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The Importance of Being Earnest: The Timeliness of the Challenge to Admissibility in *Katanga*

DOV JACOBS*

Abstract
This commentary argues that the Trial Chamber in *Katanga* adopted an erroneous interpretation of the Statute of the International Criminal Court by limiting the grounds to *ne bis in idem* on which a challenge to admissibility can be brought after the confirmation of charges. The Trial Chamber held that the 'commencement of trial' under Article 19(4) is the moment of the constitution of the Trial Chamber, rather than the making of opening statements. This commentary re-examines the legal reasoning of the Court and advocates a different reading. It also suggests that the Chamber has failed to strike a proper balance between the possibility of making challenges to admissibility and the smooth and efficient working of the proceedings, which compromises the long-term legitimacy of the institution and the interests of justice.

Key words
admissibility; International Criminal Court; *Katanga*; *ne bis in idem*; treaty interpretation

> The truth is rarely pure and never simple. Modern life would be very tedious if it were either, and modern literature a complete impossibility!
>
> Oscar Wilde, *The Importance of Being Earnest*, Act 1

Admissibility is one of the major procedural innovations of the Statute of the International Criminal Court (ICC or 'the Court'). In other international justice mechanisms, the adoption of the concept of primacy over national jurisdictions[1] meant that the case was automatically admissible if the jurisdiction of the tribunal in question was established. In case of international investigations and prosecutions, national authorities had to give preference to the competence of the tribunal and cease domestic proceedings. A different choice was taken in the context of the ICC, which operates on the basis of the principle of complementarity. Once it has established that the Court has jurisdiction over a case, it may face challenges of admissibility based on the grounds laid down in Article 17 of the Statute. The case will be deemed inadmissible (i) if it is not of sufficient gravity, (ii) if a state is already investigating

* Ph.D. Researcher, European University Institute, Florence [dovjacobs@gmail.com].

1 See the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY), Art. 9(2): 'The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.' This principle is embodied in similar terms in Art. 8(2) of the Statute of the International Criminal Tribunal for Rwanda (ICTR), Art. 8(2) of the Statute of the Special Court for Sierra Leone (SCSL), and Art. 4(1) of the Statute of the Special Tribunal for Lebanon (STL).

or prosecuting or has decided not to prosecute, or (iii) if the defendant has already been convicted (*ne bis in idem*). This admissibility threshold has raised considerable difficulties, which have been dealt with on a case-by-case basis in ICC decisions.

From a policy perspective, this additional threshold creates a need to balance two important considerations. Admissibility requires Court organs to give full effect to the requirements of Article 17, more specifically its implementation of the principle of complementarity, which grants national jurisdictions primary responsibility for investigation and prosecution. But as a judicial institution the ICC must be able to work efficiently and contain any abuses of procedure in order to limit undue delay. These considerations are addressed in two ways in the Statute. On a substantive level, Article 17 specifies strict conditions under which a state might prevent the exercise of jurisdiction by the Court. The state must not be unwilling or unable to proceed and not try to shield the person from justice.[2] On a procedural level, the Statute limits the number and timeliness of challenges, irrespective of their content.[3]

These various requirements have been the object of a number of ICC decisions. Several chambers have sought to strike a proper balance between the application of admissibility criteria and the efficient working of the Court. In its decision of 16 June 2009, Trial Chamber II (TC II) gave its Reasons for the oral decision on the Motion Challenging the Admissibility filed by Germain Katanga.[4] This decision was partly reversed by the Appeals Chamber in its Judgment of 25 September 2009.[5]

The decision of TC II, and in particular its reasoning on the timeliness of Katanga's admissibility challenge, will form the focus of this commentary. It will be argued that the Trial Chamber erred in its interpretation of the Statute by unduly limiting the possibility that the defendant challenge admissibility after the confirmation of charges.

Section 1 presents the findings that guided the Trial Chamber in its interpretation of the statutory provisions relating to the timeliness of the admissibility challenge. Section 2 reassesses the legal reasoning of the Court, in particular the meaning of the term 'commencement of the trial'. Section 3 argues that the Court has struggled to find a balance between the granting of admissibility challenges and the prevention of undue delay in proceedings. Building on Oscar Wilde, it is argued that 'good faith' should be the yardstick for striking this balance.

