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The Judgment on the *Katanga* Admissibility Appeal: Judicial Restraint at the ICC

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Abstract

This article examines the judgment on Kantaga's appeal against the decision of Trial Chamber II of the International Criminal Court that the case against him was admissible. The Appeals Chamber rejected Katanga's appeal, and affirmed the admissibility of the case. However, it did not do so on the same basis as the Trial Chamber (that the Democratic Republic of the Congo (DRC) was unwilling). Rather, it looked at the plain language of Article 17, and found that at the time of the challenge the DRC was not investigating or prosecuting Katanga. This judgment can be seen as an example of judicial restraint. The Appeals Chamber dealt only with those questions which were necessary to dispose of the appeal. It did not engage in policy debates or seek to create new facts, but rather applied the Statute as drafted to the facts of the case before it. In doing this, the Appeals Chamber confirmed certain basic principles of the admissibility regime. The case also provides an insight into the relationship between admissibility and 'positive complementarity'.

Key words

admissibility; International Criminal Court; judicial restraint; positive complementarity; sovereignty

The decision of Trial Chamber II of the International Criminal Court (ICC) on the admissibility of the case against Germain Katanga[1] was the first ruling on a challenge to admissibility in over six years of the Court's operation. While the principle of complementarity is one of the founding principles of the Court and had been the subject of extensive academic commentary and debate,[2] judicial consideration of

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1 The decision was delivered orally on 12 June 2009: *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-67-ENG ET, 12 June 2009. Written reasons were subsequently delivered on 16 June 2009 in *Prosecutor v. Katanga and Ngudjolo*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07-1213-tENG, 16 June 2009 (hereinafter *Katanga* Admissibility Decision).

2 In addition to the specific discussion of 'positive complementarity' (see *infra*, notes 89 to 101), see, e.g., M. El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008); J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008); J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008); H. Olasolo, *The Triggering Procedure of the International Criminal Court* (2005); J. Holmes, 'Complementarity: National Courts vs. the ICC', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002); W. Burke-White and S. Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and the Admissibility Challenge in the Ugandan Situation', (2009) 7 *Journal of International Criminal Justice* 257; A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 *Virginia Journal of International Law* 107; J. Martin, 'The International Criminal Court: Defining Complementarity and Divining Implications for the United States' (2006) 4 *Loyola University*

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the admissibility provisions had been limited and had previously taken place only in the context of *proprio motu* reviews by the Chamber.[3]

Decisions on admissibility are one of the few interlocutory decisions which may be appealed as of right under the ICC Statute.[4] Given the lack of any precedent or settled jurisprudence and the importance of the subjects addressed, it is thus not surprising that the Trial Chamber's decision was not the last word on this matter. Katanga appealed, initiating another substantial round of arguments, with the prosecution, legal representatives of four separate groups of victims, and the authorities of the Democratic Republic of the Congo (DRC) all filing responses to or observations on Katanga's appeal.

In the end, some 140 pages of submissions were before the Appeals Chamber. Yet the Chamber delivered a limited judgment[5] which is characterized primarily by its restraint, exhibited in three ways. First, the Chamber dealt only with those questions which were necessary to dispose of this particular appeal. Second, the Chamber confined itself to interpreting the language of the ICC Statute and applying it to the case before it. Third, the Chamber took a restrained and realist view of the role of the Court as a judicial institution, and of the relationship between the Court and states.

Many academics and commentators, and indeed some practitioners, may be disappointed that the Appeals Chamber left so much unsaid in its judgment. However, this restraint is broadly consistent with the judicial philosophy evident in much

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Chicago International Law Review 107; F. Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 *Cornell International Law Journal* 725; L. Yang, 'Article on the Principle of Complementarity in the Rome Statute of the International Criminal Court', (2005) 4 *Chinese Journal Of International Law* 121; M. Arsanjani and M. Reisman, 'The Law-in-Action of the International Criminal Court', (2005) 99 AJIL 385; M. Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity', (2003) 7 *Max Planck Yearbook of United Nations Law* 591; J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 86; M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', (2002) 23 *Michigan Journal Of International Law* 869; J. Gurulé, 'United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?', (2001–2) 35 *Cornell International Law Journal* 1; M. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', (2001) 167 *Military Law Review* 20.

3 In particular *Prosecutor v. Ntaganda*, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ICC-01/04-02/06-20-Anx2, 21 July 2008, paras. 29–89; and *Prosecutor v. Kony et al.*, Decision on the Admissibility of the Case under Article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009 (hereinafter *Kony* Admissibility Decision). Each of these proceedings also led to appeals: see *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169, 13 July 2006 (hereinafter *Ntaganda* Admissibility Appeal Judgment); *Prosecutor v. 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, ICC-02/04-01/05-408, 16 September 2009 (hereinafter *Kony* Admissibility Appeal Judgment). See further B. Batros, 'The Evolution of the ICC Jurisprudence on Admissibility', in C. Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2010, forthcoming).

4 Art. 82(1)(a). Other decisions which may be appealed as of right include decisions on jurisdiction, detention, and release, and the decision of a pre-trial chamber to act on its own initiative under Art. 56(3); and a state may appeal the decision of a pre-trial chamber to authorize direct investigative steps on its territory under Art. 57(3)(d). Final decisions under Art. 74 and decisions on reparations under Art. 75 are also appealable directly.

5 *Prosecutor v. Katanga and 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 OA8, 25 September 2009 (hereinafter *Katanga* Admissibility Appeal Judgment).

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of the Appeals Chamber's jurisprudence to date. In addition, despite the cautious and conservative approach, the judgment nevertheless clarifies some key issues in the admissibility regime. The Appeals Chamber clearly set out the structure of admissibility determinations and confirmed that the plain language of Article 17(1) of the Statute applies even in cases of self-referral. Finally, the restraint with which it approached a determination of the admissibility of a case provides insight into how the judicial branch of the Court views the relationship between 'positive' and 'classical' complementarity.

1. Background

The Trial Chamber and the Appeals Chamber arrived at the same conclusion, that the case was admissible. Nevertheless, the reasoning which they applied differed significantly, and the contrast highlights the restraint shown by the latter.

1.1. The proceedings before the Trial Chamber

Germain Katanga argued that the case against him was inadmissible because the DRC had been investigating him, prior to closing that investigation in order to surrender him to the ICC.[6] He recognized that if the national state was not acting, then the case would be admissible before the ICC.[7] However, he disputed that, for the purposes of this assessment, the Court should limit itself to examining 'whether the same person is being investigated or prosecuted in respect of the same conduct' – the 'same conduct' test which had been applied consistently by ICC Pre-Trial Chambers.[8]

On the facts, Katanga argued that the DRC authorities had been investigating him at the time that he was surrendered to the Court. He claimed that this investigation covered his alleged responsibility for crimes against humanity in relation to attacks in the Ituri district of the eastern DRC, and did not exclude the village of Bogoro (the site of the attack which was the basis for the ICC charges);[9] and that even if the 'same conduct' test was applied, this investigation included the attack on Bogoro as it was mentioned in the dossier.[10] All of this, he argued, rendered the case inadmissible under Article 17(1)(a) of the Statute.[11] Katanga subsequently expanded

6 *Prosecutor v. Katanga and Ngudjolo*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a) of the Statute, ICC-01/04-01/07-949, 11 March 2009 (hereinafter *Katanga* Admissibility Challenge). The challenge was originally filed confidentially and *ex parte* on 10 February 2009, and was made available to the other parties on 25 February 2009.

