Cour Pénale Internationale

International Criminal Court

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Date: **16 June 2009**

TRIAL CHAMBER II

Before: **Judge Bruno Cotte, Presiding Judge**
Judge Fatoumata Dembele Diarra
Judge Hans-Peter Kaul

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI

Public Document

Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)

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

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Legal Representatives of the Applicants

Unrepresented Victims

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REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber II ("the Chamber") of the International Criminal Court ("the Court"), acting pursuant to articles 17 and 19 of the *Rome Statute*, hereinafter sets out the reasons for the decision which it rendered on 12 June 2009 at a public hearing.[1]

I. PROCEDURAL BACKGROUND

1. At the status conference of 28 November 2008, the Defence for Germain Katanga announced that it intended to make a challenge to admissibility.[2] On 10 February 2009, it did file an "*ex parte* only available to the Defence" motion challenging the admissibility of the case, pursuant to article 19(2)(a) of the Statute ("the Motion").[3] After having been reclassified as a confidential document by the Registry at the request of the Chamber,[4] the Motion was transmitted, pursuant to rule 58(3) of the *Rules of Procedure and Evidence* ("the Rules"), to the Office of the Prosecutor on 25 February 2009.

2. On 5 March 2009, pursuant to rules 58 and 59 of the Rules, the Chamber rendered a decision prescribing the procedure to be followed for the purposes of article 19 of the Statute.[5] In that decision, the Chamber ordered the Prosecutor to submit his written observations pertaining to the Motion and to file a public redacted version thereof. The Chamber also ordered the Registrar to transmit a summary of the Motion to the authorities of the Democratic Republic of the Congo ("the DRC"), to the Legal Representatives of the anonymous and non-anonymous victims, and to the victims who had already communicated with the Court.[6]

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[1] ICC-01/04-01/07-T-67-ENG ET WT, 12 June 2009.
[2] ICC-01/04-01/07-T-53-ENG ET WT 28 November 2008, p. 49, lines 19 to 21.
[3] Defence for Germain Katanga, "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute", 10 February 2009, ICC-01/04-01/07-891-Conf-Exp.
[4] ICC-01/04-01/07-T-59-CONF-EXP-ENG ET 25 February 2009, p. 35, lines 6 to 8.
[5] *Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve)*, 5 March 2009 ICC-01/04-01/07-943-Conf.
[6] Ibid., para. 9.

3. A public redacted version of the Motion was filed on 11 March 2009[7] and the Prosecutor filed his response thereto on 19 March 2009 ("the Response").[8] The Defence for Germain Katanga sought leave to reply from the Chamber;[9] the leave was granted on 27 March 2009.[10] The reply was filed on 30 March 2009 ("the Reply").[11] The public redacted version of the Response was filed on the same day;[12] the public redacted version of the Reply was filed on 1 April 2009.[13]

4. On 16 April 2009, the Legal Representatives of the Victims submitted their observations pertaining to the Motion.[14] After having requested[15] and been granted[16]

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[7] "Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute", 11 March 2009, ICC-01/04-01/07-949.
[8] Office of the Prosecutor,"Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 19 March 2009, ICC-01/04-01/07-968-Conf-Exp.
[9] Defence for Germain Katanga, "Defence Application for Leave to Reply to the Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 26 March 2009, ICC-01/04-01/07-994.
[10] *Décision sur la requête de la Défense de Germain Katanga aux fins de déposer une réplique (norme 24 du Règlement de la Cour)*, 27 March 2009, ICC-01/04-01/07-1004.
[11] Defence for Germain Katanga, "Defence Reply to "Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 30 March 2009, ICC-01/04-01/07-1008-Conf-Exp.
[12] Office of the Prosecutor, "Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 30 March 2009, ICC-01/04-01/07-1007.
[13] Defence for Germain Katanga, "Public Redacted Version of the 30th March 2009 Defence Reply to "Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 1 April 2009, ICC-01/04-01/07-1015.
[14] Legal Representatives of Victims a/0330/07 and a/0331/07, "*Représentation concernant la requête sur l'exception d'irrecevabilité introduite par la défense de M. Germain Katanga (art.19 du Statut de Rome)*", 16 April 2009, ICC-01/04-01/07-1058-Conf; Legal Representatives of Victims a/0333/07 and a/0110/08, "*Représentation des victimes a/0333/07 et a/110/08 sur l'exception d'irrecevabilité déposée par la Défense de M. Katanga (Règle 59-3 du Règlement de procédure et de preuve)*", 16 April 2009, ICC-01/04-01/07-1059-Conf; Legal Representatives of the Victims, "*Observations des victimes quant à l'exception d'incompétence soulevée par la Défense de Germain Katanga dans sa requête du 10/2/2009"*, 16 April 2009, ICC-01/04-01/07-1060.
[15] Registry, "Application of the OPCV to extend the time limit for the submission of observations with regard to the admissibility proceedings", 31 March 2009, ICC-01/04-01/07-1011.
[16] *Decision on the Application by the OPCV to extend the time limit for the submission of observations with regard to the admissibility proceedings*, 3 April 2009, ICC-01/04-01/07-1019-Conf.

an extension of time, the Office of Public Counsel for Victims ("the OPCV") filed its observations on 28 April 2009.[17]

5. The authorities of the DRC submitted no observations on the matter, despite having been invited to do so by the Chamber.[18] The Chamber noted that the document entitled "*Observations de la RDC sur l'exception d'irrecevabilité soulevée par la Défense de Germain Katanga*", annexed to the Prosecutor's Response, seemed to reflect their current position on the matter.[19] However, given that the Chamber had not received information directly from the authorities of the DRC expressing their exact position, the Chamber deemed it necessary to convene a public hearing for 18 May 2009 with the attendance of the authorities of the DRC.[20] At the request of the DRC authorities, the Chamber postponed the hearing until 1 June 2009, being of the view that their attendance was indispensable.[21]

II. THE PARTIES' SUBMISSIONS

6. In the Motion, the Defence for Germain Katanga requests the Chamber to declare the case against Germain Katanga inadmissible[22] and advances two main arguments in this regard. First, it challenges the test currently applied by the Court for determining the admissibility of the case and proposes two alternative tests. Second, it raises a number of issues concerning the interpretation and application, in the present case, of the terms "unwilling" and "unable" found in article 17 of the

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[17] Registry, "Observations of the OPCV on the Defence for Germain Katanga's Motion Challenging the Admissibility of the Case with one Confidential *ex parte* OPCV only Annex and three Public Annexes", 28 April 2009, ICC-01/04-01/07-1082; "*Observations du BCPV sur l'exception d'irrecevabilité de l'affaire de la Défense de Germain Katanga avec une annexe confidentielle ex parte reservée au BCPV et trois annexes publiques*", 28 April 2009, ICC-01/04-01/07-1083.
[18] ICC-01/04-01/07-943, p. 7.
[19] "*Ordonnance aux fins de la convocation d'une audience (règle 58-2 du Règlement de procédure et de preuve)*", 7 May 2009, ICC-01/04-01/07-1112, para. 4.
[20] Ibid., para. 5.
[21] "*Ordonnance aux fins de report de l'audience relative à l'exception d'irrecevabilité (règle 58-2 du Règlement de procédure et de preuve)*", 15 May 2009, ICC-01/04-01/07-1140, para. 4.
[22] ICC-01/04-01/07-949, para. 67(a).

