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HAGUE INTERNATIONAL TRIBUNALS

Perspectives on *Katanga*: An Introduction

CARSTEN STAHN*

The principle of complementarity is one the cardinal features of the architecture of the Rome Statute. Complementarity provides not only a forum to advocate overlapping competencies and litigate jurisdictional disputes over admissibility (e.g. Articles 17 and 19), but marks the foundation of the Statute as a multidimensional system of justice (e.g. Preamble, Article 1).[1] This topic has been a focus of attention of the Court since its very inception. When taking office, the Prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, qualified complementarity as one of the key factors for the successful operation of the Court, noting that 'the absence of trials led by [the] Court as a consequence of the regular functioning of national institutions would be a major success'.[2] As of 2003, the Office of the Prosecutor (OTP) has developed guidelines and principles on complementarity in order to clarify its theoretical underpinnings and operational features.[3]

1. ICC POLICY ON COMPLEMENTARITY

In its treatment and conceptualization, the concept of complementarity has undergone a dynamic transformation. At the Rome Conference, complementarity was traditionally associated with the protection of domestic jurisdiction and the intent of states to reconcile the independent powers of the Court (e.g. Article 15) with concerns of state sovereignty.[4] ICC jurisdiction and domestic jurisdiction were largely viewed as competing, or diametrically opposed, concepts. This focus has gradually shifted in the light of the first policies and practice of the Court, which were largely dictated by ideas of 'partnership', 'dialogue', and promotion of co-operation by states.[5] Complementarity is no longer exclusively understood as an instrument

* Of the Board of Editors.

1 See also OTP, Prosecutorial Strategy (2009–2012), 21 December 2009, paras. 81 – 82.

2 See Election of the Prosecutor, Statement by Mr Luis Moreno-Ocampo, New York, 22 April 2003, ICC-OTP-20030502–10. See also the restatement in OTP, *supra* note 1, para. 81 ('[T]he number of cases that reach the Court is not a decisive measure of effectiveness. Genuine investigations and prosecutions of serious crimes at the national level will illustrate the successful functioning of the Rome system').

3 See OTP, Informal Expert Paper, 'The Principle of Complementarity in Practice', 2003; OTP, Paper on Some Policy Issues before the Office of the Prosecutor, 2003.

4 See J. Holmes, 'Complementarity: National Courts versus the ICC', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the International Criminal Court*, Vol. 1 (2002), 667, at 668. For an in-depth treatment of complementarity, see J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008); M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008).

5 In particular, the ICC Prosecutor has placed strong emphasis on the idea of dialogue and partnership with domestic jurisdictions. See OTP, Report on the Activities Performed during the First Three Years (June 2003–June 2006), 12 September 2006, paras. 2 and 58.

to protect state interests or regulate competing concurrent jurisdiction between the ICC and domestic jurisdictions in line with the duties of states under the Statute (i.e., by fostering compliance through threat).[6] It is increasingly recognized as a 'managerial' principle which may serve to promote 'effective investigation and prosecution of crimes', ensure a division of labour between the ICC and domestic jurisdictions, and enable states to carry out proceedings and overcome dilemmas of 'inability' or 'unwillingness'.[7] This approach has made its entry into prosecutorial strategy under the label of 'positive complementarity'.[8] Both the merits and the limitations of a 'positive approach' to complementarity (e.g. risks of delay or obstruction of justice, forum shopping) are actively debated by states,[9] non-governmental organizations (NGOs), and the OTP.[10] The ICC Registrar has identified core areas in which the Registry can assist domestic jurisdictions in their capacity to conduct fair trials for serious international crimes (i.e. legal representation, witness protection programmes, court management, public information and outreach, field offices, implementing legislation).[11]

2. Legal and conceptual ambiguities

While the debate on the different policy dimensions of complementarity is unfolding at rapid pace in multiple fora, judicial analysis of the scope and limits of complementarity has long taken a back seat in jurisprudence. Due to the limited insight of chambers into domestic investigation and prosecution, and the political sensitivity of admissibility findings (i.e., in relation to inability or unwillingness), fundamental aspects of complementarity, such as the structure of Article 17, the applicability of admissibility criteria (Article 17(2) and (3)) to 'situations'[12] and

6 For a survey of the traditional understanding see F. Gioia, 'State Sovereignty, Jurisdiction and "Modern" International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 LJIL 1095.

7 See e.g. W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2008) 19 *Criminal Law Forum* 5; C. Stahn, 'Complementarity: A Tale of Two Notions', (2008) 19 *Criminal Law Forum* 87.

