A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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CHAPTER THREE
Mirror Images: Complementarity in the Courtroom

The previous chapter explored complementarity's discursive shifts, tracing its ascension from an admissibility principle to a more expansive norm focused on the ICC's ability to catalyze accountability efforts at the national level. In light of this ambitious and expanding norm, it might be expected that states would be granted a relatively wide margin of discretion over the contours of their criminal proceedings. Indeed, several commentators—expressing concern at the risk of an overly permissive admissibility regime—have suggested that the ICC's "institutional bias" might "give too much deference to national proceedings."[218] Other scholars have counseled in favor of a more flexible approach, suggesting that would be a "smart way of stimulating national proceedings."[219]

This chapter argues that, rather than encouraging such flexibility, a series of strict tests for admissibility have instead characterized the Court's Article 17 practice. Most notable amongst these is an emphasis on whether proceedings initiated by the OTP and a state that would seek to successfully challenge admissibility are sufficiently similar. As described by the Appeals Chamber, "What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating."[220] Furthermore, when faced with competing claims about domestic proceedings (particularly challenges brought by an individual accused), ICC judges have undertaken a relatively superficial review, while setting a high evidentiary threshold for challengers to satisfy. The Court has also effectively narrowed the opportunity to bring admissibility challenges by restricting the scope of review for pre-trial chambers when determining whether to issue an arrest warrant.

While much of the ICC's early complementarity jurisprudence unfolded in the context of individual defendants who raised admissibility challenges following the referral of situations to the Court by the state itself (as in Uganda and the DRC), more recent decisions have been triggered at the behest of states, notably in Kenya, Libya, and in the recent case of Simone Gbagbo, the Ivory Coast. This chapter explores the evolution of the ICC's admissibility jurisprudence and identifies its key elements as developed and articulated by the Court to date. Particular attention is paid to the Appeals Chamber's 2009 and 2011 decisions in the challenges brought by Germain Katanga and the Kenyan government, as well as the challenges filed by the Libyan government to the cases brought against Saif Gaddafi and Libya's former chief of intelligence, Abdullah al-Senussi. To date, the challenge filed on behalf of al-Senussi has

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[218] See, e.g., Lars Waldorf, "'A Mere Pretense of Justice': Complementarity, Sham Trials, and Victor's Justice at the Rwandan Tribunal," *Fordham International Law Journal* 33(4) (2011), 1270. See also Drumbl, *Atrocity, Punishment, and International Law*, 206 (positing that, "the ICC shall approach complementarity determinations with some restraint").

[219] Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, 18; Michael Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?," *Santa Clara Journal of International Law* 8(1) (2010), 164 (concluding that "the ICC should work with states to enhance their domestic capacity and defer to domestic investigations or prosecutions in any feasible conditions").

[220] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 21 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi," ICC-01/11-01/11 OA 4, Appeals Chamber, 21 May 2014 ("Gaddafi Admissibility Appeals Judgment"), para. 73; see also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi," ICC-01/11-01/11 OA 6, Appeals Chamber, 24 July 2014 ("Al Senussi Admissibility Appeals Judgment"), para. 119.

been the only one to succeed. Attention is also paid to the judicial treatment of Article 93(10), which provides a statutory basis for the policy of "positive" complementarity. Here, too, however, the Court has taken a restrictive approach, choosing to separate its treatment of requests for ICC cooperation—a core tenet of "positive" complementarity—from admissibility challenges.[221]

In reviewing this body of case law, I suggest that the ICC has largely followed a strict approach to complementarity, adopting standards for admissibility that would require domestic proceedings to be framed in much the same way as the OTP's cases—in effect, to mirror them. While this approach is consistent with the coercive dimension of complementarity, insofar as it seeks to pull states towards compliance with the Rome Statute framework, it also places a heavy burden on states, one that they may be unprepared (or unwilling) to meet. Rather than catalyzing domestic proceedings through greater judicial dialogue, then, the Court's admissibility regime way well thwart them. Furthermore, while some commentators have responded to this criticism by seeking to bifurcate the juridical operation of complementarity from its treatment outside of the courtroom, I suggest that this division is unsustainable and symptomatic of legalism: it relies on an artificial division between the Court as a legal and political actor.

1. Complementarity as Admissibility Rule

1.1 "Same Case" Test: Person, Conduct, and Incident?

The "same case" test has its origins in the ICC's investigations in the DRC, following the government's referral to the Court in April 2004. Thomas Lubanga Dyilo was the first accused to be surrendered to the ICC and also the first to be found guilty: in March 2012, he was convicted on the sole charge of recruiting, conscripting, and enlisting child soldiers.[222] Two other former rebel leaders, Germaine Katanga and Mathieu Ngudjolo Chui, have also been tried: Ngudjulo Chui was acquitted in December 2012, while Katanga was convicted in March 2014.[223] Notably, as these were cases in a situation that the government itself had referred to the Prosecutor, they raised little opposition with Kinshasa. Indeed, at the time that the OTP lodged its application, Lubanga had been in the custody of Congolese authorities since March 2005, where he was being held on several charges, including genocide and crimes against humanity.[224] An arrest warrant for Lubanga was first sought in January 2006 and issued under seal by the Pre-Trial Chamber the following month.[225] In its application, the Prosecutor acknowledged that proceedings against Lubanga were underway in the DRC; however, it argued that this was not a bar to admissibility since, at the time of the Congolese

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[221] *Situation in the Republic of Kenya,* Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09, PTC II, 29 June 2011 ("PTC Article 93(10) Decision").
[222] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06, TC I, 14 March 2012.
[223] *The Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12, TC II, 18 December 2012 ("Ngudjolo Judgment"); *The Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/07,TC II, 7 March 2014. Bosco Ntaganda surrendered himself to the Court in March 2013; however, his trial has not yet begun. Although President Kabila initially refused to transfer Ntaganda to The Hague (and later expressed an intention for the DRC to prosecute him domestically), no admissibility challenge in those proceedings has been filed to date.
[224] See, e.g., William A. Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts," *Criminal Law Forum* 19 (2008), 11.
[225] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ICC-01/04-01/06, PTC I, 10 February 2006 ("Lubanga Arrest Warrant Decision").

government's referral to the ICC in March 2004, the government had stated that it was not able to prosecute crimes falling within the Court's jurisdiction.[226]

In deciding whether to approve the requested warrant, Pre-Trial Chamber I actively examined whether the case was admissible since, in its view, such a determination had to necessarily precede the issuance of a warrant. The Chamber rejected the OTP's argument that the Congolese government's referral of the situation rendered the case admissible *per se*. Importantly, it noted that for the purpose of the admissibility analysis, the DRC national judicial system "ha[d] undergone certain changes since March 2004, particularly in the region of Ituri," where Lubanga's alleged crimes had been committed, and where the OTP had opted to begin its investigations.[227] As a result, the Court found the Prosecutor's "general statement that the DRC national judicial system continues to be unable in the sense of article 17 … of the Statute does not wholly correspond to … reality any longer."[228]

The Pre-Trial Chamber nevertheless determined that the case was admissible. In so doing, it concluded that, "it is a condition *sine qua non* for a case arising from the investigations of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court."[229] Drawing on its earlier definition of a case in the context of victim participation, the Chamber noted that the word "case" referred to "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[230] Because Lubanga was charged with crimes other than those related to the recruitment of child soldiers – even where those crimes were broader in scope than those charged by the ICC – the case was not being investigated or prosecuted by the DRC within the ambit of Article 17(1)(a).[231] There was thus no bar to admissibility.

