Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/14-01/18**
Date: **19 May 2020**

APPEALS CHAMBER

Before: **Judge Solomy Balungi Bossa, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA

Public

Yekatom Defence Appeal Brief – Admissibility

Source: **Defence for Mr. Alfred Rombhot Yekatom**

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INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom ("Defence" and "Mr. Yekatom" respectively) respectfully request the Appeals Chamber to reverse Trial Chamber V's *Decision on the Yekatom Defence's Admissibility Challenge*[1] (the "Impugned Decision") and remand the matter to the Trial Chamber for further proceedings. The Defence contends that the Trial Chamber erred when denying the Defence's admissibility challenge without first seeking observations from Central African Republic ("CAR") authorities.

RELEVANT PROCEDURAL BACKGROUND

2. On 30 May 2014, the President of the Central African Republic referred the situation in CAR since 1 August 2012 to the Office of the Prosecutor.[2]

3. On 11 November 2018, Pre-Trial Chamber II issued a warrant of arrest against Mr. Yekatom.[3] On 17 November 2018, CAR authorities surrendered him to the Court.[4] Mr. Yekatom made his initial appearance before Pre-Trial Chamber II on 23 November 2018.[5]

4. On 11 December 2019, Pre-Trial Chamber II issued its decision on the confirmation of charges.[6]

5. On 17 March 2020, the Registry transmitted the record of the proceedings to Trial Chamber V.[7]

6. On the same day, the Defence filed the *Yekatom Defence's Admissibility Challenge—Complementarity* contending that his case should be tried before the

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[1] ICC-01/14-01/18-493.
[2] *Presidency*, Annex 1 to the Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II, 18 June 2014, ICC-01/14-1-Anx1.
[3] ICC-01/14-01/18-1-Red.
[4] ICC-01/14-01/18-17-US-Exp-Red, paras 19-24.
[5] ICC-01/14-01/18-T-001-ENG.
[6] ICC-01/14-01/18-403-Red.
[7] ICC-01/14-01/18-455.

CAR Special Criminal Court ("SCC"). The Defence was not aware of any ongoing investigations or prosecutions of Mr. Yekatom in CAR, but requested the Trial Chamber to seek observations from CAR authorities and give them the opportunity to open an investigation of Mr. Yekatom before deciding on admissibility.[8]

7. The Prosecution filed its response on 30 March 2020.[9] The Legal Representatives of Victims filed their response on 17 April 2020.[10]

8. The Trial Chamber issued the Impugned Decision on 28 April 2020 without seeking observations from CAR authorities.[11]

IMPUGNED DECISION

9. The relevant part of the Impugned Decision is reproduced below:

> 17. The Chamber recalls that the Appeals Chamber has repeatedly applied the Inactivity Test in its admissibility assessments. According to this test, a Chamber must ask (i) whether there are ongoing investigations or prosecutions, or (ii) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. Only if the answers to these questions are in the affirmative, does the question of unwillingness or inability of a State become relevant. The assessment of unwillingness or inability therefore necessarily depends on investigative and prosecutorial activities by the State. Consequently, in the case of inactivity, the question of unwillingness and inability does not arise. This assessment must be made 'on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge.
>
> 18. The Chamber agrees with the Appeals Chamber that a different interpretation of Article 17(1) of the Statute would be irreconcilable with the wording of the provision and the overarching aim of the Statute to 'put an end to impunity' and ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished.' These aims would be jeopardised if, 'despite the inaction of a State, a case would be inadmissible before the Court, unless that State is

[8] ICC-01/14-01/18-456.
[9] ICC-01/14-01/18-466.
[10] ICC-01/14-01/18-482-Red.
[11] ICC-01/14-01/18-493.

unwilling or unable to open investigations'. As pointed out by the Appeals Chamber, this would result in a situation, where the 'Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so.

19. With regard to Mr Yekatom's Case, the Chamber notes, firstly, that the Defence itself concedes that there are presently no investigations or prosecutions against Mr Yekatom at the SCC and that the Inactivity Test is currently not satisfied.

20. Second, there is no indication that the CAR authorities have any intention to investigate or prosecute Mr Yekatom. Notably, the Chamber recalls that the CAR authorities not only referred the situation in its territory since 1 August 2012 to the Court, but subsequently implemented the Court's warrant of arrest against Mr Yekatom by transferring him to the Court and have up to this date not challenged the Court's jurisdiction. Moreover, the Chamber notes that nothing in the recent CAR observations indicates that the CAR authorities intend to challenge the Court's jurisdiction or to investigate or prosecute Mr Yekatom in the future.

21. In light of the above, the Chamber concludes that the CAR authorities, including the SCC, are presently inactive insofar as Mr Yekatom's Case is concerned. For this reason alone, and irrespective of the CAR authorities' hypothetical willingness or ability to investigate and prosecute, the Chamber is of the view that the case against Mr Yekatom is admissible. Consequently, the Chamber will not address the question of willingness and ability.

22. While the Chamber is mindful of the complementarity principle, it also stresses that increasing or encouraging State capacity for the investigation and prosecution of the most serious international crimes is not within the Chamber's purview. On the contrary, the Chamber must limit its decisions to the judicial matters at hand. In this regard, the Chamber also recalls the findings by the Bureau on Complementarity that '[i]ssues arising from the admissibility of cases before the Court under article 17 of the Rome Statute all remain a judicial matter to be addressed by the judges of the Court.

23. Additionally, the Chamber notes that Articles 64(2) and 68 of the Statute mandate the Chamber to ensure that the trial is expeditious, with full respect for the rights of the accused and due regard to the protection of victims and witnesses.

