

1 International Criminal Court

2 Appeals Chamber

3 Before: Presiding Judge Daniel David Ntanda Nsereko

4 Situation: Democratic Republic of Congo - ICC-01/04-01/07

5 In the matter: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

6 Judgment Hearing – Open session

7 Friday, 25 September 2009

8 (The hearing starts at 10:30 a.m.)

9 THE COURT USHER: All rise. The International Criminal Court is now in
10 session. Please be seated.

11 PRESIDING JUDGE NSEREKO: Good morning. Court Officer, please call the case.

12 THE COURT OFFICER: (Interpretation) Thank you, your Honour. Situation in
13 Democratic Republic of the Congo, the case of the Prosecutor v. Germain Katanga and
14 Mathieu Ngudjolo, ICC-01/04-01/07.

15 PRESIDING JUDGE NSEREKO: May I ask the parties and the participants to
16 introduce themselves for the record, starting with Mr. Katanga.

17 Yes, Counsel.

18 MR. O'SHEA: Mr. Katanga himself, are you asking if Mr. Katanga would
19 introduce himself? Or his counsel?

20 PRESIDING JUDGE NSEREKO: Counsel, please.

21 MR. O'SHEA: Yes, may it please your Honour. I am Andreas O'Shea and I
22 appear for Mr. Katanga who, as you see, is present, with Miss Sophie Menegon, Miss
23 Caroline Buisman, Miss Nathalie Wagner and Miss Aurélie Stoflique. Thank you very
24 much.

25 PRESIDING JUDGE NSEREKO: Thank you. And counsel for Mr. Ngudjolo Chui?

1 MR. KILENDA: (Interpretation) Thank you, your Honour.

2 On my left you have Miss Hélène Gorkiewicz, who is our Case Manager; and
3 behind me you have Aimée Merlandt and Caroline Martin, who are legal assistants,
4 pro bono assistants; and myself, Jean-Pierre Kilenda, lead counsel for Mr. Mathieu
5 Ngudjolo, here presented.

6 PRESIDING JUDGE NSEREKO: Thank you very much.

7 Mr. Prosecutor?

8 MR. GUARIGLIA: Good morning, your Honour. It's Fabricio Guariglia, senior
9 appeals counsel, appearing together with Mr. Eric Macdonald, senior trial lawyer in
10 the Katanga/Ngudjolo case, and Ms. Meritxell Regue Blasi, appeals counsel.

11 PRESIDING JUDGE NSEREKO: Thank you. I assume the representative of the DRC
12 is not here.

13 Representatives for victims?

14 MS. MASSIDDA: Good morning, your Honour. Victims in these proceedings are
15 represented by the Office of Public Counsel For Victims, Miss Maria Victoria Yazji,
16 counsel, and myself, Paolina Massidda, principal counsel. Thank you.

17 PRESIDING JUDGE NSEREKO: Thank you.

18 Today the Appeals Chamber is delivering its judgment on the appeal brought by
19 Mr. Katanga against the decision of Trial Chamber II of 12 June 2009 on the
20 admissibility of the case against him. The Appeals Chamber decides unanimously as
21 follows:

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

24 I shall now summarise the reasons for the Appeals Chamber's judgment. Please
25 note that the actual judgment which will be filed and notified to the parties and

1 participants shortly is the authentic version.

2 Now the relevant procedural history. Mr. Katanga, from now on referred to as
3 the Appellant, was arrested and surrendered to the Court in October 2009 on the
4 basis of a warrant of arrest issued by the Pre-Trial Chamber I. In September 2008
5 the charges against him were confirmed and the case was subsequently transferred to
6 Trial Chamber II.

7 In February 2009, the Appellant filed a motion with Trial Chamber II
8 challenging the admissibility of the case before the ICC. He submitted, among
9 other things, that the Democratic Republic of the Congo, DRC, was in a position to
10 prosecute him and that he therefore should not be prosecuted before the ICC. He
11 submitted furthermore that the Prosecutor, when applying for a warrant of arrest,
12 should have disclosed to the Pre-Trial Chamber certain documents that indicated
13 that he was under investigation in the DRC, thus making the case inadmissible
14 before this Court. After having heard the Prosecutor, the victims, and the DRC,
15 the Trial Chamber on 12 June 2009 rendered an oral decision on the admissibility
16 challenge. The Trial Chamber decided to reject the challenge and to declare the
17 case admissible.

