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Kenya vs. The ICC Prosecutor

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I. INTRODUCTION

On August 30, 2011, the Appeals Chamber of the International Criminal Court (ICC), by a majority, rejected Kenya's admissibility challenges under Article 19(2)(b) of the ICC Statute[1] in cases involving several Kenyans who allegedly perpetrated crimes

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[1] *See* Rome Statute of the International Criminal Court art. 19(2)(b), July 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

against humanity during the December 2007 post-election violence.[2] The ICC's denial of Kenya's admissibility challenge is significant because this is the first time since the Rome Statute entered into force on July 1, 2002 that a State Party has challenged the Court's assertion of jurisdiction over its nationals on the basis that the State Party itself is investigating the incidents at issue. Accordingly, Kenya has argued it should therefore be given time and space to do its own investigation before interference from the Hague-based court. This important judgment therefore merits some attention, which this case note aims to help provide.

The ICC's involvement in Kenya began on March 31, 2010 when the Pre-Trial Chamber authorized then Prosecutor Luis Moreno-Ocampo to commence a formal investigation into the situation; the Pre-Trial Chamber ruled that potential cases from the East African nation would be admissible at the permanent Hague-based court because Kenya was not investigating or prosecuting the senior political and business leaders allegedly bearing greatest responsibility for the violence, which amounted to crimes against humanity within the ICC's jurisdiction.[3] A year later, at the prosecution's request, the same judges issued summonses for six individuals associated with the current Kenyan government, namely: Uhuru Kenyatta (Deputy Prime Minister and Minister of Finance), Francis Muthaura (Head of the Public Service and Secretary to Cabinet), Mohammed Ali (Chief Executive and Head of the National Postal Corporation and former Chief of Police), William Ruto (Minister of Higher Education, Science and Technology), Henry Kosgey (Member of Parliament),

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[2] Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11 OA, 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" (Aug. 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf [hereinafter Appeals Chamber Judgment]; *see also* Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11 OA, 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 (Sept. 20, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1234872.pdf [hereinafter Dissenting Opinion].

[3] Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf; *see* Charles Chernor Jalloh, *International Decision: Situation in the Republic of Kenya, No. ICC-01/09-19, Decision on the Authorization of an Investigation*, 105 AM. J. INT'L L. 540 (2011) (discussing the significance of the decision, which contains a seminal ruling regarding the scope of crimes against humanity).

and Joshua Sang (Head of Operations of a private radio station, Kass FM).[4] The Court recently confirmed charges in four of those cases.[5]

Three weeks later, Kenya requested that the Pre-Trial Chamber rule the matters involving its six nationals inadmissible before the Court.[6] The application, which was supported by some of the suspects and opposed by the ICC prosecutor and victims of the post-election violence, was unanimously denied on May 30, 2011. Kenya then lodged its appeal, arguing that the Pre-Trial Chamber decision should be reversed because it contained serious legal, factual, and procedural errors.[7]

II. KENYA'S ARGUMENTS: WE ARE INVESTIGATING (BUT NEED TIME TO MAKE REFORMS)

Kenya's appeal raised several issues of law, fact, and procedure. The factual and procedural issues are beyond the scope of this piece, but we will focus on legal issues. In any case, the appeal turned on the appropriate test that should be used under Article 17(1)(a) of the Rome Statute of the International Criminal Court. Under that provision, which enshrines the foundational complementarity principle giving states the primary responsibility to investigate and prosecute offenses within ICC jurisdiction, the Court "shall determine that a case is inadmissible where: (a) *[t]he 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."[8]

It was obvious that Kenya, an ICC State Party, had jurisdiction over the shocking post-election violence that occurred on its territory following the disputed presidential

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[4] *See* Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf; Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Mar. 8, 2011), http://212.159.242.181/iccdocs/doc/doc1037044.pdf.

[5] *See* Kenyatta and Ruto to Face ICC Trial Over Kenya Violence, BBC (Jan. 23, 2012), http://www.bbc.co.uk/news/world-africa-16675268.

[6] Since Kenya's admissibility challenge was denied, the ICC Pre-Trial Chamber has confirmed charges against four of these six suspects that Kenyan media had dubbed the Ocampo Six (that presumably will now become the Ocampo Four). *See* Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf; Prosecutor v. Muthaura, Kenyatta & Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf.

[7] Appeals Chamber Judgment, *supra* note 2, ¶ 13.

