

CASE NOTE

A CRITICAL REVIEW OF THE ICC'S RECENT PRACTICE CONCERNING ADMISSIBILITY CHALLENGES AND COMPLEMENTARITY

CONTENTS

I	Introduction	1
II	The Two-Fold Test in Art 17: From Pragmatic Assistance in Self-Referrals to Rejection of State Parties' Admissibility Challenges.....	3
III	Determining Activity: Exporting the 'Same Person/Same Conduct' Test to Contexts where State Parties Challenge Admissibility	7
IV	Setting Thresholds for Evidence of Investigatory Action at the National Level.....	9
V	Clarifying Procedural Issues with regard to Admissibility Challenges.....	12
VI	Should the ICC Judges Have Dismissed Kenya's Admissibility Challenge on Grounds of Inaction?	14
VII	Conclusions	17

I INTRODUCTION

The principle of complementarity, whereby national courts are given priority in the prosecution of international crimes, has often been pointed to as the cornerstone of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'),¹ a key concept which permeates the entire structure and functioning of the International Criminal Court ('ICC').² Although the legal literature has been preoccupied with discussing the nature and scope of complementarity under the *Rome Statute*, until recently the jurisprudence of the ICC has only to a limited extent dealt with a number of key issues pertaining to complementarity.³

¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*'). Citations of cases heard by the International Criminal Court will adopt the conventional acronyms of 'ICC'.

² See, eg, Markus Benzling, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591, 593; Jonathan I Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 *American Journal of International Law* 120; Eve La Haye, 'The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising Its Jurisdiction' (1999) 46 *Netherlands International Law Review* 1; Morten Bergsmo, 'Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for the Relationship between the Court and the Security Council' (2000) 69 *Nordic Journal of International Law* 87.

³ See, eg, Nidal Nabil Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference' (2009) 34 *South African Yearbook of International Law* 28, 28–9, who notes that

[t]he few decisions by the Pre-Trial, the Trial Chambers, and recently the Appeal Chamber, have done little to fill the gaps, either within the legal constituencies of article 17, or in terms of the role of complementarity in encouraging national jurisdictions to prosecute international crimes.

However, the Court's recent practice — specifically a series of decisions, including two Appeals Chamber decisions, rejecting an admissibility challenge filed by the Government of Kenya⁴ — offers a significant contribution to the understanding of complementarity. These decisions have not yet been comprehensively assessed in the literature on the ICC and complementarity.⁵ Against the backdrop of existing case law and the literature on the topic, this note identifies four key contributions of these decisions, each of which is explored in turn.

First, as is examined in Part II, the decisions seem to present a final blow to the perception that the principle of complementarity means that the ICC can only step in if a state with jurisdiction is unwilling or unable to investigate and prosecute the crime itself. Instead, the decisions suggest that art 17 of the *Rome Statute* entails a two-fold test, where it must first be determined whether a national proceeding in fact exists. Only if this can be answered in the affirmative does it then become relevant to examine whether the state in question is unwilling or unable to prosecute the crimes. Inactivity, it is held, therefore automatically renders a case admissible before the Court. While in legal terms this view would simply seem to consolidate the approach taken by the ICC so far, these decisions differ because they relate not to a self-referral, as has been the case previously, but rather to a state party which is opposed to the Court's intervention and challenges admissibility with reference to its willingness and ability to try the crimes. The Court's willingness to challenge Kenya — a state party to the *Rome Statute* — on this issue points towards the development of a stronger and more self-confident Court, as is discussed in this note's conclusions.

Secondly, as discussed in Part III, the Court's decisions clarify the meaning of 'inactivity'. Once an arrest warrant or a summons to appear has been issued, it is no longer sufficient for determining activity that the state with jurisdiction over the crimes conduct investigations into the violence that triggered the Court's intervention. Instead, it is required that the state in question investigate the same person as well as the same criminal conduct.

Thirdly, the decisions set standards in terms of the evidence required for a determination that national proceedings exist, as is examined in Part IV. For

⁴ On 30 August 2011, the Appeals Chamber rendered two separate yet essentially identical decisions, one pertaining to the so-called Party of National Unity ('PNU') case and the other to the Orange Democratic Movement ('ODM') case. Both of these decisions affirmed the Pre-Trial Chamber II's decisions of 30 May 2011 to reject the admissibility challenge filed by Kenya in respect of these cases: see *Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) ('*Muthaura Appeal*'); *Prosecutor v Ruto (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) ('*Ruto Appeal*'). Hereinafter, primary reference will be made to the *Muthaura Appeal* (commonly known as the PNU case), although the corresponding part of the *Ruto Appeal* (commonly known as the ODM case) will also be noted.

⁵ However, for a (short) comment on the decision of the Appeals Chamber, see Tom Maliti, *Appeals Chamber Dismisses Kenya Appeal to Have ICC Cases Stopped* (30 August 2011) International Criminal Court Kenya Monitor <<http://www.icckenya.org/2011/08/appeals-chamber-dismisses-kenya-appeal-to-have-icc-cases-stopped/>>.

example, the Court clarifies that a state challenging admissibility at the case stage must provide evidence pointing to specific investigative steps that have already been taken, as opposed to simply stating that national proceedings have commenced or offering promises that progress reports will be provided to the Court in the future.

Finally, as discussed in Part V, the decisions make a number of important clarifications concerning procedural issues, including the question of whether there is a connection between admissibility challenges and requests for assistance made under art 93(10) of the *Rome Statute*.

Having analysed the contributions of the decisions in the Kenyan cases, the note discusses whether the Court was right in rejecting Kenya's admissibility challenge on the grounds of inactivity,⁶ and concludes by briefly considering what consequences the decisions might have for future cases.