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2 An analysis of the complementarity framework is beyond the scope of our commentary. For more substantial studies, see P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdiction', in W. Schabas and F. Lattanzi (eds.), *Essays on the Rome Statute of the International Criminal Court* (1999), I; 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* (2002), I, 667–86; J. K. Kleffner and G. Kor (eds.), *Complementary Views on Complementarity* (2006).

3 ICC Statute, Art. 19.

4 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Art. 19 of the Statute), Case No. ICC-01/04-01/07, T.C.II, 16 June 2009 (hereinafter TC II Decision).

5 *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II on 12 June 2009 on the Admissibility of the Case, Case No. ICC-01/04-01/07 0A8, A.Ch., 25 September 2009 (hereinafter Appeals Judgment).

1. Taking a look inside: the solution adopted by the Trial Chamber

In its decision, the Trial Chamber divided its reasoning into several steps. First, it presented the question to be answered (1.1); then it adopted a contextual analysis (1.2) and a teleological approach, in order to support its interpretation of Article 19(4) of the Statute (1.3); lastly, it applied its approach to the case under consideration (1.4).

1.1. The question of the interpretation of 'commencement of the trial'

Before considering the merits of the defence motion, TC II had to satisfy itself of the admissibility of the challenge. The Chamber considered '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'.[6]

The answer to this question can be found in Article 19(4) of the ICC Statute, which sets down the conditions under which a challenge to admissibility may be brought. The article reads as follows:

> 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). (emphasis added)

This article seeks to prevent an overburdening of proceedings leading to trial. The possibility to challenge admissibility is therefore limited in two ways. First, a party[7] may only challenge admissibility once. Second, the challenge must take place before the commencement of trial. Challenges made after the commencement of trial can only be made based on Article 17(1)(c), which refers to *ne bis in idem* as defined by the Statute.[8] Based on this article and the fact that the defendant was challenging admissibility on other grounds than *ne bis in idem*, the answer revolved around the question whether the trial had already started in the sense of the Statute, and therefore barred the challenge by Katanga.

More specifically, it needed be determined 'whether the trial commences as soon as the Trial Chamber is constituted . . . or only . . . when the participants make their opening statements before the Chamber prior to the first witness testifying'.[9]

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6 TC II Decision, *supra* note 4, para. 28.

7 (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under Art. 58;
(b) A state which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
(c) A State from which acceptance of jurisdiction is required under article 12. (ICC Statute, Art. 19(2))

8 ICC Statute, Art. 20.

9 TC II Decision, *supra* note 4, para. 30.

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1.2. The absence of a contextual solution in the founding documents

In order to determine what is meant by the expression 'commencement of the trial' in Article 19(4), the Trial Chamber referred to the principles in international law of treaty interpretation, which require that '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'.[10]

When applying this rule of interpretation, the judges found that the wording of Article 19(4) itself does not establish the meaning of the term, which ruled out a simple literal interpretation of 'commencement of the trial'. This led the Trial Chamber to consider the context of this paragraph in Article 19 and more generally in the founding documents of the Court.[11] Article 19 is silent on the meaning of the expression.[12] This finding compelled the Court to broaden its contextual analysis to the Statute, the Rules of Procedure and Evidence, and the Regulations of the Court. The judges found that a reading of the founding documents 'highlights the concurrency of two conceptions of the expression "commencement of the trial"':[13] according to one conception, the trial begins when the Trial Chamber is constituted; according to the other, the trial begins when the opening statements are made. This finding made it impossible for the Chamber to draw a conclusion from this contextual interpretation.