In decisions reviewing other arrest warrants, the Court has subsequently applied the "same person, same conduct" test.[232] In these instances, the relevant pre-trial chambers have acted *proprio motu* under the discretionary power provided under Article 19(1) of the Rome Statute, leading them to conclude that the while the proceedings in question concerned the same person, they did not concern the same conduct. In several cases, the Prosecutor advanced an even narrower test, arguing in subsequent motions that the "same conduct" test required domestic proceedings to involve not only the same acts, but also the same incidents, i.e., the same factual allegations.[233] While there has been

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[226] *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor's Application for Warrant of Arrest, ICC-01/04-01/06-8, 13 January 2006, para. 186.
[227] Lubanga Arrest Warrant Decision, para. 36.
[228] Ibid.
[229] Ibid., para 31.
[230] Ibid. (citing *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6, 18 January 2006, para. 65).
[231] Lubanga Arrest Warrant Decision, paras. 39-40.
[232] See, e.g., *The Prosecutor v. Germain Katanga*, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for German Katanga, ICC-01/04-01/07-4, PTC I, 6 July 2007 (finding the case admissible before the ICC because the proceedings against Katanga in the DRC "did not encompass the same conduct" that was the subject of the Article 58 application); *The Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, Decision on the Prosecution Application Under Article 58(7) of the Statute, ICC-02/05-01/07-I-Corr, PTC I, 27 April 2007.
[233] See, e.g., *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Prosecutor's Application under Article 58(7), ICC-02/05-56, 27 February 2007, paras. 266-267; *The Prosecutor v. German Katanga*, Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging the Admissibility of the Case by the Defense of Germain

no explicit judicial endorsement of these additional requirements, Pre-Trial Chamber III, in the case of former Cote d'Ivoire President Laurent Gbabgo, indicated that a case encompasses "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects."[234]

Katanga was the first accused to challenge the admissibility of his case. In March 2009, before Trial Chamber II, he filed an application under Article 19(2)(a) on the basis that, *inter alia*, the same conduct test was overly strict and constituted "flawed" precedent.[235] Instead, he argued that the Court should adopt a more flexible approach to admissibility, one based on a "comparative gravity" or "comprehensive conduct" standard.[236] While there was "no mathematic formula" for such a standard, Katanga averred, "Only when the ICC Prosecutor's scope of investigation is significantly more comprehensive than the scope of national investigations, would there be a basis for admissibility."[237] Furthermore, even if the same conduct test did apply, Katanga argued that he was being investigated by the DRC at the time the ICC issued its arrest warrant and that these investigations encompassed crimes committed on or about 24 February 2003 in the village of Bogoro, which was the basis of the ICC's case as well.

The Trial Chamber dismissed the challenge, but rather than opine on the validity of the test (around which Katanga's motion had primarily been framed), it found that the DRC authorities were unwilling to prosecute Katanga.[238] The Chamber implicitly affirmed the validity of the test, however, insofar as it rejected Katanga's claim that the prosecution had failed to produce documents about the attack on Bogoro that he alleged were relevant to admissibility, on the grounds that they were not "decisive."[239] The presumption that domestic proceedings had to encompass the same conduct (the attack on Bogoro) was thus implicit in the Court's dismissal. The Appeals Chamber clarified this determination on review—finding that inaction at the domestic level, not unwillingness, rendered the case admissible—but it did not address the alternative standard ("comprehensive conduct"') that Katanga had proposed.[240] Other defendants

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Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-1007, 30 March 2009 (stating that the term "case" should … be understood as being constituted by the underlying event, incident, and circumstances – i.e. in the criminal context, the conduct of the suspect in relation to a given incident").

234 *The Prosecutor v. Laurent Gbagbo*, "Decision on the Prosecutor's Application Pursuant to Article 58 for a warrant of arrest against Laurent Koudou Gbagbo," ICC-02/11-01/11, PTC III, 30 November 2011, para 10. The chamber did not, however, specify what would be encompassed by the notion of "incident."

235*The Prosecutor v. Germain Katanga*, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ICC-01/04-01/07-949, 11 March 2009 ("Katanga Admissibility Challenge").

236 Ibid., paras. 46-47, 51.

237 Ibid., para. 47. The defense also proffered a "comparative gravity/comprehensive conduct" test, para 51.

238 *The Prosecutor v. Germain Katanga*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ICC-01/04-01/07, TC II, 16 June 2009, para. 95 ("Katanga Admissibility Decision") ("In light of these statements, and without the need to rule on the 'same conduct test' which the Defence for Germain Katanga sought to challenge in its Motion, the Chamber cannot but note the clear and explicit expression of unwillingness of the DRC to prosecute this case.")

239 Ibid., para. 72. In arriving at this determination, the Chamber noted that one of the documents – a request by the Kinshasa High Military Court to extend Katanga's provisional detention – "does not specify the exact date of the acts allegedly committed in Bogoro" and that it was not "conclusive as to whether the acts allegedly committed there could be attributed to Germain Katanga," paras. 68, 70.

240 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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-OA8, Appeals Chamber, 25 September 2009, para. 81 ("Katanga Admissibility Appeals

before the ICC have raised similar challenges. In *Gbagbo*, the chamber was also asked to "interpret 'conduct' in a flexible manner, focusing on the general conduct of the suspect in relation to the context in which the crimes were committed." The petition noted that the "short-sighted view of complementarity" endorsed by the Court "fails to take account of the wider goals of international criminal justice, in particular the need for national jurisdictions to build capacity to try such crimes domestically … as part of the overall process of reconciliation and peace building."[241] But the Court declined.

Significantly, the context for these cases was one in which the state had supported the ICC's intervention (at least initially) through self-referral. As Stahn notes, "state authorities sided with the ICC, rather than the defence, since they had an interest in seeing the case being tried internationally."[242] By contrast, the proceedings in Kenya and Libya present an alternative picture, as those challenges were both brought by governments under Article 19(2)(b). In Kenya, the government disputed the correctness of the test on the basis that the "same person" element of the test was flawed. Instead, national investigations should cover "the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[243] It also offered a "proposed timetable for investigative processes" at the national level, including a report on PEV investigations under a new Director of Public Prosecutions (one that would "extend up to the highest levels, and on the cooperation with the ICC Prosecutor") and, by September 2011, a "report on progress made with investigations and readiness for trials in light of judicial reforms."[244] The Pre-Trial Chamber rejected the state's challenge within two months, finding that the proposed measures "fall short of any concrete investigative steps regarding the … suspects in question."[245]

On appeal, the government continued to press its view that, "it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State"; rather, "[t]here simply must be a leaway [sic] in the exercise of discretion in the application of the principle of complementarity."[246] To that end, it averred, much as Katanga did, that a better test should query whether national proceedings capture the "same conduct in respect of the persons at the same level in the

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Judgment") (finding that, "In light of the above, the Appeals Chamber does not have to address in the present appeal the correctness of the "same-conduct" test used by the Pre-Trial Chambers to determine whether the same 'case' is the object of domestic proceedings.")

[241] *The Prosecutor v. Laurent Gbagbo*, Decision on the "*Requeté relative a la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut*," ICC-02/11-01/11, PTC I, 11 June 2013, paras. 11-12 ("Gbagbo Admissibility Decision"). Notably, the national proceedings that Gbagbo alleged were underway related to economic crimes (see para. 8), over which the Rome Statute has limited subject matter jurisdiction.

[242] Carsten Stahn, "Admissibility Challenges before the ICC," 234.

[243] *The Prosecutor v. William Samoei Ruto, et al.,* Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ICC-01/09-01/11 and ICC-01/09-02/11, PTC II, 31 March 2011, para. 32.

[244] Ibid., para. 79.

[245] See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, PTC II, ICC-01/09-01/11, 30 May 2011, para. 65 ("Ruto et al. Admissibility Decision"). The Chamber noted further that it "lack[ed] information … as to the conduct, crimes or the incidents for which the three suspects are being investigated or questioned for," para. 69; see also paras. 56, 60-61in the parallel Kenyan cases.

