Leiden Journal of International Law, 19 (2006), pp. 741–751
 Printed in the United Kingdom doi:10.1017/S0922156506003554

Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court

MOHAMED M. EL ZEIDY*

Abstract

The question whether the International Criminal Court may use its review powers to determine the admissibility of a case during the arrest warrant phase has gone widely unnoticed in legal literature on the International Criminal Court. This article treats the question from different perspectives. It presents the different stages at which admissibility questions may arise in response to a state party referral. Then it analyses the first jurisprudence of Pre-Trial Chambers I and II of the Court on the treatment of the question of admissibility at the arrest warrant stage. The article concludes that the Court may, *proprio motu* or based on a Prosecutor's request, rule on admissibility questions during arrest warrant proceedings *per* Article 58.

Key words

admissibility; arrest warrant stage; confirmation hearing; Uganda decision; Congo decision; prima facie determination; *res judicata*; self referral

Section 1

The Statute of the International Criminal Court (ICC) is based on the principle of complementarity, which provides states with primary jurisdiction[1] to prosecute the heinous crimes under the jurisdiction of the Court.[2] This primacy is not absolute

* Judge, Egyptian Ministry of Justice; Former Senior Public Prosecutor, Office of the Prosecutor General of the ARE, Egyptian Ministry of Justice; Ph.D. (cand.); LL M, Irish Centre for Human Rights – National University of Ireland, Galway; LL. M., Cairo; LL.B. & Bachelor of Police Sciences, Cairo, Egypt.

1. The idea of interpreting complementarity as providing national courts with primary jurisdiction is the outcome of the negotiations of the 1995 Ad hoc Committee. For an account of the debates, see *Report of the 1995 Ad hoc Committee on the Establishment of an International Criminal Court*, paras. 31–4.
2. ICC Statute, Preamble, para. 10, Arts. 1, 17. For a discussion of the principle of complementarity, see, *inter alia*, J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues. Negotiations. Results* (1999), 41 et seq. (hereinafter ICC Commentary); J. T. Holmes, 'Jurisdiction and Admissibility', in, R. S. Lee et al. (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (2001), at 321 et seq.; J. T. Holmes, 'Complementarity: National Courts *Versus* the ICC', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), at 667 et seq.; F. Lattanzi, 'The Complementary Character of the Jurisdiction of the Court with respect to national Jurisdictions', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998), 1; S. A. Williams, 'Issues of Admissibility', in O. Triffterer (ed.), *Commentary on the Rome Statute: Observers' Notes, Article by Article* (1999), 390 (hereinafter Triffterer Commentary); W. A. Schabas, *Introduction to the International Criminal Court* (2004), 85 et seq.; M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court, (2001) 167 *Military Law Review* 20; B. S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals', (1998) 23 *Yale Journal of International Law* 383; M. M. El Zeidy, 'The Principle

because a state loses its primacy when it manifests unwillingness or inability to exercise its jurisdiction over a specific case.[3] This occurs once the Court makes a determination on the question of admissibility. The Court's determination of admissibility may be challenged by any state that is investigating or prosecuting the situation or the case during different stages of the proceedings. Similarly, a person who meets the criteria set out in Article 19(2)(a) of the Rome Statute has the opportunity to raise such a challenge before the Court.[4] Moreover, the Court may *proprio motu* look at the question of admissibility at different stages of the proceedings.[5] In order to elucidate whether the question of admissibility may be examined during the arrest warrant phase, one needs to follow the procedural timeline of proceedings under the Statute. We will take as an example the typical scenario of a state party referral.

