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HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The ICC and Complementarity in Practice

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Abstract

Since the start of its operations 10 years ago, the International Criminal Court has dealt with a number of challenges to the admissibility of cases before it. Some of the challenges were mounted by territorial states that had jurisdiction over the cases. Others were mounted by accused persons. The Court, acting on its own initiative, has, on a number of occasions, also considered issues of the admissibility of cases before it. It has done this, in the main, at the pre-trial stages of proceedings. Some of the cases arose out of state or Security Council referrals. Others arose out of the Prosecutor's initiated investigations. In the course of dealing with these matters the Court has endeavoured to strike a balance between the states' right to exercise their sovereignty through national proceedings, on the one hand, and the interests of the international community to ensure that 'the most serious crimes of concern to the international community as a whole must not go unpunished', on the other. In the process of doing so the Court has also developed some practices and generated an impressive body of jurisprudence, the subject of this article. The jurisprudence evinces the Court's readiness to assume jurisdiction over a case in situations where there is clear inaction on the part of the national authorities. The article, which is a critical exposé of that jurisprudence, endorses this stance as a veritable antidote to impunity for atrocity crimes.

Key words

admissibility; complementarity; International Criminal Court; Security Council referrals; state referrals

1. INTRODUCTION

The Preamble to the Rome Statute of the International Criminal Court ('Statute') asserts that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.[1] It also states that the International Criminal Court ('ICC') shall be complementary to national criminal jurisdictions.[2] Article 1 of

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1 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, para. 6 of the Preamble.

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the Statute echoes what is stated in the Preamble, that the Court's jurisdiction 'shall be complementary to national criminal jurisdictions'. Quite remarkably, however, Article 1 does not impose any positive duty on states to exercise that jurisdiction.

By these provisions the drafters of the Statute reaffirmed the states' rights under customary international law, based on their national sovereignty, to regulate conduct that takes place on their territory and to proscribe and punish any of such conduct that they consider harmful to their weal. The drafters also underscored the states' obligation, as members of the community of nations, to co-operate with each other in repressing and punishing conduct that is harmful to the community as a whole. Under customary international law, such conduct, billed as 'crimes against the law of nations' or *delicta juris gentium*, was proscribed and their perpetrators considered as enemies of mankind, *hostis humani generis*. Many of these crimes have now been codified under various treaties. The Rome Statute of the ICC is probably the latest to do so. Under the principle of *aut dedere aut judicare*, states have a duty either to prosecute the perpetrators of such crimes who may be on their territory or to surrender them to other states that may be ready and willing to do so.[3] Under the universality principle, such a duty subsists regardless of the state on whose territory the crimes were committed, or the nationality of the perpetrators or of the victims of the crimes.[4]

Lamentably, however, states seldom exercise their criminal jurisdiction over crimes against the law of nations; in fact, until recently only a few of them have had legislation on their statute books incorporating those crimes into their national *corpus juris* or vesting their courts with jurisdiction over them.[5] In 1970, the UN General Assembly expressed concern that 'war crimes and crimes against humanity [were] being committed in various parts of the world' and that 'war criminals and persons who committed crimes against humanity [were] continuing to take refuge in the territories of certain States and [were] enjoying protection'.[6] In 1995, the situation had not improved, and this prompted Professor Theodor Meron to observe that 'the record of national prosecutions of violators of such international norms as the grave breaches of the Geneva Conventions is disappointing, even when the obligation to prosecute or extradite violators is unequivocal'.[7]

Meron attributed the paucity of national prosecutions to a 'lack of resources, evidence and, above all, political will'.[8] To these factors, one may also add the undue

2 Ibid., para. 10 of the Preamble.

3 W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 45.

4 G. Werle, *Principles of International Criminal Law* (2009), 70. See also *Queen v. Desire Munanyeza* [2009] QCCS 2201 (Quebec Superior Court, 22 May 2009), where the Canadian court tried and convicted the accused, a Rwandan national, of genocide, crimes against humanity, and war crimes committed in Rwanda in 1994.

5 Coalition for the International Criminal Court, 'Implementation of the Rome Statute', accessed at http://www.coalitionfortheicc.org/?mod=romeimplementation&idudctp=10&show=all, reported that currently '65 countries have enacted legislation containing either complementarity or cooperation provisions, or both, into their domestic law. 35 countries have some form of advanced draft implementing legislation'. See also Coalition for the International Criminal Court, 'Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)', accessed at http://www.coalitionfortheicc.org/documents/Chart_Summary.pdf.

6 UN General Assembly, Res. 2712, 15 December 1970, A/RES/2712(XXV).

7 T. Meron, 'International Criminalization of Internal Atrocities' (1995) 89 AJIL 554, at 555.

8 Ibid., at 555–6.

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homage that states have tended to accord to national sovereignty and to the principle of non-interference in each other's internal affairs. Additionally, states themselves were, and often still are, complicit in the commission of these crimes, often referred to as crimes of state; hence their reluctance to prosecute their perpetrators or to do so genuinely or effectively. Thus, one of the *raisons d'être* for the creation of the ICC was that 'the most serious crimes of concern to the international community as a whole must not go unpunished'.[9]

Nevertheless, the drafters of the Rome Statute, in contradistinction to those who drafted the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, made the ICC's jurisdiction 'secondary' to that of the states.[10] This means that states have a right to exercise jurisdiction first. By thus giving states primacy the drafters of the Statute wished to capitalize on the advantages of domestic jurisdiction: respect for national sovereignty, familiarity of those involved in proceedings with the local laws and procedures, existence of a legal infrastructure, cost-effectiveness, and expeditiousness. Nevertheless, the ICC may, in a sense, be characterized as a back-up or a reserve arrangement that may be resorted to only when national mechanisms are dysfunctional, inactive, or ineffective. The Court merely fills a gap or adds to, but does not replace, national courts in the prosecution and punishment of the crimes within the Court's jurisdiction.

Where the state's exercise of jurisdiction is otherwise genuine and effective, then, any proceedings commenced or contemplated to be commenced before the ICC would be unnecessary and clearly inadmissible,[11] since state jurisdiction has primacy over the ICC.[12] The latter must defer to the former. However, since the genuineness or effectiveness of the national proceedings, or the very existence of the proceedings themselves, may be questionable or contested, the drafters of the Statute provided modalities for ascertaining these issues and, where the ICC Prosecutor has commenced proceedings, resolving the ensuing conflict of jurisdiction between the ICC and national courts. In ICC parlance, these are the issues of admissibility.