The Trial Chamber explained this duality of meanings in the documents by referring to the hybrid influence of the common law and civil law systems in the drafting of the Statute.[14] In an inquisitorial logic, the trial starts as soon as the matter is referred to a trial chamber. In an adversarial system, greater emphasis is placed on the specific confrontation of evidence. The Chamber further acknowledged the nature of the drafting process, where provisions are written by different working groups in several languages, which might explain the use of the same word for different meanings.[15]

1.3. Looking for an answer in Article 19

Based on this analysis, the Trial Chamber considered '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 that gives full effect to the said provision and adheres to the intent of the States Parties when they adopted it'.[16] In other words, the Trial Chamber looked to the 'spirit of the text' in order to shed light on its letter. On its face, it appears that the judges applied a contextual analysis of Article 19 that they had previously deemed inconclusive.[17] But this apparent contradiction can be explained. The previous contextual analysis was designed to shed light on the *literal* interpretation of Article 19(4), whereas the subsequent

10 Ibid., paras. 31–32, quoting Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties.
11 Ibid., para. 33.
12 Ibid., para. 35.
13 Ibid., para. 41.
14 Ibid.
15 Ibid., para. 42.
16 Ibid., para. 42.
17 *Supra* section 1.2.

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contextual analysis is meant to shed light on the intent of the parties in drafting Article 19 as a whole, in order to interpret its fourth paragraph, and more specifically the meaning of 'commencement of the trial'.

For the judges, the context of Article 19 suggested that the challenge should be brought 'as soon as possible'.[18] This conclusion may be drawn from the fact that states are required to make their challenge 'at the earliest opportunity'.[19] TC II found further support for this position in the Rules of Procedure and Evidence. Referring to the requirement in Rule 58 not to cause 'undue delay' and the possibility in Rule 60 to bring challenges to admissibility before the Presidency, the Chamber noted that the content of the Rules 'illustrates how much the drafters . . . wanted challenges of this nature to be submitted at the earliest opportunity'.[20] The Chamber made reference to the requirements of complementarity.[21] It also argued that, given the costs of proceedings, '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'.[22] Based on this analysis, the Trial Chamber concluded that the 'commencement of the trial' for the purposes of Article 19(4) is the moment when the Trial Chamber is constituted. It found that 'after the confirmation of charges, only challenges based on [*ne bis in idem*] are allowed'.

1.4. Allowing the challenge due to exceptional circumstances

In the light of this reasoning, a challenge to admissibility by Katanga based on other grounds than *ne bis in idem* would have been inadmissible. But the Chamber broadened its approach. '[G]iven the ambiguity of the provisions of the Statute and of the Rules',[23] and due to the unclear guidelines provided by the Pre-Trial Chamber in *ex parte* hearings before the confirmation of charges, TC II found it necessary to rely on additional considerations. It argued that the defence had reason to believe that a challenge could be brought on other grounds than *ne bis in idem* after the confirmation of charges, and that 'it [was] appropriate to rule on the merits of the Motion'.[24]

Although his challenge had been allowed, the defendant claimed on appeal that the Trial Chamber had erred in its interpretation of Article 19(4), and called on the Appeals Chamber to state the correct interpretation for the benefit of future applicants.[25] The Appeals Chamber failed to provide further guidance on this point. The judges argued that the decision of TC II was not materially affected by its finding on the timeliness of the challenge, and found that a pronouncement on this issue was *obiter dicta* and 'would be tantamount to rendering advisory opinions on issues that are not properly before it'.[26]

18 Ibid., para. 44.
19 ICC Statute, Art. 19(5).
20 TC II Decision, *supra* note 4, para. 44.
21 Ibid, para. 45.
22 Ibid.
23 Ibid., para. 56.
24 Ibid., para. 58.
25 Appeals Judgment, supra note 5, para. 36.
26 Ibid., para. 38.

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2. Taking a step back: a critical analysis of the decision

Although the Appeals Chamber refused to review the Trial Chamber interpretation of Article 19(4) and the timeliness of the challenge, it voiced implicit disagreement. It stressed 'that the fact that the Appeals Chamber is refraining from pronouncing itself on the merits of the issue raised under the first ground of appeal does not necessarily mean that it agrees with the Trial Chamber's interpretation of the term "commencement of the trial" in Article 19(4) of the Statute'.[27]

Indeed, the Trial Chamber's reasoning is debatable in several respects, both in relation to its contextual analysis (2.1) and in relation to its teleological interpretation of Article 19 (2.2).

