

# The *Katanga* Trial Chamber Decision: Selected Issues

GILBERT BITTI AND MOHAMED M. EL ZEIDY\*

## Abstract

The admissibility challenge of the defence in *Katanga* has raised complex issues of litigation in the light of the practice of self-referrals and existing ICC jurisprudence. This article examines the *Katanga* Trial Chamber decision and its consequences from this perspective. It focuses on three themes that are of particular relevance, since they have a direct impact on the functioning of the Court and its different organs: (i) the timing for a challenge of the admissibility of the case; (2) access to information related to admissibility; and (iii) the role of the defence.

## Key words

complementarity; defence; *Katanga*; Pre-Trial Chamber; Trial Chamber

As is commonly known among scholars and practitioners, the principle of complementarity is one of the cornerstones of the Rome Statute of the International Criminal Court (ICC). The principle is so fundamental that it is reflected in two consecutive provisions at the opening of the Rome Statute, namely the Preamble and Article 1.<sup>1</sup> This double reference to complementarity at the beginning of the Rome Statute underlines the importance and central role of the principle for future decisions of the ICC.<sup>2</sup> Complementarity is further referred to ad nauseam throughout the entire Statute.<sup>3</sup>

Yet the jurisprudence of the Court on the subject is limited, and the treatment of the issues related to the concept in the handful of decisions issued by the Court is relatively marginal.

\* Gilbert Bitti, DEA en Droit Pénal et Licence en Droit (France); Senior Legal Adviser, Pre-Trial Division, International Criminal Court, and former member of the French delegation to the Rome Conference [Gilbert.Bitti@icc-cpi.int]. Mohamed M. El Zeidy, Ph.D. and LL M (Ireland); LL M and Licence en Droit (Cairo); Legal Officer, Pre-Trial Division, International Criminal Court, and Judge, Senior Public Prosecutor, Egyptian Ministry of Justice (1997–2007) [zeidy80@hotmail.com]. The views expressed in this comment are solely those of the authors.

1 Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (hereinafter Rome Statute), Preamble, para. 10. Preamble para. 10 reads: 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

2 Report of the Ad hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras. 36–37; also John T. Holmes, 'The Principle of Complementarity', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), 56.

3 See Rome Statute, *supra* note 1, Arts. 15, 17, 18, 19, 20, 53, 82, 89, 90, 93, 95, and 99.

There are a few rulings on complementarity,<sup>4</sup> including the decision issued by Trial Chamber II on 16 June 2009 in the case of *Germain Katanga and Mathieu Ngudjolo Chui* which forms the focus of this comment.<sup>5</sup> Other decisions have touched on the question of complementarity essentially within the context of issuance of an arrest warrant in accordance with Article 58 of the Rome Statute<sup>6</sup> (except two decisions which addressed the issue within the framework of the confirmation of charges<sup>7</sup>). In these decisions, the relevant Pre-Trial Chambers have acted *proprio motu* under the discretionary power provided under Article 19(1) of the Statute. The practice reveals that there is a lack of a clear and unified approach, sometimes even within one and the same Chamber.<sup>8</sup> In *Lubanga*, and in *Katanga and Ngudjolo Chui*,<sup>9</sup> Pre-Trial

4 *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 March 2009.

5 The decision was issued on 12 June 2009 at a public hearing and the reasons for the oral decision were subsequently given in a decision issued on 16 June 2009: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213 tENG, Trial Chamber II, 16 June 2009.