24. Accordingly, the Defence's Sequential Approach Request is rejected.

25. Lastly, as regards the Defence's submission that other Chambers have sought observations from States on admissibility before ruling on the challenge, the Chamber notes that in light of the Defence's concession that there are currently no proceedings against Mr Yekatom and the other reasons listed above, no further observations were required to adjudicate the present Admissibility Challenge.

RELEVANT PROVISIONS

Preamble to the Rome Statute of the International Criminal Court

> **The States Parties to this Statute,** […]
>
> **Emphasising** that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions […]
>
> **Have agreed as follows:**

Article 1 of the Statute

> **The Court**
>
> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 17 of the Statute

> **Issues of admissibility**
>
> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 19 of the Statute

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

   (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;

   (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.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. 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).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility

may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

   (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;

   (b) To take a Statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and

   (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Rule 58 of the Rules of Procedure and Evidence

Proceedings under article 19

1. A request or application made under article 19 shall be in writing and contain the basis for it.

2. When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. It may join the challenge or question to a confirmation or a trial proceeding as long as this does not cause undue delay, and in this circumstance shall hear and decide on the challenge or question first.

3. The Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2, who has been surrendered to the Court or who has appeared voluntarily or pursuant to a summons, and shall allow them to submit written observations to the request or application within a period of time determined by the Chamber.

4. The Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility.

GROUND OF APPEAL

10. The Trial Chamber erred when denying the Defence's admissibility challenge without first seeking observations from CAR authorities.

SUMMARY OF ARGUMENT

11. The Trial Chamber erred in refusing to seek observations from CAR authorities because (A) it has been uniform practice to hear from the concerned State before deciding an admissibility challenge based on complementarity; (B) adherence to the delicate balance reached at Rome whereby States relinquished part of their sovereign prerogatives to the Court requires that a State always be consulted when an issue of complementarity is

before the Court; (C) it failed to first establish the procedure for deciding an admissibility challenge as required by Rule 58(2) of the Rules of Procedure and Evidence; (D) due to the unique features of CAR law, the ICC Prosecutor may be the sole arbiter of admissibility; (E) "qualified deference" to post-conflict States by giving them time to investigate and prosecute is required when applying the Court's "inactivity test"; (F) it wrongly inferred the State's present position from CAR's referral of the case, transfer of the accused, failure to bring its own admissibility challenge, and failure to object to admissibility when submitting observations on interim release; and (G) it unnecessarily considered the expeditiousness of the proceedings, which are at a very early stage.

12. The Trial Chamber's error in refusing to seek observations from CAR materially affected its decision. The Appeals Chamber should reverse the Impugned Decision and remand the case to the Trial Chamber with instructions to seek observations from CAR authorities.

STANDARD OF REVIEW

13. The standard of review of the Trial Chamber's alleged procedural error in deciding not to seek observations from CAR authorities is as follows:

> The Appeals Chamber will not interfere with the Trial Chamber's exercise of discretion under article 19 (1) of the Statute to determine admissibility, save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.[12]

[12] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, 30 August 2011, ICC-01/09-01/11-307, paras. 89-90 citing *Prosecutor v. Joseph Kony et al.*, 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, 16 September 2009, ICC-02/04-01/05-408, paras. 38,47,80; *Prosecutor v. Gaddafi*, Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11-547-Red, 21 May 2014, para. 146.

14. A judgment is "materially affected" if the Trial Chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error.[13]

BACKGROUND

A. The CAR Special Criminal Court[14]

15. When, on 30 May 2014, the CAR Government referred the situation in its country to the ICC,[15] President Catherine Samba-Panza stated:

> The Criminal Justice System in the CAR, ravaged by violence and crisis experienced by the country for many years lacks the capacity to effectively conduct the necessary investigations and prosecutions.[16]

16. Likewise, when, on 24 September 2014, the ICC Prosecutor announced the opening of an investigation into the situation in CAR, she noted that:

> While the CAR authorities have made initial efforts to investigate crimes that could fall under the jurisdiction of the Court, existing proceedings remain limited to the preliminary stage and the Office understands that the prosecutors and police generally lack the capacity and security to conduct investigations and apprehend and detain suspects. Considering further the referral of the situation to the ICC Prosecutor by the CAR Government by which the CAR authorities indicated their inability to successfully conduct the necessary investigations and prosecutions, the Office has determined that the potential cases that would likely arise from an investigation into the situation would be admissible.[17]

17. However, slowly, the situation began to change. On 3 June 2015, following Parliamentary and Constitutional Court approval, President Catherine Samba-Panza signed Organic Law 15/003 creating a Special Criminal Court in the

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[13] *Prosecutor v. Simone Gbagbo*, Judgement on the Appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's Challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, ICC-02/11-01/12-75-Red, para. 41.
[14] This section is reproduced from the Yekatom Defence's Admissibility Challenge—Complementarity, ICC-01/14-01/18-456, paras. 6-13.
[15] ICC-01/14-1-Anx1.
[16] *Id.*
[17] Office of the Prosecutor, "Situation in Central African Republic II, Article 53(1) Report", 24 September 2014, para. 250.