2.1. A flawed contextual analysis

The Trial Chamber was correct in its general assessment of the hybrid nature of the procedure described in the ICC Statute. Indeed, the text shares features of both the civil law and the common law traditions. This mixture is typical of international criminal procedure since its (re-)birth at the ad hoc tribunals.[28] The pre-trial phase reflects a duality of approaches. The fact that the Prosecutor is provided with considerable discretion in the drafting and presentation of charges in the indictment is a tribute to the common law system. However, the establishment of a pre-trial chamber with oversight over the work of the OTP represents a move towards a civil-law-oriented approach to proceedings which gives judges considerably more control over the process. There is a tension between these two schools of thought at every stage of the proceedings.[29]

Yet this does not mean that there is not some form of logic in the Statute. The Trial Chamber found itself faced with two apparently irreconcilable interpretations because it lost track of what it was trying to define. Indeed, there are examples in the Statute where the term 'trial' covers the more restrictive phase following the opening statements and instances where the notion of 'trial' covers a broader set of proceedings. But the Trial Chamber was not expected to define the word 'trial', but rather the expression 'commencement of the trial'. This is an important distinction. Although it is necessary to know the general meaning of the word 'trial', the Chamber should have focused its search on instances where the term 'trial' is used in the full sentence under consideration, namely the 'commencement of the trial'.

With this clarification in mind, one may observe a clear tendency in the Statute: when the expression 'commencement of the trial' is used, it seems to indicate the actual phase following the opening statements. This follows from a brief systematic analysis.

27 Ibid.

28 See K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?', (2007) 7 *International Criminal Law Review* 335.

29 For an analysis of this tension at the ICC, see D. Jacobs, 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-trial Phase', (2007) 6 *Law and Practice of International Courts and Tribunals* 317. For an example at the ICTR, see D. Jacobs, 'Commentary on ICTR, Judgment, *Prosecutor v. Ntagerura, Bagambiki and Imanishimwe*, Case No. ICTR-99–46-T, A.Ch, 7 July 2006', in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Vol. 24 (2009), 703.

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In the Statute, this expression is used four times (other than in Article 19(4)). In Article 61(9), the term 'commencement of trial' relates to the possibility for the Prosecutor to amend the charges after the confirmation hearing. It has been interpreted as referring to 'the true opening of trial when the opening statements, if any, are made prior to the calling of witnesses'.[30] Article 64(3)(c), which regulates the powers of the Trial Chamber in relation to the disclosure of evidence, states that disclosure should be done 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. It implies that the preceding proceedings are not part of the trial for the meaning of that article. Article 64(8)(a) requires that 'at the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber'. This phrasing indicates once again a restrictive interpretation of the term 'trial'. Article 68(5) states that, in order to protect a witness, the 'Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold' evidence or information that might endanger the person 'and instead submit a summary thereof'. This formulation is a little more ambiguous. But it is difficult to understand its rationale, if one applies the broad interpretation of the Trial Chamber. It would mean that witnesses are protected up to and including the confirmation of charges, but not in the period between the confirmation and the actual trial. Here again, it seems more logical to argue that 'commencement of the trial' is the phase of confrontation of evidence.

In the Rules of Procedure and Evidence, the expression appears five times. Rule 80 specifies the procedure to be followed when a defendant wishes to raise a ground for excluding responsibility other than those referred to in the Statute, 'where such a ground is derived from applicable law as set forth in Article 21'.[31] It provides that notice shall be given to the Prosecutor 'sufficiently in advance of the commencement of the trial to enable the Prosecutor to prepare adequately for trial'.[32] The reference to the 'adequate preparation of trial' seems to indicate a more limited concept of trial. Rule 81(4) allows the Chamber to ensure the safety of witnesses and victims 'including by authorizing the non-disclosure of their identity prior to the commencement of the trial'. This rule, read in conjunction with Article 68(5) of the Statute, also refers more probably to the trial in a strict sense. Rule 94(2) invites the Court to ask the Registrar to inform the defendant of any request for reparations 'at commencement of the trial'. This is the least clear provision, where it is impossible to establish with certainty what the expression means exactly. Rule 133 relates to the application of Article 19(4) presently under consideration. The interpretation adopted for the latter will naturally apply to the former.