[8] *See* Rome Statute, *supra* note 1, art. 17(1)(a) (emphasis added).

elections. Since Kenya was before the Court insisting that it was willing and able to carry out the investigations or prosecutions, the real debate was what Article 17(1)(a) of the Rome Statute means in practice when it says that the ICC should find that "the case is being investigated" in order for the national jurisdiction to be able to pre-empt its work.

The government argued that the Pre-Trial Chamber had misconstrued that phrase and, further, that it erred by failing to address Kenya's challenge of the so-called "same person/same conduct" test that had been used as the benchmark for admissibility assessments.[9] That test, which the pre-trial judges assumed Kenya had misunderstood, would require that a national criminal investigation encompass (1) the *same person* and (2) the *same conduct* that is the subject of the ICC "case" to be rendered inadmissible before the Court.[10] Instead, according to the government, the better test that should have been used is whether the national proceedings capture the "same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC."[11] In any event, the complementarity principle gives states a first right to carry out investigations and prosecutions in their own courts before the ICC jurisdiction would be triggered. That creates a presumption in their favor that should not be easily displaced in the absence of overwhelming evidence to the contrary. If the idea of complementarity underpinning Article 17 of the Rome Statute is to mean anything, it necessarily implies that member states must have a degree of flexibility to exercise their discretion in deciding whom to prosecute.

III. THE PROSECUTION AND VICTIMS' RESPONSE: NO, YOU ARE NOT INVESTIGATING

The prosecutor and the victims disputed Kenya's appeal claiming that the Pre-Trial Chamber had ignored or misconstrued the legal test applicable to inadmissibility assessments.[12] To them, the government's preferred test only applied to the admissibility determinations at the broader *situation* stage, as opposed to the specific *case* stage. In the prosecution's view, Article 17 is at its core a conflict of jurisdiction provision in that it essentially sorts out whether the ICC or a jurisdiction-bearing state should take precedence where the two concurrently exercise authority over the same individual. Kenya's faulty logic forecloses the possibility of each side simultaneously pursuing the same or different suspects for crimes or incidents arising from the same events.[13]

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[9] Appeals Chamber Judgment, *supra* note 2, ¶¶ 26, 29.
[10] *Id.* ¶ 28.
[11] *Id.* ¶ 29.
[12] *Id.* ¶¶ 31–32.
[13] *Id.* ¶ 31.

IV. THE APPEALS CHAMBER RULING: WE AGREE WITH THE PROSECUTOR AND THE VICTIMS

The majority of the Appeals Chamber clarified that this judgment offered the first opportunity for the Chamber to rule on the "same person" element of the "same person/same conduct" test.[14] It explained that although Article 17 of the Rome Statute sets out how to resolve conflicts of jurisdiction between the ICC and its States Parties and ostensibly gives states the first right to prosecute the war crimes, crimes against humanity and genocide within ICC jurisdiction, the question whether "[t]he case is being investigated" is not a mere inquiry into whether a state is undertaking some abstract investigation over crimes committed on its territory.[15] Rather, the crucial issue is whether the "same case" is being *concurrently* investigated by both the Court and the concerned national jurisdiction.[16]

In addition, because Article 17 determinations arise at other stages of the Court's proceedings, not only at the stage for evaluation of the admissibility of concrete cases, the meaning of the phrase "case is being investigated" in Article 17(1)(a) should properly be read in each of its contexts.[17] For instance, during the Prosecutor's initiation of investigations into situations under Article 15 (which also demands Article 17 analysis), the parameters of the likely cases will be relatively vague because the prosecutorial investigations would only be in their early stages. This makes it unlikely that the prosecution would identify specific suspects or their impugned conduct. On the other hand, with respect to challenges to admissibility under Article 19, which relates to concrete cases where arrest warrants or summonses would have been issued, the determinative elements of the *case* would be more specific in relation to both the *individual* and the *conduct* in issue. Consequently, for there to be a judicial determination that the case is inadmissible at the ICC under Article 17(1)(a), "the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."[18]

Applying this test to Kenya's admissibility challenge implies that the cases would only be found inadmissible at the Court if the government can show that it was investigating those same suspects for substantially the same conduct by, for example, interviewing witnesses, collecting evidence, or undertaking forensic analysis. In the majority's view, mere preparation to initiate such investigations or undertakings to do so in the future for suspects other than the specific individuals before the ICC would be insufficient to justify a finding of inadmissibility.[19] Indeed, where there are only

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[14] *Id.* ¶ 34.
[15] *Id.* ¶ 36.
[16] *Id.*
[17] *Id.* ¶ 38.
[18] *Id.* ¶ 39.
[19] *Id.* ¶ 40.

preparations to investigate instead of actual investigations, it would be incorrect to assert that the same case is being investigated by both the Court and the State Party thereby leading to a jurisdictional conflict that would then need to be resolved.