6 Most of those decisions were issued initially under seal, and were later unsealed; they are therefore difficult to find on the website of the Court. See, however, *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-1, Pre-Trial Chamber II, 8 July 2005; *Prosecutor v. Thomas Lubanga Dyilo*, 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, Pre-Trial Chamber I, 24 February 2006 (this decision was issued on 10 February 2006, but is found on the website of the Court as an annex to a decision of 24 February 2006 which was unsealed on 17 March 2006: *Prosecutor v. Ahmad Muhammad Harun ('Ahmad Harun') and Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, Pre-Trial Chamber I, 27 April 2007; *Prosecutor v. Germain Katanga*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07-4, Pre-Trial Chamber I, 6 July 2007; *Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC-01/04-01/07-262, Pre-Trial Chamber I, 6 July 2007; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-14-tENG, Pre-Trial Chamber III, 10 June 2008 (on the website of the Court, it is possible to find the original decision taken by Pre-Trial Chamber I on 10 February 2006 on the original application by the Prosecutor against both Thomas Lubanga Dyilo and Bosco Ntaganda; although the decision was taken in the situation of the Democratic Republic of the Congo, it is to be found in the record of the case *Prosecutor v. Bosco Ntaganda*. See *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Anx2, Pre-Trial Chamber I, 10 February 2006; this decision was reversed in relation to the finding of inadmissibility of the Bosco Ntaganda case by the Appeals Chamber. See *Situation in the Democratic Republic of the Congo*, Judgement of 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', ICC-01/04-169, Appeals Chamber, 13 July 2006 (this decision of the Appeals Chamber is to be found in the record of the situation in the Democratic Republic of the Congo, not in the record of the case *Prosecutor v. Bosco Ntaganda*. Following the decision of the Appeals Chamber, Pre-Trial Chamber I issued a warrant of arrest against Bosco Ntaganda on 22 August 2006 which is to be found in the record of the Bosco Ntaganda case (ICC-01/04-02/06-2)).

7 *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Pre-Trial Chamber II, 15 June 2009. *Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-05-02/09-243-Red, paras. 28–30.

8 For further discussion see M. M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008).

9 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Art. 58, ICC-01/04-01/06-8-US-Corr, 10/02/2006, para. 18, unsealed pursuant to Decision ICC-01/04-01/06-37 dated 17/03/2006; *Prosecutor v. Mathieu Ngudjolo Chui*, Decision on the Evidence and Information provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC-01/04-02/07-3, para. 17, reclassified as public pursuant to Oral Decision dated 12/02/2008; *Prosecutor v. Germain Katanga*, Decision on the Evidence and Information Provided by the prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC-01/04-01/07-4, Pre-Trial Chamber I, 6 July 2007. The Chamber had also made an initial

Chamber I made an initial determination on the admissibility of the case during the issuance of the arrest warrant, while refraining from making any such reference in their confirmation of charges decisions.<sup>10</sup> Moreover, in the *Al Bashir* and the *Abu Garda* cases,<sup>11</sup> the same chamber expressly declined to ‘use its discretionary *proprio motu* power to determine the admissibility of the case’, although it in fact addressed the question of lack of national proceedings. This demonstrates that, although the Chamber’s initial intention was to avoid a ruling on admissibility, it has apparently done so without even recognizing it.

The current state of practice before the ICC begs a crucial question: why is litigation on the principle of complementarity so scarce or marginal? The Statute and the Rules of Procedure and Evidence<sup>12</sup> regulate litigation with respect to admissibility at a very early stage of the proceedings. Article 18 of the Rome Statute, which appears under the title ‘Preliminary rulings regarding admissibility’, is self-evident. The provision is composed of seven long paragraphs, six of which are dedicated solely to issues in relation to admissibility litigation. Thus far, these paragraphs have never been applied. The same is true with respect to certain aspects of Article 19, which deals with challenges to the admissibility of a case. The provision was never triggered on the initiative of a state. Germain Katanga was the first accused to challenge the admissibility of the case pursuant to this provision. This challenge led to two interesting rulings on the subject: the decision issued by Trial Chamber II on 12 June 2009, which is the subject of this comment, and the judgment of the Appeals Chamber rendered on 25 September 2009.<sup>13</sup> Thus the actual state of practice on complementarity does not correspond to the amount of attention and efforts provided by states during the drafting of the Statute and the Rules.

Certainly, at the time, states could not clearly foresee that the litigation on complementarity would be prevented by a strategy adopted by the ICC Office of the Prosecutor known as ‘self-referral’.<sup>14</sup> They could not predict that the OTP would be so successful in securing three self-referrals, from, respectively, Uganda, the Democratic Republic of the Congo (DRC), and the Central African Republic in barely

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determination on admissibility in *Harun and Kushayb*, but until now there has been no confirmation of a charges decision as the suspects are still at large and the Chamber has not decided on the possibility of holding a confirmation of charges *in absentia*: *Prosecutor v. Ahmad Muhammad Harun* (*Ahmad Harun*) and *Ali Muhammad Ali Abd-Al-Rahman* (*Ali Kushayb*), Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, Pre-Trial Chamber I, 27 April 2007, para. 18.

