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PRINCIPLE OF COMPLEMENTARITY AND JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT IN LIGHT OF THE KENYAN CASES

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ABSTRACT

The Rome Statute, one of the most complex international instruments, became effective in 2002, establishing the International Criminal Court and creating an international legal system with the aim to punish the perpetrators of international crimes and preventing the gravest crimes. For the purpose of achieving this aim, the Rome Statute envisages the complementarity principle, which is in place to ensure an effective response to international crimes by the member states to the fullest extent possible. In this context, the International Criminal Court (hereinafter, ICC) is a court of the last resort, stepping in only when a State Party with jurisdiction is `unable` or `unwilling` to investigate or prosecute international crimes. This article provides detailed explanations about the nature of the complementarity principle, the necessity and purpose of including it in the Rome Statute, along with the analysis of Kenyan Cases – the first case examined by the ICC, in which the ICC Prosecutor used its power granted under the Statute to initiate an investigation, but the State challenged the jurisdiction of ICC and requested to find the cases inadmissible before the Court under the complementarity principle.

INTRODUCTION

In 1998, after several years of negotiations, the Rome Statute - a treaty establishing the first permanent International Criminal Court, was adopted in Rome. The Rome Statute entered into force in 2002 and the ICC began functioning. The main purpose of establishing the ICC was to hold individuals criminally accountable for committing grave crimes, crimes committed with particular cruelty, and to deter and prevent such crimes in the future.

Unlike the *ad hoc* tribunals established by the UN Security Council under Chapter 7 of the UN Charter, with primary jurisdiction over national courts, the ICC is a treaty-based institution, created as a result of long-term negotiations between the States. Thus, it is unsurprising that the States were less prone to unconditionally yield the most important right – the right to sovereignty – in favour of the ICC; hence, the principle of complementarity was incorporated in the Rome Statute and the principle is often named as the cornerstone of the Statute.

The complementarity principle grants the States the primary jurisdiction over investigating and prosecuting the individuals, who committed international crimes, and the ICC is authorized to exercise its jurisdiction only where it has been established that a State Party of the Statute is `unwilling' or `unable' to investigate and prosecute perpetrators. "As explained by the former UN Secretary General Kofi Annan, the purpose of the complementarity provision in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order".[1]

The ICC's Kenyan Admissibility Cases played an important role in determining the importance of the principle of complementarity. This was the first case in history, where the State challenged the jurisdiction of the ICC and, as the State with jurisdiction, requested to find a case concerned inadmissible based on the complementarity principle. On the other hand, this was also the first case when the Prosecutor of the ICC used his power to launch an investigation granted under the Rome Statute.

This article discusses the issues related to the principle of complementarity. The first part of the article is dedicated to a brief overview of how the ICC was established, followed by the definition of the complementarity principle, the necessity, and purpose of including this provision in the Rome Statute.

With regards to the admissibility of Kenyan Cases, the article provides prehistory of the case, in particular, the circumstances that served as a ground and necessitated the use of *proprio motu* authority by the Prosecutor to start investigation, also overview of the legal arguments used by the government of Kenya to support its motion to find the cases inadmissible, and the important

1 See, UN Secretary General's press release dated September 1, 1998: *Secretary-General urges 'like-minded› States to ratify Statute of International Criminal Court,* SG/SM/6686,https://www.un.org/press/en/1998/19980901.sgsm6686.html (21.03.2019)

explanations provided by the Pre-Trial Chamber and the Appeals Chamber of the ICC regarding the principle of complementarity.

The article concludes with the arguments about the importance of ICC decisions in Kenyan Admissibility Cases in understanding the principle of complementarity.