Ultimately, the majority found that the Pre-Trial Chamber had applied the appropriate test. There was, therefore, no error of law requiring a reversal of its decision denying Kenya's admissibility challenge.[20]

V. DISSENTING OPINION: BUT WAIT A SECOND, KENYA DOES HAVE THE FIRST RIGHT TO PROSECUTE!

In a strong dissent, issued three weeks after the majority opinion, [21] Judge Anita Ušacka suggested that she would have reversed the Pre-Trial Chamber decision because it contained material errors.[22] Essentially, in her view, the Pre-Trial Chamber abused its discretion in failing to adapt the admissibility proceedings to fit the Kenya situation by: (1) refusing to sufficiently account for the country's important arguments rooted in complementarity in this first admissibility challenge by an ICC State Party; (2) applying an unduly high burden in its definition of "investigation" and "case;" and (3) unnecessarily hastening the proceedings only to gloss over weighty legal and factual issues and to trample upon Kenya's sovereign first right to investigate and prosecute the cases.[23]

VI. WHY COMPLEMENTARITY IS THE KEY TO THE ICC'S SUCCESS AND AN ALTERNATIVE APPROACH

The principle of complementarity regulates the relationship between the ICC and national jurisdictions. This fundamental principle was critical to gaining support for the permanent court during the Rome Conference, which one commentator has called "the most complex multilateral negotiation ever undertaken."[24] Article 17 was

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[20] *Id.* ¶ 46.

[21] It is interesting to take note of the composition of the judges. Two African judges were in the majority, including Judge Daniel David Ntanda Nsereko from Kenya's neighboring state, Uganda, who presided over the matter, and Judge Akua Kuenyehia, from Ghana in West Africa. The others in the majority were Judge Sang-Hyun Song (Republic of Korea) and Judge Erkki Kourula (Finland). The lone dissenter, Judge Anita Ušacka, is from Latvia.

[22] *See* Dissenting Opinion, *supra* note 2, ¶ 15.

[23] *Id.* ¶¶ 24–30.

[24] Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 605, 613 (Otto Triffterer ed., 2008); *see also* John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 41 (Roy S. Lee ed., 1999);

incorporated into the Rome Statute to explicitly provide a substantive rule by which to enforce complementarity ideals.[25] Complementarity, therefore, lies at the heart of both Article 17 and the Court's rejection of Kenya's admissibility challenge. By examining the broader purpose of complementarity in this comment, it will hopefully be possible to re-evaluate the Appeals and Pre-Trial Chamber's decision and to better consider the relatively unrefuted but important arguments that Kenya raised in its application.[26]

In choosing complementarity as the preferred method of regulating the relationship between the Court and national jurisdictions, the creators of the ICC had three main experiences with international penal jurisdictions from which to draw;[27] the International Military Tribunals at Nuremberg/Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) also had to determine the relationship of those institutions to national courts with competing jurisdictional claims.[28]

The U.N. Security Council, in setting up the ad hoc tribunals pursuant to its mandate to ensure the maintenance of international peace and security under Chapter VII of the U.N. Charter, adopted the primacy principle. Under that principle, the international tribunal can displace the jurisdiction of the national courts without needing to demonstrate a failure or inadequacy of the domestic system.[29] However, the ICTY and ICTR were situation-specific responses with a jurisdictional reach limited by, among other factors, the three substantive crimes (genocide, crimes against humanity, and war crimes) that they were mandated to prosecute and, more

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John T. Holmes, *Complementarity: National Courts Versus the ICC*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese et al. eds., 2002).

[25] WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 335–52 (2010).

[26] Kenya has appealed the decision with respect to all six suspects. Its filings are the same in both cases. *See* Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, 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" (June 6, 2011), www.icc-cpi.int/iccdocs/doc/doc1084702.pdf; Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, 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" (June 20, 2011), www.icc-cpi.int/iccdocs/doc/doc1094690.pdf.

[27] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 60 (2008).

[28] Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 201 (2012).

[29] KLEFFNER, *supra* note 27, at 61–70.

importantly, the geographic and temporal scope over particular historical incidents.[30] It may therefore not be surprising that when deciding how to structure a treaty-based permanent international penal tribunal court with a global jurisdiction, states shied away from primacy in favor of the more deferential and more pragmatic principle of complementarity, which envisages national authorities as the first bulwark in the fight against impunity.[31] This despite that some countries and human rights advocates preferred to have a powerful court with primacy as its core jurisdictional principle.