Statute. It also submits that in determining the admissibility of the case, the Chamber must take into consideration the time the warrant of arrest was issued.[23]

7. The Defence "reserves its position as to what should happen with Mr Katanga in the event of a finding of inadmissibility of his case",[24] arguing that this question should be addressed in its own right at a hearing as to the consequences of such a decision.[25] At the hearing and in response to a request by the Chamber to specify its position on this point, the Defence stated that Germain Katanga had no intention of returning to the DRC to be tried there and that that issue had to be dealt with independently from the decision to be made on the admissibility of the case.[26]

1. Stage of the proceedings at which the Motion was filed

8. The Defence submits that it was not until after the confirmation hearing that it came into information with sufficient particularity to knowingly assess whether one of the grounds set out in article 17(1) of the Statute could be invoked.[27] At the hearing, and in response to a question as to why it filed the Motion at such an advanced stage of the proceedings,[28] the Defence explained that the late filing was primarily due to a lack of time and resources. It added that it did not know that the case against Mathieu Ngudjolo Chui would be joined to the case against Germain Katanga,[29] a joinder which led to the postponement of the confirmation of charges hearing. The Defence also pointed out that, had it been informed of this, it might have reconsidered its priorities and filed the Motion before the confirmation of charges.[30] It also noted that, because a challenge to admissibility may only be made once, it chose to wait until it had better evidence to raise the challenge before the

[23] Ibid., para. 28.
[24] Ibid., para. 66.
[25] Ibid.
[26] ICC-01/04-01/07-T-65 ENG ET WT, 1 June 2009, p. 117, line 14 to p. 118, line 3.
[27] ICC-01/04-01/07-949, para. 2.
[28] ICC-01/04-01/07-T-65-CONF-ENG ET WT, 1 June 2009, p. 32, line 11 to p. 33 line 6.
[29] Pre-Trial Chamber I, *Decision on the joinder of the cases against Germain Katanga and Mathieu Ngudjolo Chui*, 10 March 2008, ICC-01/04-01/07-257.
[30] ICC-01/04-01/07-T-65 ENG ET WT, 1 June 2009, p. 33, line 13 to p. 34, line 1; p. 34, lines 15 to 18.

newly constituted Chamber.[31] Furthermore, the Defence argued that it was not until 28 August 2008 that it received the information it had sought from the authorities of the DRC, after requesting the Chamber to order them to cooperate with the Court. Finally, it recalled that, at that point, the confirmation of charges hearing had already been held.[32]

2. Time to be taken into consideration for determining admissibility

9. The Defence has submitted on several occasions[33] that, in determining the admissibility of the case, the Chamber has to take into account the time when the warrant of arrest was issued.[34]

10. In its Reply,[35] the Defence explains that, in its view, the Prosecutor failed to furnish all the information pertaining to the investigations conducted by the authorities of the DRC to the Pre-Trial Chamber[36] and that this provides an additional reason for the Chamber to apply article 17(1)(a) of the Statute as at the time the application for the issuance of a warrant of arrest was considered.[37] This constitutes, in the Defence's view "a defect" in the initiation of the case[38] and fairness demanded that the issue of admissibility be assessed by the Chamber, having regard to the time the mistake was made.[39]

[31] ICC-01/04-01/07-T-65 ENG ET WT, 1 June 2009, p. 33, line 13 to p. 34, line 1; p. 34, lines 15 to 18.
[32] ICC-01/04-01/07-T-65 ENG ET WT, 1 June 2009, p. 34, lines 19 to 24.
[33] ICC-01/04-01/07-949, para. 64; ICC-01/04-01/07-1015, paras. 3 and 12.
[34] ICC-01/04-01/07-949, para. 28.
[35] ICC-01/04-01/07-1015.
[36] Ibid., para. 3.
[37] Ibid., para. 12.
[38] Ibid.
[39] ICC-01/04-01/07-T-65-CONF-ENG CT ET WT, 1 June 2009, p. 40, lines 16 to 19.

3. Admissibility test

a) Defence submissions

11. In the Motion, the Defence takes issue with the "same conduct test", first articulated in the case of *The Prosecutor v. Thomas Lubanga Dyilo*,[40] and subsequently adopted in other decisions of the Court pertaining to the issuance of arrest warrants.[41] In particular, the Defence takes issue with the interpretation of the word "case" by the Chambers, maintaining that the word must be interpreted in light of the particular object and purpose of article 17.[42]

12. The Defence argues that the "same conduct test", for which there is no basis in law in its view,[43] imposes an "absolute requirement for identical charges",[44] and that, in this sense, it departs from the proper and natural interpretation of article 17 of the Statute.[45] Moreover, it points out that the current case law of the Court does not allows the term to be accurately defined or its factual and legal scope to be ascertained.[46]

13. According to the Defence, another admissibility standard combining the comparative gravity test and the comprehensive conduct test should be applied.[47] The Defence is of the view that both tests can be applied separately. The

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[40] Pre-Trial Chamber I, *Decision concerning Pre-Trial Chamber I's decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo*, ICC-01/04-01/06-8-Corr, 17 March 2006, para. 37.
[41] Pre-Trial Chamber I, *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest against Germain Katanga*, 6 July 2007, ICC-01/04-01/07-04, para. 20; Pre-Trial Chamber I, *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, *Decision on the Prosecution Application under Article 58(7) of the Statute*, 27 April 2007, ICC-02/05-01/07-1-Corr, para. 21.
[42] ICC-01/04-01/07-949, para. 43.
[43] Ibid., para. 44.
[44] Ibid., para. 33.
[45] Ibid., para. 37.
[46] Ibid.
[47] Ibid., para. 51.

"comparative gravity" test would amount to "comparing the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor".[48]

14. The "comprehensive conduct" test would enable the comparison of the factual scope of the investigations.[49] For example, a case could thus be found to be admissible before the Court, if the investigations that it has chosen to conduct cover acts committed in seven out of ten villages, while national investigations are confined to acts committed in three out of the same ten villages.[50]

15. At the hearing, the Defence explained that it intended mainly to object to the test currently applied by the Court. According to the Defence, this test favours a narrow interpretation of the concept of "case" and results in an erroneous application of the complementarity principle, which then becomes synonymous with primacy.[51] It also reiterated its objection to the meaning given by the Pre-Trial Chambers to the word "case", which, through the concept of "conduct", has mutated into a "specific charge".[52]

16. Finally, the Defence submits that, even if the "same conduct test" were to be applied in this case, the case would not be considered admissible.[53] According to the Defence, it appears from the evidence submitted in support of the Motion that Germain Katanga was prosecuted in the DRC for committing crimes against humanity, specifically in the context of the attack on Bogoro. The Defence thus considers that the charges confirmed by the Pre-Trial Chamber are similar to those

[48] Ibid., para. 46.
[49] Ibid., para. 47.
[50] Ibid.
[51] ICC-01/04-01/06-T-65-ENG ET WT, 1 June 2009, p. 25, lines 4 to 13.
[52] ICC-01/04-01/06-T-65-ENG ET WT, 1 June 2009, p. 26, lines 5 to 8.
[53] ICC-01/04-01/07-949, para. 53.

on which the prosecution in the DRC was based and that, at the very least, they do not differ sufficiently to justify the admissibility of the case before the Court.[54]

b) Prosecutor's submissions

17. In the Response to the Motion,[55] the Prosecutor recalls, in the main, that both article 17(1) and article 20(3) of the Statute expressly refer to the same "conduct". In his view, the explicit link between article 17(1)(c) and the provision on the *ne bis in idem* principle thus shows that a case must be based on the same conduct.[56] He further submits that all sub-paragraphs of article 17(1) must address the same subject matter and that all aim to determine the admissibility criteria of a case. Thus, a "case" for the purposes of articles 17(1)(a) and (b) must mean the same thing as a case for the purposes of article 17(1)(c), i.e. "the same conduct" in this case.[57] Hence, according to the Prosecutor, the application of the "same conduct test" enables a coherent implementation of all the provisions in respect of admissibility.[58] This interpretation of the basic documents was reiterated at the hearing of 1 June 2009.[59]

18. The Prosecutor further maintains that, contrary to the claims of the Defence, there is no bar to a State making a challenge to the admissibility of a case submitted to the Court by the Prosecutor, even under the "same conduct test".[60] When applied in the context of the complementarity principle, this test does not inhibit *per se* the exercise of a State's sovereignty.