1. INTERNATIONAL CRIMINAL COURT (ICC)

When discussing creation of the International Criminal Court, it should be noted that the idea of establishing such a court first originated in the 19th century, but with no success.[2] As a result of the 1937 Geneva Conference of the League of Nations, the draft Convention for the Creation of International Criminal Court was prepared, but the draft never entered in force due to the lack of the signatories.[3] The Tokyo and Nuremberg tribunals, established after World War II, created a realistic expectation of introducing the culture of responsibility, although the Cold War reality seriously hindered implementation of this expectation into real life.[4]

Actual efforts for establishing a permanent institution followed only after the creation of the United Nations. In 1948, the UN General Assembly adopted a "Resolution on the Prevention and Punishment of the Crime of Genocide". Article 6 of the same document provides that persons charged with genocide "…shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." In the same resolution, the General Assembly urged the International Law Commission to study the reasonability and the opportunities of establishing international judicial authority with the jurisdiction to try the persons charged with genocide.[5] This act amounted to the acknowledgement of the need to have an international court by the General Assembly.

After the International Law Commission deemed the creation of such a court reasonable and possible, the General Assembly established a Committee for the purpose of drafting the proposals on the establishment of the court.[6] In 1951-1953, the Committee prepared the draft statutes,

2 C.K. Hall, "The First Proposal for a Permanent International Criminal Court", 322 *Int. Rev. of the Red Cross*, (1998), p.57.

3 William A. Schabas, *An introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 4 edition, 2011), p.5.

4 Philippe Kirsch Q.C., "The International Criminal Court: Current Issues and Perspectives", *The United States and the International Criminal Court, Law and Contemporary Problems, Vol. 64, No. 1,* (winter, 2001): pp.3-4.

5 UN General Assembly Resolution on the Prevention and the Punishment of the Crime of Genocide, dated December 9, 1948; http://www.un-documents.net/a3r260.htm (21.03.2019)

6 *The International Criminal Court: Global Politics and the Quest for Justice* edited by William Driscoll, Joseph P. Zompetti, Suzette Zompetti, (New York: The International Debate Education Association, 2004), p.24.

although the General Assembly decided to postpone the discussion of the draft statutes until the definition of aggression was adopted.[7] In reality, the political tensions of the Cold War made it impossible to make further steps forward in this direction.[8]

In the following years, the issue of establishing international criminal court was raised on several occasions. At the beginning of the 1990s, the developments in Yugoslavia and Rwanda, and the creation of *ad hoc* tribunals by the UN Security Council clearly convinced the international society in the necessity to have a permanent international criminal court and sped up the process of establishing such a court.[9] In 1994, the International Law Commission finished the draft of the statute and submitted it before the General Assembly for discussion.[10] In turn, the General Assembly created a Preparatory Committee to work on establishing the court. Finally, after six meetings of the Committee, the Rome Statute regarding International Criminal Court was open for signatures[11] and became effective on July 1, 2002.[12] As a result, the Statute, "one of the most complex international instruments ever negotiated, sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of the State concerns with their own sovereignty"[13], has been adopted.

The ICC is a treaty-based court unlike the *ad hoc* tribunals for former Yugoslavia and Rwanda, which have been created on the basis of the UN Security Council Resolutions.[14] There is a significant difference between the jurisdiction of the ICC and that of the *ad hoc* tribunals, as the tribunals were granted primary jurisdiction over national courts. Notably, the primary jurisdiction of the tribunals was not a subject of harsh critique and discussions due to a very narrow and specific mandate of the tribunals.[15] The experience of these two tribunals clearly showed that there would be serious issues with the jurisdiction of a permanent criminal court, as most of the States would be less prone to give consent on restricting their own sovereignty. Therefore, a new type of relationship was required in order to preserve State sovereignty without detriment to the goal of reducing impunity.[16]

7 *Ibid*.

8 William A. Schabas, *An introduction to the International Criminal Court*, (Cambridge: Cambridge University Press, 2001), p.9.

9 *The Law and Practice of the International Criminal Court edited* by *Stahn*, *Carsten.* (Oxford: Oxford University Press, 2014), p.5.