10 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008.

11 *Prosecutor v. Omar Hassan Ahmad Al Bashir* (*Omar Al Bashir*), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 March 2009; *Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Prosecutor’s Application under Article 58, ICC-02/05-02/09-1, Pre-Trial Chamber I, 7 May 2009.

12 See Section 3 of Chapter II of the Rules of Procedure and Evidence, which is entirely dedicated to litigation in relation to admissibility issues.

13 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009.

14 On self-referrals see 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; El Zeidy, *supra* note 8, at 211–36, 274–83.

one year, from December 2003 until December 2004. These situations may have been encouraged by the fact that the Court was beginning its operation and needed to get into gear. But for the last five years the Court has received no new state party referrals (including self-referrals). Instead, the Prosecutor has moved in a different direction. He has decided to use his *proprio motu* powers under Article 15 for the first time in the context of the request to the Pre-Trial Chamber to authorize the commencement of an investigation into the situation in Kenya.<sup>15</sup> Invoking Article 15 by the Prosecutor may generate future litigation in relation to complementarity.

This comment examines the 16 June 2009 Trial Chamber II decision on the *Katanga* challenge to the admissibility of the case (*Katanga* Decision). It aims to address three issues that are of particular interest, since they have a direct impact on the functioning of the Court and its different organs: (i) the timing for a challenge of the admissibility of the case; (ii) the extent of access to information related to admissibility; and (iii) the position of the defence.

## I. THE TIMING ISSUE

As far as timing is concerned, a double reproach emanates from the *Katanga* Decision: the defence criticizes the ICC for not having examined the admissibility of the case earlier, while the Trial Chamber claims that the defence came too late with its challenge.

### 1.1. The reproach made by the defence

In its motion<sup>16</sup> the defence submitted that ‘the arrest warrant application is a vital stage of the proceedings with serious consequences when no admissibility analysis is conducted or where such analysis is flawed’.<sup>17</sup> Thus the defence argued that the Trial Chamber should have assessed the admissibility of the case as if it were the Pre-Trial Chamber at the time of the issuance of the warrant of arrest.

In an attempt to respond to this argument, the Trial Chamber was confronted with the first judgment issued by the Appeals Chamber on the subject on 13 July 2006 (the 13 July 2006 Appeals Chamber Judgment).<sup>18</sup> In this judgment, the Appeals Chamber stated that

[A]n initial determination of the admissibility of a case cannot be made an integral part of the decision on an application for a warrant of arrest for the reason that article 58(1) of the Statute lists the substantive prerequisites for the issuance of a warrant of arrest

15 *Situation in the Republic of Kenya*, Request for Authorization of an Investigation Pursuant to Article 15, ICC-01/09-3, Office of the Prosecutor, 26 November 2009.

16 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, ICC-01/04601/07-949, Defence for Germain Katanga, 11 March 2009 (hereinafter Defence Motion).

17 *Ibid.*, para. 53.

18 *Situation in the Democratic Republic of the Congo*, Judgment of 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’, ICC-01/04-169, Appeals Chamber, 13 July 2006

exhaustively. Article 19(1), second sentence, of the Statute cannot be invoked to make the admissibility of the case an additional substantive prerequisite for the issuance of a warrant of arrest.<sup>19</sup>

The Appeals Chamber went on to state that

when deciding on an application for a warrant of arrest in ex parte prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include 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.<sup>20</sup>

This was a very restrictive interpretation of Article 19(1), which provides a chamber with a broad discretion to determine *proprio motu* the admissibility of a case. The criteria established by the Appeals Chamber have no legal foundations and clearly impose an unnecessary limitation that is neither 'supported by the language of Article 19(1) nor by that of Rule 58'.<sup>21</sup>

The Appeals Chamber justified its interpretation by the need to safeguard the interests of the suspect. Of course, one could argue that the primary interest of a suspect is not to become a suspect. Interestingly, the *Katanga* defence raised concerns with respect to the Appeals Chamber analysis, whereby the impediments of the interests of the suspect in initial admissibility proceedings were not outweighed by their benefits.<sup>22</sup> However, according to the Appeals Chamber, this advantage was only marginal.