The Statute specifies the persons or entities that are entitled to raise issues of admissibility of a case before the ICC.[13] It stipulates the procedure that must be followed in raising such issues. It also sets out the benchmarks, under Article 17 of the Statute, by which a state's exercise of jurisdiction is evaluated and the conflict with the Court's jurisdiction over a case adjudicated and settled. Significantly, it is the ICC and not the state asserting jurisdiction that resolves the conflict.[14] What

9 Rome Statute, *supra* note 1, para. 4 of the Preamble.

10 Compare Rome Statute, para. 10 of the Preamble and Art. 17(1) of the Statute with Art. 9 of the Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, Security Council Res. 827 (1993), last amended by Security Council Res. 1877 (2009), 7 July 2009 and Art. 8 of the Statute of the International Criminal Tribunal for Rwanda, 8 November 1994, Security Council Res. 955 (1994), last amended by Security Council Res. 1901 (2009), 16 December 2009.

11 See Rome Statute, *supra* note 1, Art. 17(1)(a) and (b).

12 Ibid.

13 See Rome Statute, *supra* note 1, Art. 19(2).

14 Ibid., Art. 17(1), which states in part that 'the Court shall determine that a case is inadmissible'.

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might be the rationale for giving the ICC the upper hand? This author has argued elsewhere as follows:

> [W]ere States to be the final arbiters of whether they had jurisdiction they would be judges in their own cause. The intention of the international community in creating an international criminal court to ensure that crimes of concern to it were effectively prosecuted would have come to naught. It is submitted that the ICC as an institution of superior order, and manned by competent, independent, impartial judges that are carefully selected from all corners of the globe, should rightly be the final authority on whether the national justice system is effective.[15]

The experience of the Court to date with respect to admissibility challenges bears out this assertion. What follows is an exposition of the practice and jurisprudence of the Court on the issues of admissibility challenges, paying particular attention to cases referred to the Court by the UN Security Council, the persons or entities that are entitled to raise issues of admissibility, the procedural prerequisites to be followed, and the substantive benchmarks that the Court employs in resolving the issues.

2. Security Council referrals and admissibility

According to Article 13 of the Statute, jurisdiction of the Court may be triggered by a state party to the Statute referring a situation in any state party, including itself, to the Prosecutor; by the UN Security Council acting under Chapter VII of the UN Charter; or by the Prosecutor acting *proprio motu*. Cases that result from either a state referral or the Prosecutor's initiative do not pose much of a problem. This is so because these cases arise out of situations in states that have accepted the jurisdiction of the Court under Article 12 when they ratify or accede to the Rome Statute or when they make special declarations accepting that jurisdiction. States that thus accept the jurisdiction of the Court do so on the understanding that 'The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.'[16] Key provisions of the Statute are those that relate to the complementarity principle and give states primacy vis-à-vis the Court. Therefore states, qua parties to the Statute or as beneficiaries of a right gratuitously accorded them by the Statute, may invoke the complementarity principle and assert their jurisdiction over a particular case. The issue then is whether in a case arising out of a Security Council referral a state which is not a state party and which does not recognize the jurisdiction of the Court is entitled to invoke the complementarity principle and to assert its national jurisdiction and thus oust ICC jurisdiction over a particular case as inadmissible.

Ex facie, a state that is not a party to the Rome Statute or does not recognize ICC jurisdiction as aforesaid, should not be entitled to oust the Court's jurisdiction.[17]

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15 D. N. Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *Criminal Law Forum* 87, at 118.

16 See Rome Statute, *supra* note 1, Art. 1.

17 For differing views, see D. Akande, 'The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC', (2012) 10 JICJ 299; and C. Stahn, 'Libya, the International Criminal Court and Complementarity', (2012) 10 JICJ 325.

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The reasons for this proposition are fourfold. First, by referring a situation to the ICC, the Security Council must be taken to have made a deliberate choice of the ICC as being the most suitable forum at which the ends of international peace and justice would best be met. Second, the referral, being a Chapter VII action, overrides or takes precedence over all other existing mechanisms, including national mechanisms envisaged under the complementarity principle.[18] Third, Article 25 of the UN Charter obliges all members of the UN 'to accept and carry out the decisions of the Security Council'[19] relating to the maintenance of international peace and security. This obligation would require states on whose territory situations have been referred to the ICC to accept the Security Council decision and to co-operate with the Court in the investigation and prosecution of cases arising from those situations. Such states would not be entitled to set up their national sovereignty or their national laws as a pretext for not co-operating with the ICC in the due exercise of its jurisdiction in a case emanating from the Security Council referral. Fourth, to apply the complementarity regime of the ICC Statute to states who are not party to the Statute or have not accepted the Court's jurisdiction and thus are not entitled to assert any right from its Statute would be to frustrate the expeditious implementation of the Council's resolve to prosecute those individuals who may be responsible for peace-threatening behaviour. It would also send the wrong signal to and embolden states that are loath to co-operate with the Court as required under Article 25 of the Charter and under other relevant resolutions of the Security Council.[20]

Nevertheless, compelling as these arguments may sound, the Pre-Trial Chambers of the ICC have consistently taken the view that the complementarity principle also applies to situations referred to the Court by the Security Council. They have taken this position apparently on the basis of Article 13 of the Statute, which provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 'in accordance with the Statute', and that this phrase includes the Statute's complementary and co-operation provisions.[21] The Chambers reason that the Court must exercise jurisdiction 'regardless of how the exercise . . . is triggered in the particular situation'.[22] They insist that by referring a situation to the Court under Article 13(b) the Security Council must be deemed to have accepted that the investigation and

18 This argument might be supported under Arts. 2(7) and 103 of the UN Charter.

19 1945 Charter of the United Nations, Art. 25, accessed at http://www.un.org/en/documents/charter/chapter5.shtml.

20 See, e.g., para. 5 of Security Council Res. 1970 of 27 February 2011, where the Security Council decided that 'the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor'. See also para. 2 of Res. 1593 of 31 March 2005, by which the Council decided that 'the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.'

21 *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, ICC-01/11-01/11, 1 June 2012, at para. 28.