10 In 1989, upon the request of Trinidad and Tobacco, the General Assembly charged the International Law Commission to resume its works on the establishment of an international criminal court. See, the Resolution: http://www.un.org/documents/ga/res/44/a44r039.htm (21.03.2019).

11 Ketevan Khutsishvili, "Competitive and Complementary Competences of the UN Security Council and the International Criminal Court" (doctoral dissertation, Iv. Javakhishvili Tbilisi State University, 2010), p.29;

12 For information about the Signatory States of the Rome Statute, please, follow the link: https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (21.03.2019).

13 Schabas, *An introduction to the International Criminal Court*, p.20.

14 In accordance with Article 39, the UN Security Council determined that the developments in the former Yugoslavia and Rwanda represented the threat to international peace and security, and therefore established the tribunals for the purpose of restoring the peace. For relevant Security Council Resolutions, please, follow the links:
http://www.un.org/en/ga/search/view_doc.asp?symbol=s/res/827(1993) (21.03.2019).
http://www.un.org/en/ga/search/view_doc.asp?symbol=S/res/955(1994) (21.03.2019).

15 Llewellyn, Jennifer, "A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?" *Dalhousie Law Journal, vol. 24, no. 2* (Fall 2001): 2.

16 Oscar Solera, "Complementary jurisdiction and international criminal justice", *IRRC Vol. 84 No 845*, (March 2002), p.156.

This is the reason why the Preamble of the Rome Statue emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[17] It is also noteworthy, that the Statute does not explicitly use or define the term "complementarity" as such; however, the term has been adopted and discussed by the negotiators of the Statute, and later on by commentators to refer to the entirety of provisions governing the complementary relationship between the ICC and national jurisdictions.[18] The next chapter of the article is dedicated to the complementarity as such.

2. COMPLEMENTARITY

In order to understand the complementarity principle we shall read the preamble of the Rome Statute, which lists the principles and purposes that the ICC relies upon with the view to achieving its aims and tasks. In the preamble, the State parties to the Statute agreed that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[19], and the purpose of their cooperation is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[20] At the same time, the Statute recognizes that the States have a primary obligation of investigating and prosecuting international crimes, whereas the ICC is a complementary institution to national criminal jurisdictions.[21]

Article 17 of the Rome Statute provides the list of preconditions for the admissibility of a case, which in entirety form the complementarity principle. According to Article 17 (1), the Court shall find a case 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*

https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/complementary-jurisdiction-and-international-criminal-justice/F4A3F7F979031FDFB9B70A67FFF4B192 (21.03.2019).

17 "The Rome Statute, Preamble, § 10." For Georgian translation of the Rome Statute, please, follow the link: https://www.legal-tools.org/doc/8afbd3/pdf/ (21.03.2019).

18 Markus Benzing, „The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity", *Max Planck Yearbook of United Nations Law Online, Volume 7* (2003), p.592.

19 The Rome Statute, Preamble, § 4.

20 *Ibid*, § 5.

21 The Rome Statute, Article 1;

decided not to prosecute the person concerned unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;[22]

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.*

In light of the foregoing, it may be concluded that the ICC plays a role of a "permanent court of last resort",[23] taking over the cases only where the "State is unable or unwilling genuinely to carry out investigation or prosecution".

Therefore, the Rome Statute not only established the International Criminal Court but also created an international legal system involving both the Court and the States.[24] As a former Prosecutor of the ICC, Mr. Luis Moreno-Ocampo once said:

"*The effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.*"[25]

Therefore, the basic philosophical element of the complementarity is to create an international order, wherein the States will effectively respond to international crimes on a national level and, thereby, avoid criminal proceedings before the ICC.[26] This is an ultimate goal for the Court and for the entire international society.