Beginning with the International Law Commission's 1994 Draft Statute, through the various ad hoc committee meetings in 1996 all the way to the Rome Conference in 1998, complementarity was contentiously debated.[32] Some thought its inclusion in both the Preamble and Article 1 of the ICC Statute was sufficient to establish complementarity as the guiding principle for interpretation of the rest of the statute, but it was ultimately encapsulated in Article 17 as well.[33] While discussions of the complementarity principle divided delegates, the main impetus and implication for its inclusion was clear and predicated on pragmatism: it would protect national sovereignty and increase the willingness of states to accept the Court's jurisdiction.

The shift from primacy to complementarity, and the pulling back of the comparatively more sweeping authority given to the ICTY and ICTR vis-à-vis national courts is therefore both a function of the differing contexts within which each international jurisdiction was created and the desire to have an effective permanent and global institution that will supplement, instead of supplant, the work of national criminal jurisdictions. Whereas under Articles 9(2) and 8(2) of the ICTY and ICTR Statutes,[34] respectively, the international tribunals may, at any stage of the process, formally request national courts to defer to their competence in particular cases. Article 17 of the Rome Statute essentially reverses this situation. It instead directs the ICC to defer to the national jurisdictions that are genuinely willing and able to investigate and prosecute.

Although it appears that with this strict interpretation of complementarity the Appeals Chamber has effectively turned complementarity into primacy, contrasting these two different organizing principles should provide a helpful context within which to

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[30] *Id.*

[31] For a useful discussion of the two models, see Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383 (1998); Adolphus G. Karibi-Whyte, *The Twin Ad Hoc Tribunals and Primacy Over National Courts*, 9 CRIM. L.F. 55 (1998).

[32] Williams & Schabas, *supra* note 24, at 607–13.

[33] *Id.* at 612–13.

[34] The Statute of the International Criminal Tribunal for the Former Yugoslavia art. 9(2), May 25, 1993, 32 I.L.M. 1192 (1993); The Statute of the International Criminal Tribunal for Rwanda art. 8(2), Nov. 8, 1994, 33 I.L.M. 1598 (1994).

evaluate the Kenya inadmissibility decision. In this regard, in this comment, I consider two important questions. First, does the Appeals Chamber decision remain true to the underlying precepts of complementarity? And second, is there an alternative way in which Kenya's admissibility challenge could have been addressed that would better reflect not only the letter but also the spirit of complementarity?

At the outset, it is evident that there are at least two differing interpretations of complementarity competing within the Appeals Chamber admissibility ruling. The first is Kenya's and the dissent's view of complementarity, which is that national jurisdictions should win almost by default except where there is strong or even overwhelming evidence rebutting the presumption in favor of their first right to prosecute.[35] As part of this, the government and Judge Ušacka emphasized that the ICC was intended to complement the work of national jurisdictions when they exercise their primary duty to investigate and prosecute international crimes; a matter that, not coincidentally, also goes to the heart of state sovereignty. The second is the Court's application of complementarity, which is that the primary goal of the Rome Statute is to help put an end to impunity, and whatever division of labor accomplishes that end will, or rather should, win out.[36]

Both of these formulations have some historical grounding. The Kenya conception finds support in the Rome Statute and in the drafting history of the complementarity provision during the Rome Conference as well as the preparatory committees, where the preservation of national sovereignty was a primary goal. The Court's conception appears to rest primarily on a broader, more interventionist and perhaps unrealistic vision of the ICC. On this view, the crimes over which the permanent tribunal has jurisdiction are international in nature. Since the ICC was created in order to end impunity in relation to them, the application of the complementarity clause should be read flexibly and not be construed too restrictively. Otherwise, the international penal court will lose its leverage over national jurisdictions and become unable to fulfill the broader noble mission of ensuring criminal prosecutions of those most responsible for international crimes.[37] Both these interpretations are reflected in the preamble to the Rome Statute, granting some textual grounding to each interpretation.[38]

While it seems apparent that both positions generally fall within the boundaries of complementarity, meaning that each interpretation could be seen as valid, it seems arguable that neither position remains entirely consistent with other core substantive principles. Kenya's understanding of admissibility clearly expands the complementary

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[35] Dissenting Opinion, *supra* note 2, at ¶¶ 23–28.

[36] Appeals Chamber Judgment, *supra* note 2, ¶ 40.

