Dissenting Opinion of Judge Anita Ušacka

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1. I respectfully disagree with my colleagues on the resolution of this appeal that leads them to confirm the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"[1] (hereinafter: the "Impugned Decision"), in which the case against Mr Saif Al-Islam Gaddafi (hereinafter: "Mr Gaddafi") was found to be admissible before the Court.

2. For the reasons that follow, I would have reversed the Impugned Decision and remanded the matter to the Pre-Trial Chamber in order to allow it, *ex nunc*, to apply the facts to the correct interpretation of article 17 (1) (a) of the Statute, based on the specific circumstances of this case and the correct standard of proof, as laid out below.

I. IMPORTANT FEATURES OF THE PROCEDURAL HISTORY

3. Without attempting to recall the entire procedural history of this case, I would like to draw attention to several features that I consider to be of particular importance. They are important because the issue of complementarity in the case at hand should not be analysed in the abstract, but on the basis of the specific background of this case and the concrete steps taken by Libya. The facts of this case are, in many respects,

[1] 31 May 2013, ICC-01/11-01/11-344-Conf.

different from the previous cases that have formed the basis for the Court's jurisprudence to date. These differences include the trigger mechanism that allows the Court to exercise jurisdiction in this case, the fast-paced development of events in Libya following the United Nations Security Council Resolutions, the willingness of the new government of Libya to deal with the case domestically, the active cooperation of Libya with the Prosecutor, the difficulties Libya faces during its transitional period, and the particular relationship between the trio of principal participants in this case, i.e. Libya, the Prosecutor and the Defence. With respect to the latter, I specifically note the very active role taken by the suspect's Defence Counsel in opposing Libya, a position that has an impact on the relationship between the Court and Libya, as well as the apparently contradictory positions taken by the Prosecutor at different stages of this case as well as during the admissibility proceedings.[2]

4. The start of the case against Mr Gaddafi before the Court:[3] On 26 February 2011, the Security Council of the United Nations (hereinafter: "Security Council"), "[*s*]*tressing* the need to hold to account those responsible for attacks, including by forces under their control, on civilians", referred "the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court".[4] Five days later, on 3 March 2011, the Prosecutor decided to open an investigation into the situation pursuant to article 53 (1) (a) of the Statute. Two months later, on 16 May 2011, the Prosecutor requested Pre-Trial Chamber I

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[2] *See* "Prosecution's Submissions on the Prosecutor's recent trip to Libya", 25 November 2011, ICC-01/11-01/11-31, paras 7-9; "Prosecution Observations on Libya's Submissions Regarding the arrest of Saif Al-Islam Gaddafi", 2 February 2012, ICC-01/11-01/11-50; "Prosecution's Response to 'Government of Libya's Application for Leave to Appeal the "Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi"'", 16 April 2012, ICC-01/11-01/11-110; "Prosecution response to Application of the Government of Libya pursuant to Article 19 of the ICC Statute", 4 June 2012, ICC-01/11-01/11-167-Conf, paras 6-8, 33-39; "Prosecution's Response to 'Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi'", 11 February 2013, ICC-01/11-01/11-276-Conf-Exp, paras 37-38; "Prosecution's Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 16 July 2013, ICC-01/11-01/11-384-Conf, submissions in relation to the first and second grounds of appeal.

[3] Compare this time frame to that relevant to the Darfur Security Council Referral in 2005: The Prosecutor took two months to decide to open an investigation and two years (2007) to request the issuance of the first two warrants of arrest in relation to this situation. The warrant of arrest against Omar Hassan Al-Bashir was requested in July 2008 and the first warrant of arrest was issued in March 2009.

[4] United Nations, Security Council, *Resolution 1970*, 26 February 2011, SC/10187/Rev.1.

(hereinafter: "Pre-Trial Chamber") to issue three warrants of arrest,[5] including for Mr Gaddafi, for having committed murder and persecution as crimes against humanity on and after 15 February 2011. On 27 June 2011, the Pre-Trial Chamber issued these warrants of arrest.[6]

5. The regime change in Libya and Libya's first submissions before the Court: The government of Muammar Gaddafi was overthrown in October 2011. Shortly thereafter, on 19 November 2011, Mr Gaddafi was arrested within Libya[7] and has been held in Zintan, Libya, from the time of his arrest. The Pre-Trial Chamber, upon receipt of this information, invited Libya to make submissions in relation to the arrest of Mr Gaddafi.[8] In response thereto, Libya requested a postponement of the surrender request pursuant to article 94 of the Statute for the reason that it had initiated domestic proceedings against Mr Gaddafi and was also considering investigating Mr Gaddafi for the conduct that is the subject of the Court's warrants of arrest.[9] The Pre-Trial Chamber rejected the request and reiterated the need for Libya to surrender Mr Gaddafi.[10] Thereafter, Libya requested a postponement of the surrender request pursuant to article 95 of the Statute for the reason that Libya was intending to file an admissibility challenge. On 4 April 2012, this request was also rejected by the Pre-Trial Chamber, on the basis that the intention to file an admissibility challenge is not sufficient.[11]

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[5] "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI", ICC-01/11-4-Conf-Exp; public redacted version: ICC-01/11-4-Red.

[6] "Warrant of Arrest for Saif Al-Islam Gaddafi", ICC-01/11-01/11-3; "Warrant of Arrest for Abdullah Al-Senussi", ICC-01/11-15; "Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi", ICC-01/11-13. *See also* "Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI'", ICC-01/11-12.

[7] *See* Pre-Trial Chamber I, "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", 6 December 2011, ICC-01/11-01/11-39-Red, para. 3.

[8] *See* Pre-Trial Chamber I, "Public Redacted Version of Decision Requesting Libya to file Observations Regarding the Arrest of Saif Al-Islam Gaddafi", 6 December 2011, ICC-01/11-01/11-39-Red, paras 9, 11.

[9] "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 7 March 2012, ICC-01/11-01/11-72, paras 8, 12-13.

[10] "Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi", 7 March 2012, ICC-01/11-01/11-72; *see also* "Decision on the Registry-OPCD Visit to Libya", 3 February 2012, ICC-01/11-01/11-52, allowing the Registry and the OPCD that was appointed to represent the interests of Mr Gaddafi to visit Mr Gaddafi.

[11] "Decision regarding the second request by the Government of Libya for postponement of the Surrender of Saif Al-Islam Gaddafi", 4 April 2012, ICC-01/11-01/11-100.

6. Challenge to the admissibility of the case before the Court: On 1 May 2012, Libya filed the admissibility challenge (hereinafter: "Admissibility Challenge").[12] The Pre-Trial Chamber held in a separate decision that Libya may, pursuant to article 95 of the Statute, postpone the surrender of Mr Gaddafi due to the Admissibility Challenge.[13]

7. Stay of the Prosecutor's investigations: Another effect of the Admissibility Challenge is, according to article 19 (7) of the Statute, the suspension of the Prosecutor's investigation in relation to the case *Prosecutor v. Saif Al-Islam Gaddafi*.[14] Therefore, the investigation has not proceeded since. In addition, the case is not yet at the confirmation stage.