II THE TWO-FOLD TEST IN ART 17: FROM PRAGMATIC ASSISTANCE IN SELF-REFERRALS TO REJECTION OF STATE PARTIES' ADMISSIBILITY CHALLENGES

Article 17(1)(a) of the *Rome Statute* provides that

the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

The question of whether this provision entails a single or a two-fold test to determine whether a case is inadmissible has been subjected to considerable controversy in the literature on the ICC. On the one hand, a significant proportion of the scholarship argues that art 17 renders a case admissible before the ICC only if the state with jurisdiction over the crime is unwilling or unable to prosecute that crime. As Darryl Robinson has noted:

Anyone familiar with the literature on complementarity will have seen on countless occasions assertions such as, 'under the principle of complementarity,

⁶ A discussion that is also taken up by dissenting Appeals Chamber Judge Anita Ušacka. While the key argument of Judge Ušacka is that Pre-Trial Chamber II erred procedurally by failing to grant Kenya a number of rights, the judge also implies a more fundamental criticism of the decision's premises: see *Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) (Judge Ušacka) ('*Muthaura Appeal Dissent*'). See also *Prosecutor v Ruto (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) (Judge Ušacka) ('*Ruto Appeal Dissent*').

[the ICC] will assert jurisdiction only if a state is unwilling or unable to investigate or prosecute an alleged crime itself'.⁷

Accordingly, this view implies that if a state fails to investigate or prosecute, not because it is unable or unwilling but for other reasons, the ICC does not have jurisdiction. On the other hand, a number of commentators have noted that the wording of art 17 means that the question of unwillingness or inability only becomes relevant once it has been asserted that national proceedings have in fact been commenced. Markus Benzing, for example, argues that the '[m]ere inaction of a state in the face of crimes having been or being committed thus leads to the admissibility of situations and cases before the ICC'.⁸ This interpretation, which appears widely accepted in contemporary accounts of the complementarity principle,⁹ has consistently been endorsed by the ICC. The Court has on several occasions stated that the determination of admissibility must rely on a two-fold test whereby any assessment of unwillingness or inability can only take place if it has first been established that there is actual investigatory or prosecutorial

⁷ Darryl Robinson, 'The Mysterious Mysteriousness of Complementarity' (2010) 21 *Criminal Law Forum* 67, 72, quoting Julie B Martin, 'The International Criminal Court: Defining Complementarity and Divining Implications for the United States' (2006) 4 *Loyola University Chicago International Law Review* 107, 107. See also Mahnoush H Arsanjani and W Michael Reisman, 'The Law-in-Action of the International Criminal Court' (2005) 99 *American Journal of International Law* 385; Federica Gioia, 'State Sovereignty, Jurisdiction and "Modern" International Law: The Principle of Complementarity in the International Criminal Court' (2006) 19 *Leiden Journal of International Law* 1095, 1106; David Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges' (2004) 2 *Journal of International Criminal Justice* 56, 63; H Abigail Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Harvard Human Rights Journal* 267, 273.

⁸ Benzing, above n 2, 601. See also Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, 2003) 91.

⁹ See, eg, Jurdi, above n 3, 29–30, noting that '[i]t is only once national courts fail to take any action or are unwilling or unable to conduct investigations and prosecutions, that the ICC will find the situation admissible' and '[t]he third scenario is the case of inaction, which under article 17's negative phrasing, does not require that the elements of "unwillingness" or "inability" be satisfied'. See similarly Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Martinus Nijhoff, 2008) 161, 221, 229–30; William W Burke-White and Scott Kaplan, 'Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Ugandan Situation' (2009) 7 *Journal of International Criminal Justice* 257, 260.

activity in the state concerned.¹⁰ This view was most clearly stated by the Appeals Chamber in *Prosecutor v Katanga* ('*Katanga*'):¹¹

in considering whether a case is inadmissible under article 17(1)(a) and (b) of the *Statute*, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1) (d) of the *Statute*.¹²

As William Schabas has noted, this approach

has the advantage of accommodating cases that arrive at the Court through self-referrals, where it might otherwise be argued that by its cooperation the State Party is in fact demonstrating its willingness to investigate and prosecute.¹³

In other words, the early use of the two-fold test is generally accepted to have served pragmatic purposes, allowing the Court to exercise jurisdiction in cases where the relevant governments were supportive of ICC intervention and the Court could thus rely on the cooperation of the government. For example, in a move seemingly unforeseen by the drafters of the *Rome Statute*, in December 2003 the Government of Uganda chose to utilise art 14 of the *Rome Statute* to refer crimes committed within its own territory — as opposed to the territory of another state party — to the ICC prosecutor. It has been suggested that the leadership in Kampala used the ICC intervention as a tool in the toolbox dealing with the Lord's Resistance Army ('LRA'), hoping that arrest warrants would add pressure on the rebel leaders.¹⁴ Subsequently, the Government of the Democratic Republic of Congo similarly triggered ICC jurisdiction by making a

¹⁰ See *Prosecutor v Chui (Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07-262, 6 July 2007) [21] ('*Chui Arrest Warrant*'); *Prosecutor v Harun (Decision on the Prosecution Application under Article 58(7) of the Statute)* (ICC, Pre-Trial Chamber I, Case No ICC-02/05-01/07-1-Corr, 27 April 2007) [24]; *Prosecutor v Katanga (Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07-55, 5 November 2007) [20] ('*Katanga Arrest Warrant*'); *Prosecutor v Lubanga (Decision on the Prosecutor's Application for a Warrant of Arrest)* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) [30]–[32] ('*Lubanga Arrest Warrant*').

¹¹ *Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009) ('*Katanga Admissibility Appeal*').

¹² *Ibid* [78].

¹³ William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2011) 192–3.