Central African Republic.[18] The SCC has jurisdiction to prosecute, among others, genocide, crimes against humanity and war crimes committed in CAR since 2003.[19] It is composed of both international and CAR judges[20] and an international Prosecutor and Deputy national Prosecutor.[21] This is the first time a hybrid court operates alongside the ICC.[22]

18. The Organic Law further provides:

> Lorsqu'en application du Traité de Rome de la Cour Pénale Internationale ou des accords particuliers liant l'Etat centrafricain à cette juridiction internationale, il est établi que le Procureur de la Cour Pénale Internationale s'est saisi d'un cas entrant concurremment dans la compétence de la Cour Pénale Internationale et de la Cour Pénale Spéciale, la seconde se dessaisit au profit de la première.[23]

19. The SCC held its inaugural session on 22 October 2018, less than a month before Mr. Yekatom's transfer to the ICC.[24]

B. The Case Against Alfred Yekatom

20. Before the war, Alfred Yekatom held the rank of Corporal Chef in the Army of the Central African Republic.[25] During the war, it is alleged that he was one of several Anti-Balaka zone commanders.[26] He is the only lower level commander to be prosecuted by the ICC. Other zone commanders have been or are being prosecuted by CAR authorities.

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[18] Organic Law for the Creation, Organisation and Functioning of the Special Criminal Court, 3 June 2015 ("Organic Law").
[19] Organic Law, Article 3.
[20] Organic Law, Articles 11-14.
[21] Organic Law, Article 18.
[22] Patryk I. Labuda, "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?" (2017) 15 Journal of International Criminal Justice 175, 176.
[23] Organic Law, Article 37. The English translation reads: "When, in application of the Rome Treaty of the International Criminal Court or special agreements binding the Central African State to this international jurisdiction, it is established that the Prosecutor of the International Criminal Court has seized a case which is concurrently under the jurisdiction of the International Criminal Court and the Special Criminal Court, the second relinquishes jurisdiction in favor of the first."
[24] Ephrem Rugiririza, "Central African Republic: Special Criminal Court gets under way", 22 October 2018.
[25] ICC-01/14-01/18-282-AnxB1-Red, para. 20.
[26] *Id*, para. 22.

21. The Prosecution initially perceived Mr. Yekatom to have had a more significant role in the Anti-Balaka hierarchy. In its October 2018 application for the warrant for arrest, it alleged that he was part of a common plan with Patrice-Edouard Ngaïssona and others to target CAR's Muslim population through the commission of crimes.[27]

22. However, by the time it issued its *Document Containing the Charges* on 19 August 2019, the Prosecutor no longer claimed that Mr. Yekatom was part of the strategic common plan with Ngaïssona. Instead, it alleged that members of the strategic common plan used him as a "tool".[28] The Prosecution described Mr. Yekatom and his group during the hearing on the confirmation of charges as "tools of the strategic common plan".[29]

23. Mr. Yekatom stands charged with crimes arising out of seven events in the capital, Bangui, and the town of Mbaïki, in nearby Lobaye prefecture:

(1) attacking civilians in Bangui on 5 December 2013;
(2) displacing civilians from Boeing and Cattin to PK5 on 5 December 2013;
(3) destroying a mosque in Bangui on 20 December 2013;
(4) killing one person and mistreating others at the Yamwara school in Bangui on 24 December 2013;
(5) displacing civilians along the PK9-Mbaïki axis between 10 January 2014 and 6 February 2014;
(6) murdering an individual in Mbaïki on 28 February 2014; and
(7) using and enlisting children in armed conflict.[30]

24. The Pre-Trial Chamber found that Mr. Yekatom commanded up to 3,000 elements,[31] making him the equivalent of a brigade commander in an army.[32]

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[27] ICC-01/14-01/18-1-Red, para. 19.
[28] ICC-01/14-01/18-282-AnxB1-Red, para. 2.
[29] ICC-01/14-01/18-T-011-Red-ENG, p. 11, lns. 22-24.
[30] ICC-01/14-01/18-403-Red.
[31] ICC-01/14-01/18-403-Red, para. 66.

ARGUMENT

A. It has been the Uniform Practice to hear from the Concerned State before deciding a Complementarity Challenge

25. This is the first case in the history of the International Criminal Court where a Chamber decided an admissibility challenge based on complementarity without hearing from the concerned State. The Defence contends that the Trial Chamber made a procedural error when denying the Defence's admissibility challenge without first seeking observations from CAR authorities.

26. Article 17(2) of the Statute provides for an admissibility challenge based on complementarity to be made by an accused or a State. There is no provision in the Court's Statute, Rules, or Regulations explicitly requiring a Chamber to seek observations from a concerned State when an admissibility challenge based on complementarity is made by an accused. However, an examination of the three cases in which an accused made such a challenge demonstrates that Chambers have always sought observations from the concerned States, and gone to great lengths to receive and consider their views.[33]

27. In the *Katanga* case, when the accused filed his admissibility challenge, the Trial Chamber promptly ordered the Registrar to transmit a summary to the authorities of Democratic Republic of the Congo ("DRC").[34] Despite having been invited to do so by the Chamber, DRC authorities submitted no observations. The Chamber then scheduled a hearing, and requested the DRC

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[32] See, i.e. *Prosecutor v. Popovic et al*, Judgement, 10 June 2010, No. IT-05-88-T, para. 143.

[33] In a fourth case in which the accused filed an admissibility challenge, the challenge was based on the *ne bis in idem* provisions of Article 17 and did not affect the State's prosecution of the accused. In addition, the case arose form a Security Council referral of a non-member State. *Prosecutor v. Gaddafi*, Decision on the Admissibility Challenge of Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19, and 20(3) of the Rome Statute, 5 April 2019, ICC-01/11-01/11-662.

[34] *Prosecutor v. Katanga & Ngudjolo,* Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procedure et de prevue), 5 March 2009, ICC-01/04-01/07-943-Conf, as cited in *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 2.

authorities to attend.[35] At the request of the DRC authorities, the Chamber postponed the hearing, finding that their attendance was indispensable.[36] Only after receiving submissions from DRC at the hearing did the Trial Chamber issue a decision on the accused's admissibility challenge.[37]

28. In the *Bemba* case, after the accused filed an admissibility challenge, the Chamber first held a status conference to establish the procedure to be followed. The Chamber then solicited written observations from both CAR and DRC and convened a hearing to hear their oral submissions, postponing the start of the trial. At the hearing, the Chamber requested, and later received, further written submissions from CAR authorities.[38] Only after these submissions were received did the Trial Chamber rule on the accused's challenge.

