

Complementarity or Competition:

The Effect of the ICC's Admissibility Decision in Kenya on Complementarity and the Article 17(1) Inquiry

Jake Spilman*

I. Introduction

The creation of the International Criminal Court (ICC) is an achievement of incredible import: a product of growing international consensus on conceptions of right. But the ICC as contemplated by the Rome Statute—the document that produced the Court and governs its actions—is an institution that should go unused.¹ The preamble to the Rome Statute of the International Criminal Court calls on signatories to “exercise criminal jurisdiction over those responsible for international crimes” while reassuring states that the Court’s jurisdiction will complement, rather than replace, the jurisdiction of national courts.² The inclusion of this language was necessary for the creation of the Court, as the exercise of jurisdiction by an international organization over a criminal event that occurred within a particular state, no matter how horrific, is often seen as an intrusion upon a state’s sovereignty.³ The International Criminal Court’s status as a permanent institution governing a vast array of nations is a marked departure from the common practice at the time of its creation: *ad hoc* tribunals created by the United Nations Security Council that were permitted to ignore the traditional norms of territorial and

* Mr. Spilman is a 2013 graduate of the University of Virginia School of Law and a 2010 graduate of the College of William & Mary. He is currently an associate at White & Case LLP.

¹ “[I]t is the essence of the principle [of complementarity] that if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction.” Phillip Kirsch, Canadian Ambassador to the Kingdom of Sweden, Keynote Address at the Cornell International Law Journal Symposium: The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes and Aggression Symposium, *in* 32 CORNELL INT’L L.J. 437, 438 (1999).

² Rome Statute of the International Criminal Court pmb1, ¶¶ 6, 10, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

³ John T. Holmes, *Complementarity: National Courts versus the ICC*, *in*, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 670-671 (Antonio Cassese, Paolo Gaetta, & John R.W.D. Jones, eds., Oxford Univ. Press 2002).

personal jurisdiction.⁴ This new style of international court has required the adoption of new standards to govern its relation to domestic courts.⁵

The ICC's admissibility determinations regarding Kenya's 2007 post-election violence have philosophically altered the Court's admissibility regime by requiring states to do more than simply promise to investigate.⁶ The regime is now characterized, not by complementarity, but by competition between the Court and states with jurisdictional claims. The Court's treatment of admissibility and complementarity in the Kenya situation creates a regime favoring the most sophisticated party, where states and the Court are racing to advance investigations and prosecute specific individuals for specific crimes. The Court created this particular admissibility environment by circumventing the high threshold determinations of sections (a) and (b) of Article 17, Section 1, of the Rome Statute and by utilizing a demanding definition of "investigation" and a high burden of proof. Additionally, the Court fosters a spirit of competition by creating a regime where the further the ICC progresses towards a case, the higher the burden on the state to prove that it is exercising its jurisdiction, and, by shifting the burden of proving proper jurisdiction from the Court to the slower investigating party.⁷ The new admissibility

⁴ See generally Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 3, at 3, 10-18.

⁵ See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 387 (1998) ("This approach was acceptable in the case of the ad hoc tribunals because of their limited mandates and jurisdiction, but it would be inappropriate to create a permanent ICC, with general jurisdiction It would also be politically difficult, if not impossible, to do so."); Mohammed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 872, 878 (2002) ("[M]ost States are terribly jealous about their powers of criminal prosecution. They perceive these powers as linked to the very concept of sovereignty.").

⁶ Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶¶16-17 (May 30, 2011), <http://www.icc-cpi.int/iccdocs/doc.doc1078823.pdf> (commenting on prosecution's argument that a state's promise to investigate does not satisfy admissibility requirements).

⁷ Rome Statute, *supra* note 2, art. 17 § 1.

regime suggests that the Court may be unwilling to provide the type of deference to states that many nations interpreted the Rome Statute to require.⁸

This article will discuss the origins of the International Criminal Court and the progression of the theory surrounding a permanent international tribunal—beginning with the United Nations’ creation of ad hoc tribunals following atrocities in Yugoslavia and Rwanda, and proceeding through a discussion of the regime created in Rome. It will then outline the violence that engulfed Kenya following its 2007 presidential election and the procedural posture of the ICC’s case against those responsible. The analysis will then turn to the effect of the ICC’s rulings in the Kenya situation on the admissibility of cases to the Court, and the status of complementarity in creating the competitive environment surrounding the Court, as evidenced by the jockeying for jurisdiction that occurred during the Kenya adjudication.

II. Complementarity and the Beginnings of the International Criminal Court

Primacy and the Ad Hoc Tribunals

The concept of intruding upon state sovereignty in order to address vile crimes that shock the international conscience is far from novel. However, prior to the ad hoc tribunals enacted by the United Nations Security Council to address particular instances of genocide, prosecutions by non-domestic legal systems were often tools used to prosecute wartime crimes committed by high-ranking officials from defeated states.⁹ This tactic was somewhat retributive in nature, as it

⁸ The United States, for instance, has not yet ratified the Rome Statute and has explicitly expressed its disagreement with the current construction of the Court, at least partially due to concerns that insufficient checks exist to protect states from overzealous prosecutions unwilling to defer to national decisions regarding the handling of crimes covered under the Rome Statute. See JENNIFER ELSEA, CONG. RESEARCH SERV., RL 31437, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 28 (2002) (noting the U.S.’ fear that complementarity will not operate in practice as outlined in the Rome Statute).