For the Appeals Chamber it was also feasible to leave the suspect to lodge an admissibility challenge when there is a warrant of arrest against him or her. The Appeals Chamber explained that a suspect may be in a position to present his or her challenge on the admissibility of the case in accordance with Article 19(2)(a) even before (s)he is actually arrested. This justification is interesting, but it fails to take into consideration some important practical aspects, such as the manner in which warrants of arrest are issued by the ICC or the method of their execution by states. Indeed, the Court's practice reveals that warrants of arrest are often issued under seal. The suspect may thus not be aware of the existence of a warrant against him or her. Very often when the suspect is arrested, he or she is surrendered to the Court the same day or the following day. This prevents the suspect in practical terms from challenging the admissibility of the case before surrender to the seat of the Court. Furthermore, according to the latest jurisprudence of the Appeals Chamber,<sup>23</sup> interim release is not easy to obtain when a suspect is detained in the detention facilities of the Court in The Hague.

19 Ibid., para 42.

20 Ibid., para. 52.

21 See El Zeidy, *supra* note 8, at 253.

22 Defence Motion, *supra* note 16, para. 55.

23 *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment of the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631-Red, Appeals Chamber, 2 December 2009.

One may therefore conclude that the advantage of having a pre-trial chamber decide on the admissibility of a case at the time of the issuance of a warrant of arrest is not purely marginal or unnecessary. However, since the 13 July 2006 Appeals Chamber Judgment was issued prior to the issuance of an arrest warrant against Germain Katanga, Pre-Trial Chamber I applied it, although it was under no legal obligation to do so.<sup>24</sup> This resulted in a very limited review of the admissibility of the case against Katanga in the context of issuing the arrest warrant against him and in the light of the restricted amount of information provided by the Prosecutor.<sup>25</sup>

This problem appeared once more before Trial Chamber II. The accused argued that there was a defect in the issuance of the warrant of arrest due to the failure of the Prosecutor to provide the Pre-Trial Chamber 'with relevant information regarding the admissibility of the case' by the time of applying for an arrest warrant.<sup>26</sup> This placed the Trial Chamber in the difficult position of trying to respect the 13 July 2006 Appeals Chamber Judgment and to guess the Pre-Trial Chamber's attitude if it had been engaged in a detailed review of the admissibility of the case during the issuance of the arrest warrant. The Trial Chamber finally managed to avoid the problem by deciding that the document that was not communicated to the Pre-Trial Chamber did not contain decisive information.<sup>27</sup>

The fact that the Trial Chamber used a clever legal argument to overcome a practical problem cannot conceal the potential negative implications for future decisions. It would be better for the Appeals Chamber simply to reconsider the position it adopted in 2006, which seems to restrict unduly the Pre-Trial Chambers' exercise of discretion under Article 19(1) of the Statute in the issuing of an arrest warrant.

The position endorsed in the 13 July 2006 Appeals Chamber Judgment seems to have influenced the most recent ruling on admissibility. In its judgment of 25 September 2009 on the *Katanga* Decision,<sup>28</sup> the Appeals Chamber faced the same question concerning information in the possession of the Prosecutor. It refused to entertain the second ground of appeal presented by the defence, possibly to avoid any conflict with the principal approach adopted in the 13 July 2006 Appeals Chamber Judgment. However, in another judgment concerning the *proprio motu* exercise

24 Rome Statute, Article 21(2). See G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 293. See also V. Nerlich, 'The Status of ICTY and ICTR precedents in Proceedings before the ICC', in *ibid.*, at 316 n. 43; A. Pellet, 'Applicable Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (2002), 1066.

25 *Prosecutor v. Germain Katanga*, Warrant of Arrest for Germain Katanga, ICC-01/04-01/07-1-ENG, reclassified as public pursuant to the decision ICC-01/04-01/07-24 dated 18-10-2007.

26 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213 tENG, Trial Chamber II, 16 June 2009, para. 59.

27 *Ibid.*, paras 70, 72–73.