19. As for the tests proposed by the Defence, the Prosecutor submits that they have no basis in law[61] and would require the Chamber to assess scenarios which fall

[54] ICC-01/04-01/07-949, para. 53.
[55] ICC-01/04-01/07-1007.
[56] Ibid., para. 72.
[57] Ibid., para. 73.
[58] Ibid., para. 74.
[59] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 44, lines 8 to 16, and p. 44, line 24 to p. 45, line 10
[60] ICC-01/04-01/07-1007, para. 86.
[61] Ibid., para. 90.

outside the actual scope of the Statute.[62] He is of the view that the Defence proposals "in contrast to the well-settled meaning of the term 'case', would require the Chamber to engage in speculative assessments that fall beyond the range of criteria spelt out in the letter of the Statute."[63]

c) Observations of the Legal Representatives of the Victims

20. For its part, the OPCV notes that the "same conduct test" is also used in article 20(3) of the Statute, and submits that it therefore constitutes the single and common reference for several provisions in the Statute.[64] The OPCV considers that the Chamber should have due regard for the practice established by the other Chambers of the Court[65] and that the Defence's invitation to the Chamber to devise a new test is, in essence, a request to the Chamber to step outside the parameters of its judicial mandate.[66]

4. Unwillingness and inability

21. The Chamber notes that there is no disagreement between the participants as to the consequence that must be drawn from the demonstrated inaction on the part of the authorities of the DRC. In their opinion, the case would thus be automatically admissible. Instead, the disagreement centres around the question as to whether or not the authorities of the DRC actually investigated the crimes that Germain Katanga is alleged to have committed in Bogoro on 24 February 2003.

[62] Ibid., para. 91.
[63] Ibid.
[64] ICC-01/04-01/07-1082, para. 39.
[65] Ibid., para. 40.
[66] Ibid., para. 42.

a) Defence submissions

22. According to the Defence, the crimes against humanity committed in Ituri were the focus of an investigation in the DRC involving Germain Katanga.[67] In its view, the question of whether the DRC was unwilling or unable genuinely to carry out the investigation or prosecution was not addressed by the Pre-Trial Chamber. It considers that the decision by the DRC to terminate the investigation and not to prosecute Germain Katanga is not due to its inability or unwillingness to effectively prosecute, but is rather due to its wish to rely on the Court.[68]

23. In this respect, the Defence argues that the fact that the authorities of the DRC themselves referred the situation in the DRC to the Court is not relevant for a determination of the admissibility of the case[69] and that the general reference contained in the letter of referral cannot, in and of itself, be a basis for admissibility.[70] Furthermore, according to the Defence, the fact that the DRC has not challenged the admissibility of Germain Katanga's case should not be taken as an indication of "inability"[71] within the meaning of article 17 of the Statute.

b) Prosecutor's submissions

24. The Prosecutor recalls that in its decision regarding the issuance of the warrant of arrest for Germain Katanga, the Pre-Trial Chamber noted that the authorities of the DRC had taken no action in the case involving the accused. He submits that the Pre-Trial Chamber was not required to assess the unwillingness or inability of the DRC with respect to the proceedings against the accused in the DRC

[67] ICC-01/04-01/07-1015, para. 9; ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 21, line 22.
[68] ICC-01/04-01/07-1015, para. 10.
[69] ICC-01/04-01/07-949, para. 60.
[70] Ibid.
[71] Ibid., para. 65.

as they did not encompass the same conduct which was the subject of the Prosecutor's application[72] for the issuance of a warrant of arrest.

25. The Prosecutor further recalls that in a letter dated 3 March 2004, the President of the DRC pointed out that at the time of the events the relevant DRC authorities were unable to take all the necessary investigative measures.[73]

c) Observations of the Legal Representatives of the Victims

26. The OPCV argues that, contrary to the Defence's assertions, the letter of referral addressed by the President of the DRC to the Prosecutor is a factor that should indeed be taken into consideration by the Chamber. It points out that the letter expressly acknowledges that the relevant authorities of the DRC were not in a position to investigate the crimes in question or to conduct the necessary proceedings.[74] This, it submits, is one of the factors evidencing the national authorities' inability genuinely to complete an investigation or prosecution against Germain Katanga at the time the Court issued a warrant for his arrest.[75]

27. For their part, the Legal Representatives of Victims a/0330/07 and a/0331/07 submit that the DRC indisputably demonstrated a lack of will. According to them, there had been an unjustified delay in the proceedings initiated against Germain Katanga by the relevant authorities of the DRC that was inconsistent with an intent to bring the accused to justice.[76]

III. ADMISSIBILITY OF THE MOTION

28. Before considering the substantive arguments raised by the participants, the Chamber must satisfy itself that the Motion is admissible. In particular, the Chamber

[72] ICC-01/04-01/07-1007, para. 47.
[73] Ibid., para. 48.
[74] ICC-01/04-01/07-1082, para. 34.
[75] Ibid.
[76] ICC-01/04-01/07-1058-Conf, p. 6.

must determine whether the Statute allows for a challenge to admissibility to be made by a party after the confirmation of charges and, if so, on what grounds. This issue was raised by the Chamber at the hearing of 1 June 2009[77] and the participants had differing points of view.[78]

A. Stage at which a challenge to admissibility must be brought

29. With regard to the stage of the proceedings at which a challenge may be brought, article 19(4) of the Statute provides:

> The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place *prior to or at the commencement of the trial*. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or *at a time later than the commencement of the trial*. Challenges to the admissibility of a case, *at the commencement of a trial*, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).[79]

30. The question for the Chamber is whether the Motion was filed prior to or after the "commencement of the trial", within the meaning of article 19(4) of the Statute. In order to respond to this question, it must define the meaning of this term. Indeed, it should be determined whether the trial commences as soon as the Trial Chamber is constituted pursuant to article 61(11) of the Statute, or only at a later stage in the proceedings, when the participants make their opening statements before the Chamber prior to the first witnesses testifying.

31. As the Appeals Chamber has noted, the interpretation of an international treaty such as the Statute is governed, amongst other provisions, by article 31(1) of the *Vienna Convention on the Law of Treaties* of 23 May 1969 ("the Vienna

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[77] ICC-01/04-01/07-T-65-FRA ET WT, 1 June 2009, p. 23, line 18 to p. 24, line 12.
[78] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 28, line 24 to p. 29, line 10; p. 29, line 20 to p. 30, line 19; p. 45, line 11 to p. 46, line 2; p. 51, line 23 to p. 52, line 4; ICC-01/04-01/07-T-65-FRA ET WT, 1 June 2009, p. 58, line 13 to p. 60, line 4; p. 99, lines 8 to 12.
[79] Emphasis added.