⁹ Until World War II, non-domestic tribunals were often key portions of peace treaties that focused prosecution on war criminals of surrendering nations. Further, while international military tribunals from World War II infringed on domestic sovereignty by creating international bodies to try war criminals, these tribunals also focused on trying criminals from losing powers. See *Zeidy*, *supra* note 5, at 872–73 (outlining the progression of international tribunals, and aspects of such tribunals, from the Thirteenth Century until the creation of the International Criminal Court).

focused on punishing criminals from vanquished nations. The interest of the international community in enforcing international rights was not an ancillary benefit. However, domestic legal systems were entirely ignored and non-domestic prosecutions were intended as a public exercise of might and control through the victor's intrusion upon state sovereignty.

The United Nations ad hoc tribunals, created to address specific instances of genocide in Yugoslavia and Rwanda, abandoned the theory of forcing non-domestic adjudication upon states defeated in war. These tribunals were not intended to humiliate or punish wartime enemies, but rather to bring justice to criminals who severely upset international conceptions of morality. In both this philosophy and the resulting procedures, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) stood as forebears to the later ICC.¹⁰

The ICTY and ICTR were constructed quite similarly, as the ICTR was modeled after the structure of the ICTY. The jurisdiction of both ad hoc tribunals was based on primacy.¹¹ States and the ad hoc tribunals had concurrent jurisdiction over crimes that fell within the competence of the tribunals, subject to the ad hoc tribunals' ability to demand deference to their proceedings.¹² The primacy of these tribunals required states to:

accede to and accept requests for deferral on the ground of suspension of their sovereign rights to try the accused themselves[. This] compels States to accept the fact that certain domestic crimes are really international in character and endanger international peace and that such international crimes should be tried by an international tribunal, that being an appropriate and competent legal body duly established for this purpose by law.¹³

The ad hoc tribunals' temporal and jurisdictional limitations made such primacy appropriate. The United Nations created ad hoc tribunals as a reaction to specific instances of wrongdoing and

¹⁰ See Ziedy, *supra* note 5, at 889.

¹¹ Brown, *supra* note 5, at 394-95.

¹² See *id.* at 395 (discussing the primacy of the Tribunals over states).

¹³ Prosecutor v. Tadic, Case No. IT-94-1, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 83 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

strictly limited their use to prosecuting international war criminals. Specific international fears of the impartiality and functionality of the domestic legal systems of the former Yugoslavia and Rwanda, and those States' abilities to address the atrocities that had terrorized them, demanded an international response.¹⁴ The ad hoc tribunals provided uniform justice to the perpetrators of genocide in these States.

Primacy, however, did not only obligate states to defer to international prosecutors: it required states to cooperate with the Tribunals in regards to all aspects of the criminal process, including producing evidence and arresting, detaining, and transferring individuals subject to the Tribunals' prosecution.¹⁵ Primacy's international acceptance appeared to increase between the creation of the ICTY and the ICTR. The Rwandan tribunal's construct of primacy impacted *all* states, rather than a select few, seemingly diminishing some of the constraints placed upon primacy in the ICTY.¹⁶

Drafting the Rome Statute and the Emergence of Complementarity

During the drafting of the ICC statute, United Nations officials recognized that a permanent international court could not have primacy over national courts because only a court that placed limited intrusions upon state sovereignty could gain political acceptance as an institution. As the ad hoc tribunal for Rwanda became active, the International Law Commission (ILC) drafted a statute (that would become the Rome Statute) to create the International Criminal Court. The preamble of the ILC draft attempted to limit the jurisdiction of the Court by

¹⁴ Holmes, *supra* note 3, at 668 ("In the former Yugoslavia, the national courts in parts of the country and in the emerging successor States continued to function but effective prosecutions were not initiated. However, there were serious concerns that any proceedings initiated by these courts would be attempts to shield individuals [. . .] from serious punishment for the crimes committed. In Rwanda, the judicial system was decimated by the genocide and substantial international assistance was required before the country could begin to prosecute those responsible.").

¹⁵ See Brown, *supra* note 5, at 386-87 ("Primacy compromises states' sovereign prerogatives by requiring them to defer to an international tribunal, and, more generally, to cooperate with the international court and to obey its orders concerning such matters as the production of evidence and the arrest and detention of persons.").

¹⁶ *Id.* at 402.

mandating that the Court only complement national prosecutions “where such trial procedures may not be available or may be ineffective.”¹⁷ This approach took on the name “complementarity.” As mentioned above, this constraint upon the jurisdiction of the proposed ICC was the response to fears that the Court would become a constant threat of intrusion upon state sovereignty. This threat made primacy untenable and mandated a shift in philosophy from the previous ad hoc tribunals.¹⁸ The states that participated in drafting the Rome Statute identified the need for an international court to stand sentry for conscious–shocking atrocities.¹⁹ Yet, the majority of signatories wanted this body to be allowed to respond only when states whose task it was to punish these criminals were impotent.²⁰

Accordingly, the proposed Court’s procedures were intended to give priority to domestic prosecutions. The idea of complementarity was not just concerned with forum, it was meant to apply to all aspects of the criminal procedure and investigation.²¹ However, the draft was unclear on how this principle would operate in practice.²²

III. The Rome Conference and the Statutory Construction of the ICC

The ILC’s preference for complementarity prevailed throughout the editing process and was included in the Rome Statute of the International Criminal Court signed in July of 1998.²³ The term “complementary” is mentioned twice in the Statute, with duplication intended to

¹⁷ ILC Draft Statute in Report of the ILC on the Work of its forty-sixth session, U.N. GAOR, 49th Sess., pmb., U.N. Doc. A/49/10 (1994).

¹⁸ Brown, *supra* note 5, at 387.

¹⁹ See Rome Statute, *supra* note 2, pmb., ¶ 2.