8. The flow of information from Libya to the Pre-Trial Chamber: Libya submitted information about the legal proceedings initiated against Mr Gaddafi and about the development of Libya's legal system at the same time as the Admissibility Challenge.[15] Libya continued to inform the Pre-Trial Chamber about the state of affairs in Libya,[16] was heard at an oral hearing held on 9 and 10 October 2012, filed further submissions on 23 January 2013,[17] and provided further information in its

[12] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-130-Conf; public redacted version: ICC-01/11-01/11-130-Red.
[13] "Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute", 2 June 2012, ICC-01/11-01/11-163, para. 16.
[14] *See* Office of the Prosecutor, "Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011)", 16 May 2012, para. 30. *See also* "Prosecution Response to the 'Document in Support of the Government of Libya's Appeal against the Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 16 July 2013, ICC-01/11-01/11-384-Conf (OA 4), para. 142. Article 19 (7) and (8) of the Statute provides: "7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17. 8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court: (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58".
[15] "Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute", ICC-01/11-01/11-130-Conf, with eleven annexes. *See also* "Libyan Government's filing of compilation of Libyan law referred to in its admissibility challenge", 28 May 2012, ICC-01/11-01/11-158.
[16] *See* e.g. "Libyan Government's provisional reprot pursuant to the Chamber's Decision of 9 August 2012 & Request for leave to file further report by 28 September 2012", 7 September 2012, ICC-01/11-01/11-205.
[17] "Order convening a hearing on Libya's challenge to the admissibility of the case against Saif Al-Islam Gaddafi", 14 September 2012, ICC-01/11-01/11-207; "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-258-Conf-Exp with Annexes 1-23.

reply on 4 March 2013 to the responses of the parties to its further submissions.[18] In the latter filings, Libya requested that the Pre-Trial Chamber come to Tripoli to inspect the investigative file and provided additional information about the appointment of a new Prosecutor-General by the General National Congress (as opposed to the transitional government) and other additional case-related information.[19] Furthermore, it submitted additional information in support of its challenge to the admissibility of the case against Mr Abdullah Al-Senussi (hereinafter: "Mr Al-Senussi") to the same Pre-Trial Chamber in the same joint case.[20] On 23 September 2013, when the case was already at the appeals stage, Libya requested leave to submit additional evidence on appeal,[21] reporting that on 19 September 2013 an initial hearing was held in Libya before a Libyan Accusation Chamber in relation to Mr Gaddafi, Mr Al-Senussi and 37 others.[22]

9. Since the overthrow of the Gaddafi regime, Libya has been in a state of transition: The present situation in Libya has divergent aspects, as is the case with many transitional regimes. While Libya moved from a transitional parliament (the National Transitional Council) to a newly elected parliament in August 2012, it still had interim governments and was still attempting to implement steps to fully stabilise the country, including by promulgating a new constitution. The Security Council, in its Resolution 2095 of 14 March 2013, called these "positive developments [...] which will improve the prospects for a democratic, peaceful and prosperous future for its people".[23] This Security Council Resolution also extended the mandate of the United Nations Support Mission in Libya (UNSMIL) in time and scope, including supporting Libya in managing the process of a democratic transition, promoting the rule of law, restoring public security, etc. In the same resolution, the Security Council,

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[18] "Libyan Government's consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-293-Conf.
[19] "Libyan Government's consolidated reply to the responses of the Prosecution, OPCD and OPCV to its further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-293-Conf, paras 6-7.
[20] "Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute", 2 April 2013, ICC-01/11-01/11-307-Conf-Exp.
[21] "The Libyan Government's further submissions in reply to the Prosecution and Gaddafi Responses to 'Document in Support of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"", ICC-01/11-01/11-454-Conf (OA 4). A public redacted version was filed on the same day, ICC-01/11-01/11-454-Red (OA 4), paras 4-11.
[22] ICC-01/11-01/11-454-Red (OA 4), paras 4, 6.
[23] United Nations, Security Council, *Resolution 2095*, 14 March 2013, S/RES/2095, para. 1.

however, expressed grave concerns "at continuing reports of reprisals, arbitrary detentions without access to due process, wrongful imprisonment, mistreatment, torture and extrajudicial executions in Libya" and called upon "the Libyan government to take all steps necessary to accelerate the judicial process, transfer detainees to State authority and prevent and investigate violations and abuses of human rights [...]".[24]

10. With the above procedural history in mind, I note that all four grounds of appeal raised by Libya focus on the application of the principle of complementarity.[25] The first three grounds of appeal are interlinked and deal with alleged legal, factual and procedural errors in relation to the Pre-Trial Chamber's finding that Libya is not investigating the same case against Mr Gaddafi that is currently before the Court. The first ground of appeal addresses both the interpretation of the phrase "case is being investigated or prosecuted by a State which has jurisdiction over it" in article 17 (1) (a) of the Statute and the application of this legal provision by the Pre-Trial Chamber in this specific case. The focus of the first ground of appeal as well as of this Opinion therefore is on whether it is necessary that Libya investigates (substantially) the same conduct as that which is the basis for the warrant of arrest.

11. Before entering into an analysis of how article 17 (1) (a) of the Statute has been interpreted and applied in the previous jurisprudence of the Court as well as in the Impugned Decision, the principle of complementarity needs to be briefly discussed.

II. THE PRINCIPLE OF COMPLEMENTARITY

12. The principle of complementarity is enshrined in the Preamble and article 1 of the Statute, both establishing that the Court "shall be complementary to national criminal jurisdictions". While complementarity is not further explained in the Statute, it is referred to in the chapeau of article 17 (1) of the Statute, which reads under the heading "Issues of admissibility":

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[24] United Nations, Security Council, *Resolution 2095*, 14 March 2013, S/RES/2095, para. 5; *see also* J. M. Otto, et al. (eds), "Searching for Justice in Post-Gaddafi Libya", 2013, accessed at: https://openaccess.leidenuniv.nl/bitstream/handle/1887/21634/Otto%20JM%2c%20%20J%20Carlisle%2c%20J%20and%20S%20Ibrahim%202013%20Searching%20for%20Justice%20in%20Post-Gaddafi%20Libya.pdf?sequence=2.

[25] *See* "Document in Support of the Government of Libya's Appeal against the 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'", 24 June 2013, ICC-01/11-01/11-370-Conf-Exp-Corr (OA 4). The appeal was filed on 7 June 2013.

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
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> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
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> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
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> (d) The case is not of sufficient gravity to justify further action by the Court.

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

> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
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> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

13. The legal concept that a Court should "be complementary to national criminal jurisdictions" was included for the first time in the history of international criminal law in the Statute. The *ad hoc* tribunals, for example, were not complementary to the jurisdictions of the former Yugoslav States or Rwanda. Rather, these tribunals retained primary jurisdiction over domestic courts, to which the *ad hoc* tribunals

could refer cases.[26] However this Court differs from the tribunals, having been established on the basis of an international treaty, namely the Rome Statute.

14. The drafting history of the Statute shows that the principle of complementarity was, from the very beginning, at the heart of the intense discussions about the Court that took in total more than four years and which had the goal of clarifying the relationship between the Court's jurisdiction and domestic jurisdictions.[27] The basic proposal, starting from the 1994 International Law Commission Draft, was that it is the Court, and not the States, that should have the authority to decide whether a case before the Court is admissible.[28] During negotiations, it was agreed that solely mentioning this principle in the Preamble of the Statute was not sufficient, and that a mechanism needed to be established in terms of how the Court was to apply this principle.[29] These mechanisms were then established when drafting articles 17, 18 and 19 of the Statute.

15. At the beginning, two main positions were taken in relation to the understanding of complementarity, which changed gradually over the years. On the one hand, it was expressed that there should be a strong presumption for state sovereignty, which meant that the Court would not be able to intervene if a State had an operational judicial system and undertook a "*bona fide*" investigation and/or prosecution.[30] On the other hand, it was stated that the Court should have primacy of jurisdiction.[31] A view that sought to balance these two positions was that the Court should not be merely residual in character, but, at the same time, should respect the primacy of national jurisdictions.[32]

16. Later, positions were developed by States that the Court should not act as an appeals tribunal or engage in judicial review of national decisions, while other States

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[26] *See* rule 11*bis* of the ICTY Rules of Procedure and Evidence.
[27] *See* United Nations, General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court,* 6 September 1995, A/50/22 (hereinafter: "Ad-Hoc Committee Report"), para. 29.
[28] Yearbook of the International Law Commission 1994, Volume II Part Two, Report of the Commission to the General Assembly on the work of its forty-sixth session, A/CN.4/SER.A/1994/Add.l (Part 2), p. 45.
[29] Ad-Hoc Committee Report, paras 36-47.
[30] Ad-Hoc Committee Report, para. 31. *See also* United Nations, General Assembly, Report of the Secretary-General, 31 March 1995, A/AC.244/1/Add.2, pp. 9-11.
[31] Ad-Hoc Committee Report, para. 32.
[32] Ad-Hoc Committee Report, para. 33.

favoured a role for the Court in situations where national jurisdictions were ineffective.[33] At issue was therefore the balance between a State's sovereignty and an effective and credible Court.[34] The matter was of great importance because the credibility and strength of the Court in achieving its overall goal to fight impunity depended on its resolution.