29. In the *Laurent Gbagbo* case, the accused filed his admissibility challenge four days before the confirmation hearing. The Pre-Trial Chamber heard arguments from the parties and participants during the hearing and granted Ivory Coast's request to make written submissions on the issue.[39] Only after receiving those submissions did the Pre-Trial Chamber rule on the accused's challenge.[40]

30. In the one case where a Chamber raised the issue of complementarity *proprio motu*—the *Kony et al* case—the Pre-Trial Chamber invited observations from

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[35] *Prosecutor v. Katanga & Ngudjolo*, Ordonnance aux fins de la convocation d'une audience (règle 58-2 du Règlement de procédure et de preuve), 7 May 2009, ICC-01/04-01/07-1112.

[36] *Prosecutor v. Katanga & Ngudjolo*, Ordonnance aux fins de report de l'audience relative à l'exception d'irrecevabilité (règle 58-2 du Règlement de procédure et de preuve), 15 May 2009, ICC-01/04-01/07-1140, para. 4 as cited in *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 5.

[37] *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, paras. 94-95.

[38] *Prosecutor v. Bemba*, Decision on the Admissibility and the Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras. 24, 37-38.

[39] *Prosecutor v. Gbagbo*, Decision on the "Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo", 14 March 2013, ICC-02/11-01/11-418, para.7.

[40] *Prosecutor v. Gbagbo*, Decision on the "Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut, 11 June 2013, ICC-02/11-01/11-436, para. 28.

the government of Uganda. Only after receiving those observations did it rule on the issue of complementarity.[41]

31. All of the other admissibility challenges based on complementarity were brought by the States themselves, thus assuring their full participation.[42]

32. The Trial Chamber in Mr. Yekatom's case departed from these precedents primarily because it found that the Defence had conceded that no investigation of Mr. Yekatom was ongoing in CAR at the time the admissibility challenge was filed.[43] However, it was an error to give conclusive effect to the fact that the Defence knew of no active investigations of Mr. Yekatom. A suspect is not in the best position to know if he is under investigation. The Defence was forthright that it knew of no active investigations of Mr. Yekatom in CAR, but specifically requested that observations be sought from the State.[44] Such observations could have established definitively whether the State had an active investigation of Mr. Yekatom as well as whether it was willing and able to launch an investigation and prosecution if given the opportunity to do so.

33. The Appeals Chamber should find that the Trial Chamber committed a procedural error by departing from the uniform practice of seeking observations from the concerned State before deciding on an admissibility challenge based on complementarity.

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[41] *Prosecutor v. Kony et al*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, 10 March 2009, 10 March 2009, ICC-02/04-01/05-377, at paras. 1,4 and 8.

[42] *Prosecutor v. Ruto et al*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101; *Prosecutor v. Muthaura et al*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96; *Prosecutor v. Gaddafi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red; *Prosecutor v. Al-Senussi,* Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466; *Prosecutor v. Simone Gbagbo*, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47.

[43] Impugned Decision, para. 25.

[44] ICC-01/14-01/18-456, paras. 38-40, 60-63.

B. Adherence to the Complementarity Principle Requires that the Concerned State be Consulted

34. The complementarity principle has been said to be one of the cornerstones of the Rome Statute.[45] Without it there would have been no agreement at Rome.[46] Canadian diplomat John Holmes has noted that:

> Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. […] The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. […] It remains clear to those most active throughout the negotiations that any shift in the balance struck in Rome would likely have unravelled support for the principle of complementarity and, by extension, the Statute itself.[47]

35. All other Chambers, except the Trial Chamber in this case, treated the States in accord with the bargain struck in Rome where States gave up a part of their sovereignty in exchange for an assurance that the International Criminal Court would be a court of last resort. States must be heard when issues of complementarity are before the Court.

36. The literal understanding of the term "complementarity" conveys that the Court and States should work in unison - complementing each other - in reaching the Statute's overall goal, *i.e.* to fight against impunity for the commission of the most serious crimes of concern to humankind.[48] Under the complementarity principle, States have the primary responsibility to exercise

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[45] *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 34, fn. 38.

[46] S. A. Williams, "Issues of Admissibility, Article 17", in O. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article, (NOMOS, Baden- Baden, 1'* ed., 1999), p. 392, para. 20.

[47] J.T. Holmes, 'The Principle of Complementarity' in Roy S. Lee (ed.), *The International Criminal Court and the Making of the Rome Statue: Issues, Negotiations, and Results* (Kluwer 1999) 41, 73-74.

[48] *Prosecutor v. Gaddafi,* Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Dissenting Opinion of Judge Anita Usacka, 21 May 2014, ICC-01/11-01/11-547-Anx2, para. 19.

criminal jurisdiction. The ICC does not replace, but complements, them in that respect.[49]

37. The complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the Court on the one hand, and the goal of the Statute to put an end to impunity on the other hand.[50]

38. By using the term "inadmissible" rather than "admissible" in Article 17, the drafters of the Statute intended to place the emphasis in favour of national proceedings in the sense that the ICC's exercise of jurisdiction is not the rule, but the exception. States remain master over their own judicial proceedings as long as they do not allow perpetrators of serious crimes to go unpunished.[51]

39. The delicate balance between State sovereignty and international prosecution also means that there must be, to the extent possible, close cooperation and communication between the Court and the State in question.[52] Since, in case of conflict, the Court is the arbiter of where a case is to be tried, dialogue between the State and the Court is required.[53]

40. The Appeals Chamber should find that Trial Chamber made a procedural error by departing from these principles when it decided the Defence admissibility challenge without seeking observations from CAR authorities. Respect for the trust placed in the Court by the States when they gave up part

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[49] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, 30 August 2011, ICC-01/09-01/11-307, para. 37.