²⁰ The ILC adopted the idea of complementarity, because the goal for the Court was to provide an “impartial, reliable, and depoliticized process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases, and triggering the jurisdiction of the ICC when it is truly necessary.” Brown, *supra* note 5, at 389.

²¹ Rep. of the Int’l Law Comm’n, 46th Sess., 37, May 2–July 22, 1994, GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10; (1994).

²² Brown, *supra* note 5, at 417.

²³ Rome Statute, *supra* note 2.

reinforce the drafters' goal for the principle of complementarity to permeate the entire Statute.²⁴ However, the provision within the statute most evocative of complementarity is Article 17, which establishes the substantive test governing whether the Court is precluded from responding to a particular case or situation.²⁵ Article 17 creates a substantial burden that the ICC Prosecutor must surpass for the Court to rule a case admissible, thereby prioritizing domestic forums over the Court.²⁶

Section 1 of Article 17 commands the Court to rule a prospective case inadmissible when (1) the case is of insufficient gravity to trigger further Court action; (2) *ne bis in idem* applies; or (3) a state with jurisdiction is investigating the case and either the investigation or prosecution is ongoing, or the state has decided not to prosecute.²⁷ The Statute does provide a judicial check upon the domestic state's criminal and judicial process in order to prevent otherwise culpable parties from enjoying impunity. Sections 17(1)(a) and 17(1)(b) govern admissibility when states with jurisdiction have investigated cases. These sections command that (1) the investigating or prosecuting state be willing and able to "genuinely carry out the investigation or prosecution;" and (2) that any decision not to charge an individual not be based upon the state's unwillingness or inability to genuinely prosecute.²⁸ In theory, the core of this admissibility test is determining whether a state is able and willing to avoid effectively granting a criminal impunity.²⁹

²⁴ The two instances where the Statute uses "complementary" are within the opening portions of the Statute, when defining the Court and its purpose. *See id.* pmbi., ¶. 10, art. 1, ("Emphasizing that the International Criminal Court established under this Statute shall be complementary to traditional criminal jurisdictions...[The Court] shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions.").

²⁵ Rome Statute, *supra* note 2, art. 17(1)(a)–(b).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* art. 17(1)(a)–(b).

²⁹ *See Zeidy, supra* note 5, at 899 ("The core of the admissibility test is whether a State with jurisdiction has the willingness and ability to investigate and prosecute. If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction that has seized itself of the matter.").

The focus on a state's unwillingness or inability to have genuine investigations and court proceedings illuminates the influence that the ad hoc tribunals had upon the creation of the ICC. These specific shortcomings within the domestic forums of Yugoslavia and Rwanda—unwillingness in the former, inability in the latter—demanded that the ad hoc proceedings take priority over any domestic action in order to prevent *ne bis in idem* from protecting criminals from international prosecution.³⁰ Including checks on the appropriateness of domestic forums illustrates that the Court's jurisdiction was to be utilized in situations equally grave as those in Rwanda and the former Yugoslavia. Further, these admissibility requirements appear to prohibit the Court from acting either as a paternalistic body, imparting Western legal preference upon other systems of law, or as an appeals court.³¹

Articles 18 and 19 govern the procedures of admissibility determinations and challenges at both the preliminary and case stages.³² As the Prosecutor's investigation and case progresses from the general to the specific, the showing required of a state to retain jurisdiction increases in specificity as well.³³ The requirements for a state to preclude the Prosecutor from investigating are more easily satisfied than the showing necessary when the Prosecutor has a specific summons or has levied charges against an individual.³⁴

³⁰ See Holmes, *supra* note 3, at 668-69 (“Put generally, [when creating the ad hoc tribunals] the Security Council was faced with situations where in the former Yugoslavia, there was an unwillingness to investigate and prosecute effectively those responsible for international crimes and in Rwanda there was an inability to do so.”).

³¹ Upon the birth of the ICC, ICTY Prosecutor Louise Arbour voiced her reservations over the Rome Statute, arguing that, despite the Statute being constructed in good faith, the regime would work in favor of rich, developed countries and against poor countries. Zeidy, *supra* note 5, at 975.

³² See Rome Statute, *supra* note 2, arts. 18-19.

³³ *Id.* art. 18.

³⁴ *Id.* art. 19.

IV. Post-Election Violence in Kenya

After the 2007 Kenyan presidential election, politically motivated violence engulfed the majority of Kenya's provinces.³⁵ This violence resulted in over 1,100 Kenyans dead, 3,500 injured, and the forcible displacement of more than 600,000 people.³⁶ Prior to the election, prominent leaders of Kenya's Orange Democratic Movement (ODM) political party organized a sophisticated violent response, which they planned to unleash if Mwai Kibaki, presidential incumbent and member of the Party of National Unity (PNU), was re-elected.³⁷ ODM leaders William Samoei Ruto and Henry Kiprono Kosgey, and radio broadcaster Joshua Arap Sang, planned to use this violent response to gain political power in Kenya's Rift Valley by expelling and punishing perceived PNU supporters within the Valley.³⁸

As both Kibaki and the ODM presidential candidate, Raila Odinga, claimed victory, Sang issued coded directives from his radio platform to coordinate a systematic decimation of pre-chosen locations within the Rift Valley.³⁹ On his command, pre-planned attacks were carried out upon unsuspecting towns, with attackers quickly burning homes and businesses, and murdering civilians.⁴⁰

Prominent PNU members and Government of Kenya officials organized a violent response to keep the PNU in power.⁴¹ PNU members and Kenyan police forces used their positions of authority to violently attack ODM supporters in areas known as typical ODM

³⁵ Prosecutor v. Ruto, Kosgey, & Sang, Case No. ICC-01/09-30, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, at 4 (Dec. 15, 2010).