7 Ibid., para. 28.

8 Ibid., paras. 29–44. Rather, Katanga argued that the objective of complementarity required that admissibility be determined based on a broader test, such as 'comparative gravity' or 'comprehensive conduct' (ibid., paras. 46–47, 51). For further discussion of the background to and content of the 'same conduct' test, see Batros, *supra* note 3.

9 Ibid., paras. 11–12 (also including genocide, and in one instance war crimes); *Prosecutor v. Katanga and Ngudjolo*, Defence Reply to Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a), ICC-01/04-01/07-1015, 1 April 2009 (hereinafter *Katanga* Admissibility Reply), paras. 4–5, 9, 14.

10 *Katanga* Admissibility Challenge, *supra* note 6, paras. 15, 38, 53; *Katanga* Admissibility Reply, *supra* note 9, paras. 6, 9, 14, 28.

11 In addition, Katanga subsequently argued that the DRC's decision to close its investigation on his transfer to the Court should be interpreted as a 'decision not to prosecute', which also rendered his case inadmissible under Art. 17(1)(b). *Katanga* Admissibility Reply, *supra* note 9, paras. 9–10.

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his challenge to argue that when the prosecution applied for an arrest warrant, it had failed to produce to the Pre-Trial Chamber certain documents which he alleged were relevant to admissibility and that the Trial Chamber should revisit the issuance of the warrant on that basis.[12]

The prosecution opposed the challenge and maintained that the case was admissible. On the preliminary question of the issuance of the arrest warrant, the prosecution submitted that it had followed the prior jurisprudence of the Appeals Chamber and had brought all necessary information to the attention of the Pre-Trial Chamber.[13] Turning to the substance of the admissibility challenge, the prosecution argued that the 'same conduct' test was well founded in the language, the context, and the object and purpose of the Statute.[14] Any other interpretation, including those proposed by Katanga, would deprive the admissibility regime of the objectivity which states had sought to instil, and would lead to inconsistent results.[15] The prosecution maintained that the DRC had not been investigating Katanga in relation to the attack on Bogoro[16] – a position confirmed repeatedly by the DRC government itself, both in writing and at the hearing.[17] The case was therefore admissible before the Court.

1.2. The Trial Chamber's decision

In contrast to the restraint subsequently shown by the Appeals Chamber, the Trial Chamber commenced its decision by addressing a procedural question which had not been raised by either party, and ultimately decided the admissibility of the case on a ground which had not been argued before it.

Neither the prosecution nor any of the other participants had objected to Katanga bringing his challenge to admissibility at the time that he did.[18] However, the Trial Chamber questioned the timing of the challenge at the hearing held on 1 June 2009, noting that under Article 19(4) of the Statute any challenge to admissibility which is

12 Ibid., paras. 4–7, 11–14.

13 *Prosecutor v. Katanga and Ngudjolo*, Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga pursuant to Article 19(2)(a), ICC-01/04-01/07-1007, 30 March 2009 (hereinafter Prosecution Response to *Katanga* Admissibility Challenge), paras. 103–107.

14 Ibid., paras. 51–96, 108.

15 See in particular Prosecution Response to *Katanga* Admissibility Challenge, *supra* note 13, paras. 69–74, 90–91.

16 Ibid., paras. 43, 109–110, and factual submissions referred to therein.

17 *Prosecutor v. Katanga and Ngudjolo*, observations écrites des autorités congolaises telles que présentées à l'audience du 1er juin 2009, ICC-01/04–01/07–1189-Anx-tENG, 16 July 2009, at 5; *Prosecutor v. Katanga and Ngudjolo*, Transcript of Hearing of 1 June 2009, ICC-01/04-01/07-T-65-ENG ET, at 78, lines 11–19; at 79, lines 18–21; at 81, lines 4–7; at 85, line 1–86, line 3; at 93, lines 14–16; at 94, line 12.

18 Katanga initially lodged his challenge to admissibility on 10 February 2009. The Presidency of the ICC had constituted Trial Chamber II and referred to it the case of *Prosecutor v. Katanga and Ngudjolo* some three and a half months earlier, on 24 October 2008 (*Prosecutor v. Katanga and Ngudjolo*, Decision constituting Trial Chamber II and referring to it the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-729, 24 October 2008). At the time that the challenge was lodged, a date had not yet been set for the hearing of the trial to commence; however, in March 2009 the Trial Chamber set the date for the commencement of the hearing of the trial as 24 September 2009 (*Prosecutor v. Katanga and Ngudjolo*, Décision fixant la date du procès (règle 132–1 du Règlement de procédure et de preuve), ICC-01/04-01/07-999, 27 March 2009). That date was subsequently postponed until 24 November 2009 (*Prosecutor v. Katanga and Ngudjolo*, Décision reportant la date d'ouverture des débats au fond (règle 132–1 du Règlement de procédure et de preuve), ICC-01/04-01/07-1442, 31 August 2009).

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not based on *ne bis in idem* must be brought prior to the commencement of the trial.[19] Both the prosecution and the defence submitted that the term 'commencement of the trial' has been interpreted as being the opening statements by the parties.[20] Nevertheless, the Trial Chamber devoted over one-third of its decision to examining whether Katanga's challenge to admissibility was itself admissible, ultimately holding that the challenge had been filed out of time, as the 'commencement of the trial' for the purposes of Article 19(4) was the moment that the Trial Chamber is first constituted.[21]

Despite this ruling, the Trial Chamber went on to consider the substance of Katanga's challenge.[22] It first addressed the issuance of the arrest warrant, finding that the documents which Katanga complained should have been placed before the Pre-Trial Chamber were not 'decisive', and therefore did not raise the type of 'ostensible cause' which under the Appeals Chamber's jurisprudence would have warranted a decision on admissibility at that stage.[23] On the admissibility of the case itself, although the parties had focused their submissions on the existence and extent of any domestic investigation of Katanga and whether the 'same conduct' test was appropriate for determining inadmissibility, the Trial Chamber found the case to be admissible on a different basis. It did not consider the actions of the DRC authorities under the rubric of activity or inactivity; rather, it conducted its examination based on a 'second form of "unwillingness", which is not expressly provided for in article 17' and which applies where a state 'chooses not to investigate or prosecute a person before its own courts, but has nevertheless every intention of seeing that justice is done'.[24] The Trial Chamber thus found the case to be admissible based on 'the clear and explicit expression of unwillingness of the DRC to prosecute this case'.[25]

2. Restraint in the scope of the judgment

The first expression of the Appeals Chamber's restraint was in its selection of the issues on which it ruled substantively. Of the five grounds which Katanga raised on appeal, the Appeals Chamber dismissed three without considering the substance of the arguments. It also expressly declined to consider the 'same conduct' test which had been at the core of the debate before the Trial Chamber.

19 *Prosecutor v. Katanga and Ngudjolo*, Transcript of 1 June 2009, ICC-01/04-01/07-T-65-ENG ET, at 27, line 23–28, line 23.

20 Ibid., at 29, lines 5–8, and at 45, line 12–46, line 2.

21 *Katanga* Admissibility Decision, *supra* note 1, paras. 49–50. Of the 95 paragraphs of the written reasons, the Trial Chamber devoted 33 paragraphs to the question of the timing of the challenge (paras. 7–8, 28–58).