28 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, Appeals Chamber, 25 September 2009.

under Article 19(1),<sup>29</sup> rendered a few days before the issuance of the warrant against Katanga, the Appeals Chamber arguably tried to limit the reach of the 13 July 2006 Appeals Chamber Judgment. In this judgment, the Appeals Chamber attempted to justify its position by explaining that its finding was justified at the time due to the context of the proceedings (which were *ex parte* Prosecutor only) and that the decision of Pre-Trial Chamber I was based on the gravity of the case – an element which involves an assessment of facts that ‘are unlikely to change’ in the course of proceedings.<sup>30</sup> The gravity argument was in fact never used by the Appeals Chamber in the 13 July 2006 Judgment. This reasoning poses the question whether a pre-trial chamber is once more at liberty to exercise its *proprio motu* power in the context of the issuing of an arrest warrant without the restrictions imposed by the 13 July 2006 Appeals Chamber Judgment, when the assessment involves factors (Article 17(1)(a–c)) other than gravity (Article 17(1)(d)). It seems that the Appeals Chamber has in 2009 discreetly reopened a door which in 2006 it wanted firmly to close.

### 1.2. The reproach made by the Trial Chamber

In the opinion of the Trial Chamber, the defence should have presented before the Pre-Trial Chamber its challenge on the admissibility of the case. Accordingly, the Trial Chamber proposed that the phrase ‘commencement of trial’ set out in Article 19(4) of the Statute in practical terms means the ‘constitution of the trial chamber’.<sup>31</sup> Another interpretation would have been to equate ‘commencement of the trial’ with ‘commencement of the hearings on the merits’. Article 64 of the Rome Statute, taking into consideration its structure, seems to favour the latter interpretation. However, the Trial Chamber has manifestly chosen the former for reasons of practicality, namely to determine at the earliest possible opportunity the *forum conveniens* which is better suited to deal with the case.

In this regard, although Article 19(5) provides that challenges should be brought as soon as possible, it is remarkable that this is addressed only to states, and more importantly, that no sanction is provided for in case of failure to comply. This suggests that states have left a door open to challenge the admissibility of a case as late as possible. Be it as it may, the length of the pre-trial and the trial phase was certainly not foreseen by the drafters of the Rome Statute. Had they predicted the complexity and length of the pre-trial and trial proceedings prior to the commencement of the hearings on the merits, they might have opted for a different solution that ensures greater compliance by states with the time frame of lodging an admissibility challenge.

It seems difficult to justify a defendant’s waiting two years subsequent to surrender for an opportunity to present a challenge to the admissibility of the case, as was the

29 *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Judgment on the Appeal of the Defence against the ‘Decision on the Admissibility of the Case under Article 19(1) of the Statute’ of 10 March 2009, ICC-02/04-01/05-408, Appeals Chamber, 16 September 2009.

30 *Ibid.*, para. 85.

31 *Prosecutor v. Germain Katanga and Mathieu Ngujolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213 tENG, Trial Chamber II, 16 June 2009.

case in the *Katanga* proceedings. Although a fair opportunity must be given to states and suspects to present their challenges, a maximum of six months after the surrender of the suspect should be more than enough, with the possibility for the Court to grant leave to present a challenge later if good cause is shown. In this respect, an amendment to the Rome Statute should be envisaged in the future (although certainly not in the next review conference in 2010). This would avoid leaving international proceedings 'at the mercy' of states or suspects wishing to challenge the admissibility of cases for an unreasonable period of time.

## 2. ACCESS TO INFORMATION

Access to information in relation to admissibility is crucial for both the Pre-Trial Chamber and the defence.

### 2.1. Access to information of the Pre-Trial Chamber

The question is simple: should the Pre-Trial Chamber have access to all materials in the Prosecutor's possession related to the question of admissibility at the time of the issuance of a warrant of arrest?

According to the 13 July 2006 Appeals Chamber Judgment, the answer is in the negative. This is simply due to the facts that Article 19 is not referred to in Article 58 of the Rome Statute and that the Pre-Trial Chamber should receive only the information mentioned in the latter provision. Such a justification seems to ignore the fact that admissibility is a general principle in the Rome Statute which does not need to be reiterated in every single provision. The fact that the Appeals Chamber allowed a pre-trial chamber to exercise its discretion *proprio motu* in exceptional circumstances during arrest warrant proceedings makes it even more compelling for the relevant chamber to receive the information necessary to properly conduct the review. Any different conclusion would render the application of Article 19(1) during arrest warrant proceedings inoperative. In the same vein, although Article 58 does not expressly require the Prosecutor to submit information needed to ascertain the jurisdiction *ratione loci* or *ratione temporis* of the Court, one may imagine that such information has to be submitted by the Prosecutor if the Pre-Trial Chamber requires it in the context of the issuance of a warrant of arrest.