Convention"),[80] according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". In this regard, the Appeals Chamber specified that:

> [t]he rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.[81]

32. Moreover, as stated by the International Court of Justice,[82] the interpretation of the provisions of a treaty must be based above all upon the text of the treaty itself. This does not preclude recourse, as a supplementary measure, to other means of interpretation such as an analysis of the *travaux préparatoires* and the circumstances of the conclusion of the treaty. The main purpose of the interpretation of a treaty is indeed to shed light on the intention of the States Parties, so that the considerations regarding the text, the context and circumstances are inseparable from those regarding the objectives pursued by the parties to the treaty.

33. The actual wording of article 19(4) of the Statute does not enable the meaning of the term "commencement of the trial" to be determined. The Chamber cannot therefore base its consideration on a purely literal interpretation of paragraph 4 and to define this term and highlight the actual intentions of the States Parties on this point. It is thus necessary to refer to the context of this paragraph and to read it in the light of the other paragraphs of article 19 and all the provisions of the founding documents of the Court. On this point, the Permanent Court of International Justice

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[80] Appeals Chamber, *Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal*, 13 July 2006, ICC-01/04-168, para. 33.
[81] Ibid., para. 33 [footnotes omitted].
[82] International Court of Justice, *Case concerning the territorial dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, para. 41; International Court of Justice, *Case concerning maritime delimitation and territorial questions between Qatar and Bahrain, jurisdiction and admissibility*, Judgment, ICJ Reports 1995, para. 33.

clearly indicated that "[the] meaning [of a treaty] is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense".[83] This approach was in fact later confirmed by the Vienna Convention, which even widened it by inviting anyone interpreting a treaty to refer to all relevant instruments if required.[84]

34. The Chamber must therefore first of all examine the ordinary meaning and use of the term "trial", and, in particular, the expression "commencement of the trial" or the phrase "prior to the commencement of the trial" at each of their occurrences in the Statute, the Rules and the *Regulations of the Court*.

35. Firstly, article 19 of the Statute, read as a whole, does not allow this question to be answered, as the afore-mentioned terms only appear in paragraph 4 thereof.

36. Secondly, the truth of the matter is that a certain number of the provisions of the Statute and the Rules are written in very general or ambiguous terms and that it is not possible to clearly answer the question, by simply reading them, in the French or English version, and referring to their ordinary meaning. Indeed, a purely literal reading of these provisions does not seem to allow either of the two solutions mentioned in paragraph 30 to be elevated over the other. This is the case, for example, for articles 31(3), 56(3)(a) and 56(4) and article 61(9) in that the latter provides the Prosecutor with the option of withdrawing the charges with the permission of the Trial Chamber after the commencement of the trial. The same goes for articles 62, 64(7), 65(3), 65(4)(b), 68(5) and 84(1)(a) of the Statute, rule 58(2) of the

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[83] Permanent Court of International Justice, Advisory Opinion, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, 12 August 1922, Series B, No 2, p. 22.

[84] Article 31(2) of the Vienna Convention reads indeed as follows: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

Rules, which sets out the procedure to be followed for the purposes of article 19 of the Statute, as well as for rules 80(1) and 122(4) of the Rules.

37. Thirdly, although a number of other provisions in the Statute and the Rules appear to favour the argument that the trial commences as soon as the Trial Chamber is constituted by the Presidency, others seem to support the idea that the trial commences with the opening statements.

38. Without prejudging a contrary interpretation arising from a more in-depth analysis that could be given by the Chamber or any other chamber having to rule on one of these provisions, the following provisions seem to fall into the first category: the actual title of article 61 of the Statute (Confirmation of the charges before trial) read in conjunction with the title of Part VI of the Statute and of the Rules ("The trial"); articles 63, 64(2), 64(3)(a), 64(3)(b), 64(7), 67(d), the French version of the title of article 68,[85] articles 74(1), 93(10)(b)(i)(a), the French version of rule 39,[86] rule 137 and the title of rule 165 of the Rules. Lastly, the Chamber notes the wording of regulation 86(3) of the *Regulations of the Court*, which seems to draw a distinction of a procedural nature between the trial phase and the appeals phase.

39. It is permissible to conclude from a reading of the afore-mentioned provisions that the Statute divides the proceedings into three separate phases: the pre-trial phase (investigation and prosecution), which is within the jurisdiction of the Pre-Trial Chamber, the trial phase, which, in English, could be called the "trial proceedings", which is assigned to the Trial Chamber, and the appeals phase, conducted before the Appeals Chamber. In any event, it appears to the Chamber

[85] The title in French is as follows: "Protection et participation au *procès* des victimes et des témoins"; and the English title is: "Protection of the victims and witnesses and their participation in the *proceedings*" [emphasis added].

[86] The wording of the French version is as follows: "Le juge suppléant qui est affecté par la Présidence à une chambre de première instance […] doit assister à chaque phase du *procès* et à l'intégralité des débats […]"; and the English version reads: "When an alternate judge has been assigned by the Presidency to a Trial Chamber […], he or she shall sit through all *proceedings* and deliberations of the case […]."

that, for the purposes of these provisions, the trial is not confined to the evidentiary phase following opening statements.

40. Other provisions, however, seem to indicate that the trial only commences after the opening statements. This is the case in the Statute, for example, for articles 61(5) and 61(9), in that the latter suggests that there is an intermediate phase between the confirmation of charges and the commencement of the trial, which is confirmed by the wording of rule 128(1) of the Rules, article 64(3)(c) of the Statute, the chapeau of article 64(6), articles 64(8)(b) and 64(10), the French version of rule 64(2) of the Rules,[87] articles 74(2), 76(1), 83(2)(b), 84(1)(b) and rules 77, 78, 81(2), 81(4), 84, 94(2), 132(1), 134(1), 134(2), 135(4) and 138. Finally, the Chamber notes the wording of regulations 55(2) and 56 of the *Regulations of the Court*, which seems to offer a narrow definition of the term "trial", limiting it to the presentation of evidence and argument during the hearing.

41. Thus, a contextual interpretation of the founding documents of the Court highlights the concurrency of two conceptions of the expression "commencement of the trial": one, which seems to harken back to the inquisitorial system, has the trial commencing as soon as the matter is referred to the trial chamber following the investigations and/or preliminary investigation and is described as the case to be answered;[88] the other, which is closer to the common law system, sees the trial as the *momentum* of justice, described in fact as follows by *Black's Law Dictionary*: "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding".[89] The Chamber is of the view that the drafters of the Statute, who deliberately adopted a hybrid procedure which borrows from different legal

[87] The wording of rule 64(2) of the Rules is as follows in French: "Les décisions prises par les Chambres en matière d'administration de la preuve sont motivées; les motifs sont consignés dans le procès-verbal, s'ils ne l'ont pas été au cours du *procès* […]". In English, the rule reads as follows: "A Chamber shall give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of the proceedings if they have not already been incorporated into the record during the course of the *proceedings* […]".
[88] CORNU, G. (ed), *Vocabulaire juridique*, PUF, 1987, p. 711.
[89] GARNER, B.A. (ed), *Black's Law Dictionary*, Thomson West Publishing, 2004, p. 1543.

cultures and systems, intended the "commencement of the trial" to mean both the start of the proceedings before the Trial Chamber ("trial proceedings" in English) and the commencement of hearings on the merits ("trial" or "hearing" in English), depending on the provision to be applied and the context in which it was to be applied.