³⁶ *See generally id.*

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.* at 4–5.

⁴⁰ *Id.* at 4.

⁴¹ Prosecutor v. Ruto, Kosgey, & Sang, Case No. ICC-01/09-30, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, at 5 (Dec. 15, 2010).

strongholds throughout the country.⁴² The PNU response utilized pro-PNU youth to attack civilian supporters of ODM through door-to-door violence and violent responses to ODM political rallies.⁴³ Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali organized the PNU response killing many suspected ODM supporters, with the police alone responsible for perhaps a third of the total casualties.⁴⁴

Former U.N. Secretary-General Kofi Annan led a mediation process, the Kenyan National Dialogue and Reconciliation, which provided a political compromise to ongoing bloodshed.⁴⁵ The mediation resulted in a coalition government, with Kibaki, the incumbent President and PNU candidate, remaining in office as President, and Odinga, the ODM challenger, taking office as Prime Minister.⁴⁶ Both leaders quickly expressed their dedication to addressing the political violence shadowing the compromise, by using a variety of mechanisms including a South African-style Truth, Justice, and Reconciliation Commission, criminal prosecutions, and a review of Kenya's Constitution.⁴⁷ However, many members of Kenya's parliament did not share this sentiment. Following the President's and Prime Minister's establishment of the Commission of Inquiry into Post-Election Violence, which advocated for a special domestic tribunal to prosecute those responsible for the post-election violence, the Kenyan parliament rejected a bill that would have created such a tribunal.⁴⁸ After the internal dissension within Kenya in regards to responding to the post-election violence became clear, Kofi Annan approached International Criminal Court prosecutor Luis Moreno Ocampo with information on the attacks and a list of

⁴² *Id.*

⁴³ *Id.* at 6.

⁴⁴ Thomas Obel Hansen, *The Policy Requirement in Crimes Against Humanity: Lessons From and For the Case of Kenya*, 43 GEO. WASH. INT'L L. REV. 1, 3 (2011).

⁴⁵ *Id.* at 3–4.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.*

⁴⁸ *Id.*

key suspects.⁴⁹ Those key suspects—the leaders mentioned above— became known as the “Ocampo Six.”⁵⁰

Upon notification of Kenya’s inaction, Ocampo initiated a *proprio motu* investigation of the post-election violence.⁵¹ For prosecutor-initiated investigations, the Statute requires the prosecutor to analyze the tip received and determine if a reasonable basis exists for the prosecutor to initiate a full-fledged investigation.⁵² Confirmation that the inquiry is reasonable satisfies the initial requirements of Article 15 and the prosecutor then has the duty to submit his findings to the Court’s Pre-Trial Chamber to have his proposed investigation authorized.⁵³ Ocampo satisfied his Article 15 requirements, and the Pre-Trial Chamber authorized the investigation into the “Ocampo Six.”⁵⁴ The Chamber’s decision to authorize this investigation was not unanimous, as there was disagreement over whether the Court had subject-matter jurisdiction over the post-election violence.⁵⁵ Specifically, Judge Hans-Peter Kaul believed that the violence was not part of a “state or organizational policy” as required by the Statute.⁵⁶ Yet, the entirety of the Court was in agreement that no admissibility concerns existed, as Kenya’s inaction did not preclude the prosecutor’s inquiry.

⁴⁹ *Id.*

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 4.

⁵² Rome Statute, *supra* note 2, art. 53(1)(a)-(c) (Article 53 of the Rome Statute mandates particular factors that the Prosecutor must consider when determining whether a reasonable basis exists to begin an investigation. Those factors are: does the information available to the Prosecutor provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) is the case admissible under article 17, or would it be; and (c) taking into account the gravity of the crime and the interests of victims, does the Prosecutor believe that an investigation would serve the interests of justice?).

⁵³ Rome Statute, *supra* note 2, art. 15, ¶ 3 (“If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”).

⁵⁴ *See* Prosecutor v. Ruto, Kogsey & Sang, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 1 (May 30, 2011) [hereinafter 19(2)(b) Decision] (“On 31 March 2010, the Chamber . . . authori[z]ed the Prosecutor to commence an investigation into the situation in the Republic of Kenya.”).

⁵⁵ Hansen, *supra* note 44, at 4.

⁵⁶ *Id.* at 4–5.

V. The Kenya Admissibility Decision

The Prosecutor commenced the investigation and, on March 8, 2011, issued official summonses for Ruto, Kosgey, and Sang to appear before the ICC.⁵⁷ Kenya responded to the ICC summonses by challenging the admissibility of the prosecutor's case. The Kenyan Government declared that it had remedied the constitutional and judicial weaknesses that had precluded its earlier attempts at justice, and thus the previous need for a special tribunal had dissipated.⁵⁸ It argued that the substantive changes enabled Kenya to put the perpetrators of the 2007 post-election violence on trial domestically without the intrusion of the ICC. Further, the Kenyan government alleged that its investigation into the post-election violence, and into a portion of the "Ocampo Six" and other perpetrators had already begun, remained ongoing, and operated at the same level of sophistication as the ICC. However, the investigation process would take many months, so the Kenyan government requested to provide monthly updates of their progress to the Pre-Trial Chamber.⁵⁹

The prosecutor argued that, as the ICC investigation into Kenya had progressed to an actual summons against three of the "Ocampo Six," Kenya had a heightened burden to prove that the cases were inadmissible. Ocampo explained that once the prosecution's investigation progressed to the level of specificity where he could bring summons against particular individuals, Kenya was required to make a showing that they were investigating the *same* people for the *same* conduct.⁶⁰ Accordingly, he argued that Kenya had made no showing that an actual, ongoing investigation existed. Furthermore, this failure coupled with Kenya's previous inaction was evidence of the non-existence of an actual investigation at that point. Prosecutor Ocampo

⁵⁷ 19(2)(b) Decision, *supra* note 54, at ¶ 2.