22 Ibid., at para. 29.

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prosecution would take place in accordance with the Court's statutory framework.[23] Accordingly, Pre-Trial Chamber I held that Article 95 of the Statute was applicable to the Libyan situation as to entitle the Libyan government to postpone the execution of the request for surrender of Mr Saif Al-Islam Gaddafi to the ICC, pending the determination by the Court of its challenge of the admissibility of the case.[24] By so holding the Pre-Trial Chamber implicitly rejected the arguments by the Office of the Public Counsel for the Defence (OPCD) to the effect that Libya was not entitled to invoke Article 95 of the Statute to delay compliance with the request for the surrender of Gaddafi, because, on the authority of Article 25 of the UN Charter, an order for surrender which emanates from the authority of the Security Council 'entails mandatory compliance'. OPCD arguments may have credence, particularly as Article 103 of the Charter accords precedence to Charter obligations over and overrides any other conflicting treaty obligations that a state may undertake. Nevertheless, the Chamber accepted, albeit implicitly, the Prosecutor's arguments that to insist on compliance with the order to surrender Gaddafi while Libya's admissibility was still pending would be inconsistent with the principle of complementarity.[25] Indeed, in practice, the Prosecutor has evinced willingness to defer to national jurisdiction and has intervened only when there has been no national investigation of the crimes in which his Office was interested or prosecution of the alleged suspects. For instance, in the Darfur situation, before seeking the arrest warrants for State Minister Ahmed Harun and Janjaweed militia leader Ali Kushayb in February 2007, he took time to satisfy himself whether the Sudanese judicial authorities were investigating or had investigated the cases of relevance to the ICC and had done so genuinely.[26]

Thus until the Appeals Chamber authoritatively pronounces itself on the matter the prevailing view both of the Pre-Trial Chambers and of the Office of the Prosecutor is that states that are the subject of Security Council referrals and are entitled to invoke the complementarity principle and to resist cases emanating from their territory from being tried by the ICC.

23 Ibid., at para. 28, fn 34.

24 Art. 95 provides as follows: 'Where there is an admissibility challenge under consideration by the Court pursuant to Article 18 and 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to Article 18 or 19.'

25 Decision on the Postponement, *supra* note 21. It is noteworthy that under Article 19(7) of the Statute, once a state has made a challenge 'the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with Article 17'.

26 In his first report to the Security Council in 2005, the Prosecutor stated, at 4, that 'In mid-June 2005, after the decision by the Prosecutor to start an investigation, the Government of Sudan provided the OTP with information relating to the establishment of a new specialised tribunal to deal with some individuals considered to have been responsible for crimes committed in Darfur. As part of the on-going admissibility assessment the OTP will follow the work of the tribunal in order to determine whether it is investigating, or has investigated or prosecuted, the cases of relevance to the ICC, and whether any such proceedings meet the standards of genuineness as defined by article 17 of the Rome Statute.'

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3. Who may raise issues of admissibility?

3.1. The Court

Article 19(1) of the Statute imposes an obligation on the Court to 'satisfy itself that it has jurisdiction' over a case before it. Jurisdiction involves such issues as the time,[27] place,[28] and perpetrator of a crime. It also involves the nature of the crime and whether the crime is covered by the Statute.[29] However, with respect to admissibility, the same provision simply provides that '[t]he Court may, on its own motion, determine the admissibility of a case in accordance with Article 17 [of the Statute]'.[30] It does not impose an obligation on the Court, but merely confers discretion on the Court.[31] In practice, the Pre-Trial Chamber may exercise that discretion when considering applications for issuing arrest warrants or summonses to appear, or when it is confirming charges. However, the Appeals Chamber in its earliest decision on the issue opined that when deciding on issuing an arrest warrant in an *ex parte* Prosecutor proceeding, a 'Pre-Trial Chamber should exercise its discretion only when it is appropriate in the circumstances of the case, bearing in mind the interest of the suspect'.[32] The Chamber listed such circumstances to possibly include 'instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review'.[33]

It is thus imperative for a Pre-Trial Chamber to take into account the interests of a suspect who, particularly at the very initial stages of proceedings, would not be available to present his or her views on the matter, since the proceedings are held in camera, and only the Prosecutor participates.[34] Thus, in *Situation in the Libyan Arab Jamahiriya*, Pre-Trial Chamber I declined to exercise its discretion to determine whether the case against Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi was admissible, on the grounds that:

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27 See Rome Statute, *supra* note 1, Art. 11.

28 Ibid., Art. 12.

29 Ibid., Art. 5.

30 See ibid., Art. 19(1).

31 In *Prosecutor v. William Samoei Ruto and Others*, 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang', 8 March 2011, ICC-01/09-01/11-01; and *Prosecutor v. Francis Kirimi Muthaura and Others*, 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali', 8 March 2011, ICC-01/09-02/11-01, Pre-Trial Chamber II declined to exercise its discretion. However, Pre-Trial Chambers have considered it to be an obligation to conduct an admissibility examination in order to determine whether there is a reasonable basis to proceed with an investigation pursuant to Arts. 15 and 53(1) of the Statute and Rule 48 of the Rules of Procedure and Evidence. For example, in the *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire 3 October 2011, ICC-02/11-14, para. 189, Pre-Trial Chamber III stated as follows: 'Pursuant to Article 17 of the Statute, the Chamber must examine, on the basis of the available information, whether the "case" is admissible.'

32 *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, ICC-01/04-169 (OA), para. 52.

33 Ibid.

34 Ibid., at paras. 50 and 52.

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(i) the proceedings on an application for warrants of arrest were conducted on an *ex parte* basis, in the absence of the suspects; and

(ii) there was 'no ostensible cause or self-evident factor which [would] impel the Chamber to exercise its discretion'.[35]

Similarly, in *Prosecutor* v. *Callixte Mbarushimana*, the same Chamber declined to inquire into the issue of admissibility, holding that there was no ostensible cause or self-evident factors that would manifestly require it to do so.[36]

On the other hand, in *Prosecutor* v. *Jean-Pierre Bemba Gombo* ('*Bemba*'), Pre-Trial Chamber III found reason to exercise its discretion and to declare the case admissible. It stated as follows:

> [T]here is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application. On the contrary, it would appear that the [Central African Republic] judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the [Democratic Republic of the Congo ('DRC')].[37]

One should note, however, that a Chamber's declining to inquire into the issue of admissibility of a case does not invalidate its substantive decision to issue a warrant of arrest;[38] nor does it preclude the Chamber, a state, or accused from raising the matter at a future time, in accordance with Article 19(2)(a) and (b) of the Statute.[39] Where the Pre-Trial Chamber decides to exercise its jurisdiction, the Appeals Chamber has ruled as follows:

> [T]he Appeals Chamber will not interfere with the Pre-Trial Chamber's exercise of discretion under article 19(1) of the Statute to determine admissibility, save where it is shown that the determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.[40]

In *Prosecutor* v. *Joseph Kony and Others* ('*Kony*'), the Appeals Chamber held that Pre-Trial Chamber II had not abused its discretion when it acted in the absence of the suspects because the proceedings were public; not only the Prosecutor, but also the

35 *Situation in the Libyan Arab Jamahiriya*, Decision on the 'Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI', 27 June 2011, ICC-01/11-12, para. 12.

36 Warrant of Arrest for Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-2-tENG, para. 5.

37 Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, 10 June 2008, ICC-01/05-01/08-14-tENG, para. 21.