In the *Katanga* Decision, the Trial Chamber reminded the Prosecutor that he had to provide the necessary information to the Pre-Trial Chamber in order to enable the latter properly to exercise its discretion within the parameters laid down by the 13 July 2006 Appeals Chamber Judgment. Because the Prosecutor did not provide full information to the Pre-Trial Chamber at the time of the issuance of the warrant of arrest, the Trial Chamber had to assess whether a particular document that had not been communicated to the Pre-Trial Chamber contained decisive information that should have been brought to the attention of the Pre-Trial Chamber by the Prosecutor in accordance with the jurisprudence of the Appeals Chamber.

Such a complex exercise (which is totally unnecessary) would have been avoided if the Appeals Chamber had applied the plain wording of Article 19(1) of the Statute and left the relevant chamber with the authority to exercise effectively its discre-



tion during the issuance of an arrest warrant. Such a conclusion would avoid an unwarranted start of a lengthy and costly process before the ICC.

## 2.2. Access to information by the defence

The *Katanga* Decision clearly demonstrates that the defence is in a weak position regarding access to information that may be useful for its challenge on admissibility.

Indeed, on 25 January 2008, the defence first addressed a request to the DRC for legal assistance.<sup>32</sup> On 27 February 2008, the DRC rejected this request. The DRC argued that the co-operation agreement with the Office of the Prosecutor is confined to that particular organ. It must be underlined that, as far as co-operation by states is concerned, the Rome Statute, and particularly Article 86, require co-operation with the Court and therefore its organs (as provided for in Article 34 of the Rome Statute), one of which is the Office of the Prosecutor (but not the defence). There is thus in the Rome Statute no equality of arms in the collection of evidence between the Office of the Prosecutor and the defence.<sup>33</sup>

In order to remedy the weak position of the defence at least partially in relation to the collection of evidence, the drafters of the Rome Statute established a mechanism under Article 57(3)(b) of the Rome Statute and Rule 116 of the Rules of Procedure and Evidence by which the defence may request the Pre-Trial Chamber to issue any order or request for co-operation in accordance with Part IX of the Rome Statute which may assist the defence in its preparation.

Being faced with the refusal by the DRC to co-operate, on 7 April 2008, the defence decided to resort to Article 57(3)(b), requesting Pre-Trial Chamber I to seek the co-operation of the DRC. The request proved to be controversial and on 25 April 2008 Pre-Trial Chamber I issued its decision, with a dissenting opinion by Judge Usacka, granting in part the defence's request.<sup>34</sup> The Chamber directed the defence with respect to some of the items requested to address the Prosecutor and the Registrar (who were likely to be in possession of those items) before attempting to seek the co-operation of the DRC. This was problematic because the defence wanted to check, by way of its request to the DRC for information, whether there was a gap in the disclosure provided by the Office of the Prosecutor.<sup>35</sup> In addition, the defence had already requested some items twice from the Office of the Prosecutor, without having received a response. The defence sought to appeal against the decision issued by Pre-Trial Chamber I, but the request was rejected because it was presented outside the time limit provided for in Rule 155 of the Rules of Procedure and Evidence.

This underlines the difficult situation that the defence may face in relation to a challenge of admissibility. In the light of limited access to useful information, an admissibility challenge may be fully dependent on the Office of the Prosecutor, which

32 Defence Motion, *supra* note 16, para. 10(a).

33 See also Rome Statute, Arts. 57(3)(d) and 99, which may be used only by the Prosecutor.

34 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the 'Defence Application Pursuant to Article 57(3)(b) of the Statute to Seek the Co-operation of the Democratic Republic of the Congo (DRC)', ICC601/04-01/07-444, Pre-Trial Chamber I, 25 April 2008.

35 Defence Motion, *supra* note 16, para. 10.

will most likely oppose any such attempt. Moreover, a state which has surrendered the suspect to the Court may be in total agreement with the Prosecutor on the fact that the case should be tried at the ICC.