42. As a result, it is impossible to generally and definitively choose either of the two conceptions that may define the expression "commencement of the trial" and apply it uniformly to all the provisions of the Statute. It is worth recalling that the founding documents of the Court were drafted by different working groups during diplomatic conferences. The co-existence of several meanings for the expression "commencement of the trial" which may be recognised in this case is thus simply the consequence of a laborious harmonisation process of all the work carried out, in several languages moreover, at these diplomatic conferences. As a result, the Chamber considers that the meaning of the expression "commencement of the trial" must be determined in light of the provision to be applied, based on a logical interpretation which gives full effect to the said provision and adheres to the intent of the States Parties when they adopted it. For example, in the decision setting the date of the trial, the Chamber held that the expression "date of the trial" in rule 132(1) of the Rules meant the date of the commencement of the hearing on the merits.[90] Called upon to interpret article 61(9) of the Statute, Trial Chamber I, for its part, held, in a decision of 13 December 2007, that the expression "before the trial has begun" had the following meaning: "[a]lthough no definition is provided as to when the trial is considered to have begun, the Bench is persuaded that this expression means the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses".[91]

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[90] *Décision fixant la date du procès (règle 132-1 du Règlement de procédure et de preuve)*, 27 March 2009, ICC-01/04-01/07-999.

[91] Trial Chamber I, *Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings and the manner in which evidence*

43. Accordingly, it now falls to consider the specific case of article 19 of the Statute and to interpret the expression "commencement of the trial" used therein in the light of all the provisions of said article, in order to determine the exact intent of the States Parties when they adopted it.

44. In this regard, the Chamber notes that the provisions of paragraphs 5 to 8 of this article are clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase. Such is the case in paragraph 4 of article 19, as well as for paragraph 5 thereof, which requires States to make their challenges "at the earliest opportunity". The same is also true of rule 58 of the Rules, which lays down the procedure to be followed for the purposes of article 19 and provides that a challenge may be considered in the context of a confirmation of charges hearing or a trial proceeding, "as long as this does not cause undue delay", with the determination of the time limits for submitting observations being in the discretion of the Chamber. This same concern is indirectly expressed in rule 122(2) of the Rules, which requires the Pre-Trial Chamber, when called upon to rule on a challenge made during the confirmation hearing, to ensure adherence to the diligence expressly prescribed by rule 58 of the Rules. Furthermore, it should be recalled that rule 60 of the Rules, which supplements article 19(6) of the Statute, allows challenges to jurisdiction or admissibility made after a confirmation of the charges to be addressed to the Presidency. The very existence of this procedure illustrates how much the drafters of the Statute and of the Rules wanted challenges of this nature to be submitted at the earliest opportunity. In fact, with respect to all other applications or requests, the parties and participants must wait for the relevant chamber to be designated.

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shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39. See also ICC-01/04-01/07-1197-Anx2.

45. This emphasis, in article 19 of the Statute and rule 58 of the Rules, that challenges to admissibility be heard as early as possible and without undue delay, can be explained by the principle of complementarity. The drafters of the Statute clearly intended the Court to complement national courts, not to compete with them. Consequently, they endeavoured to avoid parallel and competing proceedings. In this regard, article 19(7) of the Statute specifically provides for the suspension of investigations by the Prosecutor when the admissibility of a case is challenged. Furthermore, given that investigations into crimes falling within the jurisdiction of the Court are very costly in terms of time and resources, it is in the interests of all, and primarily the suspects who have been deprived of their liberty, that the court with jurisdiction to try the case be determined as quickly as possible.

46. This view of the intent of the drafters of article 19 of the Statute regarding the stage at which a challenge to admissibility should be brought is confirmed by the *travaux préparatoires*:

> As regards the question of when such a challenge might be made (article 35), a preference was expressed for as early a time as possible. It was suggested that the right to challenge jurisdiction or admissibility should be limited to pre-trial hearings or to the commencement of the trial. To avoid any misuse of the Court or unnecessary expenditure, it was suggested that any challenge to jurisdiction or admissibility should be raised and decided upon *before any step in the trial was taken* Preference was expressed for limiting the time within which challenges to jurisdiction and admissibility might be made.[92]

47. These observations all highlight that, after the confirmation of charges, only challenges based on article 17(1)(c) of the Statute are allowed. The possibility of only bringing challenges based on the alleged violation of the *ne bis in idem* principle at this stage of the proceedings is explained by the fact that it is only when the charges are confirmed that it is possible to determine whether the case falls within the scope of article 20 of the Statute. Any other challenge to admissibility, whether stemming

[92] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), General Assembly Official Records, Fifty-first Session, Supplement No. 22 (A/51/22), pp. 57 and 58. para. 249.

from the protection of the sovereign right of States to investigate and prosecute in cases of crimes committed by their nationals or in their territory, or from the sufficient gravity of the case, must be made before the confirmation of the charges. In other words, it is mandatory for challenges to admissibility based on articles 17(1)(a), (b) or (d) of the Statute to be made before the end of the pre-trial phase.

48. The distinction between sub-paragraph (c) and the other sub-paragraphs of article 17(1) is confirmed by the drafting history of this article. Originally, the *ne bis in idem* principle was not included in article 35 (current article 17) of the *Draft Statute for an International Criminal Court*. The only reference to *ne bis in idem* was contained in article 42 of the Draft Statute (current article 20), which followed article 41, which became the current article 67, which defined the rights of the accused, in Part V entitled "The Trial".[93] This belated inclusion of the *ne bis in idem* principle in article 17(1)(c) as a basis for challenging admissibility is therefore explained essentially by the need to protect the rights of the accused, in contrast to sub-paragraphs (a), (b) and (d) of the same article, the purpose of which is to safeguard the sovereign rights of States and to ensure that cases brought before the Court are of sufficient gravity. Moreover, it should be recalled that the *ne bis in idem* principle is defined in article 20 to which article 17(1) only makes reference.

49. In sum, the Chamber considers that the Statute provides a three-phase approach in respect of challenges to admissibility. During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the "earliest opportunity".[94] In the second phase, which is fairly short, running from the filing of the decision on the confirmation of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. In the third phase, in other words, as soon as the chamber is

[93] International Law Commission, Forty-sixth session, Working Group on a Draft Statute for an International Criminal Court, *Report of the Working Group*, 14 July 1994, A/CN.4/L.491/Rev.2.
[94] Article 19(5) of the Statute.

constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber.

50. Consequently, after the decision on the confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged.

B. The possibility, for the Defence, to bring the challenge timeously

51. Germain Katanga's Defence team did not file the Motion before the Chamber until 10 February 2009. On that occasion, it recalled that on 7 April 2008, it had filed an "Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)",[95] in which it requested the Pre-Trial Chamber to direct the authorities of the DRC to cooperate with the Defence by providing it with information and documentation relevant to the preparation of its case, including material pertaining to Germain Katanga's right not to be arrested arbitrarily. It submitted that the material could also provide the Defence with useful information pertaining to the right of the accused to challenge the admissibility of the case against him.[96]

52. At an *ex parte* hearing[97] held before the Single Judge on 17 April 2008,[98] the Defence indicated that it was contemplating bringing a challenge to admissibility. In its submission, the issue of cooperation by the authorities of the DRC was a matter of urgency because it was obliged to raise certain matters before the confirmation of

[95] "Defence Application pursuant to Article 57 (3) (b) of the Statute to Seek the Cooperation of the Democratic Republic of Congo (DRC)"[95], 7 April 2008, ICC-01/04-01/07-371-Conf-Exp.
[96] Ibid., para. 6
[97] The nature of the information mentioned by the Chamber does not affect the *ex parte* nature of the hearing.
[98] ICC-01/04-01/07-T-24-CONF-EXP-ENG ET, 17 April 2008.

charges hearing[99] and it was therefore vital that it be provided with the material and assistance requested as soon as possible.