38 See Rome Statute, *supra* note 1, Art. 19(9) which states that '[t]he making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge'; see also Trial Chamber I, *Prosecutor v. Mbarushimana*, Decision on the Defence Challenge to the Validity of the Arrest Warrant, 28 January 2011, ICC-01/04-01/10-50, para. 10.

39 See, e.g., Art. 15(4) of the Statute; see also *Prosecutor v. Joseph Kony and Others*, Judgment on the Appeal of the Defence against the 'Decision on the Admissibility of the Case under Article 19(1) of the Statute' of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408 (OA 3) ('Kony Judgment OA 3'). Pre-Trial Chamber II issued warrants of arrest for four suspects on 8 July 2005. On 21 October 2008, the Pre-Trial Chamber initiated *proprio motu* proceedings under Art. 19(1) to determine the admissibility of the case. On appeal by the defence, the Appeals Chamber held that it would not interfere as the Pre-Trial Chamber did not abuse its discretion.

40 Kony Judgment OA 3, *supra* note 39, para. 80.

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government of Uganda participated in the proceedings.[41] 'The Pre-Trial Chamber also appointed [an ad hoc] Counsel for the Defence in order to facilitate submissions to the Chamber on the defence perspective.'[42]

One may conclude from the Court's jurisprudence to date that Pre-Trial Chambers act with utmost circumspection in deciding whether or not to exercise their discretion in the matter.

3.2. The Prosecutor

The Prosecutor may also raise issues of admissibility of a case under several scenarios. First, in deciding whether or not to commence an investigation, the Prosecutor must determine whether there is a reasonable basis to proceed.[43] This obligation remains the same whether the Prosecutor is acting on his or her own initiative or under a referral by a state or, as discussed above, by the Security Council.[44] It would clearly be an abuse of his or her powers and a squandering of the Court's resources were the Prosecutor to commence an investigation without a reasonable basis for doing so. Among the factors that the Prosecutor must consider in making the determination is whether the 'case is or would be admissible under article 17' of the Statute.[45]

The Prosecutor's obligation to ensure that investigations he or she wishes to undertake would not result in a conflict of jurisdictions and thus render resultant potential cases inadmissible is further buttressed by Article 18(1) of the Statute. The Article requires that, before the Prosecutor does anything, he or she must notify 'all States Parties and those States which ... would normally exercise jurisdiction over the crimes concerned' of his or her intentions to commence an investigation.[46] If, within one month after notification, a state informs the Prosecutor that it is investigating or has investigated the crimes in question, then the Prosecutor must defer to that state's investigation.[47] The Prosecutor must back off because, under Article 17 of the Statute, the case would be inadmissible before the ICC. However, where the Prosecutor has reason to believe that the state's claim to have investigated or to be investigating is spurious or a mere facade intended to defeat the interests of international justice, the Prosecutor is entitled to brush them aside and to seek a Pre-Trial Chamber's authorization to investigate under Articles 15 and 53(1) of the Statute and Rule 48 of the Rules of Procedure and Evidence.[48]

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41 Ibid., para. 85.
42 Ibid.
43 See Rome Statute, *supra* note 1, Arts. 15(3) and 53(1).
44 This conclusion is implicit in the language of Art. 53(3)(a) of the Statute.
45 See Rome Statute, *supra* note 1, Art. 53(1)(b). It is a misnomer to talk of a 'case' at this pre-investigation or situation stage, because a case does not crystallize until a charge containing an accused person and the crime he or she is alleged to have committed has been framed, preferred, and filed in the Court. Therefore 'case' here must be understood to mean 'anticipated case'.
46 See Rome Statute, *supra* note 1, Art. 18(1).
47 Ibid., Art. 18(2).
48 Article 18(2) of the Statute provides that when a state informs the Court that it is investigating or has investigated nationals or other persons within its jurisdiction and requests the prosecutor to defer to its investigation, 'the Prosecutor shall defer to the State's investigation of those persons unless the Pre-trial Chamber, on the application of the Prosecutor, decides to authorize the investigation'.

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Before granting the authorization, the Pre-Trial Chamber must be satisfied that, on the basis of the material put before it, the Prosecutor's assessment that there is a reasonable basis to proceed with an investigation is justified.[49] It must, in particular, be satisfied that the anticipated case would be admissible.[50] It is remarkable that even at this preliminary stage of the proceedings, it is the Court, and not the Prosecutor, that is the final arbiter as to whether a case would be admissible. The plenipotentiaries at the Rome Diplomatic Conference insisted on this Pre-Trial Chamber review as a necessary safeguard against the Prosecutor carrying out unwarranted or frivolous and politically motivated investigations, which are inevitably intrusive and derogating to a state's sovereignty. Notably, as several Pre-Trial Chambers have held, when a Pre-Trial Chamber exercises this power of review, it does so not as an act of discretion, but as an obligation.[51] As indicated above, at this stage of the proceedings a suspect and incriminating evidence would not have been identified and charges would not have been preferred or filed; the Chamber will perforce have to base its admissibility decision on the broad contours of the anticipated case.

Article 19(3) of the Statute also authorizes the Prosecutor to 'seek a ruling from the Court regarding a question of jurisdiction or admissibility'. Depending on the stage of the proceedings, the Prosecutor files the application for the ruling before the Pre-Trial or Trial Chamber. This provision seems to suggest that the Prosecutor, in circumstances where the situation or case may not clearly appear to be admissible but has been referred to him or her by a state or the Security Council, may seek the ruling or advice of the Court in that regard. To date, the Prosecutor has not sought such a ruling.

Lastly, it should also be noted that the Prosecutor has power, 'at any time, [to] reconsider a decision whether to initiate an investigation or prosecution based on new facts or information'.[52] It is conceivable that these 'new facts or information'[53] may relate to new evidence that makes the Prosecutor's continuation with the proceedings untenable or renders the case inadmissible. However, once the Pre-Trial Chamber has issued a warrant of arrest or summons to appear, only the Chamber has the authority to withdraw them.[54]

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49 See Rome Statute, *supra* note 1, Arts. 15(3) and 53(1), and Rule 48 of the Rules of Procedure and Evidence.

50 *Supra* note 44.

51 E.g. Pre-Trial Chamber III, *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, para. 189. The Pre-Trial Chamber III stated as follows: 'Pursuant to Article 17 of the Statute, the Chamber must examine, on the basis of the available information, whether the "case" is admissible'; see also Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 24–25.

52 See Rome Statute, *supra* note 1, Art. 53(4).

53 Ibid.

54 Ibid., Art. 58(4), provides that '[t]he warrant of arrest shall remain in force until otherwise ordered by the Court'.