17. With concessions on all sides, consensus emerged at the 1997 Preparatory Committee that "[t]he Court would not take jurisdiction unless the State with criminal jurisdiction over the offence was unable or unwilling to carry out the investigation or prosecution".[35] This consensus entered the Rome Conference as the cornerstone to the successful adoption of the Statute and was adopted without substantive changes. It has been repeatedly said that, "[w]ithout it there would have been no agreement" on the Statute.[36]

18. On the basis of this agreement, 93 States ratified the Rome Statute by March 2003, when the first 18 judges of the Court were sworn in. Today, this number has risen to 122 States Parties. Complementarity was also the subject of the first resolution of the Statute's Review Conference in Kampala in 2010. This resolution clarified that there is a close link between the overall goal of the Court, i.e. to "combat impunity for the most serious crimes of international concern as referred to in the Rome Statute", and the principle of complementarity.[37] It recalled the importance of cooperation with States for the Court's work to be successful, as the Court acts without its own police. It also stressed that it is foremost the primary responsibility of national jurisdictions to prosecute the crimes at issue. The resolution also recognised the need to strengthen national legal systems and enhance international assistance to "effectively prosecute perpetrators of the most serious crimes of concern to the

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[33] United Nations, General Assembly, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I,* 13 September 1996, A/51/22, paras 153-160; note para. 154: "Rather, [the Court's] jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quikcly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case".

[34] *See* S. A. Williams and W. A. Schabas, "Article 17: Issues of Admissibility", in O. Triffterer (ed.), Commentary on the Rome Statute (C.H. Beck-Hart-Nomos, 2nd ed., 2008), p. 608 (hereinafter: "Triffterer Commentary, Article 17"), p. 613.

[35] Triffterer Commentary, Article 17, p. 610.

[36] Triffterer Commentary, Article 17, p. 613.

[37] Kampala Review Conference, "Complementarity", 8 June 2010, Resolution RC/Res.1.

international community".[38] It also took into account that the Statute has been ratified by States from all continents with different political systems, legal traditions, cultures and languages. Complementarity has also been an ongoing subject of discussion at the Assembly of States Parties.[39]

19. The literal understanding of the term "complementary" conveys that the Court and States should work in unison – by complementing each other – in reaching the Statute's overall goal, i.e. to fight against impunity for the commission of the most serious crimes of concern to humankind.[40] In my dissents from the admissibility judgments in the *Situation in the Republic of Kenya*, I noted:

> The "criminal jurisdiction" of the Court and that of States are "complementary" to each other. This means that both the Court and States strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an "end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as a whole". This also means that there must be, to the extent possible, close cooperation and communication between the Court, especially the Office of the Prosecutor, and the State in question. Complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international criminal justice. While dialogue between the State and the Court is therefore required and desired, it is the Court, and not a third authority, that is the arbiter in case of conflict. According to a commentator, complementarity attempts to reconcile "the imperatives of sovereignty and global justice". When those "imperatives" clash, the judiciary of the Court will have to determine whether a case is admissible on the basis of article 17 (1) (a) and (b) of the Statute. [Footnotes omitted.][41]

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[38] Kampala Review Conference, "Complementarity", 8 June 2010, Resolution RC/Res.1, para. 3.
[39] ICC-ASP/9/Res.3; *see also* ICC-ASP-8-51, ICC-ASP-9-26.
[40] According to the Oxford English Dictionary, the word "complementary" is used with respect to two or more things in order to express that they are mutually complementing or complement each other's deficiencies; *see* Oxford English Dictionary, Online OED, meaning 3.a. "That which completes or makes perfect; the completion, perfection, consummation"; meaning 5.a. "Something which, when added, completes or makes up a whole; each of two parts which mutually complete each other, or supply each other's deficiencies"; the word "complement" indicates that one part is used to make a whole with another.
[41] Appeals Chamber, *Prosecutor v. William Samoei Ruto et al.*, "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'", Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, ICC-01/09-01/11-336 (OA), para. 19; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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'", Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, ICC-01/09-02/11-342 (OA), para. 19 [hereinafter: "*Kenya Admissibility Dissents*" and distinguished in the footnotes by "Muthaura et al" and "Ruto et al"].

III. THE JURISPRUDENCE ON THE "SAME PERSON – SAME CONDUCT" TEST

A. Introduction

20. From the moment of the Statute's promulgation, the principle of complementarity attracted the attention of the academic world. However, the Court had the delicate task of developing its jurisprudence on complementarity in the setting of so-called "self-referral" situations,[42] i.e. in relation to cases arising from the situations in Uganda (2003), the Democratic Republic of the Congo (hereinafter: "DRC") (2004) and the Central African Republic (hereinafter: "CAR") (2005).

21. The cases of the first suspects who were surrendered to the Court in these situations had similar histories. In cases arising from the investigations in the DRC, Mr Lubanga, Mr Katanga, and Mr Ngudjolo Chui were all arrested by DRC authorities based on national arrest warrants and held in its custody. Furthermore, national proceedings were discontinued with their surrender to the Court. Mr Bemba from the CAR situation was arrested in a European State, but he too was the subject of proceedings in CAR while he was at large. The cases differ in whether the domestic arrest warrants were for similar or different conduct investigated by the Prosecutor.

22. Evidently, these were cases where the national authorities chose not to exercise their sovereign rights, but wanted the Court to investigate and prosecute against the individuals surrendered to the Court. Therefore, these cases did not give rise to any disputes with respect to the principle of complementarity, as on its face there was no conflict between the sovereign rights of the States and the exercise of the Court's jurisdiction.[43]

23. In 2010, the Prosecutor initiated investigations in Kenya pursuant to article 15 of the Statute with the authorisation of Pre-Trial Chamber II.[44] While Kenya was

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[42] *See* e.g. C. Kress "'Self-Referrals' and 'Waivers of Complementarity': Some Considerations in Law and Policy" 2 *Journal for International Criminal Justice*, (2004), p. 944; *see also* J. Kleffner, "Auto-referrals and the complementary nature of the ICC", in: C. Stahn, G. Sluiter, *The Emerging Practice of the International Criminal Court* (Nijhoff Publishers, Leiden, Boston 2009), pp. 41-53.
[43] The question nevertheless arises as to how the Court *should* deal with such cases.
[44] *Situation in Kenya* "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09-19. A corrigendum was filed on 1 April 2010 (ICC-01/09-19-Corr).

informed at that time that, pursuant to article 18 (1) of the Statute, the Prosecutor would initiate such investigations, Kenya did not announce that it was investigating its nationals "with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States".[45] However, a year later, in 2011, after Pre-Trial Chamber II issued six summonses to appear, including against the main leaders of the major political Kenyan parties, Kenya reacted by raising admissibility challenges. Pre-Trial Chamber II rejected these challenges because Kenya was held to be inactive with respect to these six suspects.[46]

B. The Pre-Trial Chambers' first jurisprudence

24. In the case of *Prosecutor v. Thomas Lubanga*, Pre-Trial Chamber I was the first Chamber to express itself in more detail[47] on notions relevant to article 17 (1) (a) and (b) of Statute. In its decision allowing victims to participate in the situation stage of the proceedings (hereinafter: "2006 Lubanga Victims Decision"), Pre-Trial Chamber I made a first finding on the notion of a "case". It held:

> The Chamber considers that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. **Cases, which comprise 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, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.** [Emphasis added and footnotes omitted.][48]

25. It is worth mentioning that the Pre-Trial Chamber did not reveal the reasons that led it to this definition. Rather, the Pre-Trial Chamber referred to Triffterer's 1st

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[45] *See* article 18 (2) of the Statute.