⁵⁸ *Id.* ¶ 13.

⁵⁹ *Id.* ¶ 14.

⁶⁰ *Id.* ¶ 21.

concluded that Kenya's reforms may make it possible for Kenya to investigate, but did not equate to an actual investigation.

Ultimately, the Pre-Trial Chamber applied the "Same Person/Same Conduct" Test and concluded that Kenya had not shown that it was investigating the "Ocampo Six" for the same conduct as the ICC. Accordingly, Kenya appealed this decision. On review, the Appeals Chamber agreed with the Pre-Trial Chamber and the ICC's case was ruled admissible.

VI. Race to the Case: The Kenya Decision's Alteration of the Complementarity Regime

The admissibility decision in the Kenya situation is a milestone in the development of the ICC. Not only was this the first admissibility challenge by a state, but the challenge also required the Court to evolve complementarity from theory to practice, as much of the admissibility criteria remained flexible coming out of Rome.⁶¹ Ultimately, the Court was entrusted with identifying the bounds of its own jurisdiction with the Rome Statute providing structure and guidance.⁶² The rulings of the Pre-Trial Chamber and the Appeals Chamber of the Court create an admissibility regime that disfavors deference to national procedure. Instead the regime incentivizes competition between the Court and any state attempting to claim jurisdiction. Obviously, the precedential value of these rulings cannot be understated. The Court provided itself with the necessary vehicle to, in the least, limit complementarity until the international community amends the Rome Statute, or at worst, erode complementarity further as the Court ages.

⁶¹ See 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" ¶ 14 (Sep. 20, 2011) (Ušacka, J., dissenting) [hereinafter Ušacka Dissent] (describing the precedential importance of this decision); Brown, *supra* note 5, at 433 (noting that the ICC should retain flexibility in the implementation of complementarity, thus allowing the Court to tailor admissibility as it sees fit).

⁶² See Holmes, *supra* note 3, at 672 (arguing that the Rome Statute subscribed to the principle of *kompetenz-kompetenz*, the "ICC is the arbiter of its own jurisdiction," which was key in the deliberations surrounding the Rome Statute); Zeidy, *supra* note 5, at 888 ("kompetenz-kompetenz").

The post-Kenya construct of the admissibility criteria leaves complementarity a shell of what scholars interpreted the Rome Statute to require. Rather than defer to a state's sovereignty, the Court now is incentivized to actively compete with states to be the first party to act. However, alacrity alone is insufficient to preclude the Court from acting. If a state wishes to retain jurisdiction over crimes that concern the ICC, it must not dilute its procedures in order to gain speed. The Court retains the ability to examine a state's procedures. If they are viewed by the Court to be not genuine,⁶³ insufficient to bring the particular criminals to justice,⁶⁴ or otherwise "inconsistent with an intent to bring the person concerned to justice,"⁶⁵ the Court may gain admissibility.

The post-Kenya Court favors speed and sophistication, eschewing complementarity and deference to national proceedings in an effort to absolutely avoid impunity.⁶⁶ The Court appears unconcerned with any increased intrusion upon state sovereignty that this regime will cause. The Kenya Court's interpretation weakened complementarity in three main respects: by circumventing the prosecutor's stringent burden to prove unwillingness or inability by utilizing a narrow definition of "investigation" coupled with a high burden of proof for states; by positively

⁶³ The Rome Statute, *supra* note 2, art. 17 (1)(a)–(b) (noting that cases and situations remain admissible if a state is unable to genuinely carry out an investigation or prosecute); *id.* art. 17(2)(a) (sham proceedings or proceedings that are enacted with the intent to shield perpetrators from the jurisdiction of the Court are insufficient to prohibit the Court from exercising jurisdiction).

⁶⁴ *Id.* art. 17(1)(a)–(b) (Not only is the Court concerned with the genuineness of procedures, but their sufficiency as well.).

⁶⁵ *Id.* art. 17(2)(b)–(c) (declaring that, if state procedures or delays are "inconsistent with an intent to bring the person concerned to justice," than the Court may exercise jurisdiction).

⁶⁶ Admittedly, one of the main reasons the Court was created was to avoid impunity. *See* Rome Statute, *supra* note 2, pmb., ¶¶. 4–5 ("Affirming 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, [. . .] Determined to put an end to impunity for the perpetrators of these crime and thus to contribute to the prevention of such crimes"). However, many signatories to the Rome Statute would have abstained from doing so if the Court was intended to have primacy, or even priority, over domestic courts, and this is a major reason why the United States has failed to become a party to the Rome Statute. *See* ELSEA, *supra* note 8, at 28 (discussing the U.S.' reservations regarding the Rome Statute due to fears that the Court will not defer to domestic courts to the extent contemplated by the Rome Statute); *See also id.* at 1 ("The Bush Administration [. . .] has taken the measure of formally renouncing any U.S. obligations under the treaty.").

correlating the showing necessary for a state to preclude the Court's ability to exercise jurisdiction with the progress of the prosecutor's initial inquiry, investigation, and prosecution; and by shifting the burden of proving admissibility from the prosecutor to the party challenging admissibility after the initial determination.