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3.3. A state

A state may also challenge the admissibility of a case before the Court, 'on the ground that it is investigating or prosecuting the case or has investigated or prosecuted'.[55] The 'state' here includes a state party which has jurisdiction over the case, in the sense that the crime was either committed on its territory or elsewhere by its national, and a state, such as Côte d'Ivoire, that may have made a declaration under Article 12(3) of the Statute accepting the jurisdiction of the Court.[56]

It is noteworthy that the Statute requires a state to challenge the admissibility of a case 'at the earliest opportunity'.[57] According to Trial Chamber II in *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui* ('*Katanga*'), this requirement is 'clearly aimed at avoiding challenges to admissibility needlessly hindering or delaying the proceedings, which means that they must be brought as soon as possible, preferably during the pre-trial phase'.[58] In other words, a state that is otherwise in a position to bring a challenge should not sit back, or vacillate and let proceedings before the Court continue, at great cost in terms of both time and human and financial resources, only to later come forward and attempt to abort them. States must act with due diligence.

Whether or not a state brings the challenge 'at the earliest opportunity'[59] will perforce turn on the circumstances of each case. In the Kenya cases the Appeals Chamber pointed out that a state should not file a challenge just because the Court has issued a summons to appear.[60] It should do so only when it is in a legal position to do so: at the earliest point in time after a conflict of jurisdictions has arisen.[61] Unfortunately for Kenya, no conflict of jurisdictions had yet arisen at the time of the proceedings concerning the admissibility challenge.[62] As the Pre-Trial Chamber found, there was no evidence to show that there were ongoing investigations; the Chamber considered that 'there remain[ed] a situation of inactivity'.[63]

To ensure that an admissibility challenge by a state is not rendered futile by the Prosecutor's continuing actions, the Statute accords the challenge suspensive

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55 Ibid., Art. 19(2)(b).
56 Ibid.
57 Ibid., Art. 19(5).
58 Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 44 ('Katanga Admissibility Decision').
59 See Rome Statute, *supra* note 1, Art. 19(5).
60 *Prosecutor v. Francis Kirimi Muthaura and Others*, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-02/11-274 (OA), para. 45, ('Muthaura Judgment OA'); *Prosecutor v. William Samoei Ruto and Others*, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', 30 August 2011, ICC-01/09-01/11–307 (OA), para. 46 ('Ruto Judgment OA').
61 Muthaura Judgment OA, para. 98; Ruto Judgment OA, para. 100.
62 Muthaura Judgment OA, para. 45; Ruto Judgment OA, para. 46.
63 Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto and Others*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-01/11-101, para. 70 ('Ruto Judgment OA Impugned Decision'); *Prosecutor v. Francis Kirimi Muthaura and Others*, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, 30 May 2011, ICC-01/09-02/11-96, para. 66 ('Muthaura Judgment OA Impugned Decision').

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effect.[64] It provides that '[i]f a challenge is made by a State . . . the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17 of the Statute'.[65] It must be pointed out, though, that the challenge does not 'affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge'.[66] It must also be pointed out that it is the Prosecutor's investigations that are suspended, and not the proceedings that are already under way before a chamber. Lastly, as seen earlier, a challenge by a state entitles that state to apply for a postponement of compliance with requests by the Court for co-operation. Such requests may include surrender of a suspect to the Court, where that suspect is the subject of the admissibility challenge. As Pre-Trial Chamber I stated,

> It would be untenable for the Court to insist on compliance with a request for arrest and surrender, even at the risk of hampering the national proceedings, while its own investigation is suspended.[67]

Nevertheless, according to the Chamber, the state cannot unilaterally decline to surrender the suspect. It must seek and receive authorization from the Chamber, since it is the Chamber that issued the warrant of arrest and the subsequent request for arrest and surrender. [68]

3.4. The accused person

An accused person or a person for whom a warrant of arrest or a summons to appear has been issued under Article 58 of the Statute may also challenge the admissibility of a case.[69] To date, challenges by the accused have been made only in *Katanga*[70] and *Bemba*.[71] They were unsuccessful for the reasons that we shall see presently.

4. Procedural prerequisites for making challenges to the admissibility of a case

4.1. Number of challenges

Article 19(4) of the Statute provides that a challenge to admissibility or jurisdiction by a state or by an accused person may be brought only once. The rationale for this restriction seems to be the need to minimize the tendency of states and accused

64 See Rome Statute, *supra* note 1, Art. 19(7).
65 Ibid.
66 Ibid., Art. 19(9).
67 *Prosecutor v. Saif Al-Islam Gaddafi*, Decision on the Postponement of the Execution of the Request for Surrender of Saif Al-Islam Gaddafi Pursuant to Article 95 of the Rome Statute, ICC-01/11-01/11, 1 June 2012, at para. 36.
68 Ibid., para. 36. 'Since it is the Chamber that has issued the warrant of arrest and related request for surrender to the Court, the Chamber has the authority to decide that a state may postpone the execution of a surrender request to the extent that such a challenge has been properly made'.
69 See Rome Statute, *supra* note 1, Art. 19(2)(a).
70 Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, Pursuant to Article 19(2)(a) of the Statute, 11 March 2009, ICC-01/04-01/07-949.
71 Application Challenging the Admissibility of the Case Pursuant to Article 17 and 19(2)(a) of the Rome Statute, 25 February 2010, ICC-01/05-01/08-740-Red3-tENG.

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persons to bring successive challenges leading to needless delay.[72] Nonetheless, where a state has unsuccessfully challenged a ruling of a Pre-Trial Chamber authorizing the Prosecutor to investigate, it may still challenge the admissibility of a case arising out of those investigations under Article 19 of the Statute, provided it can show the existence of 'additional significant facts or significant change of circumstances'.[73] Additionally, where, again, a state has unsuccessfully brought a challenge, this does not extinguish the right of the accused person to bring his or her own challenge; if the original challenge was brought by the accused person, the state would also be entitled to bring its own challenge. This means that an accused person has at least one chance to bring a challenge.[74]

4.2. Timing commencement of the trial

Article 19(4) of the Statute provides that states or the accused must make the challenge 'prior to or at the commencement of the trial'. The rationale for this requirement is, again, to ensure that preliminary issues, such as jurisdiction and admissibility, are dealt with at the pre-trial stage so that when the trial commences it should continue to the end uninterrupted. The requirement also serves to save the Court's resources from being wasted by a trial that commences and is then aborted mid-stream. Furthermore, where a state is the challenger, it will have been notified by the Prosecutor under Article 18(1) of the Statute of his or her intention to commence an investigation. The state would have had ample time to exercise its jurisdiction. It should, therefore, not be allowed to sit back and do nothing only to belatedly come forward to seek to abort the proceedings.