[46] *Prosecutor v. William Samoei Ruto et al.*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-01/11-101, para. 70; *Prosecutor v. Francis Kirimi Muthaura et al.*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-02/11-96, para. 66.

[47] *See Prosecutor v. Joseph Kony et al.*, "Decision on the Prosecutor's application for warrants of arrest under article 58", 8 July 2005, ICC-02/04-01/05-1, p. 2.

[48] *Situation in the Democratic Republic of Congo*, "Decision on Application for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5 and VPRS-6", 17 January 2006, ICC-01/04-101, para. 65. A corrigendum was filed in English on 22 March 2006 (ICC-01/04-101-tEN-Corr).

edition of the *Commentary on the Rome Statute of the International Criminal Court* as the only source. The referenced commentary, however, does not refer to the more detailed description given by the Pre-Trial Chamber. Rather, in my view, it proposes a more elastic approach: "The concept of a 'case' would seem to imply that an individual or individuals had been or were targeted as the result of an investigation of a 'situation'".[49] It was, accordingly, the Pre-Trial Chamber that referred for the first time to the notion of "incidents", as well as to the fact that a "case" only starts after the issuance of a warrant of arrest or summons to appear.

26. In making a preliminary finding on the admissibility of the case, Pre-Trial Chamber I addressed the use of the term "case" in article 17 (1) (a) of the Statute and held by reference to the above decision and again without further reasoning (hereinafter: "2006 Preliminary Admissibility Decision")[50]:

> Having defined the concept of case as including "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," the Chamber considers that it is a *conditio sine qua non* for a case arising from the investigation 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.[51] [Emphasis added and footnote omitted.]

27. As the national proceedings related to different conduct from that investigated by the Prosecutor (i.e. article 8 (2) (e) (vii) of the Statute - child soldiers), the Pre-Trial Chamber found the case, on a preliminary basis, to be admissible, without needing to consider questions related to the self-referral that had triggered the Court's jurisdiction. This aspect of the decision was not appealed. In connected proceedings, in relation to the case *Prosecutor v. Bosco Ntaganda*, the Appeals Chamber held that Pre-Trial Chambers should, as a rule, refrain from such a preliminary assessment of the admissibility of a case when issuing warrants of arrest or summonses to appear, because neither the State nor the suspect could have a say in these proceedings.[52]

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[49] C. K. Hall, "Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, 1st ed., 1999), p. 407.

[50] "Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", dated 24 February 2006 and registered on 9 March 2006, ICC-01/04-01/06-8-US-Corr.

[51] Preliminary Admissibility Decision, para. 31.

[52] *See 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'", 13 July 2006, ICC-01/04-168, paras 48-53; unsealed in 2008.

Nonetheless, it appears that the Pre-Trial Chambers felt bound at times to make preliminary assessments of the admissibility of a case pursuant to article 19 (1) of the Statute when doing so.[53] The approach of Pre-Trial Chamber I was applied in a number of subsequent cases by other Pre-Trial Chambers[54] and developed into "the so-called 'same person/same conduct' test".[55] The Prosecutor has also relied on this test in his/her submissions before the Chambers.[56]

28. The first challenges to the admissibility of a case were raised by two accused persons in the cases of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*[57] and *Prosecutor v. Jean-Pierre Bemba.*[58] Thereafter, Kenya became the first State to

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[53] Pre-Trial Chamber I, *Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, "Decision on the Prosecution Application under Article 58(7) of the Statute", 27 April 2007, ICC-02/05-01/07-1-Corr, para. 24; Pre-Trial Chamber I, *Prosecutor v. Germain Katanga*, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga", 6 July 2007, ICC-01/04-01/07-4, para. 20, public redacted version: ICC-01/04-01/07-55; Pre-Trial Chamber I, *Prosecutor v. Mathieu Ngudjolo Chui*, "Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Mathieu Ngudjolo Chui", 6 July 2007, ICC-01/04-01/07-262, para. 21; Pre-Trial Chamber I, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 4 March 2009, ICC-02/05-01/09-2-Conf, para. 50, public redacted version: ICC-02/05-01/09-3; Pre-Trial Chamber II, *Prosecutor v. Kony et al*, "Decision on the Admissibility of the Case under Article 19(1) of the Statute", 10 March 2009, ICC-02/04-01/05-377, paras 17-18; *Prosecutor v. Bahr Idriss Abu Garda*, "Decision on the Prosecutor's Application under Article 58", 7 May 2009, ICC-02/05-02/09-l-Conf, para. 4, public redacted version: ICC-02/05-02/09-12-Anxl.

[54] *Ibid.*; *see also* Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto et al.*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-01/11-101, para. 54; Pre-Trial Chamber II, *Prosecutor v. Francis Kirimi Muthaura et al.*, "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-02/11-96, para. 48; Pre-Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", 10 June 2008, ICC-01/05-01/08-14-tENG, para. 16.

[55] *See* the reference to this "test" in: Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al.*, "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'", 30 August 2011, ICC-01/09-02/11-274 (OA), para. 27; Appeals Chamber, *Prosecutor v. William Samoei Ruto et al.*, "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'", 30 August 2011, ICC-01/09-01/11-307, para. 28 (hereinafter: "*Kenya Admissibility Judgments*" and distinguished in the footnotes by "Muthaura et al" and "Ruto et al").

[56] *See* e.g., *Prosecutor v. German Katanga and Mathieu Ngudjolo Chui*, "Prosecution Response to Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a)", 19 March 2009, ICC-01/04-01/07-968-Conf-Exp, para. 4.

[57] Trial Chamber II, "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", 16 June 2009, ICC-01/04-01/07-1213-tENG.

[58] Trial Chamber III, "Decision on the Admissibility and Abuse of Process Challenges", 24 June 2010, ICC-01/05-01/08-802.

challenge the admissibility of a case before the Court,[59] followed by Libya in relation to both suspects in the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al Senussi*.[60]

C. Appeals Chamber's jurisprudence

29. The current proceedings are the fourth appeal proceedings[61] in which a matter relevant to complementarity has come before the Appeals Chamber.

30. On the appeal of the admissibility decision in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter: "*Katanga Admissibility Judgment*"), the Appeals Chamber[62] refrained from addressing the correctness of the "same person/same conduct test",[63] because it found that the DRC was not conducting any proceedings against Mr Katanga at the time of the admissibility challenge and had ended its own prosecution due to the Court's proceedings.[64] The Appeals Chamber held that "[i]naction 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 [...]".[65] On that basis, it found that the Trial Chamber had correctly found the case to be admissible. Therefore, the *Katanga Admissibility Judgment* clarified that the Court may not only step in when it finds that a State is unable or unwilling to investigate and prosecute, but also when a State is inactive. Without it being clearly stated, this Judgment nevertheless sanctioned the practice of self-referrals and clarified that such States do not need to express that they are unable or unwilling. It is sufficient that they are inactive. Explaining the underlying rationale of this approach, the Appeals Chamber held:

> The Chamber must nevertheless stress that the complementarity principle, as enshrined in the Statute, strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the International Criminal Court on the one

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[59] Pre-Trial Chamber II, "Decision on the Application by the Government of Kenya challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 May 2011, ICC-01/09-02/11-96.
[60] *See* Impugned Decision; *see also* Pre-Trial Chamber I, "Decision on the admissibility of the case against Abdullah Al-Senussi", 11 October 2013, ICC-01/11-01/11-466-Red.
[61] This number counts the two judgments that comprise the *Kenya Admissibility Judgments* as one.
[62] Composition of the bench: Judge Nsereko, Presiding Judge, Judge Song, Judge Kourula, Judge Trendafilova and Judge Aluoch.
[63] "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", 25 September 2009, ICC-01/04-01/07-1497, para. 81.
[64] *Katanga Admissibility Judgment*, paras 80-83.
[65] *Katanga Admissibility Judgment*, para. 2.

> hand, and the goal of the Rome Statute to "put an end to impunity" on the other hand. If States do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in.[66] [Footnote omitted.]