8 In its Prosecutorial Strategy the OTP distinguishes 'complementarity as an admissibility test, i.e. how to assess the existence of national proceedings and their genuineness', and the 'positive complementarity concept, i.e. how to promote national proceedings'. See OTP, *supra* note 1, para. 16. 'Positive complementarity' shares some of the following features: (i) it is focused on the idea of burden-sharing between the Court and national jurisdictions: the Court and domestic jurisdictions have a 'shared responsibility'; (ii) 'positive complementarity' involves co-ordination and dialogue between the Court and states, in addition to vertical powers (i.e. monitoring and control of domestic jurisdiction); (iii) under 'positive complementarity', the decision about the forum for justice is not made exclusively on the basis of domestic 'failure', but may take into account the comparative advantages of the respective fora; and (iv) 'positive complementarity' is not only designed to preserve the primacy of domestic jurisdiction, but also to create incentives and opportunities for states to undertake genuine investigations and prosecutions.

9 See the Discussion Paper submitted by Denmark and South Africa, 'Bridging the Impunity Gap through Positive Complementarity', November 2009, para. 24 ('Positive complementarity must never be an excuse for delaying or obstructing justice or become a tool in the hands of those who wish to preserve impunity, nor can it in any way affect the powers vested in the organs of the Court').

10 See OTP, *supra* note 1, para. 16.

11 See Consultative Conference on International Criminal Justice, 'The Three-Year Plans and Strategies of the Registry in Respect of Complementarity for an Effective Rome Statute System of International Criminal Justice', discussion paper by Silvana Arbia, Registrar of the International Criminal Court, New York, September 2009.

12 The OTP has addressed some of the criteria in its 2006 Draft Paper on the selection of situations and cases.

'cases',[13] the compatibility of self-referrals with duties of states (6th preambular paragraph), the scope of inherent or *proprio motu* powers of chambers under Article 19 or the standard of assessment for admissibility at different procedural stages, have remained unclear or contradictory in jurisprudence.

Admissibility issues have been addressed in the context of individual decisions since 2005. But no clear and coherent approach has emerged. Pre-Trial Chamber I has addressed the structure of Article 17 in its decision on the issuance of a warrant of arrest against Thomas Lubanga.[14] Following the approach suggested by the Expert Paper on Complementarity in Practice,[15] the Chamber distinguished admissibility in case of inaction under Article 17(1) from the assessment of inability or unwillingness under Article 17(2) and (3).[16] But it then mixed considerations relating to inaction with arguments of inability in its reasoning.[17]

Standards of assessment relating to admissibility have varied among chambers. Article 53(1) requires the Prosecutor to examine admissibility in the context of a decision to initiate an investigation. Pre-Trial Chambers have assumed the authority to make findings on admissibility on their own motion in arrest warrant proceedings. But Pre-Trial Chamber I has used different language (the 'case . . . is admissible')[18] in this context from Pre-Trial Chamber II, which has relied on a prima facie test ('appears to be admissible').[19] In its Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', the Appeals Chamber confirmed the *proprio motu*

13 PTC I has ruled since 2006 that '[i]t is a *conditio sine qua non* for a case to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court'. See PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Warrant of Arrest, Article 58, ICC-01/04–01/06 (10 February 2006), para. 31.

14 Ibid., para. 29.

15 See OTP, Informal Expert Paper, *supra* note 3, paras. 18 and 19 ('Where no State has initiated any investigation (the inaction scenario) . . . none of the alternatives of Articles 17(1)(a)–(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17 . . . [I]t is only where a State is investigating or prosecuting, or has already completed such a proceeding, that Article 17(1)(a)–(c) are engaged. In such circumstances, the case will be inadmissible, unless the exceptions in those provisions are established').

16 See *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 13, para. 29 ('The Chamber considers that the admissibility test of a case arising from the investigation of a situation has two parts. The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17 (1) (a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court. Accordingly, the Chamber will treat them separately').

17 See *Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 13, para. 36. For a survey, see M. El Zeidy, 'Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court,' (2006) 19 LJIL 741; El Zeidy, *supra* note 4, at 228–32.

18 See PTC I, *Prosecutor v. Mathieu Ngudjolo Chio*, Warrant of Arrest for Mathieu Ngudjolo Chui, unsealed on 7 February 2008.