18 The written reasons for the oral decision were filed on 16 June 2009. In the
19 written reasons the Trial Chamber ruled that the Appellant had filed his
20 admissibility challenge out of time. The Trial Chamber explained that under
21 Article 19(4) of the Statute, the challenge to admissibility of a case must be made
22 "prior to the commencement of the trial". In the Chamber's view, for the purposes
23 of Article 14(4), the trial commences when the case is transferred from the
24 Pre-Trial Chamber to the Trial Chamber.

25 The Trial Chamber nevertheless decided to condone the late filing and to

1 consider the merits of the Appellant's admissibility challenge. The Trial Chamber
2 explained that the Appellant may not have been aware that his challenge was filed
3 out of time.

4 Turning to the merits of the admissibility challenge, the Trial Chamber
5 rejected the Appellant's arguments that the Prosecutor failed to disclose to the
6 Pre-Trial Chamber relevant documents when applying for a warrant of arrest. In the
7 Trial Chamber's view, the documents in question were not decisive and therefore did
8 not have to be disclosed to the Pre-Trial Chamber.

9 The Trial Chamber explained furthermore that the case against the Appellant
10 was admissible because the DRC was unwilling in terms of Article 17 of the Statute
11 to prosecute him domestically. The Trial Chamber noted that the term
12 "unwillingness" was defined in Article 17(2) of the Statute. The Trial Chamber
13 acknowledged that the definition stipulated in this provision did not fit the
14 present case. However, the Trial Chamber opined that the list of Article 17(2) was
15 not exhaustive. In the Trial Chamber's view, there is another form of
16 unwillingness, not listed in Article 17(2), namely when a State decides to transfer
17 a case to the International Criminal Court. The Trial Chamber noted that the DRC
18 had clearly indicated that the Appellant should be prosecuted before the ICC,
19 thereby rendering the case admissible before this Court.

20 The Appellant filed his notice and document in support of the appeal against
21 the Trial Chamber's decision within the time limits stipulated in the relevant
22 provisions of the Rules of Procedure and Evidence and Regulations of the Court.
23 The Prosecutor responded; the victims, as well as the Democratic Republic of the
24 Congo, made observations on the appeal.

25 The Appellant raises five grounds of appeal.

1 The first ground of appeal is that the Trial Chamber erred in finding that
2 the challenge to admissibility was filed out of time. The Appellant submits that
3 the Trial Chamber gave an erroneous interpretation of the term "commencement of the
4 trial" in Article 17(4) of the Statute. In his view, the trial commences only with
5 the opening statements and with the actual hearing of the merits of the case. The
6 Appellant acknowledges that he was not prejudiced by the purported error because
7 the Trial Chamber decided to consider the merits of his admissibility challenge.
8 He nevertheless urges the Appeals Chamber to correct the error.

9 The Prosecutor does not make any submissions on the substance of the first
10 ground of appeal, but merely notes that regardless of the error, the "Decision that
11 the case against the Appellant is admissible remains unaffected." In the view of
12 the Prosecutor, the finding of the Trial Chamber in relation to Article 14(4) of
13 the Statute was an obiter dictum.

14 The DRC and some of the legal representatives of victims made submissions in
15 support of the Trial Chamber's interpretation of the term "Commencement of the
16 trial." The Appeals Chamber notes that the Appellant himself acknowledges that he
17 did not suffer any prejudice from the Trial Chamber's alleged erroneous
18 interpretation of Article 14(4) of the Statute; and that the error, if any, had no
19 bearing on the Trial Chamber's eventual decision on admissibility.