22 Ibid., paras. 57–58. The Trial Chamber did so on the basis that the relevant provisions of the Statute and the Rules were vague, the defence was not aware that it was filing the challenge out of time, and that statements of the Pre-Trial Chamber may have led the defence to believe that it could bring the challenge before the Trial Chamber (see para. 56).

23 Ibid., paras. 59–73 (see in particular paras. 65–66, 69–71), referring to *Ntaganda* Admissibility Appeal Judgment, paras. 2, 52. See further Batros, *supra* note 3.

24 *Katanga* Admissibility Decision, *supra* note 1, para. 77.

25 Ibid., para. 95.

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The Appeals Chamber did so for various reasons. In some cases, its ruling on one ground of appeal rendered a subsequent argument or ground of appeal redundant.[26] However, many of the issues which the Appeals Chamber declined to consider illustrate the focused approach that the Appeals Chamber takes to interlocutory appeals which it considers to be a confined procedure the purpose of which is restricted to reviewing and correcting any error in the decision under appeal.[27] One consequence of this approach is that the arguments on appeal must demonstrate that the relevant Chamber erred in the decision under appeal.

In Katanga's second ground of appeal, he challenged the Trial Chamber's finding that the prosecution had not been obliged, as part of its application for a warrant of arrest, to place before the Pre-Trial Chamber a particular document which made reference to Bogoro.[28] However, one of the bases on which the Appeals Chamber dismissed this ground of appeal was that it effectively asked the Appeals Chamber to review the Pre-Trial Chamber's decision to issue the warrant of arrest, more than two years previously. This, it held, was not the purpose of an appeal against the Trial Chamber's decision on admissibility.[29] Indeed, allowing an appeal to challenge, by reference or implication, the correctness of earlier decisions might allow participants to circumvent the strict deadlines for appealing an interlocutory decision in the ICC.[30]

The nature of interlocutory appeals has another consequence: in order for the Appeals Chamber to exercise its corrective function, the alleged error must not only have been in the decision under appeal, but it must also have materially affected that decision.[31] This factor further supported the Appeals Chamber's dismissal of the second ground of appeal, as even if the Pre-Trial Chamber had erred, and the prosecution should have provided certain documents to the Pre-Trial Chamber back

26 For example, in his fourth ground of appeal Katanga argued that the Trial Chamber had confused the concepts of 'unwillingness' and 'inability'. The Appeals Chamber did not engage in the merits of this ground. In the light of its findings on the law and the facts in relation to the third ground of appeal (discussed below), the question of inability (or unwillingness, for that matter) simply did not arise in this case (*Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 89–91, 96–97).

27 *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824 OA7, 13 February 2007, para. 71, and see also para. 43; *Prosecutor v. Lubanga*, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber I Entitled 'Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 85.

28 *Prosecutor v. Katanga and Ngudjolo*, Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber '*Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire*', ICC-01/04-01/07–1279 OA8, 8 July 2009 (hereinafter *Katanga* Admissibility Appeal Brief), paras. 42–51. The document in question made reference to Bogoro in one of the applications to extend Katanga's detention in the DRC. *Katanga* Admissibility Decision, *supra* note 1, para. 68; see also paras. 70–71.

29 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 57.

30 See Rules of Procedure and Evidence, Rules 154 and 155; Regulations of the Court, Regulations 64 and 65.

31 See *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 37, and previous judgments referred to therein.

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in 2007, Katanga had not demonstrated how this error could have affected the Trial Chamber's decision in 2009 that the case was admissible.[32]

This principle was also the basis on which the Appeals Chamber rejected Katanga's first ground of appeal, which addressed the Trial Chamber's finding that his challenge to admissibility was formally out of time because it had been brought after the Trial Chamber was constituted (and therefore after 'the commencement of the trial' for the purposes of Article 19(4)). As Katanga acknowledged on appeal, he had suffered no prejudice from the alleged error because the Trial Chamber had proceeded to consider the merits of his challenge to admissibility.[33] As a result, any error could not materially have affected the decision under appeal: even if the Trial Chamber was wrong in its interpretation of Article 19(4), this would not be a ground on which the Appeals Chamber could have overturned the finding that the case was admissible.[34]

Given the express decision of the Trial Chamber to consider the merits of the challenge despite its interpretation of 'the commencement of the trial', the Appeals Chamber considered that ruling on this question would be analogous to rendering an advisory opinion,[35] a practice which the Chamber has eschewed.[36] The refusal to rule on questions in the abstract, or to entertain hypothetical arguments, is consistent with the past practice of the Appeals Chamber[37] and reflects the tight focus on the corrective scope of the appeal before the Chamber. In this case, the reluctance to rule on this issue may have been enhanced by the fact that the lack of impact on the

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32 Ibid., para. 57. The prosecution argued that this was especially the case given that the Trial Chamber had the documents in question before it, as well as all other potentially relevant documents, along with the full submissions of both Katanga and the DRC authorities. The Appeals Chamber also based its dismissal of this ground on the fact that the admissibility of a case must be determined on the basis of the facts as they exist at the time of the challenge (para. 56, examined in more detail below; see further Batros, *supra* note 3.

33 *Katanga* Admissibility Appeal Brief, *supra* note 28, para. 41.

34 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 38.

35 Ibid., para. 38.

36 *Situation in the Democratic Republic of the Congo*, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007, ICC-01/04-503 OA4 OA5 OA6, 30 June 2008, para. 30 ('If the Appeals Chamber were to answer such a request, it would have to assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority').

37 E.g., '[As] far as Mr Lubanga Dyilo's arguments regarding the purported violation of his fundamental rights are concerned, any discussion by the Appeals Chamber of the issues raised would be abstract and hypothetical. Therefore, the Appeals Chamber sees no need to address the merits of Mr Lubanga Dyilo's submissions under the second issue on appeal.' *Prosecutor v. Lubanga*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court', ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, paras. 110-111. In addition, see *Prosecutor v. Lubanga*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', ICC-01/04-01/06-568 OA3, 13 October 2006, para. 75; *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 52; *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824 OA7, 13 February 2007, paras. 122 and 138; *Prosecutor v. Kony et al.*, Judgment on the Appeals of the Defence against the Decisions Entitled 'Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II, ICC-02/04-179 OA and ICC-02/04-01/05-371 OA2, 23 February 2009, para. 38.

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decision under appeal had led the prosecution not to make substantive submissions on the interpretation of 'commencement of the trial'.[38]

While the general practice of the Appeals Chamber is to focus only on those questions which are necessary to dispose of the issue before it, this approach has not been universal. The Appeals Chamber has previously provided guidance on issues which were not strictly necessary for the disposition of the appeal because the appealed decision has already been overturned on a previous ground, if the arguments or the findings in question risk leading to further errors in the future.[39] In this case, such a risk of future error arguably did exist. Although the Appeals Chamber stressed that the Trial Chamber's interpretation was 'mere *obiter dicta*',[40] the existence of different interpretations of when a challenge to admissibility must be filed creates a situation of uncertainty.[41] The risk here is not that Trial Chamber II's interpretation is wrong – in that case, the error could be remedied on appeal. The risk is rather that Trial Chamber II's interpretation may be correct, but that given this uncertainty a future suspect may base his or her challenge on the competing interpretation pursuant to which the trial commences when the opening statements are delivered, only to find that the challenge is held to be time-barred.