31. The Appeals Chamber also established that article 17 (1) (a) and (b) of the Statute has two distinct limbs: First, a Chamber always needs to consider whether a case is being investigated or prosecuted or whether it has been investigated and prosecuted (the first limb). Second, if the first question is answered positively, a Chamber needs to determine whether a State is unwilling or unable to genuinely investigate and prosecute (the second limb).[67]

32. In the case of *Prosecutor v. Jean-Pierre Bemba Gombo*, the Appeals Chamber[68] did not find merit in Mr Bemba's appeal against Trial Chamber III's rejection of his challenge to the admissibility of the case against him. This appeal dealt with specific questions, mostly of fact, relevant to whether Trial Chamber III had correctly assessed judicial decisions taken by the CAR judiciary. The Appeals Chamber did not express itself on the "same person/same conduct" test, but confirmed the jurisprudence of the *Katanga Admissibility Judgment* set out above.[69]

33. The first appeals that were based on challenges by a State, Kenya, in the first *proprio motu* situation before the Court were rejected by the Appeals Chamber. In the *Kenya Admissibility Judgments*, based on Kenya's appeals in both Kenya cases, the Appeals Chamber, by majority,[70] confirmed Pre-Trial Chamber II's finding that Kenya was inactive in investigating and prosecuting the six suspects at issue. It made a number of findings of relevance to the ground of appeal at hand, in particular to the interpretation and application of article 17 (1) (a) of the Statute, which is summarised in the below paragraphs.

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[66] *Katanga Admissibility Judgment*, para. 85.
[67] *Katanga Admissibility Judgment*, para. 78.
[68] "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'", 19 October 2010, ICC-01/05-01/08-962. Composition of the bench: Judge Ušacka, Presiding Judge, Judge Song, Judge Kourula, Judge Kuenyehia and Judge Nsereko.
[69] "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'", 19 October 2010, ICC-01/05-01/08-962, paras 74, 107-109.
[70] Composition of the bench: Judge Nsereko, Presiding Judge, Judge Song, Judge Kourula, Judge Kuenyehia and Judge Ušacka (dissenting).

34. After establishing that it is the "case" before the Court, i.e. what is described in the summons to appear, that needs to be compared to the Kenyan proceedings,[71] the Appeals Chamber adopted the "same person/same conduct" test developed by Pre-Trial Chamber I in the 2006 Preliminary Admissibility Decision, finding that the domestic investigation or prosecution must relate to the same case consisting of the same person and the same conduct as that before the Court.[72] It did not, however, refer to "incidents" as Pre-Trial Chamber I had in the 2006 Lubanga Victims Decision, but added the word "substantially" to the term "same conduct", concluding that "the national investigation must cover the same individual and **substantially the same conduct** as alleged in the proceedings before the Court"[73] (emphasis added).

35. The Appeals Chamber also defined the phrase "is being investigated" as signifying "the taking of steps directed at ascertaining whether *those suspects* are responsible for that conduct, for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses. The mere preparedness to take such steps or the investigation of *other* suspects is not sufficient"[74] (footnote omitted).

36. Regarding the burden of proof, the Appeals Chamber found, without explanation, that

> a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. 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. It is not sufficient merely to assert that investigations are ongoing.[75] [Footnote omitted.]

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[71] *Kenya Admissibility Judgments,* Muthaura et al, paras 33-46; Ruto et al, paras 34-47.
[72] *Kenya Admissibility Judgments*, Muthaura et al, para. 39; Ruto et al, para. 40. The Appeals Chamber referred in support of its position to articles 17 (1) (c) and 20 (3) of the Statute.
[73] *Kenya Admissibility Judgments,* Muthaura et al, para. 39; Ruto et al, para. 40.
[74] *Kenya Admissibility Judgments,* Muthaura et al, para. 40; Ruto et al, para. 41.
[75] *Kenya Admissibility Judgments*, Muthaura et al, para. 61; Ruto et al, para. 62. In that context, the majority of the Appeals Chamber quoted an earlier Judgment of the Appeals Chamber, in which the Appeals Chamber held in respect of decisions taken in criminal proceedings: "[I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law", referring to *Situation in Uganda*, "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,

37. The Appeals Chamber adopted the "same person/substantially the same conduct" test without explaining why it added the term "substantially" or what this term means. One may understand this addition as allowing a more flexible approach than that taken in the 2006 Preliminary Admissibility Decision. However, this addition to the admissibility test was made in the abstract and was in any case not applied in the Judgments because the Appeals Chamber found that Kenya had not taken any investigative steps with respect to the six suspects before the Court,[76] thus making it unnecessary to compare the cases any further.

38. I dissented from these Judgments,[77] with a focus on the procedural and factual findings of Pre-Trial Chamber II and on the basis that the admissibility proceedings should have been moulded to the fact that Kenya was only starting its investigations against those suspects.[78] An additional important feature of these proceedings was that Kenya had made a request to receive materials from the Prosecutor that would allow it to focus its investigations on the six suspects, because it argued that it did not have such materials.[79]

IV. DISCUSSION OF THE IMPUGNED DECISION

39. The present appeal is the first admissibility case before the Court in which a State submitted a wealth of information about its ongoing proceedings and has clearly expressed the will to investigate and prosecute the same suspects as the Court as well as conduct that is arguably even broader than that contained in the warrants of arrests. This will of Libya is clearly evidenced by the progressing investigations and prosecutions that they have undertaken. Therefore, for the first time, the matter of what is "substantially the same conduct" was – and is in this appeal – under examination on the basis of Libya's concrete activities.

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a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06'", 23 February 2009, ICC-02/04-179 (OA), para. 36; *see also* ICC-02/04-01/05-371 (OA 2), para. 36.

[76] *Kenya Admissibility Judgments*, Muthaura et al, paras 63-69; Ruto et al, paras 64-70.

[77] *See Kenya Admissibility Dissents.*

[78] There was material in the record that related to investigative steps taken in respect of one of the suspects. *See Kenya Admissibility Judgments*, Muthaura et al, paras 63-69; Ruto et al, 64-70, in which the Appeals Chamber held in that regard that the "information falls short of substantiating what has been done to investigate him for that conduct" and "lacked specificity".

[79] Kenya therefore requested the Court to cooperate and order the Prosecutor to provide it with such materials. Pre-Trial Chamber II rejected the request to have such materials disclosed shortly after it found that there was not a sufficient amount of evidence to confirm the charges against two of the six suspects. At the trial preparation stage, the Prosecutor requested that Trial Chamber V drop the charges against two other suspects due to lack of evidence. Currently, a trial has started against two of the six suspects.

40. An analysis of the Impugned Decision reveals that the Pre-Trial Chamber applied the Court's jurisprudence, particularly that articulated in the *Kenya Admissibility Judgments*. It did so regarding the required content of the domestic investigations, i.e. the "same person/substantially the same conduct" test,[80] what establishes that an investigation is occurring,[81] the burden of proof to be applied and as to the way in which it assessed the evidence.[82] Based on this, the Pre-Trial Chamber rightly concluded that "the determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstances of the case, and, therefore, requires a case-by-case analysis".[83] Subsequently, the Pre-Trial Chamber ruled, based on the fact that the incidents mentioned in the warrant of arrest only establish samples "of the form of criminality alleged against Mr Gaddafi",[84] that Libya's investigation did not need "to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi's alleged course of conduct".[85]

41. The Pre-Trial Chamber established that Libya did not need to investigate the same international "crimes", but that it was sufficient that the "domestic proceedings [...] focus on the alleged conduct and not its legal characterisation",[86] an issue that had not been addressed in the *Kenya Admissibility Judgments*.