[50] *Prosecutor v. Katanga & Ngudjolo*, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 85.

[51] William A. Schabas and Mohamed M. El Zeidy, "Article 17, Issues of admissibility" in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court, A Commentary* (3rd edn, Beck Hart Nomos 2016), p. 793.

[52] See X. Agirre, A. Cassese, R. E. Fife, H. Friman, C. K. Hall, J. T. Holmes, J. Kleffner, H. Olasolo, N. H. Rashid, D. Robinson, E. Wilmshurst, A. Zimmermann, "*Informal expert paper: The principle of complementarity in practice*", ICC-OTP 2003, p. 5.

[53] J. T. Holmes, *Complementarity: National Courts versus the ICC*, in A. Cassese, P. Gaeta, J.R.W.D. Jones (ed.) The Rome Statute of the International Criminal Court: A Commentary, Volume 1 (Oxford 2002), p. 672.

of their sovereign prerogatives by agreeing to the Rome Statute requires that a State always be consulted when an issue of complementarity is before the Court.

C. Adherence to the Rules of Procedure and Evidence Requires that the Concerned State be Consulted

41. Admissibility proceedings are not criminal proceedings, but proceedings *sui generis*. Such proceedings are not merely between the Prosecution and the Defence, but involve the concerned State as well.[54] Rule 58(2) of the Rules of Procedure and Evidence requires that a Chamber "shall decide on the procedure to be followed" when any admissibility challenge is filed, be it by the State or the accused.

42. The Trial Chamber failed to comply with the mandatory language of Rule 58 when it ruled on the admissibility challenge without first deciding on the procedure to be followed. All other Chambers seised of an admissibility challenge based on complementarity have made orders on the procedure to be followed, including seeking observations from the concerned State, before issuing its decision on the merits.[55]

43. The fact that Rule 58(2) mandates that the Trial Chamber decide on the procedure to be followed implies that, as admissibility challenges based on complementarity necessarily implicate State sovereignty, something more than the normal practice of receiving responses from the parties and participants, already governed by Regulation 34, is required.

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[54] *Prosecutor v. Gaddafi*, Judgement on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi, Dissenting Opinion of Judge Anita Usacka, 21 May 2014, ICC-01/11-01/11-547-Anx2, para. 61.

[55] *Prosecutor v. Katanga & Ngudjolo*, Décision arrêtant la procédure à suivre au titre de l'article 19 du Statut (règle 58 du Règlement de procédure et de preuve), 5 March 2009, ICC-01/04-01/07-943-Conf; *Prosecutor v. Bemba*, Transcript of hearing on 8 March 2010, ICC-01/05-01/08-T-20-CONF-ENG, as cited in *Prosecutor v. Bemba*, Decision on the Admissibility and the Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para.24; *Prosecutor v. Gbagbo*, Decision on the "Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut, 11 June 2013, ICC-02/11-01/11-436, para. 28.

44. The explicit statements of State authorities as to its intentions are of the highest probative value in complementarity proceedings.[56] Obtaining observations from the State is therefore an essential part of "the procedure to be followed" in such proceedings.

45. The filing of an admissibility challenge on grounds of *ne bis in idem* [Article 17(1)(c)] or insufficient gravity [Article 17(1)(d)] may not require seeking observations of a State since those issues may not concern its interests. But when it comes to complementarity, under Article 17(1)(a) and (b), which can result in precluding a State from prosecuting the accused in its own courts, the requirement of deciding on the procedure to be followed requires seeking observations from all concerned, including the State. Therefore, the fact that Rule 58(3) does not specifically require seeking observations from a State in admissibility proceedings in general does not obviate the need to seek such observations when the subject of the admissibility challenge is complementarity.

46. The Appeals Chamber should find that the Trial Chamber made a procedural error in this case by failing to "decide on the procedure to be followed" as Rule 58(2) requires, and that the procedure to be followed for admissibility challenges based on complementarity must include seeking observations from the concerned State.

D. Due to the Unique Features of CAR law, the Prosecutor may be the Sole Arbiter of Admissibility

47. Even if the Appeals Chamber declines to hold that observations from the concerned State should always be sought in admissibility challenges based on complementarity, the unique features of CAR law required that they be sought in this case.

[56] *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 92; *Prosecutor v. Bemba*, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 238.

48. Article 37 of the statute creating the Special Criminal Court may be read to grant the ICC Prosecutor the exclusive power to decide on complementarity.[57] As such it would usurp the power of the judges of the International Criminal Court and vitiate the right of the accused to challenge the admissibility of the case.

49. Article 37 has been said to "contradict the idea of the ICC being a court of last resort"[58] and be "irreconcilable with even the widest interpretations of complementarity."[59] Even the Prosecutor, in her response to the admissibility challenge in this case, has observed that the primacy that Article 37 confers on her may conflict with the complementarity provisions of the Rome Statute.[60]

50. The Defence has not asked the Trial Chamber, and does not ask the Appeals Chamber, to pass on the validity of this national law. However, the operation of this law cannot infringe on the balance of powers among the organs of the Court or the rights of an accused before the Court.