In addition to the three grounds which the Appeals Chamber did not consider in substance, the Chamber also declined to rule on the proper interpretation of 'the case' in Article 17(1)(a) and (b) of the Statute, in particular whether the 'same conduct' test applied by Pre-Trial Chambers to date is correct. This question, which remains

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38 Before the Trial Chamber, the prosecution simply noted that 'the existing practice so far of the court appears to embrace a restrictive interpretation of commencement of trial whereby only the formal opening of trial proceedings with opening statements followed by evidence constitutes the commencement of trial'. *Prosecutor v. Katanga and Ngudjolo*, Transcript of 1 June 2009, ICC-01/04-01/07-T-65-ENG ET, at 29, lines 5–8, and at 45, lines 15–18. On appeal, the prosecution did not address the substance of this question for the very reason that the Trial Chamber's finding did not affect the outcomes of the decision under appeal: *Prosecutor v. Katanga and Ngudjolo*, Prosecution's Response to Document in Support of Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber 'Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire', ICC-01/04-01/07-1349, 30 July 2009 (hereinafter Prosecution Response to *Katanga* Admissibility Appeal), paras. 36–37. The Appeals Chamber has been cautious about ruling on questions without full argument from all relevant parties (see e.g. *Ntaganda* Admissibility Appeal Judgment, para. 54; although if it had considered it desirable to rule on this point, and necessary to have the views of the prosecution in order to enable it to do so, it could have requested additional submissions for this purpose under Regulation 28.

39 See, e.g., *Ntaganda* Admissibility Appeal Judgment, *supra* note 3, paras. 54, 68–82; *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 40–51; *Prosecutor v. Bemba*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 90, 104–109.

40 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 38.

41 As noted in the *Katanga* admissibility proceedings and in the *Katanga* Admissibility Appeal Brief, Trial Chamber I held that 'trial is considered to have begun' on 'the true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses'. Prosecutor v. Lubanga, Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings and the Manner in which Evidence shall be Submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39; as cited in Katanga Admissibility Appeal Brief, supra note 28, para. 17. The potential for uncertainty impacting on the parties in other cases is not purely hypothetical; see, e.g., the concern expressed in *Prosecutor v. Bemba*, Requête aux fins de divulgation des éléments pertinents relatifs á l'admissibilité, ICC-01/05-01/08-458, 22 July 2009.

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key for admissibility determinations, had been at the core of the debate before the Trial Chamber. However, the Trial Chamber did not address this test in its decision, as it found that the case was admissible on the basis that the DRC was unwilling. Katanga thus did not raise this issue in his appeal, although the prosecution did make submissions supporting the application of this test. The Appeals Chamber also declined to examine the test, which presented many of the factors identified above: it was not alleging any error in the decision under appeal, which had not ruled on this question; this issue thus could not materially have affected the decision; this issue was not required to dispose of the appeal;[42] and the other party had not made submissions on the issue.

The range of issues which the Appeals Chamber declined to consider may appear striking, in the light of the importance of the appeal, the extensive submissions before the Chamber, and the potential implications of some of these questions.[43] Yet, as demonstrated above, this is broadly consistent with the approach taken by the Appeals Chamber to judicial determinations across a range of issues and cases.[44]

In addition to these principled reasons, however, the restraint exercised by the Appeals Chamber may also reflect pragmatic considerations which militated in favour of a swift resolution of this appeal. This appeal was indeed resolved quickly by the standards of the ICC appellate proceedings: despite being one of the most important issues to come before the Chamber, the judgment was delivered just two and a half months after the appeal brief was filed, and barely two weeks after the pleadings closed.[45] Given that the trial was scheduled to open in September 2009,[46] it may be that the Appeals Chamber was even more inclined to address only those issues which were truly necessary to dispose of the appeal, to avoid the risk of delaying the trial.

42 '[At] the time of the admissibility challenge proceedings before the Trial Chamber, there were no proceedings in the DRC in respect of the Appellant. Hence, the question of whether the "same-conduct test" is correct is not determinative for the present appeal.' *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 81.

43 For example, shortly before the delivery of the *Katanga* Admissibility Appeal Judgment the Appeals Chamber had delivered another judgment which touched on questions of admissibility (*Kony* Admissibility Appeal Judgment, *supra* note 5, paras. 69–87). In that judgment, the Appeals Chamber had upheld the initiation of a *proprio motu* review of admissibility by a Pre-Trial Chamber in part because the review was based on admissibility under Art. 17(1)(a) (as opposed to Art. 17(1)(d), which had been the subject of an earlier Appeal Chamber judgment: *Ntaganda* Admissibility Appeal Judgment, *supra* note 3), in addition to being conducted in public after an arrest warrant had already been issued (*Kony* Admissibility Appeal Judgment, *supra* note 3, para. 85). The second ground of appeal in Katanga's appeal thus could have provided an opportunity for the Appeals Chamber to examine how admissibility under Art. 17(1)(a) applies at the earlier stage of the issuance of an arrest warrant, but it chose not to do so.

44 The Appeals Chamber emphasized this link to its past practice in relation to the requirement that any error has materially affected the appealed decision; see *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 37.

45 Katanga lodged his appeal on 22 June 2009 (ICC-01/04-01/07-1234) and filed his appeal brief on 8 July 2009 (ICC-01/04-01/07-1279). The pleadings closed with the filing of the prosecution's consolidated response to the observations of the victims and the DRC authorities, on 7 September 2009 (ICC-01/04-01/07-1459), and the Appeal Judgment was delivered on 25 September 2009.

46 At the time that Katanga lodged his appeal, the trial was scheduled to commence on 24 September 2009 (*Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-999, 27 March 2009). Shortly prior to the close of pleadings in the appeal, that date was postponed until 24 November 2009 (*Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1442, 31 August 2009).

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3. Restraint in interpreting the law, and focus on the case at hand

The judicial restraint of the Appeals Chamber is equally evident in the grounds of appeal in which it did examine and rule on the merits. The core of Katanga's appeal centred on the argument that the Trial Chamber's interpretation and application of 'unwillingness' was contrary to the object and purpose of the Statute and the values underlying the principle of complementarity.[47] The prosecution, in response, urged the Appeals Chamber not to follow the structure of the Trial Chamber's analysis, but rather to return to the plain language of Article 17(1)(a).[48]

In resolving this central aspect of the appeal, the Appeals Chamber took a strict and primarily textual approach to the interpretation of Article 17(1), which provides that 'a case is inadmissible where (a) the case is being investigated or prosecuted by a State . . . unless the State is unwilling or unable'. In contrast to the approach of the Trial Chamber, the Appeals Chamber commenced its analysis with the observation that 'according to the clear wording of article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability of a State having jurisdiction over the case becomes relevant only where, due to ongoing or past investigations or prosecutions in that State, the case appears to be inadmissible'.[49]

This focus first and foremost on the plain wording of the Statute is consistent with the predominantly positivist approach to questions of interpretation which the Appeals Chamber has taken. It has repeatedly stated that the Statute must be interpreted in accordance with the standard rules of treaty interpretation,[50] and has looked at the wording of a given provision, placing weight on the ordinary meaning of those terms, read in their proper context.[51]

47 *Katanga* Admissibility Appeal Brief, *supra* note 28, para. 55.

48 See, e.g., Prosecution Response to *Katanga* Admissibility Appeal, *supra* note 38, paras. 3, 51–53, 60 ff.

49 The *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 75, explains that 'Article 17 (1) (a) of the Statute covers a scenario where, at the time of the Court's determination of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction. This is expressed by the use of the present tense, "[t]he case is *being* investigated or prosecuted by a State" (emphasis added). Article 17 (1) (b) of the Statute covers a similar scenario where a State having jurisdiction has investigated a case, but "has *decided not to prosecute* the person concerned" (emphasis added).'