[246] *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Corrigendum to the "Document in Support of the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,'" ICC-01/09-02/11, 21 June 2011, para. 43.

hierarchy being investigated by the ICC."[247]By a majority, the Appeals Chamber affirmed the Pre-Trial Chamber's decision. It clarified that "where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for *substantially* the same conduct."[248] The majority further rejected Kenya's appeal to domestic discretion, noting that the only purpose of admissibility proceedings under Article 19 is to determine if there is a jurisdictional conflict. While complementarity might favor national jurisdictions, the Chamber noted, "it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level."[249] Finally, it specified that a successful challenge required concrete investigative steps: "mere preparedness" to take such steps would not suffice.[250]

Like Kenya, the Libyan government also contended in its challenges to the Gaddafi and Al-Senussi cases that the "same case" test should be broadened, recognizing that "the state is to be accorded a margin of appreciation as to the contours of the case to be investigated, and the ongoing exercise of the national authorities' prosecutorial discretion as to the focus and formulation of the case."[251] Further, domestic authorities should not be "unduly restrained in pursuing a national accountability agenda by being compelled to conduct an investigation and prosecution that mirrors precisely the factual substance" of the OTP's investigation.[252] Conformity to ICC practice should instead yield to a more flexible standard, Libya argued, "with a policy of giving the benefit of doubt to States exercising jurisdiction."[253]

While not discarding the test, Pre-Trial Chamber I took a noticeably broader approach in both cases than in previous admissibility decisions. In each challenge, it rejected the suggestion that "conduct" must be understood as "incident specific,"[254] but it affirmed that domestic investigations must be "case-specific," meaning that:

> [I]t must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom the proceedings before the Court are being

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[247] Ibid. Kenya further averred that, in conducting preliminary investigations with respect to other situation, the Prosecutor should consider the "operation and capability of the national system as a whole as being determinative of whether he should intervene," para. 89.

[248] See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang,* Judgment on the Appeal of the Republic on Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," Appeals Chamber, 30 August 2011, paras 42, 47 ("Ruto et al. Admissibility Appeals Judgment"); see also paras. 41, 46 in the parallel Kenyan cases. Arguably, the Chamber opened the door to a potentially less demanding standard by its reference to "substantially," but it did not elaborate on the implication of this qualification.

[249] Ruto et al. Admissibility Appeals Judgment, para. 44; see para. 43 in the parallel Kenyan cases.

[250] Ibid., para. 41; ibid., para. 40.

[251] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 2 April 2013, para. 88, 43 ("Al-Senussi Admissibility Application"); see also Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130-Red, 1 May 2012 ("Libya Admissibility Application").

[252]Al-Senussi Admissibility Application, para. 88.

[253] Al-Senussi Admissibility Application, para. 97; Libya Admissibility Application, para. 92.

[254]*The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PTC I, 31 May 2013, paras, 73, 76-77 ("Gaddafi PTC Decision"); Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11, PTC I, 11 October 2013, para, 66 ("Al-Senussi PTC Decision").

> conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court.[255]

As to the question of what constitutes "substantially" the same conduct, the Chamber found that will "vary according to the concrete facts and circumstances of the case, and, therefore, requires a case-by-case analysis."[256] Significantly, contrary to duty-based arguments over the need to implement Rome Statute legislation domestically, the Chamber took the opportunity in both decisions to clarify that "the question of whether domestic investigations are carried out with a view to prosecuting 'international crimes' is not determinative of an admissibility challenge."[257] In its words, "the decision to exclude reference to the ordinary crimes exception [of the ICTY and ICTR Statutes] was a deliberate decision that followed extensive discussions during the negotiating process."[258]

Pre-Trial Chamber I nevertheless rejected the challenge brought on behalf of Gaddafi—chiefly because the Zintan militia was holding him, thus making the state "unable" to obtain him for purposes of trial[259]—but it found al-Senussi's case inadmissible. It did so, in part, on the ground that while "it is not required that domestic proceedings concern each of those events [mentioned in the arrest warrant] at the national level," the "incidents" or "events" in Senussi's case were "indeed the same as the one before the Court."[260] The Appeals Chamber affirmed both rulings, holding:

> What is required is a judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating. The Appeals Chamber considers that to carry out this assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents.[261]

Notably, Judge Anita Usacka took issue with the Court's continued fidelity to the "same case" test. In dissent, she argued:

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[255] Al-Senussi PTC Decision, para. 66(i).
[256] Gaddafi PTC Decision, para. 77; Al-Senussi PTC Decision, paras.48, 66(iii);
[257] Gaddafi PTC Decision, para. 85; Al-Senussi PTC Decision, para. 66(iv). Similarly, adopting a significantly more permissive posture than it had under previous Article 19 challenges, the OTP supported most of these claims, noting that, "There is no requirement that the crimes charged in the national proceedings have the same 'label' as the ones before this Court." See *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11, 5 June 2012, para. 23.
[258] Gaddafi PTC Decision, para. 87. Thus, "It is the Chamber's view that Libya's current lack of legislation criminalising crimes against humanity does not per se render the case admissible before the Court," para. 88.
[259] Though the Chamber found that Libya had "fallen short of substantiating [its submission], by means of evidence of a sufficient degree of specificity and probative value," the gravamen of its opinion fell on its finding that the national system was "unavailable" within the meaning of Article 17(3) because it was unable to "obtain" the accused as well as necessary witnesses or testimony, and because it could not "overcome the existing difficulties in securing a lawyer for [Gaddafi]." See Gaddafi PTC Decision, paras. 135, 206-208, 215.
[260] Al-Senussi PTC Decision, para. 79. The Chamber noted that, "all or some of the 'incidents' or 'events'…are encompassed in the national proceedings may still constitute a relevant indicators that the case subject to the proceedings is indeed the same case before the Court."
[261] Gaddafi Admissibility Appeals Judgment, para. 73.

> Establishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "case before the Court" at the time of the admissibility proceedings, thereby being obliged to "copy" the case before the Court. Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court.[262]

Echoing Judge Usacka, Kevin Jon Heller has remarked that, "the same-conduct requirement expects states to be mind-readers: if [states] do not accurately anticipate the precise conduct that will draw the ICC's attention—no small task, given the 'universe of criminality in atrocity-crime situations'—they will be deemed 'inactive' with regard to the international proceedings and the Court will admit the case."[263]

Despite such criticism, the "same case" doctrine appears to have become an interpretive mainstay of the Court's jurisprudence. It was most recently applied in the Appeals Chamber's May 2015 judgment rejecting the Ivory's Coast challenge to the proceedings against Simone Gbagbo, notwithstanding the fact that Ms. Gbagbo had already been convicted and sentenced to 20 years imprisonment, on different charges, by a domestic court in March of that year.[264] Thus, while the test might be defensible as a matter of statutory interpretation,[265] it is an exacting one with the potential of placing the Court in awkward disjuncture with national jurisdictions. Rather than encouraging flexibility in the manner and method by which states pursue domestic accountability, the came conduct test, as it has been applied to date, promotes the opposite. [266]

1.2 Admissibility Challenges and Timing

In addition to the substantive constraints imposed by the same conduct requirement, the Court has also applied substantial procedural limitations on admissibility challenges. As noted, most ICC pre-trial chambers have addressed admissibility challenges pursuant to Article 19(1), which the Court interprets with broad discretion to determine *proprio motu* the admissibility of a case.[267] In July 2006, however, the Appeals Chamber issued a decision that significantly restricted the scope of such

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[262] Gaddafi Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 52; see also Al Senussi Admissibility Appeals Judgment, Separate Opinion of Judge Anita Usacka, para. 14 (finding that the PTC "may have been too demanding when it considered whether Libya was able genuinely to investigate and prosecute in relation to Mr. Gaddafi").

[263] Kevin Jon Heller, "A Sentence-Based Theory of Complementarity," 241. See also Heller, "Radical Complementarity," *Journal of International Criminal Justice* (2016, forthoming).

[264] *The Prosecutor v. Simone Gbagbo,* Judgment on the appeal of Cote d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Cote d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo," ICC-02/11-01/12 OA, Appeals Chamber, 27 May 2015.

[265] As commentators have noted, the "same conduct" language was added to the chapeau of Article 20(3) during the Rome Statute's drafting to ensure that the principle of *ne bis in idem* would be respected, without prohibiting ICC retrial for charges based on different conduct. See Kevin Jon Heller, "A Sentence-Based Theory of Complementarity"; Darryl Robinson, "Three Theories of Complementarity," 175-182.