42. Carefully analysing not only the wealth of evidence and materials that were submitted by Libya,[87] but also Libyan legislation, the Pre-Trial Chamber found that it was, "satisfied that some items of evidence show that a number of investigative steps have been taken by Libya with respect to certain discrete aspects that arguably relate to the conduct of Mr Gaddafi as alleged in the proceedings before the Court".[88]

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[80] Impugned Decision, paras 73-77.
[81] Impugned Decision, paras 73, 134.
[82] Impugned Decision, paras 52-55.
[83] Impugned Decision, para. 77.
[84] Impugned Decision, para. 82.
[85] Impugned Decision, para. 83.
[86] Impugned Decision, para. 85; It based this finding on article 20 (3) of the Statute, which clarifies that it is a conviction for the same underlying conduct and not the same legal characterisation of a crime over which the Court has jurisdiction, that prevents the Court from conducting criminal proceedings against such a convicted person.
[87] Libya submitted more than 500 pages of materials, annexed to its filings in the proceedings.
[88] Impugned Decision, para. 134. It should be noted that, in reaching the conclusion that Libya has taken "a number of investigative steps", the Pre-Trial Chamber applied the language of the *Kenya Admissibility Judgments* relevant to the definition of an "investigation"; these aspects included: "[...]

43. Regrettably, the Pre-Trial Chamber did not stop its analysis at this point, but instead arrived at a finding in the next paragraph that I find difficult to subscribe to:

> [T]he evidence, taken as a whole, does not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court. Libya has fallen short of substantiating, by means of evidence of a sufficient degree of specificity and probative value, the submission that the domestic investigation covers the same case that is before the Court.[89]

44. This finding contains numerous confusing aspects. First, no further explanation was given as to why the material provided by Libya did not meet the "same person/substantially the same conduct" test. Further, it is unclear what the Pre-Trial Chamber meant with respect to terms such as "actual contours of the national case against Mr Gaddafi", "scope of the domestic investigation" and "means of evidence of a sufficient degree of specificity and probative value". On the basis of this lack of explanation, I support the submissions of Libya that the Impugned Decision lacks clarity and reasoning on these points. I would like to point out that the notions expressed in this paragraph of the Impugned Decision are also addressed by my colleague Judge Song who comes to the conclusion that the Pre-Trial Chamber erred, but for different reasons.[90]

45. Considering the Impugned Decision in its entirety, it could be said that the Pre-Trial Chamber was not even itself entirely certain about its finding that Libya was not investigating the same case, because in considering the question of additional evidence, the Pre-Trial Chamber held that "the submission of additional evidence in support of the first limb of the admissibility test would not be determinative at this stage because, as developed below, serious concerns remain with respect to the second limb of the admissibility test, namely Libya's ability genuinely to carry out the investigation or prosecution against Mr Gaddafi".[91] Consequently, the Pre-Trial

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instances of mobilisation of militias and equipment by air, the assembly and the mobilization of military forces at the Abraq Airport, certain events in Benghazi on 17 February 2011, and the arrest of journalists and activists against the Gaddafi regime".

[89] Impugned Decision, para. 135.

[90] Separate Opinion, paras 7 *et seq.*

[91] Impugned Decision, para. 137. This finding of the Pre-Trial Chamber appears to be contradictory to the *Katanga Admissibility Judgment* that clearly established that a Chamber must first determine whether a State is investigating or prosecuting the same case as that before the Court and only needs to consider whether that State is genuinely unable or unwilling to carry out this investigation or prosecution if the first limb is answered in the *affirmative*.

Chamber proceeded to analyse the second limb and found that Libya was, in any case, genuinely unable to investigate the case against Mr Gaddafi, thereby arguably leaving open whether it had actually made a definitive conclusion on the first limb of the test.

46. The lack of reasoning and the uncertainty about its findings may already be a sufficient basis for reversing the Impugned Decision and remanding the matter to the Pre-Trial Chamber. However, despite the uncertainty as to what precisely the Pre-Trial Chamber had in mind in relation to the "conduct" that it expected Libya to investigate, it is evident that the Pre-Trial Chamber found that an investigation covering "discrete aspects" of the case before the Court was not sufficient. On the basis of the Impugned Decision, one may, however, conclude that, according to the Pre-Trial Chamber, Libya's investigation had to cover more of the conduct or even entirely the same conduct as what it considered to be the essence of the warrant of arrest against Mr Gaddafi. This conclusion of the Pre-Trial Chamber is, to my mind, based on an erroneous interpretation of the first limb of article 17 (1) (a) of the Statute and, as a result of this, on an erroneous application of this legal provision.

V. INTERPRETATION AND APPLICATION OF THE FIRST LIMB OF ARTICLE 17 (1) (A) OF THE STATUTE

47. It is my considered view that the Pre-Trial Chamber's finding that the "scope of the domestic investigation" did not "cover the same case as that set out in the Warrant of Arrest issued by the Court" is erroneous due to its incorrect interpretation of article 17 (1) (a) of the Statute, an interpretation which is based solely on the "same person/(substantially) the same conduct" test.[92] In my opinion, the problem lies in the test itself, which, contrary to the express language of the chapeau of article 17 (1) of the Statute, disregards the principle of complementarity laid out in paragraph 10 of the Preamble and article 1 of the Statute.

48. As mentioned above, since 2006, the "same person/same conduct" test has been developed in the abstract, mostly on the basis of cases in which the States at issue did not challenge admissibility and did not demonstrate that they had undertaken any steps or activities regarding investigations/prosecutions of the alleged crimes or

[92] This test is generally supported by e.g. M. M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law" 23 *Michigan Journal of International Law* (2002), p. 849, at pp. 930-940; R. Rastan, "Situations and case: defining the parameters", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), p. 421, at pp. 438-445.

suspects. The application of this test to the case at hand proves that, if this test is to be applied in order to compare a case before the Court with a domestic case, the Court will come to wrong and even absurd results, potentially undermining the principle of complementarity and threatening the integrity of the Court.[93]

49. In interpreting article 17 (1) (a) of the Statute, I will only address, as required by the ground of appeal under discussion, "conduct" as a determining criterion for comparing the case before the Court with the domestic case, thereby focusing on the concrete facts of this case and especially the investigations by Libya.

50. To begin with, I will concentrate on whether the term "conduct" may be used in comparing the "case before the Court" with the case before the domestic authorities. The term "case"[94] in its legal meaning[95] is applied throughout the Court's legal texts to refer to a criminal case before a Chamber of the Court.[96] Cases before the Court concern the commission of crimes that fall within its jurisdiction as referred to in articles 1 and 5 of the Statute.[97] Such crimes are defined by their relevant material and mental elements in articles 6 to 8 and 30 of the Statute. The Statute does not define the material elements of the crimes in general terms, but describes three main aspects "conduct", specific "consequences" and other "circumstances".[98] Thus, "conduct" is

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[93] T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p. 18; M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?" 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 119-123, stating that this "would cause a crisis of confidence that would shake the institutional foundation of the ICC".

[94] The French term that is used correspondingly in the legal texts is "l'affaire", but note that in the French versions of articles 14 (2), 15 (6), 36 (10), 42 (7), 82 (4) (c), 84 (2) (c), 127 (2) of the Statute the term "l'affaire" is used, but in the English version not the term "case". .

[95] Both the English and the French terms are mostly, but not exclusively, used with respect to proceedings before a judicial organ; e.g. in: J. E. Clapp, "Dictionary of the Law", (Random House, New York, 2000) p. 71 "case" is used with respect to "all proceedings with respect to a charge, claim or dispute filed with a court"; in B. A. Garner (ed.), "Blacks Law Dictionary" (Thomson, West, 8th ed.), p. 228, "case" is defined as "1. A civil or criminal proceeding, action, suit, or controversy at law or in equity; 2. A criminal investigation. 3. An individual suspect or convict in relation to any aspect of the criminal-justice system, [...]"; see Online Le Petit Robert: "affaire" is defined as "5. Procès, objet d'un débat judiciaire" and "4. Ensemble de faits créant une situation compliquée, où diverses personnes, divers intérêts sont aux prises".

[96] *See* for examples that do not refer directly to the admissibility of a "case", but mention in the French and English versions the terms "case" and "l'affaire": articles 24 (2); 39 (3), (4); 41 (2) (a); 64 (3); 65 (1) (c), (3), (4); 89 (2); 90; 94 (1); 103 (1) (c) of the Statute; *see also* e.g. rules 21 (5), 34 (1) (a), (b), 39, 51, 73 (6) of the Rules of Procedure and Evidence.