At the Kampala Conference held in 2010, the ICC presented a concept of "positive complementarity" – an approach aimed at enhancing cooperation between the States, while offering additional support on the part of the ICC and the NGO sector, in order to comply with their respective commitments under the Rome Statute. In turn, the ICC should refrain from interfering and facilitate national courts to deal with the criminal cases.[27] Positive complementarity was actually used in practice only in 2011 with regard to the Libya Case, in which the ICC stated that it would yield the cases to Libya,

22 *Ibid*, Article 17;

23 Kleffner, J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford/New York: Oxford University Press, 2008), 101.

24 Sang-Hyun Song, „The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law", *UN Chronicle Vol. XLIX No. 4* (2012).
https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law (21.03.2019)

25 A statement made at the ceremony for the solemn undertaking of the Prosecutor of the ICC, (The Peace Palace, The Hague, The Netherlands, and 16 June 2003). https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf (21.03.2019)

26 International Criminal Court, Informal expert paper: The principle of complementarity in practice, https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf (21.03.2019)

27 Gegout, Catherine, "The International Criminal Court: limits, potential, and conditions for the promotion of justice and peace." *Third World Quarterly, 34 (5),* (2013), p.813.

if the State would allow the Court's judges to participate in the proceedings; however, in 2013, the Libya government was demanded to transfer the Head of Intelligence Service Abdulla Al-Sanus.[28]

3. THE KENYAN CASES

The Kenyan Cases are important for several reasons. First of all, this was the first situation where the ICC Prosecutor used his discretionary power to initiate investigation granted under Article 15 of the Rome Statute[29] (*proprio motu* authority)[30], giving rise to a number of issues such as the scope of the ICC Prosecutor's discretion, independence from political influences, etc.[31] Nonetheless, for the purposes of this article, the Kenyan Cases are important in a different way – this was the first situation when the ICC had to consider the complementarity issue.[32] After the Kenyan government challenged the admissibility of the cases, the Appeals Chamber of the ICC issued two decisions that played a crucial role in defining the complementarity principle;[33] although, before discussing these decisions, it is important to briefly summarize the developments and preconditions that led to the case proceedings in the ICC.

3.1 Preconditions

In 2007, presidential and parliamentary elections were held in Kenya. In result, the Kenyan President Mwai Kibaki was re-elected for another term; however, the opposition leader and another presidential candidate Raila Odinga also claimed victory, and the civil unrest broke out resulting in the deaths of at least thousand people and the displacement of several hundred thousand.[34] Ad-

28 *Ibid*.

29 According to Article 15(1) of the Rome Statute: the Prosecutor has the *proprio motu* power to commence an investigati9on based on the information about the crimes falling within the jurisdiction of the ICC.

30 Simeon P. Sungi, „The Kenyan Cases and the Future of the International Criminal Court's Prosecutorial Policies", *African Journal of International Criminal Justice (1) 2* (2015), p.172.

31 Vincent Sarara Robi, „Prosecutorial Discretion within the International Criminal Court (ICC): A Critical Legal Analysis and Preliminary Reflections on ICC intervention into Kenya", (2012), p.8;
https://www.academia.edu/6261697/Prosecutorial_discretion_within_the_ICC_Case_study_of_kenya. (21.03.2019)

32 Steven Kay QC, „COMPLEMENTARITY AND KENYA AT THE INTERNATIONAL CRIMINAL COURT – LESSONS TO BE LEARNT UNDER ARTICLE 17 & 19(2)(B)", International Criminal Law Bureau.
http://www.internationallawbureau.com/wp-content/uploads/2011/10/COMPLEMENTARITY-AND-KENYA-AT-THE-INTERNATIONAL-CRIMINAL-COURT-%E2%80%93-LESSONS-TO-BE-LEARNT-UNDER-ARTICLE-17.pdf. (21.03.2019)

33 Hansen, Thomas Obel, „A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity, *Melbourne Journal of International Law, Vol. 13, No. 1*, (2012), 218.