In such a case, the question of admissibility may arise at different occasions. When a state party refers a situation to the Court, the Prosecutor has to determine whether to initiate an investigation into the situation.[6] In doing so, the Prosecutor is obliged to examine whether the situation 'is or would be admissible under article 17'. Admissibility questions may also arise during Article 18 proceedings – that is, once a state requests the Prosecutor to defer investigation, and the latter files an application to the Pre-Trial Chamber requesting the authorization of an investigation before the Court.[7] In reaching a decision whether to authorize an investigation, the Pre-Trial Chamber 'shall examine the Prosecutor's application and any observations submitted by a state that requested a deferral . . . , and shall consider the factors in article 17'. On investigation, the Prosecutor shall consider whether there is a reasonable basis on which to proceed with a prosecution. Among the elements that he should consider is the question of admissibility of the case.[8]

The Statute grants the concerned party only one opportunity to challenge the admissibility of the situation or case.[9] This challenge may take place at an early stage of the proceedings (situation stage) *per* Article 18, or at the case stage *per* Article 19.[10] If a state for example raises any challenge concerning the admissibility of a situation during the Article 18 stage, then it loses the opportunity to do so during the Article 19 phase, unless the challenge is based on 'additional significant facts or significant change of circumstances'.[11] In turn, if a state has not raised an admissibility challenge during an Article 18 situation, it enjoys the right of doing so *per* Article 19 at the case stage. Apart from the conditions mentioned above, and those explained in Article 19,

---

of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan Journal of International Law* 869; A. Klip, 'Complementarity and Concurrent Jurisdiction', (2004) 19 *Nouvelles études pénals* 173.

3. ICC Statute, Art. 17; see also *supra* note 2.
4. ICC Statute, Art. 19(2)(a) reads, 'An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58'.
5. RPE, Rule 55(2), ICC Statute; Art. 19(1), RPE; Rule 58.
6. ICC Statute, Art. 53(1)(b).
7. ICC Statute, Art. 18(2); RPE, Rule 55(2).
8. ICC Statute, Art. 53(2)(b).
9. ICC Statute, Art. 18(7).
10. For the distinction, see *infra* note 21.
11. ICC Statute, Art. 18(7).

https://doi.org/10.1017/S0922156506003554 Published online by Cambridge University Press

the Statute does not spell out properly all stages where questions of admissibility may be raised. However, Rule 122(2) of the Rules of Procedure and Evidence (RPE) makes it clear that challenges concerning the jurisdiction of the Court and the admissibility of the case may be examined by the Court at the confirmation hearing in response to a challenge raised before it.[12] The literal language of Rule 122(2) suggests that the Court is only permitted to examine the question of admissibility if challenged by any concerned party, therefore excluding the Court from considering the admissibility of the case *proprio motu*. Yet this reading is problematic, because it restricts the application of Article 19(1). Moreover, Rule 122(2) obliges the Pre-Trial Chamber to apply Rule 58, which already mentions in its second paragraph that the Court may act in its own motion in accordance with Article 19(1).

By contrast, the Statute lacks any explanation of whether questions of admissibility may be examined during arrest warrant proceedings.[13] Thus several questions arise. May a state, an accused, or the Prosecutor raise a question of admissibility during the Article 58 phase? May the Court consider the question of admissibility *proprio motu* at this stage of the proceedings? The following analysis seeks to answer some of these questions, relying on the assumption that the admissibility of a situation or case has not been contested until the arrest warrant stage.

Section 2

Neither the Statute, nor the RPE, nor the Regulations of the Court (Regulations) provide a direct answer to the question of the extent to which admissibility issues may be examined at the arrest warrant stage. Article 58, in particular, fails to give any express guidance on this question. Article 58(1) specifies merely that the Pre-Trial Chamber must examine whether there are 'reasonable grounds to believe the person has committed a crime within the *jurisdiction* of the Court' (emphasis added) without mentioning the word 'admissibility'. However, one needs to look beyond the language of Article 58 in order to reach a clearer answer. The key problem is to determine whether proceedings concerning the issuance of an arrest warrant fit more closely into the Article 18 stage, or into the Article 19 stage, or whether they are covered by neither.