¹⁴ See, eg, Payam Akhavan, 'Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' (2005) 99 *American Journal of International Law* 403.

self-referral.¹⁵ In both cases, the ICC accepted jurisdiction on the ground that there was inactivity at the national level, thereby avoiding having to deal with the sensitive issue of unwillingness and inability.

However, the decisions made in connection to the Kenyan cases are fundamentally different in that they concern a situation where the state with territorial jurisdiction over the crimes — or more precisely, significant parts of the leadership in that country — is opposed to ICC intervention and therefore invokes the complementarity scheme in an effort to end the Court's proceedings.¹⁶ For the first time in the history of the ICC, it is thus a state party that seeks to challenge admissibility by making reference to the existence of national proceedings.¹⁷

However, despite the unique circumstances of the Kenyan situation, Pre-Trial Chamber II relied on the two-stage test articulated by the Appeals Chamber in *Katanga* when dealing with the admissibility challenge filed by the Government of Kenya on 31 March 2011.¹⁸ So did the Appeals Chamber, which noted:

It should be underlined ... that determining the existence of an investigation must be distinguished from assessing whether the State is 'unwilling or unable genuinely to carry out the investigation or prosecution', which is the second question to consider when determining the admissibility of a case. For assessing whether the State is indeed investigating, the genuineness of the investigation is not at issue; what is at issue is whether there are investigative steps.¹⁹

Consequently, states that are opposed to ICC intervention and claim that a domestic investigation is taking place are not in the first place evaluated on the standards of unwillingness or inability. Instead, the Court will base its assessment of admissibility challenges on the judge-made criteria concerning the existence of national proceedings, which will be described in detail below in Part III. While decisions pertaining to admissibility should in principle be made without considering how the Court's jurisdiction was triggered, the decision to 'export' the two-fold test developed in the context of the self-referrals to instances where the relevant government claims to be both willing and able to

¹⁵ See, eg, Phil Clark, 'Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo' in Nicholas Waddell and Phil Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, 2008) 37, 39–42.

¹⁶ For a further analysis of how a divided Kenyan leadership has responded to ICC intervention, see Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in light of Domestic Politics and Security Concerns' (2011) 41 *California Western International Law Journal* 1.

¹⁷ Unlike the *Katanga Admissibility Appeal* (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009), the ruling in the Kenyan case(s) relates to an admissibility challenge filed in a scenario where the national authorities claim that domestic proceedings are in fact ongoing.

¹⁸ *Prosecutor v Muthaura (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [44] ('*Muthaura Pre-Trial*'); *Prosecutor v Ruto (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [48] ('*Ruto Pre-Trial*').

¹⁹ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [40] (citations omitted); *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [41].

prosecute and investigate the crimes is significant, and may have ramifications beyond the Kenyan situation, as is discussed in this note's conclusions.

III DETERMINING ACTIVITY: EXPORTING THE 'SAME PERSON/SAME CONDUCT' TEST TO CONTEXTS WHERE STATE PARTIES CHALLENGE ADMISSIBILITY

The *Rome Statute* itself offers little guidance concerning the criteria that should be used to determine whether national proceedings exist — or, in the words of the *Statute*, whether a 'case is being investigated or prosecuted'.²⁰ As a consequence of self-referrals, the ICC prosecutor early on adopted a policy towards this issue whereby national investigations must involve the same suspect as well as the same conduct in order for such investigations to render a case inadmissible.²¹ In *Prosecutor v Lubanga* ('*Lubanga*'),²² the suspect Lubanga was detained by DRC authorities on suspicion of having committed other (and arguably more serious) crimes in the country when the ICC prosecutor requested an arrest warrant for the war crime of conscripting child soldiers.²³ To solve such obstacles to admissibility, the Pre-Trial Chambers have so far been forthcoming in applying the so-called 'same person/same conduct' test as the threshold for assessing whether prosecutorial or investigative activity exists. In *Lubanga*, for example, Pre-Trial Chamber I stated that a determination of the inadmissibility of a case requires that the 'national proceedings ... encompass both the person and the conduct which is the subject of the case before the Court'.²⁴

However, until its decisions in the Kenyan cases, the Appeals Chamber had not yet ruled on the correctness of the same person component of the test.²⁵ The question of whether national investigations must always involve the same person in order for them to render a case inadmissible before the ICC had thus so far remained unanswered in the jurisprudence of the Appeals Chamber.

In order to fully understand the implications of the Appeals Chamber's recent decisions, it is first necessary to point out that the Appeals Chamber endorsed a distinction according to which art 17 must be applied differently depending on the stage of the ICC proceedings. As such, the Appeals Chamber noted that art 17 applies to the determination of admissibility at the preliminary stages under

²⁰ *Rome Statute* art 17(1)(a).

²¹ For a further discussion of the Prosecutor's policy, which was based on an informal expert paper, and its implications, see, eg, William A Schabas, "'Complementarity in Practice': Some Uncomplimentary Thoughts" (2008) 19 *Criminal Law Forum* 5. See also ICC-OTP, 'The Principle of Complementarity in Practice' (Informal Expert Paper, 2003).

²² *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006).

²³ On this aspect of *Lubanga Arrest Warrant*, see Clark, above n 15, 39–42.

²⁴ *Lubanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-US-Corr, 10 February 2006) [31]. A similar approach was taken in *Katanga Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-01/07-55, 5 November 2007) [20] and *Chui Arrest Warrant* (ICC, Pre-Trial Chamber I, Case No ICC-01/04-02/07-262, 6 July 2007). For some critical reflections on this practice, see, eg, Jurdi, above n 3, 36–7.