50 *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para. 33; see also *Prosecutor v. Katanga and Ndgudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Defence Request Concerning Languages', ICC-01/04-01/07-522 OA3, 27 May 2008, para. 39; *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal against the Decision on Joinder Rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, ICC-01/04-01/07-573 OA6, 9 June 2008, para. 5; *Prosecutor v. Lubanga*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 55; *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the Decision of Trial Chamber I Entitled 'Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, together with Certain Other Issues Raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486 OA13, 21 October 2008, para. 40.

51 See, e.g., *Ntaganda* Admissibility Appeal Judgment, *supra* note 3, paras. 42–44, 47–48; *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para. 33 ('The Appeals Chamber shall not advert to the definition of "good faith", save to mention that it is linked to what follows and that is the wording of the Statute'); *Prosecutor v. Lubanga*, Judgment on the Appeal of

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After examining in detail the wording of each of the first two paragraphs of Article 17(1), which were at issue in this appeal, the Appeals Chamber concluded that

> in 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.[52]

The text of Article 17(1) may contain elements where the wording allows room for interpretation: what is required for a case to be 'investigated' or 'prosecuted', for the purposes of paragraph (a), especially in the context of traditional or alternative justice mechanisms; what is the scope of 'the case' which is being investigated or prosecuted;[53] or when the closure of an investigation results from the state having 'decided not to prosecute the person concerned', in the context of paragraph (b).[54] However, the Appeals Chamber considered that the wording of this provision led inexorably to the conclusion that if the state is not conducting an investigation, then that is the end of the matter under Article 17(1)(a) and (b):

> [I]n case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.[55]

Mr Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I Entitled 'Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo', ICC-01/04-01/06-824 OA7, 13 February 2007, para. 134; see also paras. 94–97 on the context of a provision; *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of Mr Germain Katanga against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Defence Request Concerning Languages', ICC-01/04-01/07-522 OA3, 27 May 2008, para. 37 (holding the Pre-Trial Chamber to have erred because it 'did not comprehensively consider the importance of the fact that the word "fully" is included in the text, and the article's full legislative history'). Exceptions to this approach have arisen where a lacuna exists in the law, where the context of other provisions necessarily requires the inclusion of a particular power which is not expressly set out, or in the light of the requirement under Art. 21(3) to read the Statute consistent with internationally recognized human rights: see, e.g., *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', ICC-01/04-01/07-475 OA, 13 May 2008 (context of other provisions leading to necessary implication of a power, paras. 43–56, further supported by interpretation consistent with human rights, paras. 57–58); *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006', ICC-01/04-01/06-772 OA4, 14 December 2006 (lack of express provision to challenge jurisdiction based on abuse of process, paras. 21–24, but residual ability to stay proceeding under Article 21(3), paras. 36–39).

52 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 78.

53 As noted above, this question was debated extensively by the parties before the Trial Chamber, although both the Trial and Appeals Chambers declined to rule on it (*Katanga* Admissibility Decision, *supra* note 1, para. 95; *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 81).

54 The Appeals Chamber examined this question directly: see *Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 76, 82–83.

55 Ibid., para. 78. Under Art. 17(1)(d), a case may be declared inadmissible if it 'is not of sufficient gravity to justify further action by the Court'. The Appeals Chamber again referred to this additional requirement, along with Arts. 17(1)(c), 19(1), and 53, when noting that 'depending on the circumstances of each case, [the Court] may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court'. Ibid., para. 85.

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This approach led to two key consequences. First, the test for admissibility under Article 17(1)(a) is framed in the present, whether 'the case is being investigated or prosecuted'. Admissibility, under this paragraph, depends primarily on the investigatory and prosecutorial activities of state authorities, and these actions may change over time.[56] The question is not whether the case *was* being investigated or prosecuted; whether the case *was* admissible or inadmissible. Rather, the admissibility of a case is determined on the basis of whether it *is* being investigated or prosecuted. As a result, the admissibility of a case must be determined based on the facts at the time of the challenge.[57]

Second, the Chamber focused solely on the objective facts: on the action or inaction of the state, rather than on the subjective reasons why the state may not have been acting. Article 17 ascribes a specific role to determinations of unwillingness and inability.[58] Because these criteria only become relevant if the state *is* investigating or prosecuting,[59] the Appeals Chamber considered that Article 17(1)(a) provides no basis to examine the reasons why the state was *not* investigating or prosecuting the case.[60] This means that the motives for the state to decline to exercise its power or duty to provide accountability at the national level are not relevant to the admissibility of a case which has been initiated before the ICC.[61]

Applying these principles to the case at hand, the DRC had closed its investigation on the transfer of Katanga to the ICC. There were thus no domestic proceedings taking place at the time of the challenge. The question whether the DRC was willing or unwilling to prosecute him, whether it was able or unable to prosecute him, therefore simply did not arise.[62]

As a result, the Appeals Chamber rejected Katanga's attempt to impugn 'burden sharing' between the ICC and the state, or otherwise to force the Court to judge why a state was not investigating a case, through an admissibility challenge.[63] The Appeals Chamber emphasized that Articles 17 and 19 created a limited procedure with a particular purpose.[64] The factors which were relevant, and the specific assessment that the Chamber was required to make, in order to determine the admissibility of a case were set out in those provisions. The Chamber refused to import new criteria

56 Ibid., paras. 56, 80, 111.
57 Ibid., paras. 56, 80, 81, 97, 111.
58 Namely to review existing national proceedings and determine whether they are genuine, or whether on the other hand the ICC may still exercise its jurisdiction even in the face of the purported national proceedings. See Art. 17(2) and (3); *Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 75–78.
59 The Appeals Chamber also emphasized that Art. 17 requires an assessment of unwillingness or inability in relation to the particular case at hand (*Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 76; see further Batros, *supra* note 3.
60 *Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 78–79, 112.
61 At least in relation to the primary question of whether the state is investigating or prosecuting under Art. 17(1)(a). Similarly, provided that the decision to close an investigation did not result from a decision not to prosecute, other motives for closing the investigation could not render the case inadmissible under Art. 17(1)(b) (*Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 82–83). Nevertheless, as noted above at note 55, the Court also referred to a number of other provisions and recalled that 'depending on the circumstances of each case, [the Court] may decide not to act upon a Stat's relinquishment of jurisdiction in favour of the Court' (*Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 85).
62 Ibid., paras. 80, 97.
63 *Katanga* Admissibility Appeal Brief, *supra* note 28, paras. 95–100; see also paras. 62–72, 92–94.
64 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 113.

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or bases for inadmissibility which were not set out in the Statute, or to expand the scope of admissibility proceedings to serve other objectives.

The Appeals Chamber also declined to allow admissibility proceedings to become a forum to debate the impact of self-referrals on the admissibility regime.[65] While self-referral may not have been actively contemplated when the Statute was drafted,[66] the Appeals Chamber did not speculate whether the admissibility provisions might have been drafted differently if states had been focused on self-referrals, and, if so, how. The Chamber could apply Article 17 to the situation before it without any obvious conflict or absurdity. Nothing indicated that the mere fact of a self-referral must necessarily alter the existing regime, and the Chamber thus took the provisions of the Statute and applied them to the facts of the case.