It is evident that Article 58 is triggered after the requirements of Article 18 have been satisfied.[14] This follows from the fact that the scope of application of Article 18 encompasses situations as opposed to individual cases. Yet whether Article 58 lies within the domain of Article 19 remains to be determined. There are two lines of reasoning that are worth mentioning in this context.

First, Article 19(1) states that the 'Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the

12. RPE, Rule 122(2) reads, 'If a question or challenge concerning jurisdiction or admissibility arises, rule 58 applies.'
13. See ICC Statute, Arts. 19, 58.
14. It is clear from the wording of Art. 18(1) ('When a situation has been referred . . .') that Art. 18 is concerned with situations. Art. 58, by contrast, comes into play when a case arises, and individuals have been targeted.

https://doi.org/10.1017/S0922156506003554 Published online by Cambridge University Press

admissibility of a case in accordance with Article 17.'[15] The word 'case' is stricter than 'situation' as applicable *per* Articles 13, 14, 15, and 18, in the sense that it refers to individual cases.[16] As one commentator has argued, it implies formal proceedings that exceed the investigation of a situation such as an application for an arrest warrant under Article 58.[17] Yet, by reading Rule 58(2) and (3) together, one may reach a different conclusion. The paragraphs read in part,

> The Court shall transmit a request or application received [raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19 paragraph 2 or 3, or is acting on its own motion][18] . . . to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to summons . . .[19]

The reference in the last part of Rule 58(3), to the person 'who has been surrendered to the Court . . .', suggests that Article 19 applies subsequent to the issuance of an arrest warrant and not before or during its proceedings. This conclusion finds support in the language of Article 19(2)(a). Article 19(2)(a) stipulates that 'challenges to the admissibility of the case on the grounds referred to in Article 17 . . . may be made by: (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58'.[20]

By reading Article 19(2)(a) in the light of Rule 58(2) and (3), one could reach the same conclusion – that is Article 19 does not cover arrest warrant proceedings *per* Article 58.

> In the *Congo* situation, Pre-Trial Chamber I supported this finding when it concluded that [C]ases, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, [and] entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.[21]

Consequently, it might still be argued that Article 19 does not cover this phase of the proceedings, and based on these conclusions it appears that Article 58 proceedings lie somewhere between Articles 18 and 19 – namely at a stage which passes the phase of Article 18, but does not quite yet reach Article 19.

---

15. Ibid., Art. 19(1).
16. S. A. Fernández de Gurmendi, 'The Role of the International Prosecutor', in ICC Commentary, *supra* note 2, at 180. On the same distinction but in the context of the Security Council referrals, see L. Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', ibid., at 147–8.
17. C. K. Hall, 'Challenges to the Jurisdiction of the Court or the Admissibility of a Case', in Triffterer Commentary, *supra* note 2, at 407–8.
18. RPE, Rule 58(2).
19. Ibid., Rule 58(3).
20. ICC Statute, Art. 19(2)(a).
21. Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, Case No. ICC-01/04, 17 January 2006, para. 65. The Court drew the distinction between cases and situations when it defined the latter as follows: 'Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of Congo since 1 July 2002, entail proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation,' ibid.; see also H. Olasolo, 'The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor', (2005) 5 *International Criminal Law Review* 121, at 125–6 (providing some examples of what may constitute a situation within the meaning of the ICC Statute.)

But if the Pre-Trial Chamber's finding were to be true, on what legal basis did the Chamber examine the question of admissibility during the arrest warrant proceedings in the *Congo* situation as discussed below? Pre-Trial Chamber I, citing one commentator, concluded that technically a 'case' stage cannot be reached before an arrest warrant has been issued.[22] Literally, this means that arrest warrant proceedings are not covered by Article 19, which applies only during a 'case' stage. Thus, based on its finding, Pre-Trial Chamber I should not have been competent to examine the question of admissibility at this stage of the proceedings.[23]