19 See PTC II, *Prosecutor v. Joseph Kony et al.*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 ('Noting the statements in the 'Letter of Jurisdiction' dated the 28th day of May 2004, that "the Government of Uganda has been *unable* to arrest . . . persons who may bear the greatest responsibility" for the crimes within the referred situation; that "the ICC is the *most appropriate and effective forum* for the investigation and prosecution of those bearing the greatest responsibility" for those crimes; and that the Government of Uganda "*has not conducted* and *does not intend* to conduct national proceedings in relation to the persons most responsible"; Being satisfied that, on the basis of the application, the evidence and other information submitted by the Prosecutor, and without prejudice to subsequent determination, the case against . . . falls within the jurisdiction of the Court and *appears to be admissible*' (emphasis added).

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powers of the Pre-Trial Chamber, but set strict criteria for the determination of admissibility issues by the Chamber in the context of *ex parte* proceedings (i.e., the 'ostensible cause' test).[20]

The topic of self-referrals, which has been one of the innovations of the Court's initial practice,[21] has been approached with the utmost caution in jurisprudence. Experts have pointed to the 'potential *tension* between the two aspects of the complementarity function, i.e. the dialogue role and the monitoring role' since 2003.[22] Pre-Trial Chambers have been reluctant to engage with the deeper legal or policy justifications of this practice, or to address its risks (e.g. misuse of the Court, one-sided investigation), limitations, and implications (e.g. waiver of the right to challenge to admissibility).[23] Pre-Trial Chamber I has justified admissibility in the situation in the Democratic Republic of the Congo (DRC) by reference to concurrent inability.[24] Pre-Trial Chamber II has invited submissions on admissibility in the Ugandan situation in order to clarify the relationship between domestic justice efforts and ICC proceedings. But in its decision, the Chamber failed to analyse the deeper legality and legitimacy questions relating to the Ugandan referral. The Chamber merely reaffirmed its authority to interpret admissibility in the light of its competences under Article 19(1).[25]

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20 See Appeals Chamber, *Situation in Democratic Republic of the Congo*, Judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04–169 (issued under seal 13 July 2006, reclassified as public on 23 September 2008, para. 52 ('The Appeals Chamber accepts that the Pre-Trial Chamber may on its own motion address admissibility. However, in the Appeals Chamber's view, when deciding on an application for a warrant of arrest in ex parte Prosecutor only proceedings the Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect. Such circumstances may include instances where a case is based on the establishment jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review. In these circumstances it is also imperative that the exercise of this discretion take place bearing in mind the rights of other participants').

21 See generally C. Kress, '"Self-referrals" and "Waivers of Complementarity" – Some Considerations in Law and Policy', (2004) 2 *Journal of International Criminal Justice* 944; J. K. Kleffner, 'Auto-referrals and the Complementary Nature of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 41.

22 See Informal Expert Paper, *supra* note 3, para. 14 ('There is a potential danger that if the OTP gets too closely involved in providing training, advice and assistance to a national proceeding, it may be difficult to extricate the OTP to credibly criticize and question the process if it subsequently proves to be a non-genuine proceeding . . . It is suggested that, consistent with the presumption of bona fides toward co-operative States, the OTP proceed with a positive, co-operative approach to assisting national efforts, where appropriate, albeit with some caution to avoid being exploited in efforts to legitimize or shield inadequate national efforts from criticism. The OTP can assess this approach over time in the light of experience and lessons learned').

23 For a critical assessment, see Kleffner, *supra* note 4, at 222–3.

24 See *Prosecutor v. Thomas Lubanga Dyilo, supra* note 13, para. 35 ('In the Chamber's view . . . it appears that the DRC *was* indeed *unable* to undertake the investigation and prosecution of the crimes falling within the jurisdiction of the Court committed in the situation in the territory of DRC since 1 July 2002. In the Chamber's view, *this is why* the self-referral of the DRC appears consistent with the ultimate purpose of the complementarity regime') (emphasis added).

25 See PTC II, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04–01/05–377 (10 March 2009), para. 45 ('it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case'); para. 46 ('Since admissibility is the criterion allowing the Court to identify which cases, among those in respect of which it has jurisdiction concurrently with one or more national judicial systems, it is appropriate for it to investigate and prosecute under the complementarity regime, it is the view of the Chamber that it is for it to construe and apply the rules on admissibility as well').

3. THE FOCUS OF THE SYMPOSIUM

The case of the *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui* (which forms the basis of this symposium) marked the first opportunity for the Court to examine the rationales, foundation, and operation of complementarity in some detail.