²⁵ As noted by the Appeals Chamber in the *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [34] and the *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [35]. In *Katanga Admissibility Appeal* (ICC, Appeals Chamber, Case No ICC-01/04-01/07-1497, 25 September 2009) the Appeals Chamber had declined to rule on the correctness or otherwise of the 'same conduct' component of the 'same person/same conduct' test because this question was not decisive for the determination of that appeal.

arts 15 and 18 of the *Rome Statute* (and the prosecutor's decision under art 53(1)) as well as the determination of admissibility under art 19 where a suspect or a state with jurisdiction challenges the admissibility of a specific case.²⁶

At the preliminary stages where the *Rome Statute* speaks of a 'situation' as opposed to a 'case',²⁷ and when the suspects have typically not yet been identified, the Appeals Chamber implied that the inadmissibility test should be based on the question of whether the state is investigating the same overall conduct which is being investigated by the ICC.²⁸ Consequently, it must be assumed that the Appeals Chamber would not have objected to the criteria applied by Pre-Trial Chamber II in its decision to open an investigation into Kenya's post-election violence, according to which

[a]dmissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s).²⁹

The Government of Kenya had submitted that the same or similar criteria should apply in connection to its admissibility challenge filed according to art 19(2)(b) at the point where Pre-Trial Chamber II had already summoned the suspects to appear before the Court. Although the government accepted that national investigations must involve the same overall conduct that is being investigated by the ICC, it claimed that a case is inadmissible as long as this conduct is being attributed to 'persons at the same level in the hierarchy being investigated by the ICC'.³⁰ To support this interpretation, the government argued that national authorities do not always have the same evidence available as the ICC prosecutor and may therefore not be investigating the same suspects as the Court.

This was rejected by Pre-Trial Chamber II, which held:

The test is more specific when it comes to an admissibility determination at the 'case' stage [meaning that] the admissibility determination must be assessed against national proceedings related to those particular persons that are subject to the Court's proceedings.³¹

²⁶ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [37]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [38].

²⁷ See, eg, *Rome Statute* arts 13–15, 18.

²⁸ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [38]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [39].

²⁹ *Situation in the Republic of Kenya (Decision pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-19, 31 March 2010) [50].

³⁰ *Prosecutor v Ruto (Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) [32] ('*Ruto Admissibility Challenge*').

³¹ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [50]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [54].

The Appeals Chamber generally agreed with Pre-Trial Chamber II, noting that that for a case to be inadmissible under art 17(1)(a) of the *Rome Statute* in connection to an application filed under art 19, ‘the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court’.³² The Appeals Chamber explained as follows:

Kenya’s submission that ‘it cannot be right that in all circumstances in every Situation and in every case that may come before the ICC the persons being investigated by the Prosecutor must be exactly the same as those being investigated by the State if the State is to retain jurisdiction’ cannot be accepted. It disregards the fact that the proceedings have progressed and that specific suspects have been identified. At this stage of the proceedings, where summonses to appear have been issued, the question is no longer whether suspects at the same hierarchical level are being investigated by Kenya, but whether the same suspects are the subject of investigation by both jurisdictions for substantially the same conduct.³³

However, a state’s ability to successfully challenge admissibility does not only depend on the criteria used for determining activity, but also on the Court’s requirements as to the evidence for such activity, a topic discussed in the following Part.

IV SETTING THRESHOLDS FOR EVIDENCE OF INVESTIGATORY ACTION AT THE NATIONAL LEVEL

In its admissibility challenge, the Government of Kenya had seemingly pursued a strategy whereby it was principally argued that investigations into the crimes committed in 2008 were ongoing at the time of filing the admissibility challenge. To the extent that the Court did not support this finding, reference was also made to ongoing judicial reforms, which were seemingly thought to make credible the claim that a national process would at least commence in the near future.³⁴ More specifically, the government argued that investigations of crimes committed in the context of the post-election violence would ‘continue over the coming months’, and that the steps already undertaken and those envisaged with respect to all cases at different levels would be finalised by September 2011.³⁵ Further, the government promised that by the end of July 2011, it would provide the Pre-Trial Chamber with a progress report regarding the investigations carried

³² *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [39]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [40].

³³ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [41]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [42].

³⁴ *Ruto Admissibility Challenge* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) [2], [5], [9], [12]. In its appeal, however, the Government of Kenya appeared to give a stronger emphasis to the claim that investigations were in fact already ongoing: see *Prosecutor v Ruto (Appeal of the Government of Kenya against the ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute’)* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-109, 6 June 2011) [30].

³⁵ *Ruto Admissibility Challenge* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) [13].

out which would ‘extend up to the highest levels’.³⁶ The government also stated that its application ‘must be determined with a full understanding of the fundamental and far-reaching constitutional and judicial reforms very recently enacted in Kenya’.³⁷ The argument made by the government that institutional and legal reforms could be relevant for determining admissibility might have been influenced by Pre-Trial Chamber II’s *proprio motu* examination of admissibility in the Ugandan situation, in which it was held that the provisions for accountability measures in the peace agreements signed by the government of Uganda and the LRA had no bearing on the determination of admissibility since these provisions had not yet been turned into law.³⁸ The Government of Kenya may have interpreted this ruling as if the judicial reforms envisaged in the *Constitution of Kenya* of 2010 — and partly implemented through various legal acts at the time of filing the admissibility challenge — could be a relevant factor for assessing admissibility.