34 Chandra Lekha Sriram, Olga Martin-Ortega, *War, Conflict, and Human Rights: Theory and Practice*, (New York: Routledge, Second Edition, 2014), 233.

ministration under Kibaki was failing to take actual measures to stop the civil unrest and violence until the international society publicly interfered in the matter and the UN Secretary-General Kofi Annan facilitated the National Accord and Reconciliation Act between the opposing parties.[35] The same Accord resulted in the Commission of Inquiry into Post-Election Violence (CIPEV), a.k.a. the "Waki Commission",[36] with the sole purpose of investigating the post-election developments and draw up recommendations with the view to preventing similar situations in the future.

The 2008 report issued by the Commission contained several thousands of property destruction incidents, and the death of 1133 individuals (police identified as the party accountable for the death of half of them at least); the report also included evidence supporting the claim of the failure to act by the police and the security services. The Commission also drafted a recommendation on the creation of an *ad hoc* tribunal for trying the persons responsible for the violence.[37] The Commission report also set deadlines for establishing the tribunal. After none of the deadlines were met, and the State failed to start an investigation, Kofi Annan handed over the materials and evidence submitted by the Commission to the ICC.[38]

In November 2009, the ICC Prosecutor requested the authorization to start an investigation from the Pre-Trials Chamber based on Article 15 of the Statute.[39] In March 2010, the Chamber established that the Kenya situation was within the ICC jurisdiction and there were sufficient grounds for commencing an investigation. As a result of the investigation, the Prosecutor identified six suspects; on March 8, 2011, the ICC issued the summonses to appear for the mentioned six persons.[40] After the court decision on the issuance of summonses, the Kenyan government addressed the Court and as a State with jurisdiction filed an application before the Pre-Trial Chamber to find both Kenyan Cases inadmissible based on Article 19(b)[41] and Article 1(a) of the Rome Statute.[42]

35 Christopher Totten, Hina Asghar, Ayomipo Ojutalayo, "ICC Kenya Case: Implications and Impact for Proprio Motu and Complementarity", *Washington University Global Studies Law Review, Vol. 13*, *Iss. 4* (2014), 706.

36 Chairman of the Commission was the Judge of Kenyan Appels Court, Mr. Philip Waki, and the Commission itself was often referred to as the "Waki Commission";

37 Results and findings of the Commission - International Center for Transitional Justice: The Kenyan Commission of Inquiry into Post-Election Violence: https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf (21.03.2019)
For the full report of the Commission, please, follow the link:
http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf (21.03.2019)

38 Sriram, Martin-Ortega, *War, Conflict and Human Rights,* 233.

39 For additional information, please, follow the link:
https://www.icc-cpi.int/pages/record.aspx?uri=785972; (21.03.2019)

40 For the Pre-Trials Chamber decisions regarding the issuance of the summons, please follow the link:
https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-1
https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-1 (21.03.2019)

41 According to Article 19 of the Rome Statute, challenges to the admissibility of the case may be made by a State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted it.

42 Cases of The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sangand, The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali . Application on behalf of the Government of The Republic of Kenya, ICC-01/09-01/11, and ICC-01/09-02/11, (2011), §1.

3.2 ICC's merits about the Complementarity Principle

It should be noted again, that the Kenyan situation was different, being the first case when the Prosecutor initiated the investigation and, also, where the State challenged the admissibility of the cases referring to the complementarity principle. Therefore, decisions issued by the Pre-trial Chamber and the Appeals Chamber were of utmost importance.

In its decision, the Pre-trial Chamber considered the complementarity principle and noted that "the Chamber is well aware that the concept of complementarity and the manner in which it operates goes to the heart of States' sovereign rights. It is also conscious of the fact that States not only have the right to exercise their criminal jurisdiction over those allegedly responsible for the commission of crimes that fall within the jurisdiction of the Court, they are also under an existing duty to do so, as explicitly stated in the Statute's preamble paragraph 6."[43] The significant complementarity issues addressed in the ICC decisions are discussed below.