Circumventing the Prosecution's Burden under Sections (1)(a) and (1)(b) of Article 17

The drafters of the Rome Statute established a high threshold for ICC admissibility when they crafted Article 17, with the intent to permit the ICC to act only in the most extreme of circumstances.⁶⁷ As previously mentioned, sections (1)(a) and (1)(b) of Article 17 delineate the Court's ability to exercise jurisdiction when a state is investigating or prosecuting a case, or has investigated a case and decided not to prosecute.⁶⁸ These sections specifically deny the Court jurisdiction if a state is investigating or prosecuting, or has done so, unless the state's investigation, prosecution, or decision not to prosecute is marred by an unwillingness or inability to "genuinely . . . carry out the investigation or prosecution."⁶⁹

Throughout its brief history, the Court has separated the Section 1 inquiry of Article 17 into two distinct steps. First, the Chamber must determine whether a state is currently investigating or prosecuting, or has done so in the past.⁷⁰ If the Court answers the previous question in the affirmative, it proceeds to determine a state's intent and ability to investigate and prosecute.⁷¹ Accordingly, if the Court determines that a state has not conducted an "investigation"

⁶⁷ Ušacka Dissent, *supra* note 61, ¶ 27 ("The drafters of the Statute agreed to establish a high threshold when they drafted the legal and factual requirements for unwillingness and inability in paragraphs 2 and 3 of article 17.").

⁶⁸ Rome Statute, *supra* 2, art. 17(a)–(b).

⁶⁹ *Id.* art. 17(1)(a).

⁷⁰ See 19(2)(b) Decision, *supra* note 54, ¶ 44.

⁷¹ In its ruling on Kenya's admissibility challenge, the Pre-Trial Chamber emphasized that the first portion of the Article 17(1) admissibility test, the complementarity inquiry (the second portion of the test is the gravity determination), "concerns the *existence* or *absence* of national proceedings." 19(2)(b) Decision, *supra* note 54, ¶ 44-44 (emphasis added).

or “prosecution,” the admissibility inquiry ceases.⁷² The case is admissible without any inquiry into the fitness of the domestic judicial system and the ICC is not precluded from exercising jurisdiction over the case if the crime alleged is of sufficient gravity to demand ICC action.⁷³

Dealing with Kenya’s post-election violence, the Court outlined a definition of investigation that reflected the Court’s high level of sophistication and its chosen criminal investigation procedures.⁷⁴ Applying this definition of investigation to Article 17’s Section 1 inquiry demands that states mimic the procedures the ICC prosecutor would take when investigating. Further, the Court requires more than a mere declaration that a state is actively investigating.⁷⁵ That is, states must provide probative evidence detailing the substance of their investigations.⁷⁶ The Court found Kenya’s evidentiary showing insufficient, as it failed to provide the temporal details of ongoing investigations as well as the content of statements gathered during those investigations.⁷⁷

⁷² 19(2)(b) Decision, *supra* note 54, ¶ 42

⁷³ *See Id.*

⁷⁴ 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”, ¶ 46 (Aug. 30, 2011)

⁷⁵ *Id.* ¶ 63 (“[A] statement by a Government that it is *actively investigating* is not [. . .] determinative.”) (emphasis in original).

⁷⁶ [W]hile Kenya asserts . . . that ‘[o]fficers have been re-visiting the crime scenes to make inquiries and gather any evidence that could assist their investigations in respect of the six suspects’, it provided no evidence thereof, such as police reports attesting to the time and location of these visits or the cases in which these inquiries took place. *Id.* ¶ 69.

⁷⁷ *See* 19(2)(b) Decision, *supra* note 54, ¶ 65 The Pre-Trial Chamber listed the information that Kenya failed to provide to evidence its alleged ongoing investigation: “In particular, the Chamber lacks information about dates when investigations, if any, have commenced against the . . . suspects, and whether the suspects were actually questioned or not, and if so, the contents of the police or public prosecution’s reports regarding the questioning. . . . There is equally no record that shows that the relevant witnesses are being or have been questioned.” *Id.* ¶ 69. The Pre-Trial Chamber found the Kenyan investigation to be insufficient for the aforementioned lack of evidence despite the Kenyan government’s assertion that it had opened files on all six suspects and that investigations were ongoing. 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”, ¶ 60 (Aug. 30, 2011).

The Court's interpretation of the Article 17 complementarity inquiry accomplishes three things: (1) it allows the Court and Prosecutor to evade inquiring into the intentions and ability of the investigating state⁷⁸; (2) it shifts the Court's priority from the domestic party to the most sophisticated party⁷⁹; and (3) by favoring sophistication, it adopts a static Western definition of what constitutes "investigation" and "prosecution," thereby avoiding tailoring the Article 17 Section 1 inquiry into the specific state's particular practices.⁸⁰ All three of these alterations diminish the deference to national courts that the Rome Statute intended through its evocation of complementarity.⁸¹ However, this new interpretation of Article 17 does not just limit complementarity: it positions the Court to become a juggernaut upon poorer and less developed countries. Intrusion into these countries' sovereignty will become more frequent as the Court will deny deference to domestic prosecutions when local practices fail to incorporate the investigatory practices adopted by the ICC.⁸²

Sliding Scale of Deference

The Court's decision regarding the admissibility of the "Ocampo Six" cases illustrate the positive correlation between the burden a challenging state must prove and the progress of the prosecutor's investigation.⁸³ Simply put, as the prosecutor's case becomes tailored to certain individuals and progresses towards trial, the challenging state faces a higher burden to maintain

⁷⁸ See Holmes, *supra* note 3, at 675 (defining the Article 17 unwillingness and inability standards as "relatively high").

⁷⁹ *Id.* at 674 (noting that many nations, during the ILC drafting phase, vocalized concern regarding the wording of Article 17 and that "genuinely" was chosen because states believed that it would prevent the Court from exercising jurisdiction only because "it could do the job of investigation and prosecution better than the domestic courts").