Pre-Trial Chamber II ‘welcome[d] the express will of the Government of Kenya to investigate the case *sub judice*, as well as its prior and proposed undertakings’.³⁹ However, the Chamber’s finding that there nonetheless remained ‘a situation of inactivity’ was in part reached on the ground that the government had contradicted itself by arguing that the ongoing investigations would later extend to the highest level of the hierarchy, while at same time stating that there were actually ongoing investigations in relation to the six suspects involved in the cases under the Chamber’s consideration.⁴⁰ Pre-Trial Chamber II thus made it clear that for an admissibility challenge to succeed investigations at the national level concerning the same suspects must be *ongoing*, as opposed to some future investigations (perhaps implying that reference to future investigatory activities can be seen as an indication that these are non-existent in the present).⁴¹ Further, Pre-Trial Chamber II held that it is insufficient for a state with jurisdiction over the crimes to merely claim that there is an ongoing investigation; there must also be ‘concrete evidence of such steps’

³⁶ Ibid [72], [79].

³⁷ Ibid [2].

³⁸ *Prosecutor v Kony (Decision on the Admissibility of the Case under Article 19(1) of the Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-02/04-01/05-377, 10 March 2009) [49]–[52].

³⁹ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [41]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [45].

⁴⁰ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [58], [66]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [62], [70].

⁴¹ In each case, the Pre-Trial Chamber II noted:

In the view of the Chamber, it remains unclear why the Government of Kenya has not so far submitted a detailed report on the alleged ongoing investigations. If national proceedings against the three suspects subject to the Court’s proceedings are currently underway, then there is no convincing reason to wait until July 2011 to submit the said first report.

Muthaura Pre-Trial (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [59]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [63].

with regard to the suspects named by the Court.⁴² For example, Pre-Trial Chamber II noted that although the information provided by the government revealed that instructions were given to investigate the suspects subject to the Court's proceedings, 'the Government of Kenya does not provide the Chamber with any details about the asserted, *current* investigative steps undertaken'.⁴³ In sum, though the Pre-Trial Chamber did not assert that national investigations must have reached a particular stage for an admissibility challenge to succeed, it held that concrete, progressive investigative steps must have been taken and demonstrated at the time at which an admissibility challenge is filed.⁴⁴

In its review of Pre-Trial Chamber II's ruling, the Appeals Chamber clarified that 'a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible'.⁴⁵ The Appeals Chamber further explained:

To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.⁴⁶

Consequently, the Appeals Chamber dismissed the Government of Kenya's claim that art 17 does 'not require that the details of an investigation be provided to the Court' and that 'the statements of State Parties are to be respected and must be presumed to be accurate and made in good faith unless there is compelling evidence to the contrary'.⁴⁷ Rather, the Appeals Chamber asserted that the state in question is required to submit concrete evidence which points to specific investigative steps, such as police reports attesting to the time and location of visits to crime scenes and documentation demonstrating that witnesses and the (ICC) suspects have been interviewed by the authorities.⁴⁸

The Court's establishment of thresholds for evidence is closely related to how it approached a number of procedural issues, as explained in the following Part.

⁴² *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [60]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [64].

⁴³ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [64] (emphasis in original); *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [68].

⁴⁴ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [60]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-101, 30 May 2011) [64].

⁴⁵ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [61] (citations omitted); *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [62] (citations omitted).

⁴⁶ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [61] (citations omitted); *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [62] (citations omitted).

⁴⁷ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [62], quoting *Prosecutor v Muthaura (Document in Support of the 'Appeal of the Government of Kenya against the Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case pursuant to Article 19(2)(b) of the Statute')* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) [6], [8] ('*Kenya's Document in Support of Appeal Application*'); *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [63].

⁴⁸ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [40], [68]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [41], [69].

V CLARIFYING PROCEDURAL ISSUES WITH REGARD TO ADMISSIBILITY CHALLENGES

The decisions relating to the Kenyan cases also provide clarification on several key procedural issues surrounding admissibility challenges. First, the decisions elaborate on the question of when an admissibility challenge should be filed. Article 19(5) of the *Rome Statute* requires that a state which wishes to challenge the admissibility on the ground that it is investigating or prosecuting the case do so ‘at the earliest opportunity’. Article 19(4) further lays down a final deadline for this, stipulating that the admissibility challenge must be filed prior to the commencement of the trial. According to the same provision, a state that claims jurisdiction because of national proceedings may only once challenge the admissibility of a case (though in ‘exceptional circumstances’ the Court may grant leave for another challenge). The Government of Kenya seems to have understood these provisions as entailing an obligation, or at the least a strong encouragement to states, to file the admissibility challenge once summonses or arrest warrants against the suspects have been issued.⁴⁹ Accordingly, the government asserted that it was ‘[c]onstrained to act at the earliest moment by the *Rome Statute*’ and could therefore not be criticised for not having ‘prepared every aspect of its Admissibility Application in detail in advance [to the summonses being issued]’.⁵⁰ The Appeals Chamber, however, made it clear that this position is misconceived as art 19(5) ‘requires a State to challenge admissibility as soon as possible once it is in a position to actually assert a conflict of jurisdictions’, but not *just because* the Court has issued a summons to appear.⁵¹

Secondly, the Appeals Chamber made some elaborations concerning when the ruling on an admissibility challenge should be delivered. One complaint of the Government of Kenya with regard to Pre-Trial Chamber II’s handling of the admissibility challenge was that the Chamber failed to give Kenya the time it needed to submit additional evidence before ruling on the application.⁵² However, the Appeals Chamber concluded that a period of around two months between receiving the admissibility challenge and ruling on it is acceptable.⁵³ Although it would have been open to Pre-Trial Chamber II to allow the filing of additional evidence, the Appeals Chamber noted that ‘it was not obliged to do so,

⁴⁹ See, eg, *Prosecutor v Ruto (Reply on behalf of the Government of Kenya to the Responses of the Prosecutor, Defence, and OPCV to the Government’s Application pursuant to Article 19 of the Rome Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89, 13 May 2011) [26] (‘*Ruto Admissibility Reply*’), with its seven annexes.

⁵⁰ *Kenya’s Document in Support of Appeal Application* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) [83], quoting *Ruto Admissibility Reply* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89, 13 May 2011) [26]–[28].