[266] Sharon A. Williams and William A. Schabas, "Article 17: Issues of admissibility," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, *Article by Article* (Hart Publishing, 2008), 616. For an alternative view, see Diane Bernard, "Standard of Review and the Complementarity of the International Criminal Court," in Lukasz Gruszczynski and Wouter Werner (eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford: Oxford University Press, 2014).

[267] See, e.g., *The Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, PTC II, 10 March 2009 ("Uganda Admissibility Decision").

review, holding that "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."[268] Rather than the Pre-Trial Chamber conducting its own review of admissibility, then, the Appeals Chamber suggested that it would be possible (indeed preferable) for the accused to do so, noting that such a challenge could theoretically be lodged after an arrest warrant had issued but prior to the accused's arrest.

This decision has attracted significant criticism. As Gilbert Bitti and Mohamed El Zeidy note, the decision ignores the fact that admissibility is "a general principle in the Rome Statute which does not need to be reiterated in every single provision."[269] Furthermore, the Chamber's decision ignores, or overlooks, the practical context of ICC arrest warrants, many of which are often issued under seal. In practice, this effectively prevents a defendant from challenging admissibility prior to his or her surrender to the ICC. As the *Katanga* Trial Chamber noted, "[T]he DRC did not challenge the admissibility of the case when this warrant of arrest was communicated to it and … as soon as said warrant was unsealed, Germain Katanga's transfer to The Hague was ordered immediately."[270]

The logic of the Appeals Chamber's decision implies a circular approach to assessing prosecutorial or judicial activity at the national level, particularly in situations of self-referral. In Katanga's admissibility decision, for instance, the Chamber affirmed that the case was inadmissible but the grounds of its determination focused on the first-prong of the admissibility test: inactivity.[271] Specifically, the Chamber found that there were no proceedings against Katanga at the time he raised his challenge because the DRC had closed them upon his transfer to The Hague.[272] This approach to the admissibility provision thus subordinated the presence of domestic proceedings to a narrow question: Were proceedings ongoing "at the time of" the Court's actual determination of the admissibility of the case?[273]

The Chamber appeared untroubled by the potentially chilling effect that such relinquishment of jurisdiction might have on the duty of states to exercise their criminal jurisdiction. In its words, "It is purely speculative to assume that a State that has

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[268] *Situation in the Democratic Republic of Congo*, Judgment of 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, Appeals Chamber, 13 July 2006. Such exceptional circumstances, the Chamber noted, "may include instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review," para. 52.

[269] Gilbert Bitti and Mohamed M. El Zeidy, "The *Katanga* Trial Chamber Decision: Selected Issues," *Leiden Journal of International Law* 23 (2010), 323.

[270] Katanga Admissibility Decision, para 95.

[271] As noted, the Appeals Chamber corrected the Trial Chamber and held that complementarity comprised a two-part test: "(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 persons concerned. It is only when the answers to these questions are in the affirmative that … one has to examine the question of unwillingness and inability." See Katanga Admissibility Appeals Judgment, para. 78.

[272] Ibid., para. 82.

[273] Ibid., para 75. One commentator, acknowledging this apparent catch-22, describes it as follows: "[O]nce transferred, if the domestic investigation is terminated then this means that Article 17(1)(a) does not render the case inadmissible; and the decision to transfer, reflecting a decision that the person should be brought to justice, means that the case is also not inadmissible under Article 17(1)(b)." See Ben Batros, "Evolution of the ICC Jurisprudence on Admissibility," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 601.

refrained from opening an investigation into a particular case or from prosecuting a suspect would do so, just because the [ICC] has ruled that the case is inadmissible."[274] While the Chamber's reasoning is consistent with the plain language of Article 17(a)(1), judicial inquiry into the broader context of domestic proceedings becomes immaterial. As other chambers have similarly ruled, the nature of any past investigations—who initiated them, for what crimes, based on what evidence—is irrelevant.[275]

The insistence that concrete investigative steps must be underway at the time the Court makes a determination on an admissibility challenge is further compounded by Article 19(5) of the Statute, which stipulates that such challenges be made "at the earliest opportunity."[276] This requirement is particularly difficult for states that may have a genuine desire to conduct domestic proceedings, but suffer from the challenges common to many post-conflict states, e.g., collapsed (or compromised) judicial systems, limited capacity, or inadequate national legal frameworks. Indeed, it is on this basis that the Libyan government lodged its objection, in part, on the grounds that "no State emerging from conflict could ever benefit from the complementarity principle."[277]

Similarly, in Kenya's admissibility challenge, the government averred that the Pre-Trial Chamber had erred by failing to give it sufficient time to submit additional evidence before ruling on the application. The Appeals Chamber rejected this argument, concluding that a two-month period was sufficient between the receipt of an admissibility challenge and a ruling upon it. Further, relying on the two-stage test articulated in the Katanga judgment, the Chamber reiterated that the admissibility challenge must be "sufficiently substantiated" at the time the motion is filed. States cannot expect to be allowed to make further submissions.

1.3 Evidentiary Thresholds

An additional limitation is the scrutiny, or lack thereof, with which ICC chambers have assessed claims of ongoing domestic proceedings as part of admissibility challenges. In this regard, Katanga's proceedings illustrate the negative consequences of the Appeals Chamber's 2006 judgment, which resulted in the Pre-Trial Chamber conducting a "very limited review of the admissibility of the case against Katanga in the context of issuing the arrest warrant against him and in the light of the restricted information provided by the Prosecutor."[278] As a result, when Katanga brought his admissibility challenge before the Trial Chamber, the Chamber was thrust into the "difficult position of trying to

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[274] Ibid., para. 86.

[275] For similar outcomes, see *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges," ICC-01/05-01/08OA3, Appeals Chamber, 19 October 2010, para. 74 (recalling that a "decision not to prosecute" in terms of Article 17(1)(b) "does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC"); Gbagbo Admissibility Decision, paras. 21, 27 (noting that "national authorities chose to refrain" from opening an investigation into Gbagbo for "violent crimes," while his prosecution for economic crimes "has been impaired since his surrender to the Court").

[276] Rome Statute, Article 19(5). Article 19(4) articulates a further deadline, requiring that the challenge be filed prior to the commencement of the trial. The *Katanga* Trial Chamber further held that the "commencement of trial" is actually the moment of the constitution of the Trial Chamber, rather than the start of the trial per se; the Appeals Chamber did not pronounce on the merits of this interpretation, but noted that its decision to do so "does not necessarily mean that it agrees with the Trial Chamber's interpretation of the term." See Katanga Admissibility Appeals Judgment, para 38.

[277] Libya Admissibility Application, para. 101.

[278] Bitti and El Zeidy, "The *Katanga* Trial Chamber Decision: Selected Issues," 324.

respect the 13 July 2006 Appeals Chamber Judgment and to guess the Pre-Trial Chamber's attitude if it had been engaged in a detailed review of the admissibility of the case during the issuance of the arrest warrant."[279]

The Trial Chamber's reasoning is noteworthy for its approach to the question of state "willingness," which has otherwise yet to be addressed by the Court. Notably, the Trial Chamber did not address the activity or inactivity of the DRC authorities (as the Appeals Chamber later did); rather, it proceeded directly to what Robinson has termed the "slogan" version of the test, i.e., it proceeded directly to an unwillingness/inability assessment.[280] It examined the intent of the DRC to bring Katanga to justice, and considered that the evidence presented to date supported the "clear and explicit expression of unwillingness of the DRC to prosecute [the] case."[281] Indeed, echoing an argument that had initially been rejected by the Pre-Trial Chamber in *Lubanga*, the Trial Chamber held that, regardless of the conduct for which the accused was being tried, because the Congolese authorities had willingly surrendered him to the Court, the national system must be deemed "unwilling" within the meaning of Article 17.[282]