53. At the aforesaid hearing and in an *ex parte* decision[100] rendered on 25 April 2008 by the Pre-Trial Chamber,[101] questions pertaining to the proper conduct of the proceedings and to the admissibility of the case were dealt with separately.[102] With regard to the challenge to admissibility contemplated, the attention of the Defence was then drawn to article 19(4) of the Statute, which states that a challenge to admissibility shall take place prior to or at the commencement of the trial. The Pre-Trial Chamber also highlighted that the Defence could make a challenge at a later stage of the trial in exceptional circumstances and with leave of the Court.

54. At that same hearing, the Defence was also informed that if the authorities of the DRC did not respond prior to the confirmation of charges hearing, the right of the accused to make a challenge under article 19 of the Statute would not be thereby prejudiced.[103] On this point, in a 25 April 2008 decision, the Pre-Trial Chamber specified that the time limits provided for in rule 122 of the Rules, which had been invoked by the Defence to justify the urgency of its application, did not apply to challenges to admissibility, which are subject to a separate regime.[104]

55. At the hearing of 1 June 2009, the Chamber asked the Defence why the Motion had been filed late. The Defence reiterated the arguments set out in its Motion of 10 February 2009 and explained that prior to filing the Motion it had

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[99] The Confirmation of Charges hearing mentioned by the Defence was scheduled for 21 May 2008; Pre-Trial Chamber I, *Decision on the Joinder of the Cases against Germain KATANGA and Mathieu NGUDJOLO CHUI*, 10 March 2008, ICC-01/04-01/07-257.
[100] The nature of the information mentioned by the Chamber in the present decision does not affect the *ex parte* nature of the decision rendered by the Pre-Trial Chamber.
[101] Pre-Trial Chamber I, *Decision on the "Defence Application pursuant to Article 57(3)(b) of the Statute to Seek Cooperation of the Democratic Republic of Congo (DRC)*, 25 April 2008, ICC-01/04-01/07-443-Conf-Exp.
[102] Ibid., pp. 8 and 10.
[103] ICC-01/04-01/07-T-24-CONF-EXP ENG ET, 17 April 2008, p. 26, lines 6 to 9.
[104] ICC-01/04-01/07-444, p. 10.

sought to gather the best evidence possible.[105] It then pointed out that before the confirmation hearing, it did not have the services of co-counsel.[106] Finally, it recalled that as a result of the joinder of the *Ngudjolo* and *Katanga* cases, it had not had enough time to devise a proper strategy concerning the filing of the challenge contemplated.[107]

56. The Chamber is of the view that the reasons given do not excuse the late filing of the Motion. It should indeed be pointed out that strategic considerations invoked by parties cannot by themselves justify the filing of a document out of time. However, in the opinion of the Chamber, and in view of the ambiguity of the provisions of the Statute and of the Rules, there are reasonable grounds to believe that the Defence was never aware that it was filing the Motion out of time and that it was not its intention to do so. On the contrary, the position adopted by the Pre-Trial Chamber at the *ex parte* hearings may even have led the Defence to believe that a challenge, based on any of the grounds set out in article 17(1), could be brought under article 19 of the Statute after the confirmation of charges.

57. It should be recalled that the Motion is only based on the provisions of sub-paragraphs (a) and (b) of article 17(1) of the Statute. However, as stated previously, only challenges under sub-paragraph (c) of said article may be made at this stage of the proceedings. It follows that, in the present case, the Motion should normally be declared inadmissible.

58. However, for the various reasons set out above, the Chamber considers that it is appropriate to rule on the merits of the Motion.

[105] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 33, lines 7 and 8.
[106] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 33, lines 13 and 14.
[107] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 34, lines 2 to 18.

IV. ALLEGED DEFECT IN THE ISSUANCE OF THE WARRANT OF ARREST

59. The Defence argues that there was "a defect in the initiation of the case"[108] as a result of the Prosecutor's failure to provide the Pre-Trial Chamber with relevant information pertaining to the admissibility of the case when he applied for the issuance of a warrant of arrest, taken together with the assertion that the accused was not being investigated on matters before the court. According to the Defence, had the Pre-Trial Chamber known of the existence of certain documents, it would have declared the application inadmissible. Accordingly, the Defence argues that the Chamber should reassess the issue of the admissibility of the case as at the time when the mistake was allegedly made, i.e. on the date of the issuance of the warrant of arrest.[109]

60. The Chamber must therefore answer the following three questions: is the Prosecutor required, when filing his application for the issuance of a warrant of arrest, to provide the Pre-Trial Chamber with the information available to him pertaining to the admissibility of the case? If so, was the information mentioned by the Defence so decisive in this case that it ought to have been provided to the Pre-Trial Chamber? If so, would this information have led the Pre-Trial Chamber to exercise its discretion differently?

61. In order to answer the first question, the Chamber must refer to the judgment rendered by the Appeals Chamber on 13 July 2006,[110] in particular because it specifies the information which the Prosecutor is or is not required to supply to the Pre-Trial Chamber when an application for the issuance of a warrant of arrest is filed.

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[108] ICC-01/04-01/07-1015, para. 12.
[109] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 40, lines 16 to 18.
[110] *Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"*, 23 September 2006, ICC-01/04-169 (public redacted version).

62. In that judgment, the Appeals Chamber held that article 58(2) of the Statute does not impose an obligation on the Prosecutor to furnish evidence or information pertaining to the admissibility of the case. Thus, the Pre-Trial Chamber will generally not find in the application submitted by the Prosecutor the necessary factual information to determine the admissibility of the case.[111]

63. Furthermore, the Appeals Chamber was of the view that an initial determination that the case is admissible is not a pre-requisite for the issuance of a warrant of arrest pursuant to article 58(1) of the Statute.[112] In fact, according to the Appeals Chamber,

> [t]he Pre-Trial Chamber has the discretion pursuant to article 19 (1), second sentence, of the Statute to address the admissibility of a case on an application for the issuance of a warrant of arrest that is made *ex parte*, Prosecutor only, but should exercise such discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect.[113]

64. For the Appeals Chamber, this may involve:

> instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants.[114]

65. The upshot of this judgment is therefore that the Prosecutor is not required to provide the Pre-Trial Chamber with "the necessary factual information to determine the admissibility of the case" when requesting the issuance of a warrant of arrest. The fact remains that he 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

[111] Ibid., para. 45.
[112] Ibid., para. 1.
[113] Ibid., para. 2.
[114] Ibid., para. 52.

case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review.

66. It is in fact only when it has this type of information that the Pre-Trial Chamber is in a position to determine whether one of the circumstances justifying the exercise of its discretion exists. It will then ensure that the Prosecutor has correctly assessed the decisive nature of the information pertaining to admissibility that was available to him. Whether any of the circumstances mentioned by the Appeals Chamber to justify a *proprio motu* review exists will be for the Pre-Trial Chamber alone to decide.

67. Accordingly, it is appropriate to determine whether, in the present case, the information mentioned by the Defence was so decisive that it ought to have been furnished to the Pre-Trial Chamber.