51. By failing to seek observations from CAR authorities, the Trial Chamber allowed the law to be interpreted in such a way as to automatically make the case admissible. Under the ICC Prosecution's view, since she has asserted primacy over the case, the SCC is required to be inactive. Therefore, this Court's "inactivity test"[61] is not met. The unilateral decision of the ICC Prosecutor deprives the accused of having his complementarity challenge

[57] Article 37: "When, in application of the Rome Treaty of the International Criminal Court or special agreements binding the Central African State to this international jurisdiction, it is established that the Prosecutor of the International Criminal Court has seized a case which is concurrently under the jurisdiction of the International Criminal Court and the Special Criminal Court, the second relinquishes jurisdiction in favor of the first."

[58] Sarah Nimigan, "The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity'" (2019) 1 Journal of International Criminal Justice 1, 16.

[59] Patryk I. Labuda, "The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?" (2017) 15 Journal of International Criminal Justice 175, 193.

[60] ICC-01/14-01/18-466, paras. 17, 20.

[61] *Prosecutor v. Katanga & Ngudjolo*, 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, 25 September 2009, para. 78.

considered and deprives the Court of the right to determine if the case should be tried at this Court or in the courts of CAR.

52. That is why the Defence specifically requested the Trial Chamber invite observations from CAR authorities addressing whether, notwithstanding the ICC Prosecutor's invocation of Article 37, it would be willing and able to investigate and prosecute Mr. Yekatom's case if given the opportunity to do so.[62]

53. This approach is consistent with the "inactivity test". That test requires the admissibility of a case at the ICC to be assessed at the time of the Court's determination on admissibility.[63] By making that determination without seeking observations of the State as to whether, but for the Prosecutor's invocation of primacy, it would be willing and able to investigate and prosecute the case, the Trial Chamber abdicated its decision on the complementarity challenge to the Prosecutor, violating the balance of power among the organs of the Court and the rights of the accused to have the Judges, and not the Prosecutor, decide where his case should be prosecuted.

54. For that reason, under the particular circumstances of this case, the Appeals Chamber should hold that the Trial Chamber was required to seek observations from CAR authorities on the admissibility challenge and erred in refusing to do so.

E. Qualified Deference to National Jurisdictions is Consonant With the Complementarity Principle, and Consistent with the Inactivity Test

55. The Trial Chamber based its decision on the "inactivity test". Under that test, formulated by the Appeals Chamber, a Chamber considering a complementarity challenge must ask (i) whether there are ongoing

[62] ICC-01/14-01/18-456, para. 61.
[63] *Prosecutor v. Katanga & Ngudjolo*, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 75.

investigations or prosecutions, or (ii) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. Only if the answers to these questions are in the affirmative, does the question of unwillingness or inability of a State become relevant. The assessment of unwillingness or inability therefore necessarily depends on investigative and prosecutorial activities by the State. Consequently, in the case of inactivity, the question of unwillingness and inability does not arise.[64]

56. The assessment of inactivity is not made at the time of the arrest warrant, or the time that the complementarity challenge is filed, but must be made as of "the time of the Court's determination of the admissibility of the case."[65]

57. While formulating the inactivity test, the Appeals Chamber recognised that States' activities may change over time and that a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa.[66] If a State has the right to start an investigation and prosecution and to bring an admissibility challenge at any time before the start of the trial before the Court, then it stands to reason that the State may also start its investigation and prosecution when the admissibility challenge has already been made.[67]

58. But by applying the inactivity test without seeking observations from CAR authorities, the Trial Chamber precluded the possibility that the State could overcome the inactivity test at the time of the Chamber's determination on the complementarity challenge if given the opportunity to do so. The

[64] Impugned Decision, para. 17.
[65] *Prosecutor v. Katanga & Ngudjolo*, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 75.
[66] *Id*, para. 56.
[67] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, Dissenting Opinion of Judge Anita Usacka, 20 September 2011, ICC-01/09-01/11-336, para. 21.

establishment of a hybrid Tribunal on its territory gave CAR authorities the perfect opportunity to assert its national jurisdiction if it chose to do so.

59. Noted human rights lawyer Payam Akhavan has identified the "complementarity conundrum" of a state emerging from mass atrocities having to race to open investigations that mirror those of the ICC if it wants to prosecute a case itself.[68] He recommends that:

> In light of the complementarity principle, it would be reasonable to suggest that in a rapidly evolving post-conflict situation, the ICC should avoid a rush to judgment. National courts should be given a fair opportunity to exercise jurisdiction […] In making such determinations, it would seem that the overriding imperative should be to give effect to the object and purpose of the Rome Statute; namely, to confer primacy to national jurisdictions by making complementarity a practical reality.[69]

60. This is the problem that led Carsten Stahn, Director of the Grotius Centre of Legal Studies in The Hague and Professor of International Criminal Justice at Leiden University to promote the concept of "qualified deference". Recognising the difficulties that authorities in post-conflict societies face in rebuilding their prosecutorial and judicial systems, Stahn advocates that ICC judges, when faced with an admissibility challenge based on complementarity, should "award the state reasonable time to investigate and build the case after the notice of an admissibility challenge and prior to a final decision on admissibility."[70]

61. The Trial Chamber's concern--that the aim of ending impunity would be jeopardised "if the Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to

[68] Payam Akhavan, "Complementarity Conundrums: The ICC Clock in Transitional Times" (2016) 14 Journal of International Criminal Justice 1043, 1044.
[69] *Id*, 1047-48.
[70] Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?" in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP 2015) 228 ("Stahn, 'Qualified Deference'"), 254.

prosecute the case, even though that State has no intention of doing so"[71]—does not apply to the "qualified deference" approach, which contemplates a fixed time period by which the State must initiate an investigation and prosecution before the decision on the admissibility challenge.