The Katanga Defence team brought the first admissibility challenge under Article 19 in the history of ICC trial proceedings, arguing that the ICC had sidelined the 'primacy' of domestic jurisdiction and turned complementarity into 'primacy' of the Court by way of its application of the 'same conduct' test in admissibility assessments and its limited consideration of domestic investigations and the gravity of charges in the DRC.[26] The Trial Chamber rejected the challenge in a decision dated 16 June 2009. It specified *inter alia* that 'a State which chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done, must be considered as lacking the will referred to in article 17'.[27]

The Trial Chamber also adopted strict criteria for the timing of an admissibility challenge which have a significant impact on the relationship between pre-trial and trial procedure. It introduced a three-phase approach which limited the possibility to make admissibility challenges after the confirmation hearing, essentially to *ne bis in idem* challenges.[28]

In its decision of 25 September 2009,[29] the Appeals Chamber did not engage with arguments of the parties related to the appropriateness of the 'same conduct' test and the timeliness of the challenge under Article 19.[30] But it clarified some essential points on the understanding of complementarity.

The Appeals Chamber issued a decision of principle on the correct interpretation of Article 17, in particular the relationship between Article 17(1) and Article 17(2)

26 See ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2) of the Statute, 11 March 2009, paras. 16 f. The defence advocated a 'comparative gravity' test, which would 'compare' 'the gravity of the (intended) scope of investigations at the national level and the (intended) scope of investigations by the ICC Prosecutor', and a 'comprehensive conduct' test which would enable the comparison of the factual scope of the investigations.

27 See Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, para. 77.

28 See Trial Chamber I, *supra* note 26, para. 49: '(1) During the first phase, which runs until the decision on the confirmation of charges is filed with the Registry, all types of challenges to admissibility are permissible, subject to the requirement, for States, to make them at the "earliest opportunity". (2) In the second phase, which is fairly short, running from the filing of the decision on the confirmation of charges to the constitution of the Trial Chamber, challenges may still be made if based on the *ne bis in idem* principle. (3) In the third phase, in other words, as soon as the chamber is constituted, challenges to admissibility (based only on the *ne bis in idem* principle) are permissible only in exceptional circumstances and with leave of the Trial Chamber.'

29 See Appeals Chamber, Judgment on the Appeal of Mr Katanga against the Trial Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009.

30 Note, however, the caution of the Appeals Chamber vis-à-vis the approach of the Trial Chamber: 'The Appeals Chamber nevertheless wishes to stress 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'. See Appeals Chamber, *supra* note 29, para. 38.

and (3). The Chamber found that Article 17 is based on a two-prong test, which distinguishes inaction from unwillingness or inability:

> [I]n considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.[31]

This interpretation is essential for the future understanding of complementarity and the development of ICC policy. It leaves some leeway for the Prosecutor to use 'admissibility' as policy tool, either in an amicable way – that is, by agreed burden-sharing – or as a 'carrot and stick' – that is, the threat of ICC proceedings in case of domestic inaction.

Of particular interest is the way in which the Chamber assessed the rationale of complementarity, and the inherent tension between admissibility in case of state inaction and the (positive) duty of states to investigate and prosecute crimes (see, e.g., 6th preambular paragraph). The Chamber found that complementarity

> strikes a balance between safeguarding the *primacy of domestic proceedings* vis-à-vis the International Criminal Court on the one hand, and the goal of the Rome Statute to '*put an end to impunity*' on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in. (para. 85)

This decision adds a new dimension to the traditional 'balancing' model,[32] which had been focused on the conflict between state sovereignty *concerns* and independent powers of assessment of the Court.[33] In *Katanga*, the Chamber assesses the *free sovereign will* of states against 'considerations of efficiency and effectiveness'. It introduces a case-by-case assessment, which determines admissibility in inaction scenarios in the light of the facts existing at the time of the admissibility challenge[34] and considerations of effectiveness of justice (e.g. 5th preambular paragraph: 'put an end to impunity').[35]

The main contribution of the Appeals Chamber lies in its clarification of the general approach towards voluntary relinquishment of jurisdiction, which has been the

31 See Appeals Chamber, *supra* note 29, para. 78.

32 The reference of 'primacy of domestic proceedings' is misleading in this context, since there is no admissibility conflict, and thus no real (need for) primacy in case of inaction (the Court is then not a 'Court of last resort', but simply the only point of entry).

33 See Holmes, *supra* note 4, at 684. See also PTC II, *supra* note 25, para. 34 ('Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes').