The Chamber's primary focus on the text of Article 17 rather than on broader policy questions is not to say that it ignored how its interpretation related to the object and purpose of the Statute and of the principle of complementarity. It expressly examined this question. However, in line with its restrained approach to the judicial function, the Chamber approached it through the lens of the case before it. The Chamber concluded that if a case was inadmissible even when no domestic authority was investigating or prosecuting it, then this would itself conflict with a purposive reading of the Statute. The objective of the Statute is 'to put an end to impunity'.[67] While the Appeals Chamber agreed that the Statute recognizes a duty on states to exercise their criminal jurisdiction over international crimes,[68] the recognition of a pre-existing duty on states does not mean that it is incumbent on the Court to enforce compliance with this duty, let alone that any attempt by the Court to enforce this duty should trump the fundamental aim of the ICC.

It must be recalled that for a Chamber to rule a case inadmissible has serious consequences. It is not a question of approving or disapproving of the actions of a state. A finding of inadmissibility is a ruling that the ICC is prohibited from exercising its jurisdiction over a case involving serious international crimes. The Court cannot assume that declining to exercise its jurisdiction over a case would lead to previously inactive states suddenly being spurred into action: 'It is purely speculative to assume that a State that has refrained from opening an investigation into a particular case or from prosecuting a suspect would do so, just because the International Criminal Court has ruled that the case is inadmissible.'[69]

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65 Ibid., paras. 85–86.

66 See C. Kress, '"Self-Referrals" and "Waivers of Complementarity": Some Considerations in Law and Policy', (2004) 2 *Journal of International Criminal Justice* 944; W. Schabas, '"Complementarity in Practice": Some Uncomplimentary Thoughts', (2008) 19 *Criminal Law Forum* 5, at 7, 12–13.

67 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 79, referring to the fifth paragraph of the Preamble to the Statute (and also to the fourth paragraph, 'the most serious crimes of concern to the international community as a whole must not go unpunished'). See also para. 83 ('the provision [Art. 17(1)(b)] must also be applied and interpreted in light of the Statute's overall purpose, as reflected in the fifth paragraph of the Preamble, namely "to put an end to impunity".')

68 Ibid., paras. 85–86. The Trial Chamber recognized the same duty (*Katanga* Admissibility Decision, *supra* note 1, para. 79), as has the Prosecutor (Paper on Some Policy Issues before the Office of the Prosecutor, September 2003, at 5).

69 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 86.

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There can be no doubt as to the importance or merit of promoting national proceedings as a policy objective. But when faced with a case which is not being investigated or prosecuted by any other competent authority, it is difficult to argue that the fight against impunity is best served by the one Court which *is* addressing the case deciding that it must divest itself of jurisdiction.[70] However important the goal of promoting national proceedings may be, it is unrealistic to expect a judicial chamber to pursue this by interpreting a provision in a way that leads to the direct and concrete result of impunity in the instant case.

4. Restraint in the role of the court

The restrained interpretation of the admissibility provisions in question also reflects a conservative approach to the Court's position vis-à-vis states. The Trial Chamber had held that 'the fact of the matter is that a challenge to admissibility by the Defence can only be made within the scope of the expression of the sovereignty of the State in question'.[71] The Appeals Chamber did not put it in quite these terms, but the same deference to the sovereign decision of the state on whether to exercise its jurisdiction in a given case underpins the judgment.

The Appeals Chamber was clear that the Statute gives the Court the final word on the determination of admissibility.[72] However, it was equally firm that the admissibility of a case must be determined on the facts presented to the Court.[73] This included focusing first and foremost on the objective actions of the state:[74] the Court would not delve behind these facts into the motivation of the state, unless the state was obstructing the operation of the Court and the Statute provided clear authority and criteria to do so.[75] Admissibility, at least under Article 17(1)(a) and (b), was not viewed as a means for impugning the sovereign decision of a state not to assert its jurisdiction in favour of allowing the Court to proceed instead.

In addition, the Appeals Chamber did not attempt to forecast what might happen, or what might have happened, if either the state or the Court made different choices. As the Appeals Chamber stated,

> [A]n accused person does not have a 'right' under the Statute to insist that States or organs of the Court behave in a manner that would render a case inadmissible. The

70 In regard to Art. 17(1)(b), the Appeals Chamber put this in even starker terms. It highlighted the absurdity that would result if the decision of a state to close an investigation in order to transfer a case to the Court resulted in that case becoming inadmissible (on the basis that it constituted a decision not to prosecute), and both potentially competent authorities were thus precluded from exercising their jurisdiction. *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 83.

71 This statement was made in the context of the situation before the Chamber, where 'a State makes clear its unwillingness to bring the accused to justice'. *Katanga* Admissibility Decision, *supra* note 1, para. 88.

72 'Whether or not a case is admissible is determined by the Court, which assesses the relevant facts against the criteria of article 17 of the Statute.' *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 111.

73 Ibid., paras. 56, 80, 111.

74 I.e. whether or not the state is investigating or prosecuting the case; ibid., paras. 75, 78, 80. The objective nature of this primary determination is also consistent with the efforts of the states to create objective parameters for the assessment of 'unwillingness' or 'inability' when drafting Art. 17; see Holmes, supra note 2, at 673–4.

75 Such as the definitions of 'unwillingness' and 'inability' in Arts. 17(2) and (3); or the procedure in Art. 87(7) for the Court to follow in cases of non-co-operation with a request under Part 9 of the Statute.

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> admissibility of the case must be determined on the basis of the facts as they are, not on the basis of how they, in the view of the Appellant, should be. While he has the right to challenge admissibility, he has to accept that the Court will determine the admissibility on the basis of facts as they present themselves.[76]

The *theoretical* willingness and ability of a state to investigate or prosecute a case in respect of which it is not actually taking any action, or the willingness and ability of a state to prosecute other, similar, cases, thus cannot in itself render a case inadmissible.

Underpinning much of the judgment is the Appeals Chamber's recognition that 'under the Rome Statute, the Court does not have the power to order States to open investigations or prosecutions domestically'.[77] While the Court judges the legal effect of the facts, in essence it is the state that defines those facts.[78] It is this reality, when combined with the focus of the Chamber on doing justice in the case before it, which played a key role in the Chamber's reconciliation of its interpretation and application of Article 17 with the object and purpose of the Statute: if a state is not acting, the Court cannot force it to act; it is purely speculative to assume that an inactive state would commence proceedings just because the Court has declared a case inadmissible;[79] therefore the course which is most consistent with the objective of combating impunity is to continue with the prosecution of the case by the Court.