⁸⁰ *Id.* at 676 ("Again, a key factor for the Court to take account of is whether the proceedings are typical of the usual practices relating to the investigation and prosecution of serious criminal cases in the State in question.").

⁸¹ See *id.* at 673–73 (noting agreement among delegations that the Court should give deference to States if the State is exercising its jurisdiction).

⁸² *Id.* at 674 (the phrase "genuinely" was included in Article 17 because states believed that it would prevent the Court from exercising jurisdiction only because the Court "could do the job of investigation and prosecution better than the domestic courts").

⁸³ See 19(2)(b) Decision, *supra* note 54, ¶ 59.

or retrieve jurisdiction.⁸⁴ At the infancy of the admissibility process, when the prosecutor requests authorization from the Court to investigate, a state must convince the Court that national investigations that “cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC” are ongoing, or have been previously committed.⁸⁵ However, once the prosecutor’s investigation has matured to the case or summons stage, a state must prove that it is investigating, or has investigated, the *same people* for the *same conduct* that the ICC is investigating.⁸⁶ Lastly, the Statute is clear that once an ICC trial has begun, a state can no longer challenge the admissibility of a case before the ICC.⁸⁷ Accordingly, this system incentivizes states to challenge the admissibility of a case or situation before the ICC early, comporting with the Rome Statute’s demand that a state challenge the Court’s admissibility “at the earliest opportunity.”⁸⁸

However, the Court’s interpretation of the admissibility process requires states to strategize in order to effectively time their admissibility challenge.⁸⁹ This requirement motivates the ICC to conduct criminal investigations and adjudications more quickly than the interested state. Other nuances of this procedure also amplify the incentives of parties to compete. For

⁸⁴ See Rome Statute, *supra* note 2, art. 18 (discussing the procedure for establishing jurisdiction over an investigation).

⁸⁵ See 19(2)(b) Decision, *supra* note 54, ¶ 16 (exemplifying the investigative threshold Kenya had to meet in order to retain jurisdiction from the ICC).

⁸⁶ *Id.* ¶ 14 (exemplifying the progression of the threshold).

⁸⁷ Rome Statute, *supra* note 2, art. 19(4) (“The [Admissibility] Challenge shall take place prior to or at the commencement of the trial.”).

⁸⁸ *Id.* art. 19(5) (“A State . . . shall make a challenge at the earliest opportunity.”). The Rome Statute’s drafters have said that this provision is toothless, as there is no statutorily-mandated punishment for states which do not challenge at the earliest moment. See Holmes, *supra* note 3, at 684. However, the drafters’ statement is incorrect considering the Court’s admissibility criteria after the Kenya situation. Late acting parties face more difficult burdens of proof regarding the scope and scale of their domestic investigations and severely tardy states are barred from challenging a case’s admissibility. Simply, the Court’s decision further incentivizes competition and, in so doing, adds punitive provisions to the Article 19(5) declaration that states make admissibility challenges as early as possible.

⁸⁹ See Holmes, *supra* note 3, at 673-73 (noting agreement among delegations that the Court should give deference to States if the State is exercising its jurisdiction).

instance, a state can only bring one admissibility challenge.⁹⁰ The Court's decision in the Kenya situation dictates that the Court must examine a state's investigation at the filing of the admissibility challenge. This analysis causes the Court to ignore future plans and even advances made between the challenge and the Court's ruling.⁹¹ Therefore, although it would be in a challenging state's best interest to wait until the latest possible moment to contest the Court's admissibility, in order to have sufficient probative evidence of an ongoing investigation per the Court's stringent definition, deference to the Court increases as the prosecutor's case progresses until a state can no longer challenge the admissibility of a case. This correlation between the advancement of the prosecutor's case and the state's requirements for preventing ICC action only further incentivizes competition between the Court and states.

This race to trial does little harm to sophisticated, wealthy parties because they will likely enjoy at least similar financial and human resources as the Court. Therefore, this type of regime may not provide the Court with a distinct advantage over a world power with a well-entrenched and efficient legal system. However, the competitive regime will likely give the Court significant advantages over developing countries that lack the human and financial resources to successfully challenge the Court.

The core of the complementarity portion of the admissibility determination is whether a state has the willingness and ability to prosecute a crime of international concern and character.⁹² Due to the deference that the Court was designed to show to domestic court proceedings, prior to the ICC's rulings on Kenya's admissibility challenge it was assumed that the burden of proving

⁹⁰ Rome Statute, *supra* note 2, art. 19(4) ("The admissibility of a case or the jurisdiction of the Court may be challenged only once.").

⁹¹ Ušacka Dissent, *supra* note 61, at ¶ 28.

⁹² See Zeidy, *supra* note 5, at 899 ("The core of the admissibility test is whether a State with jurisdiction has the willingness and ability to investigate and prosecute. If the Court concludes that such a national forum is available, it must show deference to the national jurisdiction that has seized itself of the matter.").

admissibility fell upon the prosecutor.⁹³ Inherently, this would avoid punishing states for being less sophisticated than the Court and would lead to a regime where the Court's procedures ensured that the default standard was to defer to domestic proceedings. However, the Court declared in response to the Kenya admissibility challenge that the challenging party bears the burden of proving that the Court is, in fact, precluded from exercising jurisdiction.