[37] For an excellent article on the manner in which complementarity has been misconstrued in the literature, see Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67 (2010).

[38] Rome Statute, *supra* note 1, preamble.

test too far to give the appearance that the six cases at issue obviously fall within the realm of the inadmissible. In doing so, however, it seemed to oversimplify the issue and boiled the entire inquiry down to whether or not the national jurisdiction is willing to assert a claim over the case and gives a promise to proceed with some investigations or prosecutions. While the idea that an ICC State Party has the first right to prosecute is on solid ground, as even a cursory look at the Rome Statute will confirm, the suggestion that mere expression of an intent to proceed against an amorphous group of unidentified suspects that may or may not include the suspects presently before the Court swings the pendulum too far in the opposite direction.

On the other hand, although the Court's way of interpreting admissibility should depend on the facts of each case, its approach arguably endorses an unnecessarily straight-jacketed reading of Article 17. By rejecting all of Kenya's stated objectives to make wide ranging legal reforms to its justice system in the hope that it will retain the cases involving its nationals, including adhering to a self-imposed strict timetable for its planned reforms, the Court lost an opportunity to breathe life into the oft discussed idea of positive complementarity which in practice will require a generous view of the ambit of the provision in an effort to encourage or promote national attempts to prosecute. In its interpretative stance, the Appeals Chamber gave itself wide latitude that could be invoked to engage in outright judicial rejections of any legitimate national attempts to prosecute crimes that occur within a state thereby effectively turning complementarity into primacy.

By refining but essentially retaining the strict "same person/same conduct" test, which gave limited wiggle room for states to make different investigating or charging decisions vis-à-vis the ICC Prosecutor, the Appeals Chamber has placed extremely high and perhaps even unrealistic demands on States Parties seeking to assert jurisdiction over the international crimes that occur within their territory. This high threshold, which if taken to its logical conclusion might undermine or dampen national efforts to prosecute, works against the pragmatic burden-sharing goals of complementarity in at least two ways.

First, although the majority tweaked the complementarity test from the initial "same person-same conduct" to "same person *substantially* same conduct" formulation, this does not appear to radically impact the admissibility test. On their face, both the earlier and latest tests would require that the national authorities be investigating the same person at the time of the inadmissibility challenge. This makes sense for many reasons, including the fact that it prevents states from manipulating the ICC to shield favored suspects from international prosecutions. I therefore do not see serious difficulty with the first part of the test. But the revised test also requires national prosecutors to focus on "substantially the same conduct" of the same individuals. The ordinary dictionary meaning of "substantially," the adverb form of "substantial," clarifies that it means, "to a great or significant extent," and "for the most part;

essentially."[39] The term is a qualifier of the second element of the test, which insists on targeting of the "same conduct" of the alleged perpetrator.

It follows from the above that so long as the national authority is essentially pursuing the same individual for essentially the same conduct, then it may succeed in clawing back a case that otherwise would remain within the ICC prosecutor's jurisdiction. If the government is not investigating the person, as Kenya was found not to be, then it would not be entitled to take back the case as long as the case is in the hands of the ICC. If it investigates the same person, but focuses on aspects of his conduct that is not substantially the same because, for example, it wants to minimize the suspect's role by taking up the lesser of the incidents under investigation, it equally cannot claw back the case. This reasoning appears correct because it makes it difficult for states parties to the ICC to play games with the Court and shield powerful friends by (1) focusing on different suspects for crimes arising out of the same incidents or (2) undermining the cause of justice by deliberately choosing to charge the suspect with crimes reflecting the less serious conduct.

The problem is that, under both these tests, there seems to be limited discretion for a national prosecutor to choose to charge the same person for a lesser offence or to charge someone else deemed more culpable, for instance, for conduct constituting murder as an ordinary offense under domestic law instead of murder as a crime against humanity. Both the *mens rea* (guilty mind) and *actus reus* (act) elements of those two offenses would be the same, although all things being equal, it would be harder to prove murder as a crime against humanity because the offense will additionally require proof of the so-called contextual elements that transform the ordinary offense into an international one.[40] So, besides the requirement that the perpetrator must have intentionally caused the death of another human being, which would be the test for ordinary murder, there would have to be evidence that the killing took place (1) as part of a widespread or systematic attack direct against any civilian population and that the suspect (2) knew of or intended his actions to further those broader attacks for it to be transformed into a crime against humanity.[41]

A key question then arises: if the goal of the ICC is to ensure that states dispense justice for heinous crimes committed in a given situation, why would the Court care which crime the person will be charged with at the national level if the national authorities are investigating or prosecuting him for the problematic conduct? In other words, as Professor William Schabas has argued, it seems unnecessary to reduce admissibility challenges to "a mechanistic comparison of charges in the national and the international jurisdictions, in order to see whether a crime contemplated by the

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[39] CONCISE OXFORD ENGLISH DICTIONARY 1438 (11th ed. 2008).
[40] For a discussion of this requirement, see Jalloh, *supra* note 3, at 544–45.
[41] *See* Rome Statute, *supra* note 1, art. 7.