[97] It is noted that article 70 of the Statute also includes crimes that fall within the jurisdiction of the Court.

[98] *See* G. Werle, "Principles of International Criminal Law", (Second Edition, Asser Press 2009), pp. 143-144. This is also confirmed by the Elements of Crimes, which mentions these elements and adds the contextual circumstances of the crimes. This refers e.g. to whether an attack against a civilian

an important material element of a "crime" and therefore also an element of a "case". "Conduct" may, however, also be understood as extending to the acts of the individuals who are held responsible for the commission of these crimes in accordance with articles 25 and 28 of the Statute. These individuals need not necessarily personally carry out the "conduct" that is the basis of a crime, but this conduct and the consequences of this conduct are attributed to them.

51. This leads to the conclusion that conduct might be one of several possible elements for the purposes of comparing the "case before the Court" with a domestic case. But, in my opinion, article 17 (1) (a) of the Statute, applied in accordance with the principle of complementarity, does not require domestic authorities to investigate "(substantially) the same" conduct as the conduct that forms the basis of the "case before the Court". This means that, contrary to how I understand the Impugned Decision,[99] I do not think that the domestic investigation or prosecution needs to focus on largely or precisely the same acts or omissions that form the basis for the alleged crimes or on largely or precisely the same acts or omissions of the person(s) under investigation or prosecution to whom the crimes are allegedly attributed.

52. 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.[100] 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.[101]

53. Such an approach would strongly intrude upon the sovereignty of States and the discretion afforded to national prosecutorial authorities, with the consequence that the Court would become a "supervisory" authority, checking in detail not only the

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population occurred in relation to crimes against humanity. The Elements of Crimes also mention "particular mental elements".

[99] *See supra* para. 46.

[100] D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at pp. 100-101; *see also* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at 163, stating that "[c]omplementarity was never intended to institute a system of competition in which the domestic authorities face a hostile supranational forum intent on preserving its own prestige and power at the expense of endangering lasting peace and stability in countries already ravaged by mass atrocity."

[101] Newton, *ibid.*

"scope" and content of any investigative and prosecutorial steps, but also scrutinising the State's substantive and procedural law and how it relates to the crimes in the Rome Statute.[102]

54. This approach not only disregards the many differences in the legal frameworks and in the practice of criminal justice between domestic jurisdictions and the Court, but also between the various domestic jurisdictions.[103] National cases can differ from the "case before the Court" in respect of evidence, such as available witnesses, victims, and the number and locations of incidents that are under investigation or prosecution.

55. Further, such an approach could potentially preclude a State from focusing its investigations on a wider scope of activities and could even have the perverse effect of encouraging that State to investigate only the narrower case selected by the Prosecutor. I view this as a harmful potential effect, particularly so in a situation such as Libya, where the actions of the Gaddafi regime in February 2011 (which is also the time period of the alleged crimes in the Court's warrant of arrest) triggered the Security Council referral, but where the change of government many months later led to the initiation of a transitional justice process. In such a situation, it may be assumed that the interests of the people of Libya and of the victims of the former regime could be better and more directly addressed by Libyan investigations and prosecutions in a process of transitional justice. Weighing the interests at stake in conformity with the principle of complementarity, it could indeed be said that "[i]t seems plainly more important that Libyans have the experience of transitional justice than that the ICC works its mandate".[104]

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[102] *See* Impugned Decision, paras 199-204; *see* similarly, but with respect to the second limb of article 17 (1) (a) of the Statute, A. Bishop, "Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge" 22 *Minnesota Journal of International Law* (2013), p. 388, at pp. 414-415.

[103] *Kenya Admissibility Dissents*, Muthaura et al, para. 27; Ruto et al, para 27, stating that "a note of caution is necessary in relation to the understanding of the terms 'investigation' and 'prosecution'. The terms used in the various official language versions of the Statute appear to differ in their meaning too, especially with respect to the distinction between investigation and prosecution. This is not surprising, given that the terminology is based on the criminal law traditions of the countries in which the official languages are spoken. There are important differences not only between, for instance, Common Law and Civil Law systems, but also between the various national jurisdictions belonging to the same tradition".

[104] *See* D. Luban, "After the Honeymoon: Reflections on the Current State of International Criminal Justice", 11 *Journal of International Criminal Justice* (2013), p. 505, at p. 512.

56. In addition, applying this strict approach raises a concern about timing, as the proceedings before the Court might have progressed further than the domestic proceedings or *vice versa*.[105] Therefore, the "case before the Court" may already have many more concrete elements than a "case" which is still under investigation domestically. In the proceedings before the Court, the Prosecutor has wide discretion to determine the parameters of a case and also to decide which case to prosecute.[106] The same is also true for many other legal systems. Therefore, domestic authorities could still be at a stage of their proceedings where the "conduct" is not yet as clearly defined as in the case before the Court, if at all. It also needs to be pointed out that the "case before the Court" is also subject to development at different stages of the proceedings. The conduct that is the basis of the crimes alleged in the warrant of arrest might be different from the conduct that is under scrutiny at the confirmation hearing or at trial.[107]

57. The drafting history shows that the States were fully aware of differences in legal cultures and the difficulties that domestic legal systems may face in investigating and prosecuting the "most serious crimes of concern to humanity". In my opinion, the task imposed on the Court is to find the appropriate balance between respecting the sovereignty of States and ensuring an effective Court, within the framework of the overarching common goal of the Court and the States, which is to fight impunity.[108]

58. As opposed to solely relying on the "same person/(substantially) the same conduct" test, I would prefer that the Court, in comparing a case before the Court and a domestic case, be guided by a complementarity scheme that contains multiple criteria that are assessed by reference to the concrete circumstances of each specific case.[109] In the case at hand, "conduct" is one of the essential elements in deciding whether the "case before the Court" is being investigated or prosecuted by domestic

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[105] In that respect it is also noteworthy that the proceedings before the Court could not progress during the past two years since the admissibility challenge was raised, while the national proceedings continued.

[106] *See* e.g., The Office of the Prosecutor, "Office of the Prosecutor Policy Paper", September 2003, pp. 5-7; The Office of the Prosecutor, "Strategic Plan, June 2012-2015", 11 October 2013, pp. 6, 13-14, 18-21.

[107] This is only restricted by the rule of speciality (article 101 of the Statute).

[108] Preamble of the Statute setting out that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

[109] *See* for the concrete circumstances of this case, *supra*, paras 3-9.

authorities. In my view, contrary to the opinion of my colleagues,[110] "conduct" should be understood much more broadly than under the current test. While there should be a nexus between the conduct being investigated and prosecuted domestically and that before the Court, this "conduct" and any crimes investigated or prosecuted in relation thereto do not need to cover all of the same material and mental elements of the crimes before the Court and also does not need to include the same acts attributed to an individual under suspicion.[111] In the case at hand, it may be argued that the goal of fighting impunity is also achieved, even if not exactly the same conduct as that before the Court is under investigation by Libya, but if the suspect's link to the use of the Security Forces in Libya and their consequences are the subject of the investigation of the Libyan authorities. Beyond that, the domestic investigations might even potentially focus on subsequent time periods, if the crimes allegedly committed through the use of Security Forces are considered by the domestic authorities to be graver than those on which the Court's investigations concentrate.

59. Another criterion of this complementarity scheme is the clearly expressed, genuine will of a State to carry out investigations and prosecutions that manifests itself in an advancing process of investigating and prosecuting, as exemplified in this case by the concrete actions taken by Libya.[112] I do not doubt that future cases on admissibility will raise new issues that will require the jurisprudence of the Court to develop further, and possibly add more confined and new elements to the test relevant to the first limb of article 17 (1) (a) of the Statute, such as the persons at issue,[113] the range of the sentence/s[114] and alternative forms of justice.[115]

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[110] *See* Majority Judgment, paras 63, 72-75; Separate Opinion, para. 6.
[111] *See supra*, para. 50.
[112] *See* in relation to such "advancing proceedings", D. Robinson, "Three Theories of Complementarity: Charge, Sentence or Process? A Comment on Kevin Heller's Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013), pp. 375-378; H. O. Hobbs, "The Security Council and the Complementarity Regime of the International Criminal Court: Lessons From Libya", 9 *Eyes on the ICC* (2012-2013), p. 19, at p. 45.
[113] *See* T. O. Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", 13 *Melbourne Journal of International Law* (2012), p. 1, at p.18
[114] *See* K. J. Heller, "A Sentence-Based Theory of Complementarity", in W. A. Schabas, et al. (eds), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate Publishing Limited, 2013).
[115] *See* C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at pp. 625-629.