This restrained interpretation of the admissibility provision and realist view of the Court's powers vis-à-vis states[80] will, in certain circumstances, grant the state a choice of jurisdiction.[81] While it was argued that this is inconsistent with the principle of complementarity or that it will discourage states from investigating or prosecuting cases themselves,[82] the impact of the Court's rulings should not be overstated. At the theoretical level, the Appeals Chamber was careful to note that it would not automatically act on a state relinquishing its jurisdiction in favour of the Court.[83]

More importantly, a state only gets to 'choose' between the ICC and its domestic authorities prosecuting a case if the ICC Prosecutor decides to take on that case. A state cannot refer a particular case to the ICC, only a situation,[84] and even then the

76 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 111.
77 Ibid., para. 86.
78 Ibid., paras. 56, 80, 111.
79 Ibid., para. 86.
80 A similar realist interpretation of the Court's relationship with states is reflected in *Prosecutor v. Bemba*, Judgment on the Appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa', ICC-01/05-01/08-631-Red OA2, 2 December 2009, paras. 106–107.
81 The Trial Chamber acknowledged this implication directly; see *Katanga* Admissibility Decision, *supra* note 1, paras. 79 ('[If] a State considers that it is more opportune for the Court to carry out an investigation or prosecution, the State will still be complying with its duties under the complementarity principle') and 80 ('A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case').
82 See in particular *Katanga* Admissibility Appeal Brief, *supra* note 28, paras. 64–66, 100.
83 *Katanga* Admissibility Appeal Judgment, *supra* note 5, para. 85.
84 Arts. 13(a) and 14(1). See A. Marchesi, 'Article 14', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2009), 575, at 579 [11]–[12]; see also Schabas, *supra* note 66, at 13 ('a complainant

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Prosecutor will make an independent determination whether to open an investigation.[85] Given the limited number of cases that the ICC will prosecute,[86] this 'choice' is thus of limited practical effect. National authorities are not given a free pass simply to wait in the hope that the ICC *might* take on a particular case. Further, if the ICC has investigated a serious case,[87] then if the state chooses to allow the ICC to pursue that case and instead devote the law enforcement and legal resources that this releases – resources which will almost inevitably be scarce and stretched in the situations of mass criminality before the Court – to investigating and prosecuting other crimes which might otherwise go unpunished, how does this conflict with the objective of ending impunity?

5. Restraint in action: the role of the chamber, admissibility, and positive complementarity

In addition to the reality that the Court cannot force a state to investigate or prosecute a case, the Court is also faced with the reality that in most situations of mass atrocity it will be unable to investigate and prosecute all the alleged perpetrators itself. This second reality has led to discussion of the concept of 'positive complementarity'.[88] The traditional, or 'classical', understanding of complementarity was as a protection for states, to prevent the Court from overriding genuine and sovereign efforts to

state was being prevented from submitting a specific case or crime to the Court. It could only refer a "situation"'). For example, although Uganda sought to refer 'the situation concerning the Lord's Resistance Army', the Prosecutor clarified that 'the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA'. *Prosecutor v. Kony et al.*, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ICC-02/04–01/05–68, 2 December 2005, paras. 4–5.

85 Art. 53(1).

86 As the Prosecutor recognized from the outset, 'there are limits on the number of prosecutions the ICC can bring' (Paper on Some Policy Issues, *supra* note 68, at 4). According to the Draft Prosecutorial Strategy 2009–2012, 18 August 2009, the Office of the Prosecutor aims to conduct in the order of four trials, and conduct approximately 11 investigations in the period 2009–12 (at 2). In addition, that limited number of cases will be focused on the prosecution of 'those who bear the greatest responsibility for the most serious crimes' (ibid., at 6).

87 Such a case must by definition be serious to meet the threshold of gravity under Art. 17(1)(d) and in the light of the prosecutorial policy to prosecute 'those who bear the greatest responsibility for the most serious crimes'. Draft Prosecutorial Strategy, *supra* note 86, at 6; see also Report on Prosecutorial Strategy, 14 September 2006, at 5; Paper on Some Policy Issues, *supra* note 68, at 3, 7.

88 See in particular C. Stahn, 'Complementarity: A Tale of Two Notions', (2007) 19 *Criminal Law Forum* 87; W. Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice', (2007) 19 *Criminal Law Forum* 59. This notion has also been referred to as 'proactive complementarity' – see W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', (2008) 49 *Harvard International Law Journal* 53. On the link between positive or proactive complementarity and the practical limitations of ICC operations, see Burke-White, 'Implementing a Policy of Positive Complementarity', at 66–7; J. Almqvist, 'Complementarity and Human Rights: A Litmus Test for the International Criminal Court', (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 335, at 349–50. David Tolbert, who served as both Deputy Prosecutor and Deputy Registrar at the International Criminal Tribunal for the former Yugoslavia (ICTY), also linked positive complementarity to the limitations on the workload of international courts and the practice of the ICTY of referring cases back to national jurisdictions: D. Tolbert, 'International Criminal Law: Past and Future', (2009) 20 *University of Pennsylvania Journal of International Law* 1281 at 1293–4; see also D. Kaye, 'New World Order or a World in Disorder? Testing the Limits of International Law: Late-Breaking Issues and the International Criminal Tribunals – Introductory Remarks', (2005) 99 *American Society of International Law Proceedings* 277.

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achieve accountability.[89] This aspect of complementarity regulates when the Court may step in to exercise its jurisdiction, and envisages a binary system where the Court becomes active only on a failure of the state. 'Positive' complementarity takes a more interactive view of the Court and the state, seeing them not in a competitive relationship but jointly pursuing shared objectives.[90] It envisages the Court encouraging and facilitating domestic investigations and prosecutions where possible, in addition to conducting international proceedings where necessary.

So what does this appeal judgment indicate about the relationship between 'positive' and 'classical' complementarity? Does the restraint shown by the Appeals Chamber undermine the notion of the Court encouraging states to investigate and prosecute cases themselves? At first glance, it might appear so: the Appeals Chamber did not examine the motives of the state in favouring the Court exercising jurisdiction, or use the admissibility provisions to compel the state to take action. However, nothing in this judgment is inconsistent with a strong and effective principle of positive complementarity: both the Trial and Appeals Chambers have acknowledged that states have a duty to exercise their criminal jurisdiction over international crimes.[91] Rather, the judicial restraint of the Appeals Chamber paints a more nuanced and ultimately constructive picture of the relationship between 'classical' and 'positive' complementarity.

Article 17 on admissibility is the core provision of the Statute implementing the principle of complementarity. But not every aspect of Article 17 relates to complementarity: 17(1)(a) and (b) specifically address complementarity, but 17(1)(c) operates to protect the rights of a suspect or accused under the principle of *ne bis in idem* as well as its complementarity dimension, and 17(1)(d) governs the admissibility of a case on a completely distinct ground, that of gravity.[92] Similarly, not every aspect of complementarity is necessarily embodied in Article 17. Admissibility is the means by which complementarity is implemented and enforced in the judicial aspects of the Court's activities.[93] Article 17 governs the admissibility of 'a case'; it encapsulates the manner in which the principle of complementarity operates *once a case has been initiated*.[94]

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89 Stahn, *supra* note 88, in particular at 88–9. Also referred to as 'passive complementarity' – see Burke-White, 'Proactive Complementarity', *supra* note 88. In relation to the classical conception of complementarity being designed primarily as a protection for the interests or sovereignty of states, see further Burke-White, 'Implementing a Policy of Positive Complementarity', *supra* note 88, at 60; F. Gioia, 'State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court', (2006) 19 *Leiden Journal of International Law* 1095, at 1101; Holmes, *supra* note 2, at 668; S. Williams and W. Schabas, 'Article 17' in Triffterer, *supra* note 84, 605 at 606 [1], also at 613 [20].

90 Burke-White, 'Implementing a Policy of Positive Complementarity', *supra* note 88, at 66; Stahn, *supra* note 88, at 90 and 92; Gioia, *supra* note 89, at 1114; P. Seils, 'Justice Should Be Done, but Where? The Relationship between National and International Courts', (2007) 101 *American Society of International Law Proceedings* 289, at 293.

91 *Katanga* Admissibility Decision, *supra* note 1, para. 79; *Katanga* Admissibility Appeal Judgment, *supra* note 5, paras. 85–86.