In arriving at this conclusion, the trial judges uncritically accepted the DRC's submissions that it had voluntarily relinquished jurisdiction. It cited to a letter from the government, which stated the DRC's "official position" that the ICC must reject Katanga's admissibility challenge because, in so doing, the ICC would be "doing justice" to "His Excellency Mr. Joseph Kabila, President of the DRC, [who] has demonstrated to the world his determination to fight resolutely against impunity by making the DRC to date an unequalled model of cooperation with the ICC."[283] The Court further appeared to accept as dispositive a letter submitted to the OTP by the Director of the Immediate Office of the Chief Prosecutor of the High Military Court in Kinshasa, which stated that "the Military Prosecuting Authority had not initiated any investigation against Germain Katanga in relation to the attack on Bogoro on 24 February 2003."[284] Such "clear and explicit" expressions of unwillingness, according to the Chamber, meant that the "DRC clearly intend[ed] to leave it up to the Court" to prosecute Katanga for the attack in Bogoro.[285]

Yet, by the Chamber's own admission, disagreement did exist as to whether domestic criminal proceedings against Katanga had been initiated and whether there was unwillingness to prosecute. One of the threshold questions was defense counsel's claim that the Prosecutor had "inadvertently or negligently" failed to provide the Pre-Trial Chamber with information of the existence of domestic proceedings against Katanga at the time the arrest warrant was issued.[286] These documents included a request filed by

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279 Ibid.

280 See Robinson, "The Mysterious Mysteriousness of Complementarity."

281 Katanga Admissibility Decision, para 95.

282 Ibid., para 77. ("This second form of unwillingness, which is not expressly provided for in Article 17 of the Statute, aims to see the person brought to justice, but not before national courts. The Chambers considers 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.")

283 Ibid., para. 94.

284 Ibid., para 93.

285 Ibid., para 95.

286 *The Prosecutor v. Germain Katanga*, Document in Support of Appeal of the Defense for Germain Katanga Against the Decision of the Trial Chamber "Motifs de la Décision Oral Relative a l'Exception d'Irrecevabilité de l'Affaire," ICC-01/04-01/07, 8 July 2009, paras 42-51.

the Kinshasa High Military Court in March 2007 to extend Katanga's provisional detention, which contained reference to Bogoro "as one of the ten locations where people had allegedly been killed in the course of systematic attacks against the civilian population."[287] In light of this submission, the Chamber even acknowledged that the document contained "objective information indicating that Germain Katanga was one of several persons under investigation for crimes … between 2002 and 2005 in, among other locations, Bogoro."[288]

The awkward posture in which the Trial Chamber found itself – effectively second guessing the issuance of Katanga's arrest warrant, following the Pre-Trial Chamber's limited review – likely contributed to its cursory analysis of the documents that had allegedly not been provided.[289] These documents suggest, at the least, discrepancies between the DRC government's representation and the situation on the ground at the time, but the Chamber declined the opportunity to query the matter further. In particular, the judges found "no need to answer the question" as to whether the materials would have led the Pre-Trial Chamber to exercise its discretion differently because, in its view, the document did not contain "decisive information" on the question of whether there had been domestic proceedings, nor was it "conclusive as to whether the acts allegedly committed there could be attributed to Germain Katanga."[290] As with the Court's later decisions, this apparent endorsement of a "conclusive" and/or "decisive" standard sets a high threshold for indicia of domestic activity.

The Trial Chamber's conclusions also appeared to rest on an uncritical acceptance of the representations of the Congolese executive. In effect, it treated the state as a unitary actor, overlooking evidence that there had been disagreement *within* the state on the status of Katanga's case, as well as on the ability to try cases at the sub-state, i.e., provincial, level.[291] Phil Clark, for instance, notes that the ICC's Ituri-only focus at the time of Katanga's challenge had raised concerns amongst senior judicial officials since Ituri then had one of the better functioning local judiciaries in the DRC. Clark quotes Chris Aberi, the Sate Prosecutor in Bunia:

> When the ICC first came here, we showed them the dossiers we had already assembled on Lubanga and others. We were ready to try those cases here. We had the capacity to do this and it would have had a major impact for the people here, to see these [rebel] leaders standing trial in the local courthouse.[292]

Michael Reed of the International Center for Transitional Justice poses a similar question: "We have little sense of how the ICC measures willingness. Is willingness determined

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[287] Katanga Admissibility Decision, para. 68.
[288] Ibid., para 70.
[289] In Bitti and El Zeidy's words, rather than undertaking a more robust inquiry into whether proceedings had been underway, the Trial Chamber "used a clever legal argument to overcome a practical problem," 324. See also Matthew E. Cross and Sarah Williams, "Recent Developments at the ICC: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*—A Boost for 'Co-operative Complementarity'?," *Human Rights Law Review* 10(2) (2010), 342 ("On the facts, the decision rested on a delicate, and perhaps somewhat strained, definition of 'inactivity.'")
[290] Katanga Admissibility Decision, paras. 70-73.
[291] See Phil Clark, "Chasing Cases: The Politics of State Referral," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1194-95.
[292] Ibid.

according to what a country's executive branch says? By the judicial system's choice of cases?"[293]

The evidentiary threshold established by the Trial Chamber in Katanga is compounded by the Appeals Chamber's treatment of the Kenyan admissibility challenge. There the Chamber clarified that a state challenging the admissibility of a case "bears the burden of proof to show that the case is inadmissible" and that, to "discharge that burden," the state "must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case."[294] Concrete evidence would have to be submitted that pointed to "specific investigative steps," including, *inter alia*, "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses."[295] Despite these requirements, the Appeals Chamber refused to grant the Kenyan government's requests to submit additional evidence or to present its argument in an oral hearing, where it had wanted the state police commissioner to testify concerning the progress of national proceedings. In the Chamber's view, "although there might have been reasons to hold an oral hearing," the decision not to do so was not an abuse of discretion.[296]

Judge Usacka again dissented strongly from this view. She criticized the Pre-Trial Chamber for not seeking submission on such "pivotal matters" as the "definition of investigation and prosecution, standard of proof, and the type of evidence that was required to meet the burden, even though the Appellant had requested a hearing on those matters."[297] She further argued that the Pre-Trial Chamber abused its discretion in failing to consider Kenya's submissions that investigations were underway (it had, for instance, included a case file referring to Ruto as a suspect with information on the scope of the investigation) or about their prospective nature, i.e., the possibility that, while in an early stage, the investigations might satisfy Article 19's standards at some point in the near future since "the assessment of complementarity is the outcome of an ongoing process."[298] In her view, the Kenyan government should have been allowed more time to submit further evidence; moreover, the Pre-Trial Chamber could (and should) have used its authority to request additional documentation.

The Court's approach in both the Katanga and Kenya's admissibility challenges suggests that the level of scrutiny applied to investigations and prosecutions at the national level has been less than thorough, and that a desire for speed or "efficiency" has overwhelmed the opportunity for more careful analysis and dialogue with national (or local)-level courts and prosecutors.[299] Notably, the Court appeared to adjust this

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[293] "The ICC on the Ground: Complementarity at work in Colombia and the DRC," International Center for Transitional Justice (May 2010), at https://www.ictj.org/sites/default/files/ICTJ-Global-Newsletter-May-2010-English.pdf.

[294] See *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ICC-01/09-02/11 OA, Appeals Chamber, 30 August 2011, para. 61 ("Kenya Admissibility Appeals Judgment").

[295] Ibid., para. 40.

[296] Ibid., para. 108.

[297] Ibid., Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 25; see also para. 8.

[298] Ibid., para. 20; see also para. 27 ("The Court should not circumvent [the high threshold] created by unwillingness or inability by requiring a State to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity.")