Rule 134 relates to 'trial proceedings'. It provides that 'prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor

30 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 shall be submitted, ICC-01/04-01/06 1084, T.C. I, 13 December 2007, para. 39.

31 ICC Statute, Art. 31(3).

32 Rules of Procedure and Evidence, Rule 80(1).

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or the defence, may rule on any issue concerning the conduct of the proceedings'.[33] It adds that, '[a]t the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings'.[34] The wording of these paragraphs seems to run counter to the idea that the trial starts when the Trial Chamber is constituted. It appears to indicate that there is a phase preceding the 'commencement of the trial' where the Trial Chamber is already constituted.

A contextual analysis of the Statute and the Rules of Evidence shows therefore that (despite one ambiguous example in Rule 134) whenever the expression 'commencement of trial' is used, it refers to a more restrictive definition of 'trial' – that is, an understanding that is limited to the confrontation of evidence following the opening statements of the parties. Such a reading of the Statute would have saved the Trial Chamber from the need to look for exceptional circumstances in order to allow the challenge.

2.2. An inconclusive teleological interpretation

Even if one were to accept the first part of the Chamber's argumentation – that is, the argument that a contextual analysis is in fact inconclusive – the reasons for its subsequent findings are equally puzzling. The starting point is correct. The wording of the Statute reflects the wish of the drafters to ensure an efficient conduct of the proceedings by preventing an abuse of the possibility to challenge. This explains, as the Trial Chamber rightly recalls, why a state 'shall make a challenge at the earliest opportunity'[35] and that a challenge can only be made once by a party and only in exceptional circumstances after the commencement of trial.

But this indication alone does not answer the specific question of what the terms 'earliest opportunity' or 'commencement of the trial' mean. The Chamber supports its own reading by a series of additional examples that grossly misrepresent the content of the founding documents and *travaux préparatoires* (2.2.1) and lead to an inconclusive justification of the wording of the Statute (2.2.2).

2.2.1. Evidentiary overkill

The Chamber first draws some examples from the Rules of Procedure and Evidence. However, neither Rule 58 nor Rule 60 says what the Trial Chamber says they do. Both rules are procedural in nature. The 'undue delay' in Rule 58[36] relates only to proceedings concerning challenge to admissibility. The reading of Rule 60 is even more puzzling. Rule 60 states that challenges after the confirmation of charges have to be addressed to the Presidency. The Chamber argues that this approach 'illustrates how much the drafters of the Statute and of the Rules wanted challenges

33 Ibid., Rule 134(1).
34 Ibid., Rule 134(2).
35 ICC Statute, Art. 19(5).
36 'When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case . . . it may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay . . .' (Rules of Procedure and Evidence, Rule 58).

of this nature to be submitted at the earliest opportunity'.[37] But nothing in the rule suggests that a challenge must be brought after the confirmation of charges and before the constitution of the Trial Chamber.[38] The rule only provides an alternate recipient for the motion until the constitution of the Chamber. This is a purely procedural clarification which does not shed much light on the meaning of Article 19.

The Trial Chamber further refers to the *travaux préparatoires* in order to support its reasoning. It quotes the following sentence to highlight the drafting history: '[I]t was suggested that any challenge to jurisdiction or admissibility should be raised and decided upon *before any step in the trial was taken*.'[39] This passage is related to Article 35 of the 1994 Draft Statute for the International Criminal Court, which limited challenges to admissibility to the period 'prior to the commencement of the trial'.[40] However, neither the text of the draft statute nor the *travaux préparatoires* actually clarifies the ambiguity surrounding the expression 'commencement of the trial'. A further weakness of TC II's reasoning is that the relevance of this passage is not fully clear in the ICC context. In the 1994 Statute, there was no clearly defined pre-trial phase with a designated pre-trial chamber. The indictment prepared by the Prosecutor had to be presented to the Presidency, who could confirm it and then appoint a trial chamber.[41] This mechanism has two implications. Under the Draft Statute regime, challenges to admissibility were only possible after the nomination of the Trial Chamber. The article supports thus the exact opposite position than the one defended by TC II. Moreover, under the 1994 system, the only chamber to be appointed was the Trial Chamber itself. To equate the term 'commencement of the trial' with the moment of the constitution of the Trial Chamber would de facto bar any challenge to admissibility in the 1994 framework, and thus render Article 35 inapplicable. These findings indicate that the only possible interpretation of the expression in the 1994 draft Statute is in fact one that would define the commencement of trial as the moment when the opening statements are made.