92 See further Batros, *supra* note 3.

93 '[Admissibility] can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario.' *Kony* Admissibility Decision, *supra* note 3, para. 34.

94 Ibid., para. 44; see further Batros, *supra* note 3.

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The Appeals Chamber has previously described the admissibility criteria in Article 17 as 'barriers to the exercise of the jurisdiction of the Court' and has stated that '[t]he presence of any one of the aforesaid impediments enumerated in article 17 renders the case inadmissible and as such non-justiciable'.[95] In this function of regulating when the Court may assume jurisdiction and when it is precluded from doing so, admissibility embodies 'classical' complementarity. The Appeals Chamber implicity recognized that the policy objectives of positive complementarity cannot be transformed into a statutory bar to the Court's exercise of jurisdiction.

Nevertheless, the Chamber's refusal to import the policy aspects of positive complementarity into the admissibility regime – to judge the admissibility or inadmissibility of an ongoing ICC case based on the objectives of positive complementarity – does not detract from the existence and importance of positive complementarity in the Court's operations. It is simply to say that this dimension of complementarity is not one which is enforced by judicial decisions.[96] Rather, positive complementarity operates through the actions of the executive organs of the Court, in particular the Prosecutor, whose mandate and prosecutorial discretion has been described as providing 'considerable leverage to encourage and activate national judiciaries'.[97] In addition, positive complementarity will apply much earlier than strict determinations of admissibility: not only before the initiation of a particular case, but often even before the opening of an investigation.[98] The locus and timing of positive complementarity therefore places primary responsibility for it within the Court on the Prosecutor,[99] in his interaction with external partners, including states, and in the exercise of his discretion to initiate investigations and cases.[100]

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95 *Prosecutor v. Lubanga,* Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 23.

96 The Prosecutor articled a similar vision of the distinction at the Eighth Session of the Assembly of States Parties, noting that when complementarity is raised as a question of admissibility then it is a judicial matter; but positive complementarity operates in a different field and concerns the role that a range of stakeholders can play in ensuring the achievement of the goals of the Rome Statute (Luis Moreno-Ocampo, Address to the Assembly of States Parties, Opening of the Eighth Session of the Assembly of States Parties to the Rome Statute, 18 November 2009).

97 Burke-White, 'Implementing a Policy of Positive Complementarity', *supra* note 88, at 62, going on at 63–70 to examine in detail the links between the legal basis of positive complementarity and the mandate of the Office of the Prosecutor. See also Burke-White, 'Proactive Complementarity', *supra* note 88, at 76–86; C. Stahn, *supra* note 88, at 94–95, 105–107.

98 Seils, *supra* note 90, at 293, referring in particular to the monitoring and pre-investigation phases. This is further consistent with the fact that, unlike admissibility or 'classical' complementarity, positive complementarity is not limited in its application to specific cases.

99 While the primary responsibility for positive complementarity may lie with the Prosecutor, other organs of the Court may also play a role: see S. Arbia, 'Discussion Paper: The Three-Year Plans and Strategies of the Registry in Respect of Complementarity for an Effective Rome Statute System of International Criminal Justice', prepared for the Consultative Conference on International Criminal Justice, 9–11 September 2009, New York, available at www.internationalcriminaljustice.net/experience/papers/session2.pdf (last visited 17 December 2009).

100 The Prosecutor has recognized both the role that admissibility assessments must play in all phases of the proceedings (Informal Expert Paper: The Principle of Complementarity in Practice, 2003, at 9–13), and has also developed internal policies and practices regarding case selection and positive complementarity (Draft Prosecutorial Strategy, *supra* note 86, at 6). On the relationship between complementarity and prosecutorial discretion, see Stahn, *supra* note 88, at 92–3, 105–7. On the importance of prosecutorial discretion in the ICC generally, see A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the

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In addition, positive complementarity is not compromised by the Chamber's conservative and realist approach to the division of powers between the Court and states. In explaining how its interpretation of Article 17 supports the principle of complementarity, the Appeals Chamber recognized that the Court cannot force states to investigate or prosecute a case. But positive complementarity has never been based on the Court *forcing* states to take action. Rather, this aspect of complementarity revolves around the Court, and other international actors, *encouraging* domestic proceedings. The principle can apply when the Court prosecutes some cases in a situation, focusing on those most responsible, which may facilitate the state in providing accountability for other alleged perpetrators. The appeal judgment may actually facilitate the implementation of positive complementarity in such situations, as it confirms that, even where the state is willing and able to prosecute other cases, the motives for a state in declining to investigate or prosecute a given case do not render that case inadmissible before the ICC.

6. Conclusion

In upholding the conclusion that the case against Katanga is admissible, the Appeals Chamber declined to impose any policy preferences, whether its own or those of the parties, on the language of the Statute. A Chamber is primarily charged with deciding the case before it, and the Appeals Chamber therefore avoided engaging in the debate on the relative merits of local versus international justice or imposing value judgments regarding the preferred venue for trial. The realist recognition that the Court cannot force a state to act – not even in the specific case before it, let alone more broadly – supports this focus on ensuring justice in the present case, wherever that can be achieved.

The Chamber thus did not seek to expand the ambit of admissibility proceedings to address alleged burden sharing between the ICC and states. Nor did it contemplate that the basic architecture of the admissibility provisions should be rewritten by judges in the light of the practice of self-referrals. It recognized the role and competence of the Chamber with regard to admissibility: to judge the facts of the case before it in accordance with the provisions of Article 17. The Appeals Chamber took the facts as they existed at the time, rather than trying to use the judgment to create new facts which might have been more in line with the ideals of complementarity. And to these facts it applied the law as written: the law as it is, not as the appellant wanted it to be.

Just as the admissibility regime is not the solution for every issue that faces the Court, so the Court cannot be the solution for every challenge facing a state struggling to ensure accountability for mass-atrocity crimes. Each is part of a system, and must be seen in that context. The Court can, should, and does work with national

International Criminal Court', (2003) 97 AJIL 510, in particular at 522, 542; M. R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', (2004) 2 *Journal of International Criminal Justice* 71, in particular at 78–9.

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authorities to encourage and facilitate domestic accountability,[101] but these objectives should not allow the Court or its partners to lose sight of the fact that its primary function is to combat impunity by investigating and prosecuting serious international crimes where necessary. There will always be scope to discuss policy choices or particular examples of prosecutorial discretion. However, this discussion should not obscure the fact that the paradigmatic example of why the Court was created, and where it should exercise this primary function, is where serious international crimes are not being investigated or prosecuted by any state with jurisdiction. The Appeals Chamber's judgment reflects the fact that, regardless of the reasons that led to such a situation, admissibility cannot be interpreted in a way which prevents the Court from fulfilling its core mandate.

101 [See R. Gallmetzer 'Prosecuting Persons Doing Business with Armed Groups in Conflict Areas – the Strategy of the OTP and the OTP's Law Enforcement Network' in (2010) *Journal of International Criminal Justice* (forthcoming)] For an example of this approach in the situation in Kenya, see 'Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and the Delegation of the Kenyan Government', 3 July 2009; 'ICC Prosecutor: Kenya Can Be an Example to the World', ICC-OTP-20090918-PR452, 18 September 2009; 'ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya', ICC-OTP-20090930-PR456, 30 September 2009, all available at www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Kenya/ (last visited 17 December 2009).

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