Rome Statute is being prosecuted directly or even indirectly."[42] He rightly suggested that the better approach would be to make "an assessment of the relative gravity of the offen[s]es tried by the national jurisdiction put alongside those of the international jurisdiction."[43]

Similarly, Kevin Jon Heller's recent article suggests that complementarity should be interpreted in a way that encourages, not discourages, states from prosecuting international crimes as ordinary crimes.[44] He argues that squeezing complementarity into the same conduct analysis should be abandoned and be replaced by a new sentence-based theory under which any national prosecution of an ordinary crime satisfies the complementarity requirement if it results in a sentence that is equal to, or greater than, the sentence the perpetrator would receive from the ICC.[45] This could be one way to solve the problem, although it may not necessarily be ideal. Ultimately, though this is not to condone Kenya's problematic failure to initially prosecute the crimes through its national courts or before a specially constituted tribunal before the Court got involved, it should be sufficient if the offender is being held accountable for serious crimes, especially if the end result is the same or similar.[46] By taking jurisdiction under the current framework, the appeals court seems to continue the logic of accountability in a purposive way which is laudable, although some might see this as taking it beyond what states would have initially anticipated as the proper role of the ICC during the Rome Conference.

One fairly straightforward objection to giving national prosecutors a free hand to choose what crime to charge the suspect would be that indicting someone for committing murder as an ordinary offense carries less moral opprobrium than saying that he perpetrated crimes against humanity, even if the underlying act is the same. Yet, it is possible to imagine some instances where national prosecutors could legitimately choose to focus on different suspects than those of interest to the ICC prosecutor. What will happen, for example, if the national investigation revealed that someone who was not yet a suspect before the Court was the most culpable for the crimes? We might respond: that person too would deserve to be prosecuted, in addition to the person whose case is the subject of the admissibility challenge before the international court. In such a situation, in fact, it may be that no problem or conflict of jurisdictions arises that would require the Court to relinquish a case to the State Party challenging admissibility. In fact, keeping in mind the purpose of the

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[42] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 182 (2007).

[43] *Id.*

[44] *See generally* Heller, *supra* note 28.

[45] *Id.*

[46] *See* Charles C. Jalloh, *Kenya's Dangerous Dance with Impunity*, JURIST (Aug. 18, 2009), http://jurist.law.pitt.edu/forumy/2009/08/kenyas-dangerous-dance-with-impunity.php (expressing early concern about the failure to establish the Special Tribunal for Kenya).

Rome Statute, one could say that this is exactly the type of role that the ICC should play—to catalyze national action to prosecute heinous crimes and in that way reduce the accountability gap. This effect should thus be welcomed because it forces the State Party and the ICC to prosecute even more people for the crimes committed in a given context than might otherwise be the case without the Court's involvement.

On the other hand, what if the national jurisdiction can only prosecute a handful of people due to limited resources? This scenario is not so implausible given the conflict-post-conflict context of most of the situations that so far and will seemingly continue to come before the Court. Further, what if the State Party decides to appease the victims' demand for justice by choosing to focus not on the distant leader who orchestrated the crimes and is appropriately of investigative interest to the ICC, but on the enthusiastic killer who directly perpetrated the atrocities? Imagine further that, for these reasons, the national prosecutor, in contrast to the ICC prosecutor, selects the suspect whose conduct was so egregious given the gravity, brutality, and scale of his crimes that they prefer to have him removed from the community.[47] In that situation, it would seem hard to justify prosecuting the less directly culpable person, instead of the more directly culpable one, only to satisfy the high standard that the ICC's admissibility test sets in order for the government to pre-empt its prosecution of crimes arising out of the same incidents. Of course, under the Rome Statute, the ICC is barred, because of the double jeopardy rule, from seeking to prosecute the same person who has already been prosecuted before the national courts—as Professor Linda Carter cogently explained in an in depth article on the issue.[48]

An alternative judicial approach in the Kenya admissibility decision could have attempted to find a middle ground between the extreme interpretations given by the majority, on the one hand, and the dissenting judge on the other, preserving both the primacy of national jurisdiction as well as the Court's ability to evaluate and shape domestic criminal proceedings. Indeed, there are ample provisions in the Rome Statute directed at encouraging national proceedings through bilateral discussions with the prosecution before an ICC investigation escalates to the point where a formal admissibility challenge is required.[49] The overall thrust of the scheme is international deference to genuine national processes.