2.2.2. Unconvincing justification of their position

There are some further objections to the justification of the interpretation by TC II. Some of them relate to methodology and invocation of interest. The Chamber claims that it is in the interests of 'suspects who have been deprived of their liberty' that the challenge to admissibility be brought as early as possible.[42] This is a surprising argument, since it is used against the defendant, who himself is making the challenge. Apparently, Katanga has decided not to invoke his right at an earlier stage. It is not

37 TC II Decision, *supra* note 4, para. 44.

38 'If a challenge to the jurisdiction of the Court or to the admissibility of a case is made after a confirmation of the charges but before the constitution or designation of the Trial Chamber, it shall be addressed to the Presidency, which shall refer it to the Trial Chamber as soon as the latter is constituted or designated in accordance with rule 130' (Rules of Procedure and Evidence, Rule 60).

39 Quoted in TC II Decision, *supra* note 4, para. 46. The emphasis is in the quotation, but was not in the original, a fact not mentioned in the decision.

40 Draft Statute for the International Criminal Court, 1994, adopted by the ILC at their forty-sixth session, Art. 35, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf.

41 Ibid., Art. 27.

42 TC II Decision, *supra* note 4, para. 45.

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necessarily the role of the Trial Chamber to invoke such an interest against the defendant.[43] The justification of the Chamber is based on a fictional assumption of will.

In its reasoning, TC II distinguished further between different rationales underlying the grounds of inadmissibility under the Statute. Article 17(1)(a) and (b)[44] are deemed to protect the sovereign rights of the state. Article 17(d)[45] is meant to ensure that the cases brought before the Court are of sufficient gravity. Article 17(c) (*ne bis in idem*) is designed to protect the rights of the defendant.[46] Although this distinction may serve as a useful general policy consideration, the Statute itself does not appear to be that rigid. It does explicitly limit challenges by the defendant to *ne bis in idem*. To have a domestic investigation and prosecution may in some cases be in the interests of the defendant, and one may argue that it is as much in the interests of the accused, as it is for the Court, to establish that a case is not of sufficient gravity.

TC II argues further that is only possible to ascertain whether the case would fall within the scope of *ne bis in idem* once the charges are confirmed. This is a valid point, but one that can also be applied to other grounds of inadmissibility.[47] In fact, from a purely logical point of view, it would seem that the existence of an actual completed trial, and thus the application of *ne bis in idem*, will be easier to ascertain at an earlier stage than the existence of national 'investigations' and 'proceedings', which are more fluctuating and ambiguous concepts.

3. Taking a step further: good faith as the yardstick

The previous analysis of the decision shows that the solution adopted by the Trial Chamber is neither justified by a contextual interpretation of the Statute and Rules of the Court, nor in line with the 'spirit' of Article 19. According to the correct interpretation, Article 19(4) must be read to allow challenges based on all grounds of inadmissibility until the opening statements. Thereafter, only challenges based on the principle of *ne bis in idem* may be admissible, with leave of the Court.

Despite its flawed legal reasoning, TC II raised some fundamental policy considerations that shed light on the balance between the rights of the defendant, the interests of states, and the interests of the Court in relation to admissibility challenges.

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43 For a striking international decision following the same approach, see *Prosecutor v. Samuel Hinga Norman*, Decision on the Request by the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman, Case No. SCSL-2003–08-PT, Trial Chamber, 29 October 2003 (the single judge claimed that international defendants had 'super due-process rights', a previously unknown category, which allowed the Tribunal to reject the request made by the Truth and Reconciliation Commission in order to protect Norman's rights, such as the right against self-incrimination, despite the defendant himself having given his approval for public testimony).