68. The Defence for Germain Katanga argues, in this regard, that the Prosecutor misled the Pre-Trial Chamber by inadvertently or negligently[115] withholding certain information from the Pre-Trial Chamber that clearly indicated that Bogoro featured in the investigations conducted by the DRC authorities concerning Germain Katanga. One of the items of information in question appears in a request filed with the Kinshasa High Military Court on 2 March 2007 to extend the provisional detention of Germain Katanga and seven other persons.[116] In that document, "Bogoro" is mentioned as one of the ten locations where people had allegedly been killed in the course of systematic attacks against the civilian population.

69. The Chamber notes that the Prosecutor stated that he did not inform the Pre-Trial Chamber of the existence of that document because he had reviewed its

[115] ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 35, lines 24 to 25, p. 36, line 1.
[116] "*Requête aux fins de prorogation de la détention provisoire*", 2 March 2007, ICC-01/04-01/07-891-Conf-Exp-AnxH1. Pursuant to Trial Chamber II's oral decision of 1 June 2009, this document was made public. ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 20, line 21.

relevance with the relevant authorities of the DRC,[117] who had assured him that they were not investigating the Bogoro incident of 24 February 2003.[118] This was in fact confirmed by the representatives of the DRC at the hearing of 1 June 2009.[119] The Prosecutor explained that he concluded from this that "no obvious or ostensible investigations" into these facts had been conducted by the DRC, which is what he reported to the Pre-Trial Chamber when he filed his application for the issuance of a warrant of arrest. In fact, it appears that, in that application, the Prosecutor stated that the information available to him at the time did not indicate the existence of any national proceedings pertaining to the same case and that the Single Judge should defer any determination on the admissibility of the case until such time as the person named in the warrant may raise a challenge.[120] The Chamber notes, moreover, that the Prosecutor did not in fact immediately submit a copy of the afore-mentioned application for extension of provisional detention.[121] No doubt he endeavoured to ascertain both the importance and relevance of said document and concluded, in light of the information supplied by the DRC, that it did not contain any information pertaining to the circumstances listed by the Appeals Chamber in paragraph 52 of its afore-mentioned judgment.[122]

70. The fact of the matter is that the document contains objective information indicating that Germain Katanga was one of several persons under investigation for their alleged involvement in the commission of crimes against humanity, pillaging, and destruction of property between 2002 and 2005 in, among other locations, Bogoro.[123] However, it must also be noted that this document does not specify the

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[117] ICC-01/04-01/07-968-Conf-Exp-AnxI.
[118] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 49, lines 12 to 17.
[119] ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 99, lines 3 to 5.
[120] Office of the Prosecutor, "Prosecutor's Application for Warrants of Arrest under Article 58 and Request for Expedited Consideration (Part Two)", 25 June 2007, ICC-01/04-01/07-420-Conf-AnxA, par. 225, referred to by the Defence for Germain Katanga in the public hearing of 1 June 2009, ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 35, line 11.
[121] ICC-01/04-01/07-11-Anx 1, 1-9.
[122] ICC-01/04-350-US-Exp, para. 225 and footnote on p. 85.
[123] ICC-01/04-01/07-T-65-ENG WT, 1 June 2009, p. 35, lines 15 to 23.

exact date of the acts allegedly committed in Bogoro. Nor is it conclusive as to whether the acts allegedly committed there could be attributed to Germain Katanga rather than to one or other of the seven people also mentioned in the document, which significantly diminishes the importance of the document.

71. The Chamber can therefore but note the significantly vague nature of the document in question, which is after all simply a request to extend provisional detention. It is worth reiterating that during the period mentioned in the document, i.e. between 2002 and 2005, Bogoro was attacked several times. Moreover, the contents of the document are not supported by any of the other material that was in the Prosecutor's possession, except perhaps only for a document entitled "Pro-Justitia, Record of Interview" [*Pro-Justitia P.V. d'audition*] dated 20 January 2006, which was discussed at length at the hearing of 1 June 2009.[124] This is the written record of Germain Katanga's interview by an officer of the Prosecuting Authority of the High Military Court.[125] However, this written record, which is simply a transcript of what Germain Katanga said during the interview, does not constitute evidence to the effect that the judicial authorities of the DRC were conducting an investigation into the events under consideration by the Pre-Trial Chamber.

72. The Chamber considers therefore that the document of 2 March 2007 did not appear to contain decisive information on the "circumstances of the case", as understood by the Appeals Chamber in the afore-mentioned judgment and which ought to have been brought to the attention of the Pre-Trial Chamber by the Prosecutor.

73. Accordingly, there is no need to answer the question of whether the document in question would have led the Pre-Trial Chamber to exercise differently its discretion to conduct a *proprio motu* review of the admissibility of the case.

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[124] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 91 line 25 to p. 92, line 14.
[125] ICC-01/04-01/07-891-Conf-Exp-Anx Q.

V. THE INTENT OF THE DRC TO BRING GERMAIN KATANGA TO JUSTICE

74. The provisions of article 17 of the Statute must be read in light of paragraph 10 of the Preamble and article 1 of the Statute. Read together, these provisions establish one of the fundamental principles of the Statute, namely that the Court is complementary to national criminal courts. Thus, according to the Statute, the Court may only exercise its jurisdiction when a State which has jurisdiction over an international crime is either unwilling or unable genuinely to complete an investigation and, if warranted, to prosecute its perpetrators.

75. The Chamber points out that as these criteria form the limbs of an alternative, it is not bound to ascertain whether the second criterion has also been met should it consider one of them to be met.

A. The different forms of unwillingness

76. Paragraph 2 of article 17 of the Statute describes the unwillingness of a State in three sub-paragraphs, all of which refer to the absence of intent on the part of the State concerned to bring the person concerned to justice.

77. In this regard, the Statute makes explicit provision for the case of a State which has no intention of bringing a person to justice, because it wants to shield that person from criminal responsibility. This is unwillingness motivated by the desire to obstruct the course of justice. There is also the case of a State which may not want to protect an individual, but, for a variety of reasons, may not wish to exercise its jurisdiction over him or her. This second form of "unwillingness", which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chamber considers that a State which chooses not to investigate or prosecute a person before its own courts, but has

nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17.

78. In fact, it appears to the Chamber that this second form of "unwillingness" is in line with the object and purpose of the Statute, in that it fully respects the drafters' intention "to put an end to impunity",[126] while at the same time adhering to the principle of complementarity. This principle is designed to protect the sovereign right of States to exercise their jurisdiction in good faith when they wish to do so. As holder of this right, the State may waive it, just as it may choose not to challenge the admissibility of a case, even if there are objective grounds for it to make a challenge.

79. The Chamber recalls, in this respect, that, according to paragraph 6 of the Preamble, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". However, if a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle, if it surrenders the suspect to the Court in good time and cooperates fully with the Court in accordance with Part IX of the Statute.

80. The Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case. A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case. The reasons for such a decision may be because the State considers itself unable to hold a fair and expeditious trial or because it considers that circumstances are not conducive to conducting effective investigations or holding a fair trial.

[126] Paragraph 5 of the Preamble.

81. The Chamber considers, however, that the mere fact that a State is "unwilling", as described above, does not mean that the case is therefore *ipso facto* admissible. The Chamber must still determine its admissibility by ascertaining, as provided for under article 17(1)(c), whether the person has not been tried already for the same conduct by another court, or whether the case is of sufficient gravity to justify further action by the Court, as provided for under article 17(1)(d).

B. Exercising the complementarity principle with regard to the rights of the Defence

82. In its submissions, the Defence challenges the validity of what it termed a "waiver of complementarity". It argues that "the accused cannot become the victim of some sort of burden sharing between the DRC and the Prosecutor".[127] The Defence identifies two violations in this respect.