[299] One commentator has also suggested that the Pre-Trial Chamber's imposition of a "high legal burden of proof" on the Kenyan challenge was because of its lack of faith in the government's intentions: "the real

approach in the course of Libya's admissibility challenge to the case against Gaddafi, when it requested further clarifications on a variety of issues to obtain "concrete, tangible and pertinent evidence that proper investigations are currently ongoing" in Libya."[300] While this additional information did not alter the Pre-Trial Chamber's admissibility determination, the breadth of the additional information it sought—and the year it took to reach its decision—suggests the possibility of a more probing approach in assessing future challenges, albeit still an exacting one.[301]

1.4 Due Process: Domestic Legal Systems on Trial

Following the two-stage test for dealing with admissibility challenges, states are not first evaluated as to their willingness and ability to prosecute. This determination comes second, and has only rarely been dealt with in the complementarity case law to date. When it has, however, the legal framework applied suggests a similarly exacting approach to admissibility determinations. In Uganda, for instance, the Pre-Trial Chamber invoked its *proprio motu* powers to examine the continued admissibility of the case against LRA leader Joseph Kony, following the creation of a new special division within the Ugandan High Court meant to prosecute serious crimes. In finding that it remained properly seized of the case notwithstanding this development, the Chamber suggested a strict approach to complementarity, consistent with the expanded concept of it as a tool for compliance. In its words, "Pending the adoption of *all* relevant texts and the implementation of *all* practical steps, the scenario … remains therefore the same as at the time of the issuance of the warrants, that is one of *total inaction* on the part of the relevant national authorities."[302]

The adequacy of a state's domestic legal framework was considered most extensively in the context of Libya, where the fairness of domestic proceedings and the adequacy of the country's national criminal code were central issues. Whereas the Kenyan accused were aligned with the government's admissibility challenges, in Libya both Gaddafi and al-Senussi sought transfer to The Hague on the basis that they would not be afforded a fair trial domestically. These challenges have presented perhaps the most complex set of questions for the Court to consider, in a political environment where there is little desire to cooperate with the ICC's warrants but where genuine

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issue is that it simply did not believe that Kenya was acting in good faith." See Clare Brighton, "Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court," *International Criminal Law Review* 12 (2012), 658.

[300] *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi, ICC-01/11-01/11, PTC I, 7 December 2012, para. 9. These documents included: 1) issues relating to the status of domestic proceedings (including what investigative steps have been taken, whether evidence has been collected, and of what type); 2) issues relations to the subject-matter of the domestic investigations (including the "anticipate contours" of the case at the national level"; 3) issues of Libyan national law (including progress made in relation to law reform and the incorporation in Libyan law of international crimes as defined under the Rome Statute, and whether such reform would impact on the proceedings against Gaddafi); 4) issues relating to Gaddafi's exercise of his rights under Libyan national law; and 5) issues relating to the capacity of Libyan authorities to investigate and prosecute (including questions of resource allocation, witness protection, and custody). Ibid., paras. 14-47.

[301] Notably, however, Pre-Trial Chamber I did not seize a similar opportunity in rejecting the Ivory's Coast admissibility challenge to the case against Simone Gbagbo; it concluded that, despite evidence suggesting national proceedings had been initiated, the document provided was "contrary, sparse and disparate." Further clarification was not sought. See *The Prosecutor v. Simone Gbagbo,* Decision on Cote d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, ICC-02/11-01/12, PTC I, 11 December 2014, para. 65.

[302] Uganda Admissibility Decision, para. 52 (emphasis added).

political transition offered—at least for a time—greater prospects for domestic accountability. Put differently, the concern was not that Libyan authorities were unwilling to prosecute Gaddafi and al-Senussi, but rather that they were too willing.[303]

In its challenge to the case against Gaddafi, Libya submitted that an active investigation—broader than but including the same incidents and conduct as those contained in the ICC warrant—was ongoing since the date of Gaddafi's capture, and that it was willing and able genuinely to carry out the proceedings.[304] The government focused on efforts made to strengthen judicial capacity building and to improve the security situation, but argued that, "It is not the function of the ICC to hold Libya's national legal system against an exacting and elaborate standard beyond that basically required for a fair trial."[305] Similar arguments were made in the challenge to the al-Senussi case, with Libya asserting that an appropriate courtroom complex and prison facilities would be available.[306] It noted, however, that due process need not "ensure that the domestic proceedings accord with a particular ideal as determined by the ICC."[307] In this case, the Prosecutor agreed.[308]

As noted, the Court issued divided rulings. In the case of Gaddafi, the Chamber rejected Libya's challenge chiefly on the grounds of "inability," insofar as it was unable to "obtain" both the accused as well as testimony from witnesses who were being held in detention facilities not yet under the government's control.[309] A third main line of reasoning, however, was that *national* due process standards were relevant to the principle of complementarity. Specifically, the Chamber found that the failure to provide Gaddafi with a defense attorney, despite the guarantee of counsel under Libyan law, was "an impediment to the progress of proceedings," as it meant that, "a trial cannot be conducted in accordance with the rights and protections of the Libyan national justice system."[310] In short, while a state's failure to satisfy international standards of due process might not render a case inadmissible, the failure to respect national due process standards—"in the context of the relevant national systems and procedures"—could.[311]

The Chamber, however, granted the state's challenge to the admissibility of al-Senussi's case. While that case was substantially different than Gadaffi's (for one, he was

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[303] As Mégret and Samson put it, "Violating someone's due process rights denotes not unwillingness, but if anything, its opposite in an extreme form." See Frédéric Mégret and Marika Giles Samson, "Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials," *Journal of International Criminal Justice* 11 (2013), 574. For a "modified" approach to this thesis, advocating a focus on "core fair trial elements … without turning the ICC into a traditional human rights body," see Elinor Fry, "Between Show Trials and Sham Prosecutions: The Rome Statute's Potential Effects on Domestic Due Process Protections," *Criminal Law Forum* 23 (2012).
[304] Libya Admissibility Application, para. 101.
[305] Ibid., para. 99.
[306] Al-Senussi Admissibility Application, paras. 176, 181, 193.
[307] Ibid., para. 111.
[308] OTP Response to Libya Application, para. 28 ("The Statute requires that the State with jurisdiction must establish a genuine willingness and ability, but it need not also establish that its domestic procedural protections comport with the ICC Statute and Rules of Procedure and Evidence.").
[309] Gaddafi PTC Decision, paras. 206-11.
[310] Ibid., para. 214.
[311] Ibid., 200

in the custody of the Libyan government), the Court's approach suggests a modified approach to due process questions.[312] In affirming the decision, the Appeals Chamber,

> recall[ed] that, in the context of admissibility proceedings, the Court is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated. Rather, what is at issue is whether the State is willing genuinely to investigate or prosecute.[313]

The Chamber concluded that, even accepting the fair trial violations that would flow from lack of access to a lawyer during the investigation stage of proceedings, "such violations would not reach the high threshold for finding that Libya is unwilling genuinely to investigate or prosecute Mr. Al-al-Senussi."[314] In its view, such a high threshold meant proceedings that would "lead to a suspect evading justice … in the equivalent of sham proceedings that are concerned with that person's protection."[315]

While the Court's decision in al-Senussi has been criticized,[316] its general approach to both of the Libyan cases suggests that there may be an overall loosening of other admissibility doctrines, particularly where, in an environment of political transition, the desire of state authorities to investigate and prosecute is not in doubt. Complementarity-as-admissibility in this context thus hews more closely to the goals of complementarity-as-catalyst. At the same time, the Appeals Chamber's effective rejection of the "due process" thesis, as well as its explicit affirmation that conduct need not be charged as international crimes, suggests that there may be a greater margin for discretion in future admissibility assessments, even if the restrictive "same case" test endures.