In this context, keeping in mind the catch that in the admissibility challenge in this case the issue was how actually how "genuine" the government was in its purported

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[47] For the victims, convicting someone for murder as an ordinary crime instead of murder as a crime against humanity should be sufficient to meet their desire to see justice done.

[48] *See* Rome Statute, *supra* note 1, arts. 17(1), 20 (describing circumstances that will render such a case inadmissible and setting out the rule against double jeopardy respectively); Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of* Ne Bis in Idem, 8 SANTA CL. J. INT'L L. 165 (2010).

[49] *See* Rome Statute, *supra* note 1, art. 18.

desire to prosecute the post-election violence through its national courts, one solution could have been to suspend or defer the ICC prosecutor's investigation in Kenya to give the State an opportunity to conduct its own investigation and prosecution of the suspects while also closely monitoring the ongoing proceedings to ensure that they remained genuinely directed at the same "case." Article 18(2) appears to provide the framework for such a deferral, even if the "within one month" time limitation makes the provision not entirely applicable to the Kenya case. Still, under that provision, the ICC Prosecutor is required to step aside when a State informs the Court that it is investigating or has investigated persons within its jurisdiction for criminal acts that constitute offenses under the Rome Statute.[50] In fact, upon receipt of that notice, she can only proceed with an investigation if the Pre-Trial Chamber decides to authorize him to so do. In the Kenya situation, the government actually requested the assistance of the Court.[51] And while perhaps it would have slowed down how quickly justice can be rendered, such a halfway solution would have numerous advantages over the Court's outright dismissal of the admissibility application.

First, such a solution would continue to foster the development of national solutions to combat international crimes, which is the stated purpose of the ICC.[52]

Second, much like the manner in which the ICTY and ICTR now transfer and monitor cases of high value suspects to national jurisdictions under tribunal authority with the option to claw them back, it would maintain ICC leverage over the national criminal proceedings and eliminate the possibility of shielding by Kenya. Indeed, besides the extensive mechanisms providing for cooperation between the Court and

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[50] Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction 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. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

Id. art. 18(2).

[51] Situation in the Republic of Kenya, No. ICC-01/09-63, 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, ¶¶ 33–34 (June 29, 2011), http://icc-cpi.int/iccdocs/doc/doc1100546.pdf; Situation in the Republic of Kenya, No. ICC-01/09-78, 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(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence,'" ¶ 1 (Aug. 10, 2011), http://icc-cpi.int/iccdocs/doc/doc1195608.pdf.

[52] Rome Statute, *supra* note 1, preamble

national jurisdictions, thinking outside of the Rome Statute box would potentially have also been helpful to the Court.

For one thing, the Court could have referred to the extensive body of jurisprudence that has emerged from the Rule 11 *bis* transfers process under which those U.N. tribunals send cases to willing national jurisdictions for prosecutions under certain conditions, if a fair trial is deemed possible, and the death penalty would not be applied.[53] The effect that such transfers of cases have had, especially on improving the fairness of the Rwandese justice system, appears to be nothing short of remarkable. In any event, the ICC approach seems to go not only against the explicit requirements of its statute but also against the current trajectory of international criminal justice—even ad hoc courts said to have primacy over national courts, have come to recognize that it is only pragmatic that national courts first attempt to prosecute the international crimes that occurred on their territories. That approach also recognizes that an international jurisdiction, no matter how well endowed, can at best prosecute a small fraction of the cases that can be properly pursued within willing and capable national jurisdictions and courts.

Third, it would uphold the broader purpose of the ICC to help challenge impunity and ensure the prosecution of international crimes without overreaching and thereby placing the Court on a collision course with states whose cooperation will ultimately be crucial for its success in holding trials of suspects if indeed their charges are later confirmed.

Fourth, it would not commit the ICC to any specific interpretation of Article 17 that could negatively impact the way it handles future admissibility dilemmas.