However, a different argument may be drawn from the language of Article 19(6) in conjunction with Article 19(2)(a). The language of Article 19(6) allows the possibility of raising admissibility challenges prior to 'the confirmation of charges'.[24] Thus it could be argued that because Article 58 proceedings precede the confirmation of charges hearing *per* Article 61, Article 19 might be meant to cover Article 58 proceedings (arrest warrant proceedings). Although Article 19(2)(a) limits admissibility challenges by a person only after an arrest warrant has been issued, it does not mean per se that admissibility questions in general cannot be examined during arrest warrant proceedings. Indeed, it merely means that only a person mentioned in Article 19(2)(a) is not permitted to raise an admissibility challenge before the Court unless he/she meets the status of an accused or in case an arrest warrant has been issued against him/her. It follows that a state within the meaning of Article 19(2)(b), (c) does not appear to be barred from challenging the admissibility of the case, nor does the Court appear to be prohibited from examining *proprio motu* questions of admissibility. Even the Prosecutor might seek a ruling regarding this question during Article 58 proceedings.

Nevertheless, by looking once more at the language of Article 58, one may observe that this conclusion does not fit neatly within the parameters of that provision. Article 58 restricts legal submissions to the prosecution, which are subject to the review powers of the Pre-Trial Chamber.[25] Accordingly, it may be safely concluded that during arrest warrant proceedings admissibility questions may only be raised by the prosecution, or examined by the Pre-Trial Chamber using its *proprio motu* powers.

The possibility of addressing issues of admissibility during arrest warrant proceedings finds support in the Pre-Trial Chamber's decision concerning the issuance of arrest warrants in the *Uganda* case, where the Court has made a prima facie

22. Pre-Trial Chamber I citing Hall, *supra* note 17, at 407–8. By looking at the work cited by Pre-Trial Chamber I, one may observe that it lacks a reference that supports this point directly. The author merely argues that 'cases' imply formal proceedings that 'might include an application for a warrant under Article 58,' which is different in meaning than saying 'proceedings that take place after the issuance of a warrant of arrest or a summons to appear.'

23. It follows that Pre-Trial Chamber I has erred in its ruling that a 'case' stage only starts subsequent to the issuance of a warrant of arrest. The reason is that suspects would have already been identified even prior to the issuance of an arrest warrant, which presupposes that a 'case' stage may begin from that moment.

24. ICC Statute, Art. 19(6) reads: 'Prior to the confirmation of charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber.'

25. ICC Statute, Art. 58(1).

determination that the case 'appears to be admissible'.[26] The decision implies that the Court may question the admissibility of the case during the arrest warrant phase. Although Pre-Trial Chamber II has not made a detailed examination of this question, the expression 'appears to be admissible' suggests that the Court may proceed with the case and that a closer admissibility ruling may follow,[27] perhaps during the confirmation hearing in accordance with Article 19(1), (2), and (3) and Rules 58 and 122(2). In addition, in a recent decision against Thomas Lubanga Dyilo (*Congo* situation), although Pre-Trial Chamber I referred to the *Uganda* decision, its examination was not confined to the prima facie determination. Pre-Trial Chamber I instead made an 'initial' detailed ruling on the question of admissibility of the case during this stage. That being said, it appears legally permissible to examine admissibility questions during the arrest warrant phase.

Section 3

The fact that the Pre-Trial Chamber is competent to rule on the question of the admissibility of the case during the arrest warrant stage does not mean per se that such examination is mandatory. In the *Congo* situation, Pre-Trial Chamber I adopted the view that the issuance of an arrest warrant is subject to a compulsory determination of the admissibility of the case:

> [T]he Chamber recalls the practice of Pre-Trial Chamber II in its decisions on the Prosecution's requests for warrants of arrest for Joseph Kony ... which grants the Prosecution's requests only after finding that the cases fall within the jurisdiction of the Court and appear admissible. In this regard, it is the Chamber's view that an *initial determination* on whether the case against Mr Thomas Lubanga Dyilo falls within the jurisdiction of the Court and *is admissible* is *a prerequisite* to the issuance of a warrant of arrest for him.[28]