2. "Positive" Complementarity in the Courtroom

The ascendance of the concept of "positive" complementarity within the OTP and amongst non-state actors seeking to maximize the ICC's catalytic properties is partly rooted, as chapter two argued, in a cooperative spirit of mutual assistance and interaction. Article 93 sets forth the ways in which states parties are obligated to cooperate with the Court and also the way in which the Court *may* cooperate with states (both state and non-state parties.) Article 93(10), in particular, provides the legal basis for such cooperation. It authorizes (but does not require) the ICC to, upon request:

> [C]ooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crimes within

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[312] The Pre-Trial Chamber's apparent emphasis on the fact that al-Senussi's lack of counsel "at the present time" was not dispositive of "inability" (as it appeared to be in the case of Gaddafi), suggests a more permissive temporal approach by the Court as well. Ibid., paras. 307-308.
[313] Al Senussi Admissibility Appeals Judgment, para. 190.
[314] Ibid., 190
[315] Ibid., par. 218.
[316] See, e.g., Kevin Jon Heller, "It's Time to Reconsider the Al-Senussi Case. But How?" (2 September 2014), at http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/. Similarly, civil society reaction to the Court's decision was decidedly mixed. The only international NGO to explicitly welcome the ruling was No Peace Without Justice, which considered it "a positive answer to Libyans' aspirations to see the alleged perpetrators of crimes against them face justice where those crimes were committed." See "Libya: NPWJ and NRPTT welcome ICC ruling on the Al-Senussi case" (24 July 2014).

> the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting state.[317]

While a broad array of information can be provided—ranging from the "transmission of statements, documents or other types of evidence obtained in the course of an investigation or trial conducted by the Court," to "the questioning of any person detained by order of the Court"—the Statute provides certain safeguards for the provision of such information, including if the documents or information sought were provided by another state, or a witness or expert.[318]

But while the Court has endorsed, as in *Katanga*, positive complementarity's vision of certain division-of-labor relationships between the Prosecutor and national jurisdictions,[319] direct assistance under Article 93(10) has found little judicial support to date.[320] It was raised directly in the course of the Kenyan litigation when the government filed, along with its admissibility challenge, a request for assistance from the Court seeking the "transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations."[321] Other than that request, however, judicial precedent is scant. The only previous occasion in which such a request appears was in Katanga's challenge, where defense counsel pointed to "evidence that the DRC was keen on investigating this case at the national level" and noted that the government had "submitted a request for legal assistance to the Prosecutor, making use of the mechanism in Article 93(10)."[322] Counsel stated that it was "unaware of the fate of that request," but, two weeks later, the OTP noted the following in its reply:

> The ICC was not created to be an international investigative bureau with resources to support national authorities. It is instead a judicial body with jurisdiction over the most serious crimes of international concern and established to be complementary to national criminal jurisdictions. Furthermore, Article 93(10), which addresses requests for cooperation from States to the Court, does not impose an obligation on the ICC to render assistance to States. Compliance

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[317] Rome Statute, Article 93(10)(a). As noted, non-state parties may also be granted requests for assistance as well. Ibid., Article 93(10)(c).

[318] Ibid., Article 93(10)(b)(i)-(ii). Christopher Hall urges an added set of safeguards, namely that the OTP develop criteria for determining whether, consistent with Article 21(3), the assistance the Office might provide could have "a seriously detrimental impact on human rights," for instance through application of "the death penalty, torture or other ill-treatment, unfair trial or other human rights violations." See Christopher Hall, "Positive Complementarity in Action," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1032-1033.

[319] As the Appeals Chamber noted, "[T]here may be merit in the argument that the sovereign decision of a State to relinquish its jurisdiction in favor of the Court may well be seen as complying with the 'duty to exercise [its] criminal jurisdiction' as envisioned in the … Preamble." Katanga Appeals Admissibility Judgment, para. 85.

[320] For similar conclusions, see Nidal Nabil Jurdi, "Some lessons on complementarity for the International Criminal Court Review Conference," *South African Yearbook of International Law* 34 (2009), 36 ("No traces of positive complementarity can be found in either the *Lubanga, Katanga*, and *Ntaganda* cases, or in the Ugandan situation."); Nouwen, *Complementarity in the Line of Fire*, 101; Karolina Wierczynska, "Deference in the ICC Practice Concerning Admissibility Challenges Lodged by States," in *Deference in International Courts and* Tribunals, 369 ("At the moment the complementarity principle, as interpreted by the ICC, seems mainly focused on the mechanism of control.").

[321] *Situation in the Republic of Kenya*, Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194, ICC-01/09, 21 April 2011, para. 2.

[322] Katanga Admissibility Challenge, para. 50

> with a request is discretionary and dependent on the fulfillment of the factors listed therein, including considerations of witness protection and the principle of originator consent.[323]

Subsequent proceedings indicate no judicial determination as to the outcome of Katanga's request.

The Court's assessment of the Kenyan government's 93(10) application, considered in June 2011, preceded the onset of its more overtly volatile relationship with the state (President Kenyatta himself was not elected until two years later), as well as serious allegations of witness intimidation and interference. While these subsequent developments raise legitimate questions about the good faith of the government's application (and its intention to undertake a genuine investigations), at the time the Court appeared unwilling to indulge the state's request for assistance. First, it explicitly stated that any requests for assistance under 93(10) should be assessed apart from complementarity: in the Pre-Trial Chamber's words, "a determination on the inadmissibility of a case pursuant to article 17 of the Statute does not [necessarily] depend on granting or denying a request for assistance under article 93(10) of the Statute."[324] Then, in a subsequent, terse opinion, the Chamber articulated relatively strict conditions for such requests, stating that "the requesting State Party must show that it is at a minimum investigating or has already investigated" Rome Statute crimes.[325] Referring only to the cooperation request—not the information provided in the government's admissibility challenge—the Chamber concluded that, "The Government submitted … a two-page [request], which lack[s] any documentary proof that there is or has been an investigation, as required pursuant to article 93(10)(a) of the Statute."[326]

The relationship between a state's admissibility challenge and a related Article 93(10) request is difficult to ignore, particularly where the need to satisfy a high admissibility standard may well depend on information in the Court or Prosecutor's possession.[327] Indeed, read alongside the "same case" jurisprudence highlighted above,

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[323] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, TC II, 30 March 2009, paras. 100-101 ("OTP Response to Katanga Admissibility Challenge"). Notably,when the OTP and DRC signed a 2004 cooperation agreement (in the absence of national legislation), a provision was included, consistent with Article 93(10), that the OTO "could cooperate with national jurisdictions and provide them with assistance in their investigations, prosecutions and eventual trials for crimes committed within the ICC's subject matter jurisdiction." See Judicial Cooperation Agreement between the Democratic Republic of Congo and the Office of the Prosecutor of the International Criminal Court, para. 39 (on-file).

[324] Ruto et al. Admissibility Decision, para. 34.

[325] *Situation in the Republic of Kenya*, Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence, ICC-01/09, PTC II, 29 June 2011, para. 33.

[326] Ibid., para. 34. As noted by Judge Usacka, however, the government had submitted evidence that investigations were underway at the time of the admissibility challenge. See Dissenting Opinion of Judge Anita Usacka, 20 September 2011, para. 8.

[327] On appeal, Kenya insisted on the "inter-relationship" between it's Article 93(10) request and its Article 19 application (and thus appealable as of right under Article 82(1)(a)), noting that a state "may simply not have evidence available to the Prosecutor of the ICC or may even be deprived of such evidence," further complicating the state's ability to pursue "an identical cohort of individuals" as those of the ICC. *Situation in the Republic of Kenya*, Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(1) of the Statute and Rule 194 of the Rules of Procedure and Evidence,"

the Chamber's fleeting treatment of Kenya's cooperation request establishes both a high bar to merit assistance but also a paradox: in order for states to receive assistance they must demonstrate that they have investigated the same person as the Court, yet to do so they may lack the very evidence for which they seek assistance.[328] As Stahn agues, "this approach leaves limited space to take into account emerging justice efforts under domestic jurisdiction."[329]

Judge Usacka has again been a dissenting voice on this issue. In the Kenyan cases, her dissent correctly suggests that the Pre-Trial Chamber "did not take into account that … [it] has the power to adapt the admissibility proceedings to … changing circumstances," or on how it could "facilitate the Appellant by asking for more information or awaiting additional evidence on the start of investigations."[330] While subsequent actions of the Kenyan government may give Furthermore, in her dissent in *Gaddafi*, she specifically endorsed that the Court "is in an ideal position to actively assist domestic authorities in conducting [investigations and prosecutions], be it by the sharing of materials and information collected or of knowledge and expertise."[331] Such explicit approval of the Court's role in encouraging domestic accountability has yet to find similar endorsement from other judges.