34 Appeals Chamber, *supra* note 29, para. 56 ('Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17(1)(a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time').

35 Ibid., para. 79.

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subject of considerable controversy.[36] The Appeals Chamber jurisprudence provides an impact-based justification of the 'consensual' policy towards referrals which has shaped initial ICC practice.[37] It clarifies that self-referrals may be permissible under the Statute and consistent with its object and purpose of limiting impunity. The Chamber recognizes expressly that there 'may be merit' in 'the decision of a State to relinquish its jurisdiction in favour of the Court'.[38]

This reasoning coincides well with the status quo of the Court as an emerging new institution which requires cases to build its record and to justify its cause in the landscape of international criminal justice. But it may require further differentiation in the future. There is a flip side to the logic of voluntary relinquishment. With a growing docket and caseload, the Court might have to explain more thoroughly in the future why it does *not* take on situations or cases in scenarios of domestic inaction, even if it is the more effective forum. Moreover, in its long-term strategy, the Court may ultimately have to give greater weight to the idea of encouraging states to overcome their own ability (rather than facilitating an 'outsourcing' of responsibility) in order to produce a sustainable and lasting impact in specific situations.

These concerns are reflected in a caveat in the decision which demonstrates a certain uneasiness on the part of the Chamber to provide unconditional support for 'consensual admissibility'. Footnote 169[39] and a short proviso at the end of paragraph 85 leave a door open for the Court '[to] decide not to act upon a State's relinquishment of jurisdiction in favour of the Court', 'under the relevant provisions of the Statute and depending on the circumstances of each case'. This safeguard may provide some space to engage more deeply and critically with some of the limits and risks of self-referrals in other contexts – that is, risks of politicization of the ICC, court shopping, and disempowerment of domestic capacity.

The *Katanga* jurisprudence has some curious ramifications for the defendant. Admissibility turns into a 'catch-22' for the defendant in situations in which a state (self-)refers a situation to the Court and remains voluntarily inactive. The admissibility challenge under Article 19(2) becomes virtually impotent in such circumstances, since there is no alternative domestic forum.

This symposium seeks to shed further light on some of these issues. It discusses the legal and policy implications of the Trial and Appeals Chamber decisions from different perspectives.

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36 See, e.g., S. A. Williams and W. Schabas, 'On Article 17', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 614–16, paras. 23–24; M. H. Arsanjani and W. M. Reisman, 'Law-in-Action of the International Criminal Court', (2005) 99 AJIL 385.

37 See OTP, Paper on Some Policy Issues, *supra* note 3, at 4 ('The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. The principle is also based on considerations of efficiency and effectiveness since States will generally have the best access to evidence and witnesses').

38 See Appeals Chamber, *supra* note 29, para. 85.

39 Ibid., 169 ('Note, however, that not every inaction of States will automatically lead to proceedings before the Court').

Gilbert Bitti and Mohamed El Zeidy address the merits and shortcomings of the 16 June decision in the light of previous ICC jurisprudence, access to information, and the role of the Pre-Trial Chamber and the position of the defendant. They argue that the *Katanga* jurisprudence treated complementarity mainly in a one-dimensional way, namely as 'a mechanism designed to protect state sovereignty', while providing limited attention to the implications for the defendant.

Dov Jacobs devotes specific attention to the timing of admissibility challenges which remained undecided on appeal. He challenges the interpretation of the term 'commencement of the trial' by the Trial Chamber. He argues that considerations of 'good faith' ought to be given greater space in the adjudication of admissibility disputes.

Ben Batros analyses the *Katanga* Appeals Chamber decision from the perspective of the OTP. He places special emphasis on the role and dimensions of 'judicial restraint' in the decision – that is, restraint in the scope of the decision, the interpretation of the law, and the role of the Court. He argues that 'judicial restraint' is not (necessarily) a weakness but a strength, since it leaves flexibility regarding future policy choices in relation to 'positive complementarity'.

Susana SáCouto and Katherine Cleary challenge this point of view. They claim that the Appeals Chamber decision is correct in law (i.e. in its interpretation of Article 17), but shaky in terms of policy. They argue that the decision may facilitate undue burden-sharing by the OTP and undermine the role of domestic jurisdictions and duties of states under the Statute.

The contributions assembled in this symposium represent only a fraction of the diversity of opinion on complementarity, and the different interests and issues at stake. They should thus be understood as a starting point for discussion, rather than as a closing word on the legacies and failures of the *Katanga* decisions.