Such an assertion raises some problems from a legal point of view. If one accepts the argument that Article 58 proceedings lie within the ambit of the Article 19

26. See Arrest decisions on warrants of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya, ICC documents ICC-02/04-01/05-53, 13 October 2005, para. 38; ICC-02/04-01/05-54, 13 October 2005, para. 38; ICC-02/04-01/05-56, 13 October 2005, para. 28; ICC-02/04-01/05-57, 13 October 2005, para. 26; ICC-02/04-01/05-55,13 October 2005, para. 26. All documents available are at http://www.icc-cpi.int/cases/current_situations/Uganda/ug_decision.html.

27. The core idea behind the prima facie determination does not seem to be entirely a novelty of the ICC. The International Court of Justice (ICJ) has initially introduced a parallel standard to be applied for a prima facie determination that there is a basis upon which jurisdiction might be founded at the provisional measures stage, see *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Request for the Indication of Provisional Measures, 5 February 2003, paras. 38–9; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda)*, Request for the Indication of Provisional Measures, 10 July 2002, paras. 58–59; and generally, for example, P. H. F. Bekker, 'Provisional Measures in the Recent Practice of the International Court of Justice', (2005) 7 *International Law Forum du droit international* 24. Nevertheless, the *Uganda* decision lacks any indication as to whether the approach of making a prima facie determination regarding the admissibility of the case may have been influenced by the standard applied by the ICJ.

28. See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, Case No. ICC-01/04-01/06, 10 February 2006, paras. 17–18, emphasis added.

stage as argued previously,[29] it is difficult to conclude that an admissibility ruling is mandatory at this stage. This is so because the wording of Article 19(1) makes the admissibility test optional at this phase of the proceedings.[30]

Moreover, Pre-Trial Chamber I 'recalls' the practice of Pre-Trial Chamber II in its previous decision regarding the issuance of the arrest warrants against the five Lord's Resistance Army leaders in the *Uganda* case. Thus, if one assumes that the word 'recalls' is used in this context in order to highlight the fact that Pre-Trial Chamber I is building its decision on the basis of the findings of Pre-Trial Chamber II in the *Uganda* decision, one could argue therefore that Pre-Trial Chamber I has erred in reaching its conclusions by determining that the admissibility of the case 'is a prerequisite' to the issuance of an arrest warrant. This is so because the decision of Pre-Trial Chamber II does not contain any direct reference to support this finding.[31] The decision does not spell out that Pre-Trial Chamber II was under an obligation to question the admissibility of the case.[32]

Likewise, in the same part of the decision, Pre-Trial Chamber I referred to the term 'is admissible',[33] and not 'appears to be admissible'[34] as stated in the *Uganda* decision. Thus, if one follows the argument that the decision of Pre-Trial Chamber I was relying on the findings of Pre-Trial Chamber II, then why did the former use the term 'is admissible' as opposed to 'appears to be admissible' as stated in the *Uganda* decision? Does this mean that Pre-Trial Chamber I meant to treat the two terms as having the same meaning? If this is so, then one might argue that Pre-Trial Chamber I has erred once more in reaching its conclusion, because there is a difference in meaning between the phrases 'appears to be admissible' and 'is admissible'. But whether such a difference has any legal ramifications remains to be determined.