3. Complementary as Policy and Law

Complementarity's evolution in both legal and policy discourse underscores the dynamic, shifting nature of the principle. Given the ambitious goals that animate "positive" complementarity in particular, one desirable approach is to conceive of it as "primarily a device to accommodate diversity."[332] Under this view, a broad conception of the interpretive principles that underwrite admissibility is necessary if the Court is to play a catalytic role in a world of multiple, complex states. Furthermore, if the ICC is to encourage national investigations and prosecutions, then it will likely have to do so in a way that preserves political discretion and flexibility to states.

This approach rests uneasily, however, with the ICC's complementarity jurisprudence to date. Commentators have defended the Court's "refusal to import the policy aspects of positive complementarity into the admissibility regime," contending that it "does not detract from the existence and importance" of such a policy; rather, "It is simply to say that this decision of complementarity is not one which is enforced by judicial decisions."[333] The ASP has attempted a similar partition of the juridical approach to complementarity from its policy goals as a catalyst. For example, the Assembly's 2012 report on complementarity states:

ICC-01/09-70 (7 July 2011). The Appeals Chamber rejected the government's request, affirming the formal partition 93(10) requests from admissibility challenges.

[328] It should be noted that the Court's decision, as well as t

[329] Stahn, "Admissibility Challenges before the ICC," 237.

[330] Kenya Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 28.

[331] Gaddafi Admissibility Appeals Judgment, Dissenting Opinion of Judge Anita Usacka, para. 65.

[332] Frédéric Mégret, "Too much of a good thing? Implementation and the uses of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 390.

[333] Ben Batros, "The *Katanga* Admissibility Appeal: Judicial Restraint at the ICC," *Leiden Journal of International Law* , 23 (2010), 36o. Batros argues that the *Katanga* Appeals Chamber "took the facts as they existed at the time, rather then trying to use the judgment to create new facts which might have been more in line with the ideals of complementarity," 361. See also Batros, "Evolution of the ICC Jurisprudence on Admissibility," 600. For an opposing view, see Charles Cherner Jalloh, "Kenya vs. The ICC Prosecutor," *Harvard International Law Journal* 53 (August 2012),

> As stressed in the Court's first report, two aspects of the term "complementarity" have to clearly be separated. The first aspect is the question of admissibility as provided for in the Rome Statute, this being a judicial issue to be ultimately determined by the judges of the Court. The second aspect of complementarity relates to the complementary roles of the Court and national jurisdictions in contributing toward ending impunity. Within this second aspect, the term "positive complementarity" is sometimes used to refer to the active encouragement of and assistance to national prosecutions where possible.[334]

The OTP has also ratified this dichotomy, stating that complementarity has two dimensions: "(i) the admissibility test, *i.e.* how to assess the existence of national proceedings and their genuineness, which is a judicial issue; and (ii) the positive complementarity concept, *i.e* a proactive policy of cooperation aimed at promoting national proceedings."[335]

Such a bifurcated approach may be appealing insofar as it allows the OTP to summon different versions of complementarity, for different purposes and audiences. Whereas the Office took a dim view of cooperation in *Katanga* and the Kenyan cases, it has otherwise championed (at least rhetorically) such a relationship outside of the courtroom. But the goal of promoting national proceedings and questions of judicial admissibility are intimately linked; they cannot be "clearly separated." Indeed, while the Court's apparent endorsement of a burden-sharing component to "positive" complementarity lends support to complementarity's more cooperative dimensions, it simultaneously "downplays the significance of the national duty to investigate and prosecute."[336] As noted in a 2009 report on the DRC:

> Despite the intention spelled out in the ICC Rome Statute to complement and give precedence to investigations and prosecutions in national courts, the national justice sector seems to use the ICC as an excuse for not pursuing such cases. UN officials working to strengthen national capacities have been frustrated when, in at least one case, a judge insisted he should not take up a case if there were a chance that the ICC might prosecute it. [337]

Thus, just as ICC prosecutions can create an incentivizing environment for states consistent with the complementarity-as-catalyst framework, they may also have a chilling effect.

Furthermore, even if judicial proceedings must, as a matter of statutory interpretation, "mimic" those of the ICC, that requirement cannot be easily reconciled with broader goals for the Court to function as a catalyst for domestic accountability. As Drumbl notes, "Should [such] trials become the expected baseline of post-conflict justice, the result may be the universalization of a methodology that is unaffordable to nearly all

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[334] Assembly of States Parties, "Report of the Court on Complementarity," ICC-ASP11/39, 16 October 2012, para. 2.
[335] OTP Prosecutorial Strategy, 2009-2012 (1 February 2010), para. 16
[336] Cross and Williams, "Recent Developments at the ICC," 343; see also Susana SáCouto and Katherine Cleary, "The *Katanga* Complementarity Decisions: Sound Law but Flawed Policy," *Leiden Journal of International Law* 23 (2003).
[337] Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC* (ICTJ: March 2009), 30.

states or would only remain affordable if the justice narrative were limited to a tiny subsection of perpetrators."[338] Evidence of such "universalization"—or "mirroring," as the Appeals Chamber termed it—can be seen in Uganda, where, in the absence of clear precedents for challenging complementarity, the "safer route" appears to be following the ICC as closely as possible. Nouwen quotes the then Principal Judge of the Ugandan High Court as follows, "The ICC wants us to do everything the way they did it: we must use the same Statute and the same standards."[339]

The ICC's reluctance thus far to develop a more pro-active approach to its admissibility jurisprudence suggests that the Court has been cautious to incorporate explicit policy considerations into its admissibility jurisprudence. Ultimately, however, the policy goals of complementarity and the body of law the principle produces are linked. Legalism suggests that the political imperatives of complementarity-as-catalyst can be separated from, or subordinated to, legal questions, yet both have a powerful influence on the ability and willingness of states to pursue accountability at the domestic level.

4. Conclusion

Despite the ascension of the complementarity-as-catalyst norm, ICC judges have appeared noticeably more reticent to incorporate this goal as part of their interpretive framework. At the same time, the weight of Article 17 jurisprudence has seen the ICC emerge as the privileged forum for prosecution. Specifically, under the Court's case law, in order for a state to successfully challenge admissibility, domestic proceedings must be conducted in relation to the same "case" as that of the ICC, such that they concern the same person, conduct, and possibly even the same factual incidents. This already substantial threshold is even more pronounced in the case of "self referrals," where the practical value of Article 17 to individuals contesting admissibility appears increasingly unclear. Furthermore, when faced with competing claims about the existence of national-level proceedings, the ICC has undertaken a relatively superficial level of review, while setting a high evidentiary threshold for challengers to satisfy. And despite otherwise endorsing the "burden sharing" model that has accompanied the policy of "positive" complementarity, as a cooperation regime under Article 93(10) it has barely registered.

Thus, despite many claims about the Court's complementary nature to domestic jurisdictions, a *de facto* primacy regime—not unlike the Rule 11 referral system pioneered by the ICTY and ICTR, though without their explicit "conditional referral" authority—appears to have instead been erected. Complementarity thus appears less as a space for constructive engagement and dialogue than a set of unifying criteria with which states must comply.[340] The Libyan admissibility challenges may signal a more rigorous approach to Article 17 assessments and a partial loosening of the Court's interpretive commitment to the "mirror" test, but it remains to be seen whether this approach will prevail in the long term.

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[338] Drumbl, *Atrocity, Punishment, and International Law*, 210.

[339] Nouwen, *Complementarity in the Line of Fire*, 205.

[340] Stahn similarly gestures towards the "possibility of adopting a dialogue-based understanding of complementarity which would promote continued interaction with domestic jurisdictions in deference of cases." See "Admissibility Challenges before the ICC," 245.