Requiring that the challenging party bear the burden of proof further weakens complementarity in ICC proceedings and heightens the importance of the Court's determination of whether an "investigation" or "prosecution" has truly occurred. This places the challenging state in the undesirable position of having to prove by probative evidence that its investigative procedures comport with the Court's high standard. Rather than mandating that the Prosecutor refute the veracity of the challenging state's claim that it is investigating a particular situation or crime, the challenging state must satisfy the Court's heightened evidentiary requirement. This appears to defy the idea of deference to domestic proceedings that the Rome Statute's adoption of complementarity was based upon. Instead, failing to fix the burden of proof for ICC admissibility with the prosecutor appears to instill a competitive jurisdictional regime, evocative of concurrent jurisdiction. Due to the inherent sophistication of the Court, as it is an international body created by the United Nations, this will likely lead to fair competition between the Court and similarly situated sophisticated nations, as mentioned previously, because both parties will likely have similar levels of skill and financial means. However, when the Court faces off against less sophisticated parties, this failure to anchor the burden of proof will insulate the ICC from losing an admissibility challenge. Undeveloped nations challenging ICC jurisdiction will face an unending uphill battle.

⁹³ *Id.*

VII. Conclusion

The post-Kenya admissibility regime offers no leniency to states without legal systems of the utmost sophistication and dedication, at the expense of state sovereignty. One of the fundamental reasons underlying the creation of the International Criminal Court was to end impunity for perpetrators of the most heinous crimes, actions that run afoul of an international consensus of right.⁹⁴ Admittedly, the method in which the Court has altered its practice of complementarity strengthens its ability to ensure that criminals of such international concern are brought to justice. Some may approve of a stronger ICC similar to the one created by the Kenya jurisprudence because, in theory, it ensures justice. But does it in practice? And, if so, what is the cost of an ICC void of complementarity?

The creation of the Court as an entity that deferred to national court proceedings and avoided intruding upon sovereignty was a compromise essential to forming the international consensus needed to enact the Rome Statute.⁹⁵ As an entity void of an enforcement arm or any real enforcement power, the Court depends on the U.N. Security Council and parties to the Statute to enable the Court's proceedings. If either the Security Council or the Statute's signatories disagree with the Court's aggressive approach to admissibility, the Court could be left powerless to enable its own proceedings to occur.⁹⁶ Obviously, a state's refusal to enable the

⁹⁴ Rome Statute, *supra* note 2, pmb1., ¶¶. 4–5. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . . [the State Parties to the Rome Statute are] determined to put an end to impunity for the perpetrators of these crimes.”).

⁹⁵ Holmes, *supra* note 3, at 671.

⁹⁵ See Brown, *supra* note 5, at 387 (“This approach was acceptable in the case of the ad hoc tribunals because of their limited mandates and jurisdiction, but it would be inappropriate to create a permanent ICC, with general jurisdiction It would also be politically difficult, if not impossible, to do so.”); Zeidy, *supra* note 5, at 878 (“[M]ost States are terribly jealous about their powers of criminal prosecution. They perceive these powers as linked to the very concept of sovereignty.”).

⁹⁶ For instance, if a state refuses to provide a suspected criminal to the Court and the Security Council is unwilling to intervene to apprehend the criminal, the Court will be precluded from acting. See Rome Statute, *supra* note 2, art. 63(1) (“The accused shall be present at trial.”). Also, the United States previously voiced its displeasure about the drafting of the Rome Statute. Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, 77 FOREIGN AFF. 20, 20 (1998) (noting that the United States was against the Court as drafted after the Rome

Court's proceedings would quickly lead to international tension. The likelihood of such a refusal should not be overstated. It would come from a state that had recently been in the backdrop of an embarrassing crime, and the state would likely seek to avoid any further condemnation or scrutiny from the international community. But if even a minority of states condemn the Court's interpretation of its admissibility criteria, the Court's pleas to override refusals could fall upon deaf ears.

Further, this aggressive approach to admissibility fails to incentivize states to actively investigate, prosecute, and convict criminals themselves, thereby overburdening the ICC. Due to the intrusions contemplated by the post-Kenya ICC, many developing states will seek to avoid competing with the ICC for jurisdiction over a prospective case. Even if the ICC abstains from challenging a state's ability or intentions to bring international criminals to justice, a ruling that a state has failed to investigate or prosecute still reflects poorly upon the state in the international forum. Failing to incentivize states to adjudicate these crimes domestically is not only contrary to the goals of the ICC,⁹⁷ but, as mentioned previously, it could overwhelm the ICC, leaving the Court with a burden its resources cannot handle.

The Court's ruling upon Kenya's admissibility challenge to the ICC's exercise of jurisdiction over the post-election violence may pose greater consequences than a simple policy focus on avoiding impunity at the expense of state sovereignty. The post-Kenya admissibility

Conference). As some of the United States' main fears were that complementarity would not work as designed and that allowing the prosecutor to initiate his own investigations would provide the prosecutor with undue power, the status of the Court after its rulings upon Kenya's admissibility challenge seem to confirm the United States' fears and distance the United States from the Court even further. *Id.* ("Washington vehemently opposed an independent prosecutor out of fear he might start investigations on his own motion, subject only to court approval."); ELSEA, *supra* note 8, at 28 ("Opponents to the ICC [within the United States] . . . question whether complementarity will operate as promised, or whether the ICC judges will focus on a perceived deficiency in . . . trial or court-martial practice to declare that a particular . . . prosecution or investigation was not conducted in a manner consistent with 'the intent to bring the person concerned to justice.'") (citations omitted).

⁹⁷ See Rome Statute, *supra* note 2, pmb., ¶. 4 ("Affirming 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.").

regime may alienate the Court from state parties to the Rome Statute and heap an overwhelming burden upon the Court. Simply put, the Court relies upon signatories to the Rome Statute for not only its existence, but also its functionality. Accordingly, the Court should rethink its approach to admissibility, in order to remain in compliance with the idea of complementarity imagined by the drafters of the Rome Statute.