial Chamber "individually and in total, have materially affected the Trial Chamber's Decision."[232] He states that "[i]f not for these errors, the Trial Chamber would have declared the case against [him] inadmissible, as any reasonable Trial Chamber would have done."[233] He asks the Appeals Chamber to reverse the decision and "declare the case against [him] inadmissible".[234]

115. The Prosecutor urges the Appeals Chamber to "uphold the Trial Chamber's finding that the case [...] is admissible and dismiss the Grounds of Appeal."[235]

116. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). For the reasons given above, the Appeals Chamber is satisfied that the Trial Chamber correctly decided that the case against the Appellant is admissible. The Appeals Chamber therefore considers it appropriate to confirm the decision and to dismiss the appeal.

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[231] Document in Support of the Appeal, para. 99.
[232] Document in Support of the Appeal, para. 104.
[233] Document in Support of the Appeal, para. 103.
[234] Document in Support of the Appeal, para. 104.
[235] Response to the Document in Support of the Appeal, para. 92.

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

Judge Daniel David Ntanda Nsereko
Presiding Judge

Dated this 25th day of September 2009

At The Hague, The Netherlands