20 In previous decisions, the Appeals Chamber has required that for a successful
21 appeal, the error raised by an Appellant must have materially affected the appeal
22 decision. In the present case, the alleged error in relation to the time limit for
23 an admissibility challenge cannot be said to have materially affected the decision
24 on admissibility because the Trial Chamber did not dismiss the admissibility
25 challenge on the basis that it had been filed out of time. Instead, the Trial

1 Chamber considered the merits of the challenge and found the case admissible.

2 Thus, even if the Appeals Chamber were to conclude that the Trial Chamber
3 made an error in respect of its interpretation of the term "Commencement of the
4 trial" in Article 19(4) of the Statute, this error would not in itself be a reason
5 to reverse the Trial Chamber's decision on the admissibility of the case. In these
6 circumstances, the Appeals Chamber does not deem it necessary to consider the
7 merits of the Appellant's submissions under the first ground of appeal.

8 The Appeals Chamber nevertheless wishes to stress that although it is
9 refraining from pronouncing itself on the merits of the issue raised under the
10 first ground of appeal, this does not necessarily mean that it agrees with the
11 Trial Chamber's interpretation of the term "Commencement of the trial" in Article
12 14(4) of the Statute.

13 Now the second ground of appeal: The second ground of appeal is that the
14 Trial Chamber erred in finding that the Prosecutor was under an obligation to bring
15 to the attention of the Pre-Trial Chamber the Bogoro and related documents. The
16 Appellant argues that the Trial Chamber's assessment of the relevance of the
17 documents withheld from the Pre-Trial Chamber is flawed. He submits that it will
18 often be in the interests of the Court, the suspect and the State concerned to
19 consider the question of admissibility in the course of the application of an
20 arrest warrant.

21 The Appellant argues that the Trial Chamber erred when it found that the
22 Pre-Trial Chamber had determined the admissibility of the case on proper grounds.
23 He submits that the Pre-Trial Chamber may have determined the case to be admissible
24 had the Prosecutor provided it with the relevant documents. He requests the
25 Appeals Chamber to reverse this part of the decision pursuant to Article 83(2)(a)

1 of the Statute.

2 The Prosecutor contests the arguments of the Appellant under the second
3 ground of appeal. He recalls that the Appeals Chamber established in a previous
4 decision that a high standard must be met before a Pre-Trial Chamber should
5 determine the admissibility of a case proprio motu in the context of arrest warrant
6 proceedings. In his view, the Appellant has not presented any basis for departing
7 from this decision. The Prosecutor also submits that the Trial Chamber was correct
8 in finding that there was no need to disclose the documents to the Pre-Trial
9 Chamber.

10 The DRC and the victims generally support the decision of the Trial Chamber
11 and the position of the Prosecutor in respect of the second ground of appeal. The
12 Appeals Chamber does not deem it necessary to address the merits of the Appellant's
13 submission under the second ground of appeal. The present appeal is brought under
14 Article 82(1)(a) of this Statute against the decision with respect to
15 admissibility.

16 The purpose of an admissibility challenge and by extension an appeal under
17 Article 82(1)(a) of the Statute is to determine whether or not a case is
18 admissible. Generally speaking, the admissibility of a case must be determined on
19 the basis of the facts as they exist at the time of the proceedings concerning the
20 admissibility challenge. This is because the admissibility of a case under Article
21 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and
22 prosecutorial activities of States having jurisdiction. These activities may
23 change over time; thus, a case that was originally admissible, may be rendered
24 inadmissible by a change of circumstances in the concerned States and vice-versa.

25 The Appellant's argument that the Prosecutor failed to disclose relevant

1 documents to the Pre-Trial Chamber when applying for a warrant of arrest does not
2 present a cogent reason for the Appeals Chamber to depart from this principle. His
3 complaint relates to the decision of the Pre-Trial Chamber I regarding the issuance
4 of a warrant for his arrest. That is, however, not the subject of this appeal.

5 Were the Appeals Chamber to consider the merits of the second ground of
6 appeal it would, in effect, be assessing the correctness of the Pre-Trial Chamber's
7 decision on the warrant of arrest and not the decision of the Trial Chamber which
8 is the subject of this appeal.

9 Third ground of appeal: The third ground of appeal is that the Trial Chamber
10 erred in defining unwilling in the light of Article 17(2) of the - and the
11 principle of complementarity. The Appellant's main contention is that the Trial
12 Chamber erred when finding that the definition of the term "unwillingness" is not
13 exhaustive. He submits furthermore that the Trial Chamber's interpretation of the
14 term "unwillingness" is incompatible with the principle of complementarity. In his
15 view, States which are willing and able to prosecute international crimes should
16 not be allowed to relinquish jurisdiction in favour of the ICC.