In the *Uganda* decision it was clear that Pre-Trial Chamber II intended to limit itself to a prima facie determination regarding the admissibility of the case when it mentioned that the case 'appears to be admissible'. It follows that a subsequent determination of the admissibility of the case is evidently possible.[35] By contrast, Pre-Trial Chamber I used the words 'is admissible' followed by a detailed examination of the question of admissibility,[36] thus moving from the stage of a prima facie determination to an actual determination of the question of admissibility. The question remains, therefore, whether invoking the term 'is admissible' followed by a

29. Even this conclusion may be deduced from the decision of Pre-Trial Chamber I in the *Congo* decision. See ibid., paras. 16–17, 19.
30. ICC Statute, Art. 19(1). Art. 19(1) stipulates: 'The Court may, on its own motion, determine the admissibility of a case in accordance with Article 17'; concurring Hall, *supra* note 17, at 408 ('paragraph 1 provides that the Court . . . has the discretion, on its own motion, to determine the *admissibility of a case* . . . in accordance with Article 17').
31. See *Prosecutor v. Joseph Kony*, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as Amended on 27 September 2005, Case No. ICC-02/04-01/05, 27 September 2005.
32. Ibid.
33. *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, Case No. ICC-01/04-01/06, 10 February 2006, para. 18.
34. *Supra* note 31, at, para. 38.
35. This conclusion is even backed by a statement made by Pre-Trial Chamber II to the effect that the prima facie determination would not prejudice subsequent determinations regarding admissibility. Ibid.
36. *Supra* note 33, at paras. 18, 29–40.

detailed ruling on the question of admissibility raises the *res judicata* effect regarding subsequent determinations of that question.

Neither the Statute nor the Rules or the Regulations of the Court support the conclusion that an 'initial' determination of the question of admissibility of a case during arrest warrant proceedings prevents the Court from reconsidering the question at a later stage, either in response to a challenge made by an accused person[37] or by a state mentioned in Article 19(2), (b), or (c), or on the basis of the Chamber's *proprio motu* powers.[38] In this context, it appears that the error is linguistic and not primarily substantial.

If the word 'recalls'[39] is interpreted literally and thus is understood merely as a reminder of awareness of the findings of Pre-Trial Chamber II, the deviation of Pre-Trial Chamber I ('is admissible') still has no substantial effect on subsequent determinations of the question of admissibility. The only difference in applying the 'is admissible' test (as opposed to the 'appears to be admissible' test), is that Pre-Trial Chamber I raised the threshold for issuance of an arrest warrant from a prima facie determination[40] to an actual detailed determination of the question of admissibility of the case *at this stage of the proceedings* (which are guided by an examination of 'reasonable grounds', see Article 58(1)).

However, assuming that the word 'recalls' is given its literal meaning, one may still argue that Pre-Trial Chamber I has erred in reaching its findings that a warrant of arrest may not be issued prior to a determination that the case 'is admissible'. Such a finding appears to run counter to the permissive language of Article 19(1). How can a determination whether the case is admissible be made 'a prerequisite to the issuance of an arrest warrant' given the fact that the scope of Article 19(1) makes it discretionary?

Section 4

In some instances an examination of the question of admissibility of the case during the arrest warrant phase may not be feasible, because the Chamber has an insufficient factual and legal basis on which to decide. At this stage of the proceedings, the right to submit evidence and information related to the case lies primarily with the Prosecutor,[41] therefore prompting the Pre-Trial Chamber to render its verdict relying merely on a single source. Indeed, in reaching its decision concerning the question

37. ICC Statute, Art. 19(2)(a).
38. Ibid., Art. 19(1). Interestingly, Art. 19(1) has no limitation on the number of times where the Court may *proprio motu* examine the question of admissibility. Even the Prosecutor 'may seek a ruling from the Court regarding a question of jurisdiction or admissibility,' Ibid., Art. 19(3).
39. The use of the word 'recalls' or 'recalling' as a reminder may be found in most resolutions of the Security Council, and the General Assembly; see *inter alia* SC Res. 1159, 1325,1441, 1566, and GA Res. 39(I), 51/158, 60/128, 96/860.
40. Assuming that the proper understanding of the decision of Pre-Trial Chamber II that it intended to subject the issuance of an arrest warrant to a mandatory determination of the admissibility of the case. But if it is to be understood that the decision does not support this finding, then it could be argued that Pre-Trial Chamber I not only raised the threshold for the issuance of an arrest warrant, but also endorsed a new rule that was lacking in the decision of Pre-Trial Chamber II.
41. ICC Statute, Art. 58.

of admissibility in the *Congo* situation, Pre-Trial Chamber I relied exclusively on the evidence and information provided by the prosecution.