### 3. THE ROLE OF THE DEFENCE IN THE APPLICATION OF THE PRINCIPLE OF COMPLEMENTARITY

The *Katanga* Decision reveals that complementarity is mainly a mechanism designed to protect state sovereignty,<sup>36</sup> and that the interests of defendants are sometimes only of secondary importance in this context.

This crucial statement is contained in paragraph 88 of the *Katanga* Decision:

[W]hen, 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.<sup>37</sup>

It does not come as a surprise that the Trial Chamber made this statement. The manner in which Article 17 is drafted suggests that the success of an admissibility challenge by a suspect may depend not only on his or her will, but rather on the state's desire. If a state has decided not to initiate proceedings and leaves a situation to the ICC, a challenge based on the desire of the suspect to be tried elsewhere is likely to fail, because the key factor in such determination is whether the *state* has the will to take genuine action with respect to the case involving the person. Although Article 19(2)(a) of the Rome Statute does not literally state that a challenge to the admissibility of a case brought by a suspect or an accused must be subject to the will of the state, this is in fact the sad reality resulting from the application of complementarity as designed in the text of Article 17.

There was a clear prior indication in the *travaux préparatoires* that practice might develop in this direction. The drafters of the Rome Statute were extremely clear on this point when they said,

It was further stated that an accused should not be able to challenge admissibility on the grounds of a parallel investigation by national authorities where those national authorities had in fact declined to challenge the Court's jurisdiction. These issues

36 See, e.g., Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), paras. 29–51; Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), para. 154. See also R. Rastan, *Complementarity – Contest or Collaboration?*, FICHL Publication Series No. 7 (forthcoming 2010); M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', (2001) 167 *Military Law Review* 20, at 47–8; K. Ambos, 'The International Criminal Court and the Traditional Principles of International Co-operation in Criminal Matters', (1998) 9 *Finnish Yearbook of International Law* 413, at 418; M. M. El Zeidy, 'From Primacy to Complementarity and Backwards: (Re)Visiting Rule 11 Bis of the Ad hoc Tribunals', (2008) 57 *International and Comparative Law Quarterly* 403, at 14.

37 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213 tENG, Trial Chamber II, 16 June 2009, para. 88.

involved how best to allocate prosecutorial power between the Court and those States where the accused did not have a proper role.<sup>38</sup>

When there is an agreement between the ICC Prosecutor and the referring state on the basis of burden-sharing and mutual agreement (as is the case, for example, in the DRC self-referral),<sup>39</sup> the opportunity of the defence to bring a successful admissibility challenge becomes very limited. An admissibility challenge may perhaps succeed in rare situations where the motion involves issues of *ne bis in idem* under Article 17(1)(c) of the Statute.

The suspect is literally deprived of challenges following an agreement between the Prosecutor and the state. Such an agreement may have the advantage of allowing the ICC to proceed quietly with its cases – that is, without facing a constant threat of being blocked by the challenge of a state having jurisdiction. But it has the clear disadvantage of facilitating a prosecutorial policy at the ICC that may be seen as being based on opportunism and partiality.<sup>40</sup> It is very unlikely that a state which refers a situation on its territory will agree to leave the ICC Prosecutor space to choose the cases he or she wants to prosecute before the Court in a free and transparent way. An agreement might, for example, be based on the understanding that government forces will be spared, while the Prosecutor will focus its independent investigations and prosecutions on rebel forces, and eventually on political opponents.<sup>41</sup> This may be a high price to pay in terms of credibility just to secure adjudication of a few minor cases by the ICC.

38 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Vol. 1, Supp. No. 22, UN Doc. A/51/22 (1996), para. 250.

39 To understand the extent of the agreement between the OTP and the DRC in the *Katanga* case, it is interesting to note that the observations of the DRC on the admissibility challenge brought by Germain Katanga were in fact simply annexed to the observations of the Prosecutor, albeit as a confidential annex; see *Katanga* Decision, para. 5.

40 On prosecutorial discretion see also W. A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', (2008) 6 *Journal of International Criminal Justice* 731; C. Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On', in Stahn and Sluiter, *supra* note 24, at 247.

41 See also A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *Journal of International Criminal Justice* 434, at 436.