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[53] Transfers were first approved in 2011. Since then, a number of referrals have been approved by the ICTR. See The Prosecutor v. Jean Uwinkindi, Case No. ICTR-75-R11*bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Jun. 28, 2011), http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf. For earlier cases rejecting the Prosecutor's 11bis request, *see*, *e.g.*, The Prosecutor v. Gaspard Kanyarukiga, Case No. ICTR-2002-78-R11bis (Oct. 30, 2008), http://unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C081030.pdf; The Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-R11bis, Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11*bis* (Dec. 4, 2008), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Hategekimana/decisions/081204.pdf; The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-2000-61-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (Nov. 17, 2008), http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Gatete/decisions/081117.pdf; The Prosecutor v. Fulgence Kayishema, Case No. ICTR-01-67-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, (Feb. 22, 2012), http://unictr.org/Portals/0/Case/English/Kayishema_F/decisions/120222.pdf.

Finally, it would more adequately address Kenya's "let us take a big picture" approach to complementarity argument the merits of which the pre-trial and majority of the appeal judges basically failed, or rather, refused to engage. Again, a perusal of the drafting history or the Rome Statute shows that the ICC system was always conceptualized as a secondary, back-up mechanism to that of States Parties. [54] This is not to say that one does not have sympathy for the difficulties that the Court faced in this context where the Kenyan public apparently prefers The Hague option be exercised while governmental authorities were pushing the Nairobi option largely because what will happen to the cases is more apparently within their control.

The approach of enabling national prosecutions is just one possible solution that could have been utilized by the Appeals Chamber instead of summarily dismissing Kenya's ambitious plans. It is not necessarily the best solution that could have been found, but its core advantage is rooted in the *raison d'etre* of complementarity and in the long-term thinking that extends beyond the details of the particular cases before the Court and its role in a broader system of international criminal justice. The analysis shows that, at a minimum, the judges' strict application of the same "person/same conduct" test arguably does not respect and nurture the growth of complementarity and the anti-impunity work of national jurisdictions upon which the Rome Statute was predicated. The proposed alternative solution of suspensions or a deferral, perhaps on condition that the ICC Prosecutor monitors the trials and report back to the Pre-Trial Chamber every six months, would respect those goals while simultaneously maintaining safeguards against the risk of allowing impunity to prevail for the heinous crimes against humanity committed in Kenya.

VII. CONCLUSION

By way of conclusion, since Kenya's appeal has been lost before the ICC Appeals Chamber and the Court's situations docket continues to grow, it is clear that the appeals judges will, over the next few years, have other opportunities to define the parameters of complementarity following a challenge to admissibility by a State Party. The judges should keep in mind how their interpretation in future Article 19 admissibility challenges will shape the actions of national jurisdictions. This includes not just the jurisdiction in question, but all 122 current ICC States Parties with which the Court will potentially work in the future. All of them will be watching to see whether it will respect the bargain in Article 17 and the rest of the Rome Statute: that the tribunal will defer to their competence to investigate or prosecute genocide, crimes against humanity, and war crimes in their national courts wherever they are willing and able to do so. More fundamentally, at least for the African cases, even if they do not necessarily initially have the capacity to investigate and prosecute, they could rely to a certain measure on the Court's flexibility to help the undertake the

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[54] *See* Rome Statute, *supra* note 1, preamble and art. 17.

requisite legal and judicial sector reforms to enable them to discharge their obligations under the Rome Statute.

As the Court now works with its Kenya cases, it is also creating de facto guidelines for operation that will be noted by all other national jurisdictions within and outside the Rome system of justice.[55] The relationship between the ICC and national jurisdictions in this way reflect many similarities to that of the federal and state courts in the American judicial system.[56] By deferring jurisdiction, the Court gains the invaluable opportunity to direct national proceedings thereby giving effect to the much discussed but seemingly not yet applied ideal of positive complementarity. By giving a less stringent and more generous interpretation to admissibility, it will permit non-Western states an opportunity to conduct criminal proceedings through trial and error with the ICC, while the rest of the world watches and brings itself into compliance with the international obligations to prosecute crimes against humanity. It is in this way, rather than a one size fits all approach to complementarity that takes as sole referent the standard of justice in developed Western states, that the ICC will help contribute to the grand goal of eradicating the culture of impunity that has far too long made national prosecutions of international crimes the exception rather than the rule.

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[55] *See* Ada Sheng, *Analyzing the International Criminal Court Complementarity Principle Through a Federal Courts Lens*, 13 ILSA J. INT'L. & COMP. L. 413, 423–24 (2007).

[56] *See id.* at 413–14.