62. National prosecutions for war crimes and crimes against humanity committed during the 2013-14 civil war are not a mere pipedream. CAR courts have convicted four Anti-Balaka zone commanders, and as recently as February 2020, convicted 32 Anti-Balaka members of crimes in the area of Bangassou. National courts have also convicted 14 members of the ex-Seleka.[72]

63. Today, international and domestic prosecutors and judges are installed in the Court's new premises in Bangui. More than €10 million per annum has been pledged by the United States, European Union, and EU member states. On 23 February 2020, the Prosecutor of the SCC reported that his office had detained three persons, transmitted seven files to the investigative judges, eight additional files were in the planning phase, and 15 more were part of the roadmap for 2020.[73]

64. CAR President Faustin-Archange Touadéra explained in September 2019:

> Mr. Rombhot [Yekatom] was arrested as part of the agreement we have with the ICC. I believe that today the Special Criminal Court has the means to begin its work and achieve its goals.[74]

65. The Trial Chamber's rush to judgement precluded CAR authorities from remedying their ICC Prosecutor-imposed inactivity. For this reason, the Appeals Chamber should hold that the Trial Chamber committed a procedural error in failing to provide CAR authorities with an opportunity to make observations before deciding the complementarity challenge.

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[71] Impugned Decision, para. 18.
[72] See ICC-01/14-01/18-456, paras. 51-53.
[73] Radio Ndeke Luka, "Bangui : La CPS rassure à travers un film documentaire", 23 February 2020.
[74] Le Monde, "Faustin-Archange Touadéra: 'Les conflits entre la France et la Russie n'ont pas lieu d'être en Centrafrique'", 7 September 2019.

F. The Trial Chamber Erred by Inferring, rather than Obtaining, the Position of CAR Authorities

66. In the Impugned Decision, the Trial Chamber expressly declined to seek observations from CAR authorities, reasoning that no further observations were required to decide the admissibility challenge since there was no indication that CAR authorities had any intention to investigate or prosecute Mr. Yekatom.[75]

67. The Chamber inferred this from the fact that CAR authorities (1) referred the situation to the Court; (2) transferred Mr. Yekatom to the Court; (3) have not challenged the Court's jurisdiction; and (4) did not indicate in its recent observations on Mr. Yekatom's interim release that they intended to investigate or prosecute Mr. Yekatom in the future.[76]

68. None of these were valid reasons not to seek observations.

69. A self-referral of a situation to the Court does not operate as a waiver of a State's right to prosecute its own nationals. Nothing in the Statute or drafting history suggests that a State cannot oppose the admissibility of an individual case that arises from its self-referral. On the contrary, Article 17(2) of the Statute provides for an admissibility challenge based on complementarity to be made by an accused or a State. In this case, the referral took place six years before the Impugned Decision and before the SCC was operational. The Appeals Chamber has made it clear that admissibility is to be judged based on facts existing at the time of the Chamber's admissibility decision.[77]

70. The same is true for the transfer of an accused to the Court. Nothing in the Statute or its drafting history indicates that a State waives its right to oppose the admissibility of a case by transferring a suspect to the Court. In the 17

[75] Impugned Decision, paras. 20, 25.
[76] Impugned Decision, para. 20.
[77] *Prosecutor v. Katanga & Ngudjolo*, 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, 25 September 2009, ICC-01/04-01/07-1497, para. 75.

months since Mr. Yekatom's transfer, the CAR Special Criminal Court has become operational, with a full slate of judges and prosecutors actively investigating cases like Mr. Yekatom's. It was wrong to infer from the transfer of Mr. Yekatom in 2018 that CAR authorities would not investigate and prosecute Mr. Yekatom in 2020 if given the opportunity.

71. Using a State's self-referral and its transfer of a suspect to the Court as an implied waiver of its right to prosecute its own citizens would have the unwelcome effect of discouraging States from referring situations to the Court and arresting and transferring suspects wanted by the Court. The Statute operates to do the opposite—encourage States to refer a situation and arrest a suspect and then have the issue of complementarity litigated before an ICC Chamber based on the facts as they exist at the time of the decision on admissibility.

72. The Trial Chamber also erred in inferring from the fact that CAR authorities had not brought their own admissibility challenge that they did not intend to investigate and prosecute Mr. Yekatom if given the opportunity. Article 19 provides two routes for the admissibility of a case to be challenged—one by the accused and one by the State. The fact that a State has not brought its own admissibility challenge cannot be a valid reason to deny a challenge by the accused as of right.

73. Had that been a valid reason to deny admissibility challenge at the request of an accused, the Trial Chambers in *Bemba, Katanga, and Gbagbo* would have denied the challenge on that basis alone, rather than seeking observations from the States.[78]

[78] *Prosecutor v. Bemba*, Decision on the Admissibility and the Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras. 24, 37-38 ; *Prosecutor v. Katanga & Ngudjolo*, Ordonnance aux fins de la convocation d'une audience (règle 58-2 du Règlement de procédure et de preuve), 7 May 2009, ICC-01/04-01/07-1112 ; *Prosecutor v. Gbagbo*, Decision on the "Demande d'autorisation de la République de Côte d'Ivoire aux fins de déposer des observations sur la requête relative à la recevabilité de l'affaire en vertu des articles 19 et 17 du Statut déposée par l'équipe de la défense de M. Laurent Gbagbo", 14 March 2013, ICC-02/11-01/11-418.