⁵¹ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [45]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [46].

⁵² See, eg, *Kenya’s Document in Support of Appeal Application* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) [12], [60], [63].

⁵³ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [96]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [98].

nor could Kenya expect to be allowed to present additional evidence'.⁵⁴ Rather, the Appeals Chamber held that it was up to the Government of Kenya to ensure that the admissibility challenge was sufficiently substantiated by evidence at the point when it was filed.⁵⁵ Thus, a state challenging admissibility cannot expect to be allowed to amend an admissibility challenge, nor can it expect that it will be allowed to submit a substantial amount of additional evidence once the admissibility challenge has already been filed. The dissenting judge of the Appeals Chamber, Judge Anita Ušacka, strongly disagreed with this view, noting that that 'the assessment of complementarity is the outcome of an ongoing process'.⁵⁶ Judge Ušacka explained that Pre-Trial Chamber II should have granted the government more time to submit additional evidence and could have requested Kenya to provide additional documentation to support the claim that a national investigation was in fact ongoing, rather than simply dismissing the challenge on the basis of the information provided by government.⁵⁷

Thirdly, the Appeals Chamber elaborated on some of the procedural rights relevant for a state which wishes to challenge the admissibility of a case. The Government of Kenya had argued that Pre-Trial Chamber II had erred by refusing it the possibility of presenting its arguments in an oral hearing before deciding on the admissibility challenge. In particular, the government wanted its police commissioner to testify before the Chamber concerning the progress of the national proceedings.⁵⁸ However, the Appeals Chamber asserted that 'although there might have been reasons to hold an oral hearing', the Pre-Trial Chamber's choice to decide the application only on the basis of the written documents submitted did not constitute an abuse of that Chamber's discretion.⁵⁹

Finally, the Appeals Chamber elaborated on the question of whether there is a procedural connection between an admissibility challenge and a request for assistance under art 93(10) of the *Rome Statute*. Article 93(10)(a) stipulates:

The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.

⁵⁴ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [96]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [98].

⁵⁵ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [64]–[65], [96]–[99]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [64]–[65], [98]–[101].

⁵⁶ *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [20]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [20].

⁵⁷ See, eg. *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [21], [24], [28]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [21], [24], [28].

⁵⁸ *Kenya's Document in Support of Appeal Application* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) [66], [67].

⁵⁹ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274 30, August 2011) [108]–[112]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [110]–[114]. Judge Ušacka also disagreed with the majority on this issue, strongly implying that Pre-Trial Chamber II should have granted Kenya the possibility to present its arguments in an oral hearing: *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [24]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 30 August 2011) [24].

On 21 April 2011, the Government of Kenya attempted to make use of this provision, requesting

the transmission of all statements, documents, or other types of evidence obtained by the Court and the Prosecutor in the course of the ICC investigations into the Post-Election Violence in Kenya, including into the six suspects presently before the ICC.⁶⁰

While the government had requested Pre-Trial Chamber II to decide on this request *before* ruling on the admissibility challenge, the Pre-Trial Chamber did not agree that there was any connection between the two filings, and hence did not find any obstacles to ruling on the request for assistance (against the government) only after the admissibility challenge had been decided.⁶¹ In its appeal, the Government of Kenya stated that receiving assistance from the ICC prosecutor was directly relevant to the admissibility challenge, and that it was therefore ‘unfair to have denied [Kenya] the opportunity to rely on such evidence in its national investigations and consequently its admissibility challenge’.⁶² The Appeals Chamber noted in this regard that although the Pre-Trial Chamber ‘could have first decided on the *Request for Assistance* and then on the *Admissibility Challenge*, it was not obliged to do so’.⁶³

VI SHOULD THE ICC JUDGES HAVE DISMISSED KENYA’S ADMISSIBILITY CHALLENGE ON GROUNDS OF INACTION?

Although the Government of Kenya has officially expressed its commitment to ICC intervention in the country,⁶⁴ it is a well-known ‘secret’ that large segments of the political leadership remain opposed to the prospects of international justice (or any other form of criminal justice) with regard to the individuals responsible for orchestrating the 2008 post-election violence. As a clear indication of political elites’ opposition to the ICC, the Kenyan Parliament passed a motion in December 2010, which requires the government to withdraw from the *Rome Statute* (which the government however did not act on, probably due to the correct understanding that doing so would not have any ramifications

⁶⁰ *Situation in the Republic of Kenya (Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-58, 21 April 2011) [2].

⁶¹ *Muthaura Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-02/11-96, 30 May 2011) [30], [31]; *Ruto Pre-Trial* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-101, 30 May 2011) [34], [35]; *Situation in the Republic of Kenya (Decision on the Request for Assistance Submitted on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-63, 29 June 2011).

⁶² *Kenya’s Document in Support of Appeal Application* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-130, 20 June 2011) [74], [77].

⁶³ *Muthaura Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-02/11-274, 30 August 2011) [121]; *Ruto Appeal* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-307, 30 August 2011) [123].