3.2.1 The Twofold Test

By citing the decision of the Appeals Chamber against the Prosecutor Katanga with regard to Article 17 of the Statute, the Pre-Trial Chamber once again emphasized that "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".[44] It is only when the answers to these questions are in the affirmative that one has to examine the question of "unwillingness" and "inability". However, the 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.[45]

The Appeals Chamber upheld these arguments, noting 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 had been taken.[46]

Application of the twofold test in Kenya situation was important, because as a rule the test was always applied for pragmatic reasons; in particular, it allowed the ICC to extend its jurisdiction to the

43 Pre-Trial Chamber II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11, (2011), § 44.

44 *Ibid*, § 48.

45 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", TCC-01/04- 01/07-1497, (2009), § 78.

46 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», (2011), § 40.

cases in which the States supported the ICC's involvement, but the Kenya situation was fundamentally different since in this case, the State was against the ICC's involvement.[47]

3.2.2 Degree of Evidence

In its Application, the government of Kenya argued, in principle, that the Chamber should have made its determination with a full understanding of the fundamental and far-reaching constitutional and judicial reforms, *inter alia* the adoption of a new constitution in August 2010 which incorporated a Bill of Rights that strengthened "fair trial rights and procedural guarantees" in the criminal justice system.[48] According to the government, the new constitution empowers Kenyan national courts to try the post-election crimes, including the crimes involved in the ICC criminal cases, without needing to pass legislation establishing a special tribunal.[49]

At the same time, the government of Kenya claimed that the investigation was already ongoing with regard to the matters concerned and that it would require months to obtain results and submit a report about the investigation findings to the Chamber.[50]

The Prosecutor did not agree with the mentioned arguments and noted that at that stage when the summonses had already been issued for the persons concerned, the government of Kenya had a higher burden of proof to determine that the case was inadmissible and that the State was conducting a proper investigation.[51]

The Pre-Trial Chamber welcomed the desire of the government of Kenya to investigate the crimes but noted that when examining the admissibility of a case, the important issue is to determine that there is an ongoing national investigation against the same suspects.[52] At the same time, the Chamber noted that "the Government of Kenya does not provide the Chamber with any details about the asserted, current investigative steps undertaken."[53]

The Pre-Trial Chamber also explained that a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible.[54] To discharge that burden, the

47 Hansen, Obel, *„A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity"*, p.221.

48 The Prosecutor v Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-02/11, (2011), § 13.

49 *Ibid.*

50 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-01/09-02/11, (2011), § 13.

51 Jake Spilman, "Complementarity or Competition: The Effect of the ICC's Admissibility Decision in Kenya on Complementarity and the Article 17(1) Inquiry", *Richmond Journal of Global Law and Business Online,* (2013)*,* 12. https://rjglb.richmond.edu/files/2013/10/Spilman1.pdf (21.03.2019)

52 The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute. ICC-01/09-02/11, (2012), § 59.

53 The decision on the Application by the Government of Kenya Challenging the Admissibility of the Case, ICC-01/09-02/11, (2011), § 64.

54 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-01/09-02/11,(2011), § 61.

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.[55]

In its explanations, the Court established a specific degree of evidence to be submitted to the Court, stating that the States must provide convincing evidence to prove that the investigation actions are actually taking place, including but not limited to police reports, witness interview records, etc.[56]

3.2.3 The Same Person/Same Conduct Test

The second test discussed in the decisions related to the Kenyan Cases is the same person/same conduct test.