1. Infringement of the fundamental rights of the accused

83. In the Motion, the Defence maintains that a flexible interpretation of complementarity can produce highly adverse effects for the individual concerned.[128] In that regard, it identified four points of concern: first, the right of the accused not to be taken away from his "natural judge".[129] It then submits that the relocation of the accused to the seat of the Court "may deprive [him] of a meaningful exercise of the right to family life."[130] It also argues that the "[Court's alleged] lack [of] the power to subpoena witnesses" jeopardises the right to a fair trial.[131] Finally, the Defence suggests that trials before an international criminal court are too lengthy, as cases take less time before national courts.[132] At the hearing of 1 June 2009, the

[127] ICC-01/04-01/07-1008-Conf-Exp, para. 26.
[128] ICC-01/04-01/07-949, para. 21.
[129] Ibid., para. 22.
[130] Ibid., para. 23.
[131] Ibid., para. 24.
[132] Ibid., para. 25.

Defence added "language difficulties and cultural difficulties in trial"[133] to these concerns.

84. The Chamber considers that the conditions under which trials are conducted before the Court, although undoubtedly important for the accused, are not relevant to the issue of admissibility. All States Parties have accepted that their nationals may be transferred to the Court if the Court issues a warrant for their arrest. The Chamber notes, in this respect, that the conditions under which prosecutions and trials are conducted before the Court will inevitably be different from those before a national court. This is inherent in the nature of international criminal trials, which are often held at great distance from the country of origin of the accused or from the place where the crimes were committed. Accordingly, the Defence cannot insist that trials held before the Court be conducted under identical conditions as those held, for example, in the DRC. The Chamber assumes in fact that when they created the court and decided that it would sit in The Hague, the States Parties were fully mindful of the consequences that this would entail for the accused brought before the Court, and considered that they were not infringing their fundamental rights.

85. Moreover, except with respect to the application of the *ne bis in idem* principle, article 17 of the Statute makes no reference to the violation of the fundamental rights of an accused as a ground for challenging the admissibility of cases brought before the Court. If the Defence is of the view that its client's rights have been violated by his transfer to the Court, it would ultimately have to have recourse to other means of redress.

[133] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 13, lines 12 to 13.

2. Loss of the accused's right to challenge admissibility

86. The Defence also argues that accepting the principle of a "waiver of complementarity" would render the right of the accused to challenge the admissibility of the case theoretical and illusory.[134]

87. The Chamber notes that any form of "waiver" on the part of a State can only be based on sub-paragraphs (a) and (b) of article 17(1) of the Statute and that it does not in any way deprive the Defence of its right to challenge the admissibility of a case on the basis of the *ne bis in idem* principle or the level of gravity of the case.

88. When, as in the present case, a State makes clear its unwillingness to bring the accused to justice, the fact of the matter is that a challenge to admissibility by the Defence 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 by the Court, the expression of the unwillingness of the State to bring the accused to justice before its own courts can be such that it can only result in a Chamber declaring the case admissible. Consequently, in the face of such a clearly expressed determination, there would be no need for the Chamber to undertake a comparative assessment of the cases brought before national and international courts and, thereby, apply any given admissibility test.[135]

89. Accordingly, the Chamber must now ascertain whether the DRC clearly demonstrated its unwillingness to bring Germain Katanga to justice before its own courts.

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[134] ICC-01/04-01/07-1008-Conf-Exp, para. 26.
[135] See paragraphs 11 *et seq*. of the present decision.

C. Ascertaining unwillingness in the present case

90. The Chamber considers that what must be taken into consideration for the purpose of determining whether a State is in fact unwilling, within the meaning of article 17 of the Statute, to exercise jurisdiction over a particular case is the intent of that State to see the person or persons involved brought to justice. This intent can be conveyed expressly by the State, either in the specific context of a proceeding before the Court or generally. This intent can also be inferred from unambiguous facts.

91. For the Chamber, the question of whether a State has the intent to bring a person to justice itself or whether it is totally "unwilling" must be determined on a case-by-case basis, taking into consideration the precise circumstances of the case. In this respect, it is of particular interest to note that, in the present case, it is the State concerned which referred the situation to the Court, that it did not object to the surrender of the accused and made no challenge to admissibility. In order to ascertain the real intentions of a State, the level and form of cooperation received by the Court from that State with regard to a particular case may also be taken into consideration.

92. In order to ascertain whether the DRC intended to express its unwillingness to prosecute Germain Katanga in the case that is before the Court, the Chamber must first take into consideration the explicit statements of the representatives of the authorities of the DRC.

93. In a document dated 14 March 2009, entitled *"Observations de la RDC sur l'exception d'irrecevabilité soulevée par la défense de Germain Katanga"*[136] and addressed to the Prosecutor, the Director of the Immediate Office of the Chief Prosecutor of the High Military Court [*Auditeur Général près la Haute Cour Militaire*], unequivocally stated that the Military Prosecuting Authority [*Auditorat Général*] had not initiated

[136] ICC-01/04-01/07-968-Conf-Exp-AnxJ.

any investigation against Germain Katanga in relation to the attack on Bogoro on 24 February 2003.

94. In addition, at the hearing of 1 June 2009, the representatives of the DRC noted that its motivation for referring the situation in its territory to the Court in 2004[137] was its commitment to fight against impunity;[138] they stated that the Chamber ought to reject the Motion in order to be able to try the case.[139] They further expressly rejected the suggestion that the DRC could now have to try Germain Katanga and made the following statement, which was subsequently incorporated into a document dated 4 June 2009:[140]

> [TRANSLATION] "[…] the authorities of the DRC consider that the ICC must reject the challenge to admissibility made by the Defence for Germain Katanga so that Mr Katanga may effectively be prosecuted before the ICC. In rejecting this challenge, the ICC will be doing justice to the DRC, a country devastated by the countless number of victims of atrocities (five million dead and three million war-displaced), regarding which His Excellency Mr Joseph Kabila Kabange, President of the DRC, has demonstrated to the world his determination to fight resolutely against impunity by making the DRC to date an unequalled model of cooperation with the ICC. This is the official position of the DRC regarding the challenge to admissibility.

95. In light of these statements, and without the need to rule on the "same conduct test" which the Defence for Germain Katanga sought to challenge in its Motion, the Chamber cannot but note the clear and explicit expression of unwillingness of the DRC to prosecute this case. It recalls that the DRC did not challenge the admissibility of the case when the warrant of arrest was communicated to it and that as soon as said warrant was unsealed, Germain Katanga's transfer to The Hague was ordered immediately.[141] The Chamber concludes therefore that the DRC clearly intends to leave it up to the Court to prosecute Germain Katanga and to try him for the acts committed on 24 February 2003 in Bogoro.

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[137] ICC-01/04-01/06-39-AnxB1.
[138] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 81, lines 14 to 17.
[139] ICC-01/04-01/07-T-65-ENG ET WT, 1 June 2009, p. 81, lines 8 to 12.
[140] Registry, "*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-Anx.
[141] ICC-01/04-01/07-40-Anx 3.6.

FOR THESE REASONS,

The Chamber

1) **REJECTS** the Motion; and

2) **DECLARES** the case against Germain Katanga admissible.

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

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Judge Bruno Cotte
Presiding Judge

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Judge Fatoumata Dembele Diarra **Judge Hans-Peter Kaul**

Dated this Tuesday 16 June 2009

At The Hague