However, a less easy question to answer is: when does a trial commence? Divergent views by different Chambers already exist in the Court's jurisprudence. The first view, by Trial Chamber I, is that a trial commences with the start of the hearings on the merits of the case, when the parties make their opening statements prior to calling witnesses.[75] This view seems to stem from the common-law tradition, which associates a trial with formal court proceedings. The other view, by Trial Chamber II, posits that a trial commences as soon as the Presidency constitutes the Trial Chamber and refers the case to it, following the confirmation of the charges.[76] This view, which has origins in Romano-Germanic tradition, is informed by the context of Article 19(4) of the Statute, which appears to call for expeditiousness and the need

72 C. K. Hall, 'Article 19: Challenges to the Jurisdiction of the Court or the Admissibility of a Case', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), at 655, mn 21.

73 See Rome Statute, Art. 18(7).

74 This conclusion is derived from the language of Art. 19(4) that '[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by *any* person or State referred to in paragraph 2' (emphasis added).

75 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Status before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decision of the Pre-Trial Chamber in Trial Proceedings, and the Manner in Which Evidence Shall Be Submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39.

76 In Katanga Admissibility Decision, para. 50, the Chamber stated that '[c]onsequently, after the decision on the confirmation of charges is filed with the Registry, a case must be considered admissible unless breach of the *ne bis in idem* principle is alleged'. However, the Trial Chamber condoned the late filing of the challenge on the ground that the defence was 'misled' by Pre-Trial Chamber, which opined that the challenge could be filed later than the confirmation of the charges. See ibid., para. 56.

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to dispose of admissibility and jurisdictional issues as soon as possible. There are provisions in the Statute that support both views.[77] Indeed, what 'commencement of trial' ultimately means will depend on the context and purpose of the provision of the Statute where the phrase is used. The Appeals Chamber is yet to pronounce itself authoritatively on its meaning in the context of Article 19(4) of the Statute.[78]

4.3. Exceptional circumstances

Notwithstanding the above, Article 19(4) of the Statute allows a challenge to be brought more than once or after the commencement of the trial 'in exceptional circumstances'. However, the challenge must be with leave of the Court.[79] What constitutes 'exceptional circumstances' will turn on the facts or merits of each case. In my submission, such circumstances must truly be exceptional, unusual, or out of the ordinary. Be that as it may, however, where the challenge is brought at the commencement of the trial or, subsequently, with leave of the Court, it can only be brought on the ground that the accused has already been tried by another court for similar conduct as that proscribed under the Court's Statute – the *ne bis in idem* rule (or rule against double jeopardy).[80]

4.4. Right of appeal

A state or an accused person who unsuccessfully brings a challenge may appeal the decision of the Pre-Trial Chamber to the Appeals Chamber as of right.[81] The prosecutor, who is invariably a party to the challenges, also has an automatic right of appeal against any admissibility or jurisdictional decision.[82] However, where the state or the accused person, as the case may be, was not the challenger but merely submitted observations under Article 19(3) of the Statute, that state or accused person has no right of appeal.[83] Similarly, victims, who also have a right to submit observations, are not entitled to appeal decisions with respect to jurisdiction or admissibility. They are not parties.[84]

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77 For example, Art. 64(3)(c) provides that upon being assigned a case for trial, the Trial Chamber must provide for disclosure of information not previously disclosed, 'sufficiently *in advance of the commencement of the trial* to enable adequate preparation for trial' (emphasis added). The emphasized language suggests that the mere receipt of the assignment of a case from the Presidency does not constitute commencement of the trial. The commencement is still in the future. The period immediately following receipt of the assignment is the preparation period. During that period, a state or the accused may bring an admissibility challenge; see also Rule 84 of the Rules of Procedure and Evidence; Katanga Admissibility Decision, para. 40, which includes a detailed listing of other relevant provisions of the Statute, Rules of Procedure and Evidence, and the Regulations of the Court. The Chamber also listed provisions of the Statute, Rules of Procedure and Evidence, and the Regulations of the Court, which suggest that 'for purposes of these provisions, the trial is not confined to the evidentiary phase following opening statements'. Ibid., paras. 38–39.

78 It declined to do so in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 (OA 8), para. 38, ('Katanga Judgment OA 8'), as this was not necessary for the disposal of the appeal on the merits.

79 See Rome Statute, *supra* note 1, Art. 19(4).

80 Ibid.; Katanga Admissibility Decision, para. 49.

81 See Rome Statute, *supra* note 1, Arts. 18(4), 19(6) and 82(1)(a).

82 See ibid., Art. 82(1)(a).

83 Article 82 (1) of the Statute restricts the right of Appeal to 'either party' only.

84 Ibid.

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5. Grounds and principles by which the Court resolves issues of admissibility

For a challenge to the admissibility of a case to succeed, it must be shown that the case is indeed disqualified under Article 17 of the Statute. That article reads in part as follows:

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[85]

It is significant to note that the *chapeau* to Article 17 of the Statute refers to paragraph 10 of the Preamble and to Article 1 of the Statute, which introduce complementarity into the Court's system and make it the overarching principle that must inform the Court's decisions on admissibility challenges. It is also significant that the *chapeau* is couched in a negative tone in favour of state jurisdiction. It requires the Court to determine that '*a case is inadmissible*' when certain prerequisites exist, unless the exceptions indicated in subparagraphs (a) to (d) apply. The jurisprudence of the Appeals Chamber to date focuses on the prerequisites which it considers to be *conditio sine qua non*, before any Chamber considering an admissibility challenge can delve into the exceptions.

5.1. The case is being investigated or prosecuted

The first prerequisite is that there must be an investigation or prosecution.[86] In *Katanga*, the Appeals Chamber declared the following:

> [I]n 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

85 Ibid., Art. 17(1).

86 Art. 17(1)(a) reads as follows: 'Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that the 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' (emphasis added).

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> 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.[87]

With respect to investigations, the Appeals Chamber has held that the state must have taken steps directed at ascertaining whether specified individuals have committed the crimes in question; for example, 'by interviewing witnesses or suspects, collecting documentary evidence or carrying out forensic analyses'.[88] With respect to prosecutions, it is the author's view that the state must have opened a case file and actually formally commenced proceedings in court. Whether or not there are, or have been, investigations or prosecution is a question of fact to be proven by the state or individual so alleging. It is not enough for a state merely to make self-serving assertions that it is investigating or that it has investigated. Nor does it satisfy the requirements of proof for the state merely to aver that since it is a state party to the Rome Statute, the Court should believe it, unless it can be shown to have acted *mala fide*. In this respect, the Appeals Chamber stated the following in the Kenya cases:

> As Kenya also acknowledges, a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.[89]

In other words, there must be proof.