⁶⁴ For a recent statement confirming the government’s commitment to the ICC process, see Office of the Government Spokesperson, ‘Government Response to the Media Statement by ICC Prosecutor Luis Moreno Ocampo’ (Press Release, 14 March 2011) <<http://www.communication.go.ke/media.asp?id=1278>>, noting that ‘[t]he government wishes to inform the world that we understand, appreciate and respect the *Rome Statute*, the rights enshrined by the United Nations and the ICC process’.

for the government's obligations in connection to the ongoing ICC cases).⁶⁵ Further, given that the Government of Kenya made reference to ongoing domestic accountability efforts in connection to the admissibility challenge, it is rather contradictory that the government at the same time has claimed that an accountability process involving high-profile politicians is undesirable because it presents a danger to peace and stability (a claim that was made in connection to the attempt to obtain a UN Security Council deferral of the ICC cases).⁶⁶

This resistance to the accountability process is hardly surprising given that some of those charged by the ICC are among the country's top politicians and government officials. Though Uhuru Kenyatta was forced to resign as Minister of Finance following Pre-Trial Chamber II's ruling in January 2012 that he will stand trial, he continues to serve as Deputy Prime Minister and has made it clear that he intends to run for the presidency in the 2013 elections. William Ruto, who was also committed for trial, does not hold any government posts, but is similarly considered among the frontrunners for the 2013 presidential elections. A third suspect, Francis Muthaura, held the position of head of Kenya's civil service at the point when the admissibility challenge was filed, but has recently stepped aside as a consequence of the January 2012 ruling that he too will stand trial.⁶⁷

Examined in this context, the present author is not alone in assuming that the real objective of the Government of Kenya's admissibility challenge was to construct another obstacle to the criminal prosecution of those responsible for planning and organising the 2008 post-election violence.⁶⁸ After all, the government had had more than three years to prosecute those responsible for the post-election violence, but the political leadership has on several occasions voted down bills to establish a local tribunal to deal with the violence.⁶⁹ Statements made by high-ranking government officials support the interpretation that the

⁶⁵ For a detailed analysis of the various moves made by the leadership aimed at ending ICC involvement, see Hansen, above n 16.

⁶⁶ Ibid.

⁶⁷ Ibid. For a brief comment on the events after Pre-Trial Chamber II confirmed the charges against four of the original six suspects, see, eg, Bernard Namunane, 'Timeline: ICC Cases against Kenya's Ocampo Six', *Daily Nation* (online), 26 January 2012 <<http://www.nation.co.ke/ICCLive>>.

⁶⁸ The Director of the Kenyan branch of the International Commission of Jurists, George Kegoro, explains:

The government has the right to challenge admissibility, but if wise counsel prevailed, they would spend that time doing something else. If government was saying it has got something of its own that it's falling back on, then you would sympathise with the government. But they are saying let's not have ICC and instead let's have nothing. They are saying — leave us alone.

George Kegoro quoted in Mugumo Munene, 'State Enlists Queen's Counsel in Hague Cases', *Daily Nation* (online), 12 March 2011 <<http://www.nation.co.ke/News/politics/State+enlists+Queens+Counsel+in+Hague+cases+/-/1064/1123962/-/6qr9cm/-/index.html>>.

⁶⁹ The Kenyan Parliament and cabinet have on various occasions rejected bills that would have established a special tribunal as recommended by the Panel of Eminent African Experts, headed by former UN Secretary General Kofi Annan. See further South Consulting, 'Kenya National Dialogue and Reconciliation Monitoring Project: Reforms and Preparedness for Elections' (Review Report, May 2012) [14] <<http://www.dialoguekenya.org/Monitoring/MAY%20REPORT%20%28Released%20June%202012%29.pdf>>. For an analysis of the motives behind these moves, see generally Hansen, above n 16.

important parts of the leadership in Kenya remain opposed to the accountability process, and would perhaps have interfered in any potential domestic accountability process. Vice President Kalonzo Musyoka, for example, has stated as follows:

You [Ruto and Kenyatta] should not lose hope because of being named in the ICC list. The Government will do its best to assist you because we want to ensure that every Kenyan feels part and parcel of the next dispensation.⁷⁰

With this in mind, the ICC judges certainly seem to have reached a reasonable conclusion when rejecting Kenya's admissibility challenge. However, when analysing the information provided by the Government of Kenya in objective terms, it is hard to reach a conclusion that there was investigatory 'inaction' in the country within any ordinary meaning of that word.⁷¹ As noted by dissenting Judge Ušacka, the material that Kenya submitted 'contained specific information as to the investigations that were carried out by Kenya', including information that indicated that a case file had been opened on one of the ICC suspects, William Ruto.⁷² More specifically, the information provided by Kenya 'referred to him as "suspect", indicated his case file number, and stated where the case was pending'.⁷³ It also contained information indicating 'the scope of the investigations and the allegations against Mr Ruto, including the location and time of the alleged criminal conduct'.⁷⁴ As further noted by Judge Ušacka, the government had provided information indicating that 'orders had been given,

⁷⁰ 'Raila Rivals Toy with Single Candidate Plan', *Daily Nation* (online), 16 January 2011 <<http://www.nation.co.ke/News/politics/Raila+rivals+toy+with+single+candidate+plan+/-/1064/1090904/-/13rakr/-/index.html>>.

⁷¹ See generally *Ruto Admissibility Challenge* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-19, 31 March 2011) in combination with the 22 annexes filed with *Prosecutor v Ruto (Filing of Annexes of Materials to the Application of the Government of Kenya pursuant to Article 19 of the Rome Statute)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-64, 21 April 2011); *Ruto Admissibility Reply* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89, 13 May 2011).

⁷² *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [8]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [8]. Judge Ušacka cites annex 2 attached to the 13 May 2011 reply by Kenya, which is a report conducted by the director of Kenya's Criminal Investigations Department concerning the progress of investigations into the 2008 post-election violence: see *Ruto Admissibility Reply* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, 13 May 2011) ('*Ruto Admissibility Reply (Annex 2)*').

⁷³ *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [8]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [8]. See also further *Ruto Admissibility Reply (Annex 2)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, 13 May 2011).