74. Finally, the Trial Chamber erred in expecting CAR authorities to indicate its intention to investigate and prosecute Mr. Yekatom in a submission on Mr. Yekatom's proposed interim release. The Registry's invitation to CAR asked them only to provide their observations on Mr. Yekatom's interim release.[79] As can be seen from the CAR authorities' observations, they directed their remarks solely to that issue.[80] If there is anything to be taken from the CAR submissions on interim release, it is that CAR authorities would in no way protect or favor Mr. Yekatom if entrusted with his prosecution.

75. The Trial Chamber erred in using CAR's self-referral, transfer, failure to make an admissibility challenge, and submissions on interim release as a substitute for seeking observations on Mr. Yekatom's admissibility challenge. The Appeals Chamber should find that the Trial Chamber committed a procedural error when relying on these matters rather than seeking observations from CAR authorities.

G. The Trial Chamber Erred in Relying on the Need for an Expeditious Trial when Refusing to Obtain Observations from CAR

76. In the Impugned Decision, the Trial Chamber also justified its decision not to seek observations from CAR authorities on the grounds that it needed to ensure that the trial is expeditious.[81]

77. The Defence filed its admissibility challenge the day after the Presidency constituted the Trial Chamber.[82] The first Status Conference has not yet occurred. The date for commencement of Mr. Yekatom's trial has not even been set. The Prosecution's submissions in advance of the first status conference indicates that because of COVID-19 restrictions, it would not be in a position to comply with its disclosure obligations until late 2020 at the earliest, and estimates that early 2021 would be the earliest period in which a

[79] ICC-01/14/01-18-478-Conf-AnxII, p 2.
[80] ICC-01/14-01/18-478-Conf-AnxII.
[81] Impugned Decision, para. 23.
[82] ICC-01/14-01/18-456.

trial could realistically begin.[83] The Defence has indicated that trial preparation should take place in parallel to the consideration of the admissibility challenge.[84] In any event, the timing of the Defence's admissibility challenge was well within the time limit provided by Article 19(4): "prior to or at the commencement of the trial."

78. Given these circumstances, seeking observations from CAR authorities on the admissibility challenge, or even giving them time to begin an investigation and prosecution, would have no impact on the commencement of the ICC trial should the admissibility challenge fail.

79. An examination of how other Chambers have handled admissibility challenges based on complementarity shows that written and oral observations from the State have been sought and received without compromising the expeditious conduct of the proceedings in circumstances where the challenges were filed far closer to the trial or hearing.

80. In the *Katanga* case, the accused filed his challenge three months after the first Status Conference. The Trial Chamber nevertheless sought written observations, extended the time for the State to respond, and held an oral hearing at which the State made submissions.[85]

81. In the *Bemba* case, the accused filed his challenge more than five months after the Presidency constituted the Trial Chamber. The Trial Chamber nevertheless sought written observations from two States and held an oral hearing at which CAR authorities made submissions.[86]

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[83] ICC-01/14-01/18-474-Red, paras. 9-10, 14, 25.
[84] ICC-01/14-01/18-472, para. 3.
[85] *Prosecutor v. Katanga & Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, paras. 1-5.
[86] *Prosecutor v. Bemba*, Decision on the Admissibility and the Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, paras.22-43.

82. In the *Laurent Gbagbo* case, the accused made his challenge on the eve of the hearing on the confirmation of charges. The Pre-Trial Chamber nevertheless sought and considered written observations from the State.[87]

83. In the *Ruto* case, Judge Usacka noted in her dissenting opinion that neither Article 19 of the Statute nor Rule 58 of the Rules of Procedure and Evidence specifically use the term "expeditious". Where criminal proceedings are at an early stage, it cannot be said that a decision to slightly prolong the admissibility proceedings compromises the right to be tried without undue delay. She concluded that the Chamber unduly emphasised and overweighed "expeditiousness", when compared to the State's sovereign right to investigate and prosecute the case itself.[88]

84. The Trial Chamber also had a misplaced concern for expeditiousness given that a trial date had not even been set and the importance of hearing from the concerned State. The Appeals Chamber should find that the Trial Chamber erred in refusing to seek observations from CAR authorities because it would have an adverse impact on the expeditiousness of the trial.

H. The Trial Chamber's Errors Materially Affected its Decision

85. For the reasons expressed above, the Trial Chamber committed a procedural error in failing to seek and consider observations of CAR authorities before deciding the admissibility challenge. This error materially affected its decision to deny the admissibility challenge on the grounds that the inactivity test has not been satisfied.

86. Had the Chamber obtained the observations from CAR authorities, those observations would have definitively indicated whether those authorities had

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[87] *Prosecutor v. Laurent Gbagbo,* Decision on the "Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut, 11 June 2013, ICC-02/11-01/11-436, paras. 1-5.

[88] *Prosecutor v. Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, Dissenting Opinion of Judge Anita Usacka, 20 September 2011, ICC-01/09-01/11-336, para. 29.

any active investigation of Mr. Yekatom, were willing and able to investigate, and the time frame in which such investigations could be conducted. The Trial Chamber would then have been in a position to fairly evaluate whether the State was indeed inactive at the time of its decision.

87. Since it cannot be said how the Trial Chamber would have decided the admissibility challenge had it not made the procedural error of failing to seek observations from CAR authorities, the error materially affected the Impugned Decision.[89]

CONCLUSION

88. The Appeals Chamber is respectfully requested to reverse the Impugned Decision and remand the matter to the Trial Chamber with instructions to seek observations from CAR authorities.[90]

RESPECTFULLY SUBMITTED ON THIS 19th DAY OF MAY 2020

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[89] *Ruto et al.*, Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application of the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(b) of the Statute, Dissenting Opinion of Judge Anita Usacka, 20 September 2011, ICC-01/09-01/11-336, para. 31.
[90] This filing complies with the provisions of Regulation 36 of the Regulations of the Court.