> Concerning the first part of the admissibility test, the Chamber therefore holds that, on the basis of the evidence and information provided by the Prosecution in the Prosecution's Application, in the Prosecution's Submission, in the Prosecution's Further Submission and at the hearing of 2 February 2006, no State with jurisdiction over the case . . . is acting, or has acted, in relation to such case . . .[42]

The case would have been different if the question had been examined during the confirmation hearing, where the 'person charged, as well as his or her counsel',[43] should have been present in order to submit their views. The possibility of taking into account submissions and views of the defence is limited at the arrest warrant stage. Regulation 77 entrusts the Office of Public Council for the Defence (OPCD) with a limited mandate to represent and protect the rights of the defence. The role of the OPCD is focused on the 'initial stages of the investigation, in particular . . . the application of Article 56, paragraph 2 (d), and rule 47, sub-rule 2'.[44] To hear the defence fully at the stage of the confirmation hearing might allow a more balanced decision that takes into account the views of two parties (instead of one).[45] This may make it more plausible to examine the question of admissibility during the confirmation hearing rather than the arrest warrant stage. But if this conclusion is true, why did the Court look at the question of admissibility during the arrest warrant stage in the *Uganda* and *Congo* decisions without waiting for the confirmation hearing?

Neither the *Uganda* nor the *Congo* decision provides a clear answer to this question. None of the decisions directly addresses the question of why the respective Chambers looked at the question of admissibility during the arrest warrant phase. Accordingly, some legal policy analysis is required to find an explanation.

The *Uganda* and *Congo* situations were received by the Court by way of a state party referral under Articles 13(a) and 14 (and defined as self-referral).[46] A self-referral means that a state with a direct link with the crime or crimes in question – presumably the territorial state prefers to waive its primacy over a specific situation or case to the Court, despite its willingness and ability to act.[47] Referrals of this kind were not seriously contemplated by the drafters.[48] The direct implication of a self-referral

42. *Supra* note 33, at para. 40.
43. ICC Statute Art. 61, ICC Rule 121.
44. ICC Regulation 77, sub-regulations 1, 4.
45. It does not come as a surprise that defence counsel in the *Congo* case challenged Pre-Trial Chamber I's findings on admissibility. See Appeal by Duty Counsel for the Defence against Pre-Trial Chamber I's Decision of 10 February 2006 on Prosecutor's Application for a Warrant of Arrest, Article 58 of 24 March 2006, ICC-01/04-01/06; see also Prosecution Response to Thomas Lubanga Dyilo's Brief in Support of the Appeal, Case No. ICC-01/04-01/06, 1 May 2006.
46. ICC Statute, Arts. 13(a) and 14. Since a self-referral is in fact a state party referral, the regime governing state parties applies.
47. This does not deny Pre-Trial Chamber I's determination that by the time the President of the Democratic Republic of Congo (DRC) sent the letter of referral of the situation to the Court, the DRC 'was indeed unable to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002'; see *supra* note 33, at paras. 33–5.
48. Some discussions have taken place during the drafting history of the Rome Statute in relation to the question whether a state may waive complementarity-related issues. The question was left out, to be addressed in the Rules of Procedure and Evidence. The final text of the latter was adopted without any reference