17 The Prosecutor's principal response to the issues raised by the Appellant
18 under the third ground of appeal is that a contextual analysis of Article 17(2)(1)
19 of the Statute indicates that the question of unwillingness arises only if and when
20 there are investigations or prosecutions in a State having jurisdiction. The
21 Prosecutor, therefore, submits that the correctness or otherwise of the Trial
22 Chamber's interpretation of "unwillingness" is irrelevant.

23 He also underscores the fact that the Court cannot force a state to open
24 investigations or to prosecute a case and that the admissibility provisions do not
25 empower the Court to refuse to take up jurisdiction because it believes a State

1 should or could have done so.

2 The DRC and the victims generally support the arguments of the Prosecutor in
3 relation to the third ground of appeal. The Appeals Chamber notes that in the
4 appealed decision the Trial Chamber addressed the purported unwillingness of the
5 DRC to prosecute the Appellant domestically, but failed to address in detail the
6 other elements of Article 17(1)(a) and (b) of the Statute. In the view of the
7 Appeals Chamber, however, the case against the Appellant is admissible irrespective
8 of the correctness of the Trial Chamber's interpretation of the term
9 "unwillingness."

10 The Appeals Chamber agrees with the submissions of the Prosecutor that
11 according to the clear wording of Article 17(1)(a) and (b) of the Statute, the
12 question of unwillingness or inability of a state having jurisdiction of a case
13 becomes relevant only when due to ongoing or past investigations or prosecutions in
14 that State the case appears to be admissible.

15 In both Article 17(1)(a) and (b) of the Statute, the question of
16 unwillingness or inability is linked to the activities of the State having
17 jurisdiction. Article 17(1)(a) links the unwillingness or inability to the
18 investigation or prosecution unless the State is unwilling or unable genuinely to
19 carry out the investigations or prosecution. Similarly, in Article 17(1)(b),
20 unwillingness and inability refer to the decision of a State after investigation
21 not to prosecute the person concerned unless the decision resulted from the
22 unwillingness or inability of the State genuinely to prosecute.

23 Therefore, in addressing whether a case is inadmissible under Article
24 17(1)(a) and (b) of the Statute, the initial question to - the initial questions to
25 ask are, one, whether there are ongoing investigations or prosecutions or, two,

1 whether there have been investigations in the past and the State having
2 jurisdiction has decided not to prosecute the person concerned. It is only when
3 the answers to these questions are in the affirmative that one has to examine the
4 question of unwillingness and inability. To do otherwise would be to put the cart
5 before the horse.

6 It follows that in the case of inaction, the question of unwillingness or
7 inability does not arise. Inaction on the part of a State having jurisdiction
8 renders a case admissible before this Court.

9 The Appeals Chamber is not persuaded by the argument of the Appellant that it
10 would be to negate the obligation of States to prosecute crimes if they were
11 allowed to relinquish domestic jurisdiction in favour of the International Criminal
12 Court. The Appeals Chamber acknowledges that States have a duty to exercise their
13 criminal jurisdiction over international crimes. The Chamber must, nevertheless,
14 stress that the complementarity principle as enshrined in the Statute strike a
15 balance between safeguarding the primacy of domestic proceedings vis-a-vis the
16 International Criminal Court on the one hand and the goal of the Rome Statute to
17 put an end to impunity on the other hand. If states do not or cannot investigate
18 and where necessary prosecute, the International Criminal Court must be able to
19 step in.

20 Turning to the application of Article 17(1) to the present case, it should be
21 recalled that the Appeals Chamber is of the view that the admissibility of a case
22 must be determined on the basis of the facts at the time of the admissibility
23 proceedings. At the time of the admissibility proceedings in this case, there were
24 no proceedings against the Appellant in the DRC, be it for the crimes for which he
25 is charged before this Court, or for other alleged crimes. Nor has there been a

1 decision of the Democratic Republic of the Congo not to prosecute the Appellant.
2 To the contrary, the DRC has made it clear that it wished that he be prosecuted,
3 albeit before the ICC.