5.2. Decision not to prosecute

Where a state carries out an investigation into a case, but, in the exercise of its sovereignty, subsequently decides not to prosecute, Article 17(b) of the Statute ordains that the case will be inadmissible before the ICC, 'unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute'. In *Katanga*, DRC national authorities commenced an investigation against Mr Katanga and others in respect of crimes allegedly committed during incidents in the Ituri region, including Bogoro. The authorities subsequently discontinued the investigation when they decided to refer the situation to the ICC and to surrender Mr Katanga to the Court. One of the issues on appeal was whether by referring the situation to the ICC and surrendering Mr Katanga to the Court, the DRC had thereby 'decided not to prosecute' him in the terms of Article 17(1)(b) of the Statute. The Appeals Chamber held that the decision to discontinue national proceedings was not 'a decision not to prosecute' Mr Katanga. It was, instead, a decision that 'he *should* be prosecuted, albeit before the International Criminal Court'.[90] Thus, a decision to refer a situation to the Court and to surrender a suspect to it per se is not a decision not to prosecute, which would render the case inadmissible.[91]

87 Katanga Judgment OA 8, *supra* note 78, para. 78.
88 Ruto Judgment OA, *supra* note 60, para. 1; Muthaura Judgment OA, *supra* note 60, para. 1.
89 Ibid., Ruto Judgment OA, para. 62; Muthaura Judgment OA, para. 61.
90 Katanga Judgment OA 8, *supra* note 78, para. 82 (original emphasis).
91 Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 Entitled 'Decision on

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5.3. 'Facts at the time of the proceedings'

Another interesting issue that arose out of *Katanga* was the timing of the factual situation upon which a chamber should base its determination of an admissibility challenge. In this case, Mr Katanga contended in effect that the Trial Chamber ought to have based its determination on the facts as they existed when the Prosecutor applied for the warrant for his arrest, i.e., before the DRC discontinued its proceedings against him, and not at the time when he instituted the challenge. On appeal, the Appeals Chamber rejected the contention and held that under Article 17(1) of the Statute, 'the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the admissibility challenge. The *chapeau* requires the Court to determine whether or not the case *is* admissible, and not whether it *was* admissible'.[92] This view can be supported on the ground that factors that make a case admissible or inadmissible are not static but dynamic and keep on changing. A case may have been admissible at one time but may become inadmissible later on and vice versa.

It may also be noted that in its pronouncement on this issue, the Appeals Chamber used non-definitive language, 'at the time of the proceedings',[93] and not 'at the time of the *filing* of the proceedings'. In the Kenya cases, Pre-Trial Chamber II elastically interpreted this flexible language and acquiesced at Kenya's filing of 22 annexes covering over 900 pages three weeks after filing its initial application,[94] as additional evidence in support of its assertion that its investigations were ongoing.[95] The Pre-Trial Chamber also granted leave to Kenya to reply to the observations filed by the Prosecutor, defence, and the Office of Public Counsel for Victims. Kenya, again, used the opportunity to append seven additional annexes to its reply as further evidence of its case.[96] In its decision, the Pre-Trial Chamber stated that it based the decision on information available to it up to the time when Kenya filed its reply to the Prosecutor's response.[97] However, Kenya was not content with this. As part of its reply, Kenya requested the Pre-Trial Chamber to, in effect, postpone the rendering of the decision in the case for a period of six months, to allow Kenya to file three periodic reports on the progress of its investigations. The Chamber did not accede to this request, and treated the request as a contradiction to Kenya's assertions that at the time of the proceedings ongoing investigations against the suspects existed.[98] The Appeals Chamber affirmed the Pre-Trial Chamber's refusal to permit the filing of the reports, holding that, in doing so, the Pre-Trial Chamber did not abuse its discretion.[99] The Appeals Chamber stated further that 'the State cannot expect to

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the Admissibility and Abuse of Process Challenges', 19 October 2010, ICC-01/05-01/08-962-Corr (OA 3), para. 74, quoting Katanga Judgment OA 8, *supra* note 78, para. 83.

92 Katanga Judgment OA 8, para. 56 (original emphasis).

93 Ibid.

94 Filing annexes three weeks after an original filing is not common practice, and a party would normally seek leave from the Chamber, though there is no definite rule in the Court's legal texts.

95 Ruto Judgment OA Impugned Decision, paras. 6, 43; Muthaura Judgment OA Impugned Decision, paras. 7, 39.

96 Ibid., paras. 8, 9.

97 Ibid., paras. 43, 39.

98 Ibid., paras. 62, 58.

99 Ibid., paras. 98, 96.

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be allowed to amend an admissibility challenge or to submit additional supporting evidence just because the State made the challenge prematurely'.[100]

5.4. The case at the national level must be substantially the same as the case before the ICC

Article 17(1) lists four situations where a case before the ICC would be inadmissible. One of those situations is that the case 'is being investigated or prosecuted by a State which has jurisdiction over it'. Therefore, to be inadmissible, the case that the state claims to be dealing with, or to have dealt with, must be substantially the same as the case before the ICC. If the two cases are not substantially the same, then one is not talking about the case before the ICC, and there is no conflict of jurisdiction that would render the case inadmissible. To determine whether the cases are substantially the same, the 'same person/same conduct' test must be applied.[101] The Appeals Chamber in the Kenya cases stated as follows:

> The defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.[102]

The case before the ICC is defined by the warrant of arrest or the summons to appear.[103] These documents must contain the names of the suspects or accused persons as well as the conduct or crimes they are alleged to have committed.[104] Although the Appeals Chamber did not go into what constitutes 'conduct', it is submitted that that conduct must be defined with reference to the essential ingredients of the crime as defined under the Statute and in the Elements of Crimes, as well as the date when and the place where the incidents that gave rise to the conduct occurred.

Be that as it may, however, the 'same person/same conduct' test cannot be strictly applied at the situation, pre-warrant, or pre-summons stage, for purposes of initiating investigations under Articles 15 and 53 of the Statute or for preliminary challenges under Article 18 of the Statute. This is so because, at that stage, the Prosecutor would not have identified with certitude the suspects to proceed against or the precise legal characterization of the conduct or crimes they might have committed. In that case, the Appeals Chamber has endorsed the test applied by the Pre-Trial Chamber: it is sufficient if national proceedings covered the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC.[105] However, the Appeals Chamber rejected Kenya's plea to extend the test to the case stage, when a concrete case has already crystallized and specific suspects have already been identified.[106]

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100 Ruto Judgment OA, *supra* note 60, para. 100; Muthaura Judgment OA, *supra* note 60, para. 98.
101 Ibid., paras. 40, 39.
102 Ibid.
103 Ibid.
104 Ibid.; Rome Statute, *supra* note 1, Art. 58(2); see also Reg. 52 of the Regs. of the Court.
105 Ruto Judgment OA, para. 39; Muthaura Judgment OA, para. 38.
106 Ibid., paras. 42, 41.