44 The case (a) is being investigated or prosecuted by a state or (b) has been investigated by a state.

45 The case is not of sufficient gravity.

46 TC II Decision, *supra* note 4, para. 48.

47 Several defendants have raised the issue of ongoing criminal investigations by national authorities. The case law of the Court has consistently adopted a restrictive 'same person, same conduct' test in order to allow investigations for crimes other than those being prosecuted at the national level. See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for an Arrest Warrant, Art. 58, Case No. ICC-01/04-01/06, P-T Ch. I, 10 February 2006. Such a test implies that only after the confirmation of charges can one can effectively establish whether the same conduct is being investigated at the national level.

As mentioned in the introduction and recalled throughout the commentary, the Statute contains safeguards against an abuse of admissibility challenges. A deliberate choice was made to require challenges to be made as early as possible – that is, according to the correct interpretation of Article 19(4), no later than at the start of trial. This is the moment when the balance shifts in favour of the international judicial institution and its interest in conducting its proceedings effectively.[48] As is rightly pointed out, 'disruptions, including transfer of proceedings to a completely different jurisdiction, particularly at the trial stage, will seriously impede efforts to secure justice without undue delay'.[49]

If one places the *Katanga* jurisprudence in a broader context, it appears that the Court is facing some difficulty in striking the desired balance between honouring admissibility challenges and avoiding undue delay in proceedings. For example, in its jurisprudence the Appeals Chamber has limited the possibility for Pre-Trial Chambers to assess admissibility on their own motion in the context of an arrest warrant,[50] by imposing conditions that are not explicitly contained in the founding documents of the Court.[51] The Appeals Chamber held that only exceptional circumstances may justify the exercise of discretion at that early stage. It specified that 'such circumstances may include instances where a case is based on established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review'.[52]

Another example is the gravity threshold contained in Article 17(1)(d). The scope of application of this provision has been significantly limited by the Appeals Chamber. The Chamber rejected[53] the original test proposed by Pre-Trial Chamber I[54] in such a way that the gravity issue has not been addressed in any notable way in subsequent proceedings. As a result, insufficient gravity is de facto no longer a ground on which admissibility can be challenged. Chambers have relinquished judicial oversight of the evaluation of the gravity of a case, and left its determination widely to prosecutorial discretion.[55]

These individual decisions must be seen within the context of the ongoing search for a proper procedural balance in the application of the provisions on admissibility. There is not necessarily one 'correct' legal interpretation of each single requirement.

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48 This explains why only *ne bis in idem* challenges are allowed at this stage, not only because it is a fundamental human right of the accused (S. Log, 'The Practical Application of *Ne Bis in Idem* in International Criminal Law', in S. Yee (ed.), (2004) 2 *International Crime and Punishment, Selected Issues* 169, at 172) but also because it requires a state making the challenge to show not only an investigation, but a successful prosecution. See C. K. Hall, 'Article 19', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 637, at 657.

49 Ibid.

50 ICC Statute, Art. 19(1): 'The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.'

51 ICC, *Situation in the Democratic Republic of the Congo*, Judgement on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber 1 Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Case No. ICC-01/04, A.Ch., 13 July 2006.

52 Ibid., para. 53.

53 Ibid., paras. 69–82.

54 ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Case No. ICC-01/04, P-T.Ch. I, 10 February 2006.

55 D. Jacobs, 'Commentary', in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals*, Vol. 23 (2010, forthcoming).

As expressed by Oscar Wilde, 'truth is rarely pure and never simple'. Typically, each actor in the proceedings puts forward his or her own version of the truth in order to defend his or her own perceived interests. States and defendants might seek to prolong or disrupt the procedure, while the Court will wish to proceed without undue delay. Even within the Court, interests do not necessarily coincide (for example, the Prosecutor may try to limit judicial oversight of its activities).

In the light of this, one must look for an overarching guiding principle that goes beyond the black letter of the law. Greater effectiveness and legitimacy of the system can only be achieved if all parties involved discover the 'importance of being earnest' by exercising their rights and interests with the maximum of good faith. This applies especially to the judges, who are the supreme guarantors of the legacy of the Court. They must look beyond short-term conditions of efficiency, as they have done in the current decision. Their willingness to exercise their mandate in good faith and to balance the interests of parties fairly will ultimately condition the long-term effectiveness of the Court and its legitimacy as a justice institution in the eyes of the world community.