4 The third ground of appeal is therefore rejected.

5 Fourth ground of appeal

6 The fourth ground of appeal is that "... the Trial Chamber erred in confusing
7 the concepts of unwillingness and inability." This ground of appeal is closely
8 linked to the third ground of appeal. As the Appeals Chamber considers that in the
9 circumstances of the present case there is no need to consider whether the DRC was
10 unwilling in terms of Article 17 of the Statute to prosecute the Appellant, the
11 Appeals Chamber deems it unnecessary to address his arguments under the fourth
12 ground of appeal.

13 Fifth ground of appeal

14 The fifth ground of appeal is that "... the Trial Chamber's erroneous
15 definition of "unwillingness" has deprived the accused of a real and effective
16 right to challenge admissibility. The Appellant submits that the Trial Chamber
17 gave too little weight to his human rights. He states that if the State can decide
18 willingness "without the need to justify or explain its lack of willingness,
19 consensual burden sharing between the ICC Prosecutor and the national jurisdiction
20 would bind the Court and the accused; nothing the Defence would submit could alter
21 this or put such burden sharing into question." He argues "... that the Trial
22 Chamber's interpretation of "unwillingness" leading to a deprivation of the right
23 of the accused to effectively challenge the admissibility of the case, constitutes
24 a legal error which has materially affected the decision."

25 The Prosecutor refutes the Appellant's arguments under the fifth ground of

1 appeal. In his submission, the Appellant's claim that he cannot challenge the
2 admissibility of the case effectively is incorrect, noting a distinction between
3 the "right to challenge and the certainty of prevailing."

4 The DRC and the victims generally support the arguments of the Prosecutor in
5 relation to the fifth ground of appeal.

6 The Appeals Chamber is not persuaded by the Appellant's arguments under his
7 fifth ground of appeal. His main contention is that if a State were allowed to
8 transfer cases to the Court, the accused would be deprived of the right to
9 challenge the admissibility of his or her case effectively. The Appellant's
10 argument is misconceived. Pursuant to Article 19(2)(a) of the Statute, an accused
11 person has the right to challenge the admissibility of a case. Whether or not a
12 case is admissible is determined by the Court, which assesses the relevant facts
13 against the criteria of Article 17 of the Statute. As stated before, an important
14 element of Article 17(1)(a) and (b) is the behaviour of the State in question. If
15 at the time of the admissibility challenge the State is investigating or
16 prosecuting a case, or has investigated a case and decided not to prosecute, the
17 case will be inadmissible before the Court, subject to the exceptions provided for
18 in Article 17(1)(a) and (b). However, as the Prosecutor correctly notes, an
19 accused person does not have a right under the Statute to insist that States or
20 organs of the Court behave in a manner that would render a case inadmissible. The
21 admissibility of the case must be determined on the basis of the facts as they are,
22 not on the basis of how they in the view of the Appellant should be.

23 The Appeals Chamber is also not convinced by the Appellant's argument that he
24 should be allowed to raise, in the context of admissibility proceedings, an alleged
25 violation by the DRC of its obligation under international law to prosecute

1 international crimes. Nor is an admissibility challenge under Article 19(2)(a) of
2 the Statute the mechanism under which to raise alleged violations of the rights of
3 the accused in the course of the prosecutorial process. It is a limited procedure
4 that triggers the relevant Chamber's powers to determine the admissibility of the
5 case under Article 17 of the Statute. Unless alleged prejudices and violations are
6 relevant to the criteria of Article 17 of the Statute, they cannot render a case
7 inadmissible.

8 On an appeal pursuant to Article 82(1)(a) of the Statute, the Appeals Chamber
9 may confirm, reverse or amend the decision appealed. For the reasons I have
10 summarised, the Appeals Chamber is satisfied that the Trial Chamber correctly
11 decided that the case against the Appellant is admissible. The Appeals Chamber
12 therefore considers it appropriate to confirm the decision and to dismiss the
13 appeal.

14 This concludes my summary of the judgment and this session is closed. Thank
15 you.

16 (The hearing ends at 11:05 a.m.)