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5.5. Inaction and self-referrals

In all the four completed admissibility challenges before the Court to date, the Court has held the cases admissible because of inaction on the part of the states concerned, i.e., absence of investigation or prosecution at the national level at the time of the proceedings on the challenges.[107] It is only in the Kenya cases where the state claimed that it was investigating but, alas, failed to convince the Pre-Trial Chamber that it was actually doing so. The remaining cases (i.e., *Kony*, *Katanga*, and *Bemba*) arose out of referrals by the very states that otherwise had jurisdiction. Those states voluntarily discontinued national proceedings in favour of proceedings at the ICC.

It is noteworthy that when adopting Article 13(a) of the Statute on state referrals, the plenipotentiaries at the Rome Diplomatic Conference seem to have had in mind the situation, under human rights conventions, of states filing complaints against other states. This was to some extent in line with a provision in the International Law Commission Draft that proposed complaints by 'interested' states parties as one of the two methods for triggering the jurisdiction of the Court (the other being Security Council referrals). However, as it has turned out, and as some participants at the Rome Conference and some scholars predicted, no state party has to date referred a situation on the territory of another state party to the ICC for investigation.[108] Thus what the plenipotentiaries in Rome did not envision is what is actually happening in practice today: states referring to the Court situations on their own territory.[109] Suffice it to say here, however, that the practice is not prohibited. It does indeed demonstrate the dynamic and organic nature of the Rome Statute. The Statute is malleable enough to meet the needs of international justice as they may exist at a particular point in time.

Be that as it may, however, the practice of self-referrals, particularly by states with functioning judicial systems or by states that are otherwise able to exercise their national criminal jurisdiction, has been criticized by some scholars on the grounds that (i) it contravenes the injunction expressed under paragraph 6 of the Preamble to the Statute that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', and thus generally undermines the

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107 Kony Judgment OA 3, para. 86; Katanga, Judgment OA 8, para. 80; *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against the Decision of Trial Chamber III of 24 June 2010 Entitled 'Decision on the Admissibility and Abuse of Process Challenges', 19 October 2010, ICC-01/05-01/08-962 (OA 3), paras. 66–68; Muthaura, Judgment OA, para. 61; Ruto Judgment OA, para. 62.

108 See, e.g., Daniel D. Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues', (1999) 10 *Criminal Law Forum* 87, at 109, where this author, a participant at the Rome Conference, observed as follows: '[I]t must be pointed out that past experience with human rights instruments demonstrates that States are very reluctant to file complaints against each other. This stance may be due to the fear of straining relations with each other. It may also be due to the fear of terrorist reprisals . . . With the exception of the *European Convention*, virtually all the complaints under the instruments just mentioned have been filed by non-governmental organizations acting on behalf of individuals. Since most defendants before the ICC are likely to be key government or military officials, States are not likely to complain against them'.

109 See Schabas, *supra* note 3, 309–10. For a differing view, see D. Robinson, 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', (2011) 9 JICJ 355–84; D. Robinson, 'The Inaction Controversy: Neglected Words and New Opportunities', in C. Stahn and M. M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (2011) 460, 492–8.

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principle of complementarity, and (ii) that it encourages states to use the Court to pursue real or perceived government opponents.[110]

These criticisms are not wholly devoid of merit. However, with respect to the first criticism, it is debatable whether, under the law of treaties, a statement in the Preamble to the Rome Statute which is not supported by any substantive provision of the Statute can be validly interpreted as founding a duty for states parties. What is certain, however, is that, under customary international law, states have a duty to co-operate to repress crimes against the law of nations and that this duty includes either to prosecute or to surrender suspects to other states that may be able and willing to prosecute.[111] It could, therefore, be argued that by referring a suspect to the ICC, states are fulfilling their duty. Likewise, surrendering suspects to the ICC, which may be better positioned to try them, may also be viewed as a legitimate exercise of the state's sovereignty. Indeed, the surrender is a veritable way of combating impunity, and not a breach of a so-called duty to prosecute. Were the ICC to hold a case inadmissible where a state which otherwise has jurisdiction declines to exercise that jurisdiction, the case would not be prosecuted at all, either at the national or international level. Consequently, as the Appeals Chamber remarked in *Katanga*, 'impunity would persist unchecked and thousands of victims would be denied justice'.[112]

With respect to states possibly abusing the ICC process, one may not always be able to discern the motives of a state when it refers a situation to the Prosecutor. What is certain, though, is that when the Prosecutor decides to investigate and to indict certain individuals, he or she must not base his or her decision on political or other extrinsic considerations that may be irrelevant to the proper presentation of the case before the Court or to securing a conviction. Nevertheless, to allay fears that the referring state may be using the referral for ulterior motives, it behoves the Prosecutor to act even-handedly when deciding on what incidents to focus investigations and who to indict. Where crimes arise out of an armed conflict, the Prosecutor's choice of the persons to indict must reflect the fact that it takes two to tango.

6. Conclusion

States have always had jurisdiction over crimes against the law of nations – at least in theory. These crimes include the core crimes under the Rome Statute. However, until recently, states have, in practice, not exercised that jurisdiction, for reasons some of which are indicated in this article. Nonetheless, with industrialization, improved means of communication, perfection of man's instruments of inhumanity toward fellow man, and the ever-increasing incidence of atrocity crimes as well as the need to suppress such crimes, protection of human rights has taken centre stage

110 See particularly, e.g., W. Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts', (2008) 19 *Criminal Law Forum* 5.

111 Schabas, *supra* note 3, 45.

112 Katanga Judgment OA 8, *supra* note 78, para. 79.

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in the international legal system. Today, international justice is also acknowledged to be an essential element in that system in the effort to repress atrocity crimes. Consequently, states, as evidenced by their adoption of and adherence to the Rome Statute, are now more willing than before to co-operate in this effort. The Rome Statute activates and energizes the international justice system. However, in the absence of a global government, the system still largely depends on state action for it to work, hence the need for national prosecution of the ICC core crimes. The ICC was established, not to compete with, but to complement national prosecutions. It is a stand-by mechanism, to be resorted to in case of failure or ineffectiveness of national prosecutions. As this article has endeavoured to show, it ensures that impunity for the most serious crimes of concern to the international community does not continue unchecked.

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