vis-à-vis a referral from a state other than the state that would normally exercise jurisdiction over the crime is that a case is considered admissible with regard to the state waiving its jurisdiction to the Court (waiver of complementarity), and generally admissible if no other state challenges the admissibility of the situation or case. Scholars have argued in favour of the legality of the practice of self-referrals,[49] despite some legal arguments to the contrary.[50] Thus it could be argued that the uncertainties surrounding this question made it crucial to determine the admissibility of the case at the earliest possible stage in the *Uganda* and *Congo* decisions, in order to quash any doubt regarding the legality of the practice. In the *Uganda* case, Pre-Trial Chamber II implicitly endorsed the practice of a self-referral and its consequences – though without spelling out the legal reasoning when it determined that the case 'appears to be admissible'. In the *Congo* decision, Pre-Trial Chamber I went a step further and made it clear that self-referral might be acceptable only on a case-by-case basis,[51] as long as it is in line with the 'purpose of the complementarity regime' – that is, the Court 'by no means replaces national criminal jurisdictions'.[52] Perhaps the foregoing explains the reason why Pre-Trial Chamber I treated the question of admissibility as mandatory, although it is in fact optional at this stage of the proceedings.

Section 5

This leads us to our conclusion. The question of the examination of admissibility issues during arrest warrant proceedings was not directly addressed during the drafting history of the Statute, nor was it discussed in the literature concerning the ICC. The question was examined for the first time in practice before Pre-Trial Chambers I and II of the ICC. The practice of the Court suggests that both Chambers may have looked at admissibility issues at this early stage of proceedings because the underlying situations were referred by way of self-referral. Although Pre-Trial Chambers I and II endorsed the same result, the concrete treatment differed and led to a partial deviation in the jurisprudence of the Court. In its first decision on the matter, Pre-Trial Chamber II found that it was sufficient at this stage of the

---

to this question – leaving the question for the Court to decide. See Report of the Ad hoc Committee on the Establishment of an International Criminal Court, G.A., 50th Sess., Supp. No. 22, A/50/22, 1995, para. 47; Decisions taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, A/AC.249/1997/L.8/Rev.1, 1997, art. 35, at p. 11, n. 17; Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, (A.AC.249/1998/L.13, 1998), art. 11, at 42 n. 53; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (A/Conf.183/2/Add.1, 1998), art. 15, at 48, n. 38; A/CONF.183/2/Add.1, art. 15, at 40, n. 38. Some scholars, including myself, have argued in favour of self-referrals and as a result accepting the possibility of waiver of complementarity-related issues by the state concerned; see *infra* note 49.

49. M. M. El Zeidy, 'The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC', (2005) 5 *International Criminal Law Review* 102; C. Kress, '"Self Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy', (2004) 2 *Journal of International Criminal Justice* 944; P. Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', (2004) 2 *Journal of International Criminal Justice* 949.
50. El Zeidy, *supra* note 49, at 99–102; Kress, *supra* note 49, at 945.
51. This requirement was not explicitly mentioned in the pre-trial chamber's decision, but may be deduced from the entire decision.
52. *Supra* note 33, at para. 35.

proceedings to confine its examination to a prima facie determination. By contrast, in a later decision, Pre-Trial Chamber I treated the issue in a different manner by undertaking a detailed examination regarding the admissibility at that same stage of the proceedings. Pre-Trial Chamber I further argued that the competence of the Chamber to issue an arrest warrant is subject to a prior determination that the case under consideration 'is admissible'. This finding is difficult to reconcile with the ruling of Pre-Trial Chamber II, which avoided establishing admissibility as a firm requirement for the issuance of an arrest warrant. Even assuming that Pre-Trial Chamber II intended to subject the issuance of an arrest warrant to a prior ruling concerning admissibility, the decision of Pre-Trial Chamber I raised the threshold by finding that a prima facie determination concerning admissibility is not sufficient to meet the requirement for the issuance of an arrest warrant. Moreover, in drawing the distinction between the terms 'case' and 'situation', in the decision concerning the *Applications for Participation in the Proceedings of VPRS 1 to VPRS 6*, Pre-Trial Chamber I might have deviated from the practice of Pre-Trial Chamber II when it considered that a 'case' stage only begins after the issuance of an arrest warrant.