⁷⁴ *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [8]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [8]. See further *Ruto Admissibility Reply (Annex 2)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, 13 May 2011) 2–3, which states:

The investigations have not been completed for various reasons that include unreliable s [sic] and uncooperative witnesses. Some of the prominent pending cases include: Nakuru CID Inquiry file No 10/2008, the suspect in this inquiry is Hon William Samoei Ruto — immediate former Minister for Agriculture. The allegations were that, the Minister together with others from the Kalenjin community incited Kalenjin youths to commit violence against non-Kalenjins living in some parts of Rift Valley Province. The matter is still under investigation because there are some areas requiring further corroboration in order to reach to a fair conclusion [sic].

apparently by the authorities in charge, to start investigations against the other five persons under investigation by the Court'.⁷⁵ In other words, the problem in Kenya is not that there was a complete absence of investigatory action at the point when the Court rejected the admissibility challenge, but rather that the real purpose of the investigative steps made was to succeed with the admissibility challenge rather than to ensure accountability for the post-election violence.

It would therefore had been more obvious had the Court cited art 17(2) of the *Rome Statute*, according to which the Court can determine unwillingness if the national proceedings are being undertaken for the purpose of 'shielding the person concerned from criminal responsibility', or if those proceedings are not being 'conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice'.⁷⁶ As will be argued below, the decision to reject on grounds of inaction, as opposed to unwillingness, should not be understood as a mere technical question of using the most fitting provisions in the *Rome Statute*, as this decision may have implications beyond the Kenyan cases.

VII CONCLUSIONS

It seems as if international justice is entering a new era. After ten years of operation, the ICC increasingly appears as an institution with teeth; a Court that acts decisively, even when its interventions are against the will of State Parties. While the Court's early years of operation were often characterised, or even defined, by respect for state sovereignty, there are signs that the balance is now tipping in favour of international justice.

Perhaps the clearest indication of this shift concerns the struggle over complementarity that has been canvassed in this note. In the past, the principle of complementarity was seemingly perceived as a barrier that the ICC needed to find its way around in order to exercise jurisdiction in instances where states with territorial jurisdiction over the crimes were supportive of ICC intervention, though not necessarily unwilling or unable to prosecute themselves. While the criteria used by the Court to determine investigatory activity at the national level — namely the test whereby national proceedings must relate to the same person as well as the same conduct — were developed as a result of the self-referrals, they have with the Kenyan decisions been 'exported' to another context, as of yet without much controversy. However, there is a fundamental difference between applying this test in the context of self-referrals as a means of ensuring that cases can be handled by the ICC when a state party with territorial jurisdiction so wishes — despite it not necessarily being unwilling or unable to

⁷⁵ *Muthaura Appeal Dissent* (ICC, Case No ICC-01/09-02/11-342, 20 September 2011) [8]; *Ruto Appeal Dissent* (ICC, Appeals Chamber, Case No ICC-01/09-01/11-336, 20 September 2011) [8]. See also *Ruto Admissibility Reply (Annex 2)* (ICC, Pre-Trial Chamber II, Case No ICC-01/09-01/11-89-Anx2, 13 May 2011) 3–4, which states:

the Commissioner of Police ... tasked the team of investigators to carry out exhaustive investigations relating to the Ocampo six and other high ranking citizens [and further noted that the] team is currently on the ground conducting the investigations as directed.

⁷⁶ *Rome Statute* art 17(2).

prosecute the crimes itself — and applying the test where a state with territorial jurisdiction claims it has the will and ability to try the crimes at issue.

While the recent practice of the ICC concerning complementarity could simply be seen as a continuation of earlier practice, it could also be seen to reflect a more general trend of judicial activism in international tribunals, whereby the judges of the ICC increasingly grant themselves powers that were not clearly envisaged by the drafters of the *Rome Statute*.⁷⁷

Though a seemingly strengthened and active ICC is from some perspectives a positive development, there is also the danger that the Court might be granting itself powers that could undermine key principles of the *Rome Statute*. The Court's interpretation of the complementarity principle could end up being an example of this. Relying on a two-fold test in combination with high thresholds for determining activity could potentially allow the Court to intervene in situations where the state in question is both willing and able to prosecute atrocities, but where the local accountability process does not involve the same persons and same crimes dealt with by the ICC. For example, should the ICC exercise jurisdiction in instances where a state has experienced a regime change and the new government commences a credible accountability process to deal with the crimes committed by its predecessor, but this process does not end up targeting the same suspects as implicated in an ICC case, or deals with crimes not covered by the ICC charges?⁷⁸

Though in some ways different from the problems related to the Kenyan situation, it will be interesting to see how the Court decides to deal with the Libyan situation, where the transitional government has made it clear that it wishes to prosecute the ICC suspects domestically. At the time of writing, it appears that another clash between the Court and an African state is under way, as Pre-Trial Chamber I ruled in early April 2012 that no additional delays will be accepted and that Libya must start making arrangements for the transfer of Saif al-Islam Gaddafi to The Hague, while the transitional government has made it clear that it will file an admissibility challenge.⁷⁹

THOMAS OBEL HANSEN*

⁷⁷ See further William A Schabas, 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 *Journal of International Criminal Justice* 731; Jared Wessel, 'Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication' (2006) 44 *Columbia Journal of Transnational Law* 377.

⁷⁸ Because the crimes falling under the ICC's jurisdiction are typically committed by a large number of individuals, such a situation is not a mere theoretical construct, but a rather likely scenario. On the selectivity of prosecutions of international crimes, see generally Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 151–4.

⁷⁹ *Prosecutor v Gaddafi (Decision regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif al-Islam Gaddafi)* (ICC, Pre-Trial Chamber I, ICC-01/11-01/11-100, 4 April 2012).

* BSc (Aalborg); LLB, LLM, PhD (Aarhus), Assistant Professor of International Law, Department of International Relations, United States International University, Kenya. The author wishes to thank the anonymous referees for their insightful comments on an earlier draft of this case note.