60. In addition, I find that the Pre-Trial Chamber erred in imposing the burden of proof solely on Libya and in its evidentiary standards when assessing the materials relevant to Libya's investigations in order to establish whether Libya is investigating or prosecuting the case before the Court.[116] In my opinion, this does not comply with article 17 (1) (a) of the Statute and the principle of complementarity.

61. Admissibility proceedings are not criminal proceedings, but proceedings *sui generis*.[117] The ways in which admissibility proceedings may be triggered differ as do the participants to any such proceedings.[118] In the proceedings at hand, the proceedings have three main participants: the Prosecutor, the State that is investigating or prosecuting and the suspect or accused. Victims as well as the authority that referred the situation to the Court may also make observations in these proceedings.[119] Any of the participants may have materials and information that are potentially relevant to whether a State is investigating or prosecuting the case before the Court and that they can share with the Court. As a rule, such materials should also be in the possession of the Prosecutor who needs to consider, from the very start of a "case", whether it is or may be admissible pursuant to article 17 of the Statute.[120] Requiring all of the participants to provide information would allow the Court to fully assess whether a State is investigating or prosecuting the case before the Court. The Court would thereby discharge its duty under the Statute that it "shall be complementary to national jurisdictions".[121] Such an approach would imply that the admissibility proceedings are Chamber-led and do not depend on which participant

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[116] The Pre-Trial Chamber also imposed a "high" burden of proof, but this is apparently due to its strict understanding of what is required by "(substantially) the same conduct" and would be remedied with a more flexible test as proposed in this Opinion.

[117] *See Kenya Admissibility Dissents*, Muthaura et al, para. 16; Ruto et al, para. 16. *See also* rule 58 of the Rules of Procedure and Evidence, providing the Chamber with discretion to conduct the proceedings as appropriate for their specific character. Further, with respect to whether the burden to prove that the investigation by a State is insufficient lies with the Prosecutor, *see* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at p. 136; J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Martinus Nijhoff Publishers, 2008), pp. 178, 183.

[118] *See* e.g. article 19 (1), (2) and (3) of the Statute.

[119] *See* article 19 (3) of the Statute.

[120] *See* article 53 (1) (b) and 53 (2) (b) of the Statute. Further, regarding the uncertainty of the relationship between the Prosecutor and the State of Libya, *see* S. C. Roach, "Legitimising Negotiated Justice: the International Criminal Court and Flexible Governance", 17 *The International Journal of Human Rights* (2013), p. 619, at p. 628.

[121] *See* article 1 of the Statute.

initiates the admissibility proceedings pursuant to article 19 of the Statute.[122] Having this background in mind, I consider that placing the burden of proof to show that a State is investigating or prosecuting solely on the challenging State, i.e. in this case Libya, appears unfair and undermines the principle of complementarity.[123]

62. Furthermore, the Court's rules of evidence should not be routinely applied to materials provided by a State in admissibility proceedings that are *sui generis*. Evaluating materials provided by a State according to the rules of evidence may lead, as it apparently did in the case at hand, to the result that documents submitted by governments in transition might be considered as lacking "probative value" or being not sufficiently "specific". Rather, to my mind, the materials provided should be taken at their face value, especially if the State, as in the case of Libya, has clearly expressed its intent to investigate the case before the Court and has taken action in this regard. Furthermore, stringent standards would impose unnecessarily high requirements on States with a legal and judicial system in transition and would unduly burden their transitional justice efforts. In addition, States that do not have such difficulties might more easily meet these high standards, putting them in a more advantageous position compared to States in transition.[124]

63. To follow my suggested approach would most likely lead to the conclusion that Libya is investigating the same case against Mr Gaddafi and would, depending on a finding in relation to the second limb of article 17 (1) (a) of the Statute, make the case before the Court inadmissible. However, considering the lack of reasoning and the Pre-Trial Chamber's decision to address the second limb of article 17 (1) (a) of the Statute although it had found that Libya is not investigating the same case,[125] I would leave the application of the standards established in this Opinion in the hands of the

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[122] *See e.g.* L. M. Keller, "The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum'", *8 Santa Clara Journal of International* Law (2010), p. 199, at pp. 228-230; M. A. Fairlie and J. Powderly, "Complementarity and Burden Allocation", in C. Stahn and M. M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice*, Vol. I (Cambridge University Press, 2011), pp. 642-681; suggesting also admissibility proceedings with a shared burden, or burden-free for the State; J. K. Kleffner (ed), *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, 2008), pp. 208-209; *see also* Ad-Hoc Committee Report, para. 49.

[123] *See* article 1 of the Statute.

[124] *See* e.g., T. O. Chibueze, "The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute", 21 *Annual Survey of International & Comparative Law* (2006), p. 185, at p. 196.

[125] *See supra* para. 45.

Pre-Trial Chamber and would consequently not address the second limb, in this case, the fourth ground of appeal, either.

64. In addressing the consequences of a finding of inadmissibility of a case before the Court, it should be noted that the Prosecutor has the power, according to article 19 (10) of the Statute, to request the Chamber to review this decision if "new facts have arisen which negate the basis on which the case has previously been found inadmissible under article 17". There is no temporal limitation established in this provision. The Prosecutor may therefore continue her monitoring activities, *inter alia*, in relation to whether the State's investigation or prosecution is conducted with a genuine intent. Where a case is declared admissible by the Court upon a State's challenge to its admissibility, the State depends on the Court to "grant leave" if it considers that "exceptional circumstances" justify allowing a second challenge.[126] Thus, it may be argued that in such a scenario, the State's right to challenge the admissibility of a case is effectively forfeited.

65. As a concluding remark on the subject of complementarity, I would also like to point out that the overall goal of the Statute to combat impunity can also be achieved by the Court through means of active cooperation with the domestic authorities.[127] Many States, and not only States Parties of the Rome Statute, have incorporated the crimes of the Statute into their domestic legislation.[128] They might, however, face problems that are inherent in the investigation and prosecution of the "most serious crimes of international concern".[129] The Court, together with other international organisations and other States, is in an ideal position to actively assist domestic authorities in conducting such proceedings, be it by the sharing of materials and information collected or of knowledge and expertise.[130]

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[126] *See* article 19 (4) of the Statute.
[127] *See* M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 *Santa Clara Journal of International Law* (2010), p. 115, at pp. 163-164; D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 *Criminal Law Forum* (2010), p. 67, at p. 100; S. C. Roach, "How Political is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy", 19 *Global Governance* (2013), p. 507, at p. 515.
[128] *See* L. E. Carter, "The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?", 12 *Washington University Global Studies Law Review* (2013), p. 451, pp. 464-473.
[129] *See* e.g. F. Mégret and M. G. Samson, "Holding the Line on Complementarity in Libya", 11 *Journal of International Criminal Justice* (2013), p. 571, at pp. 577, 587.
[130] *See* C. C. Jalloh, "Kenya vs. The ICC Prosecutor", 53 *Harvard International Law Journal* (2012), p. 269, at pp. 284-285. This is also termed "positive" and/or "active" complementarity.

VI. CONCLUSION

66. For the reasons given, I would have ordered the reversal of the Impugned Decision and remanded the matter to the Pre-Trial Chamber for new consideration.

Done in both English and French, the English version being authoritative.

Judge Anita Ušacka

Dated this 21st day of May 2014

At The Hague, The Netherlands