In its application, the government of Kenya argued that when examining the admissibility issue, the Pre-Trial Chamber should apply the same admissibility test used for the purposes of authorising an investigation under Article 15 in respect of the Kenya Situation (Authorization Decision issued by the Chamber), according to which admissibility of the case before the ICC is determined by whether (i) the groups of persons that to be the object of an investigation by the ICC and (ii) the crimes that are likely to be the focus of such an investigation, are being investigated or prosecuted before the national courts.[57] At the same time, the government of Kenya accepted that that national investigations must, therefore, cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC.[58]

In response to this argument of the government of Kenya, the Pre-Trial Chamber noted that it considered this interpretation misleading. The Chamber, in its Authorisation Decision, was deciding admissibility of the case (s)[59], within the context of a "potential" case, as at the preliminary stage of an investigation, the suspects are not identified. However, the test is more specific when it comes to an admissibility determination at the `trial' stage when the summons to appear have already been issued, and one or more suspects have been identified. Therefore, during the 'trial' stage, the Court should establish whether investigation at domestic level is launched and related to the same persons that are subject to the Court's proceedings.[60]

The Appeals Chamber agreed with the argument of the Pre-Trials Chamber and noted that at this stage of a case, when a specific case is examined with alleged actions and suspects, for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover

55 *Ibid*.

56 *Ibid,* § 68.

57 ICC-01/09-01/11 and ICC-01/09-02/11, Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute. ICC-01/09-01/11-1942, (2011), § 32.

58 *Ibid.*

59 The decision on the Application by the Government of Kenya Challenging the Admissibility of the Case, ICC-01/09-01/11, (2011), § 54.

60 *Ibid.*

the same individual and substantially the same conduct as alleged in the proceedings before the Court.[61]

Notably, this was the first time when the Court considered the "same person" component within the same person/same conduct test.[62] The Court ascertained that when determining admissibility of a case at different stages of proceedings, Article 17 of the Rome Statute should also be applied differently, according to the stage of proceedings.

However, with regard to this issue, the Judge Anita Usacka expressed a dissenting opinion, practically agreeing with the position of the government of Kenya. In her dissenting opinion, the Judge mentioned that complementarity is the foremost guiding principle in the relationship between a State and the Court, guaranteed by the Statute as well as the history of working on the creation of the Statute.[63] In her opinion, the Court did not take it in consideration that this was the first case when the Court was examining the application of a State on challenging admissibility of a case, and that the Court has never before examined a number of related legal issues. Therefore, the judge concluded that the Court failed to find a proper balance between various factors, which resulted in the improper use of discretionary power.[64]

Both of these understandings find some historical grounding in the Rome Statute and unsurprisingly, therefore, were invoked by each of the opposing sides. The position of Kenyan Government and Judge Usacka is reflected in the Rome Statute, as well as the drafting history of its provisions, where the preservation of national sovereignty was a primary goal.[65]

The Appeals Chamber has placed extremely high and perhaps even unrealistic demands on States Parties in terms of the same person/same conduct test, which might work in conflict with the aims of the complementarity principle.[66] At the same time, defining the test as "the same person, essentially the same crime" limits the discretion of the local prosecutor – if the goal of the ICC is to ensure that states dispense justice for heinous crimes committed in a given situation, the Court should have no particular Interest in which crime the person will be charged with at domestic level, If the national authorities are investigating or prosecuting him/her for criminal conduct.[67]

Despite the fact that, it might be assumed that the test requires from the investigation at the national level to draw particular attention to the same suspect and the crime same/similar to the ones prosecuted by the ICC, with such an approach it is less likely that the local prosecutor will charge the

61 The Appeals Chamber Judgment, ICC-01/09-02/11, § 39.

62 *Ibid,* § 34.

63 *Ibid,* § 19.

64 *Ibid,* § 30.

65 Charles C. Jalloh, International Decision: Situation in the Republic of Kenya. No. ICC-01/09-02/11-274- Judgment on Kenya's Appeal of Decision Denying Admissibility. *American Journal of International Law, Vol. 106* (January 2012), p.121.

66 Charles C. Jalloh, Kenya vs. the ICC Prosecutor, *Harvard International Law Journal. Volume 32 (August 2012), p.*278.

67 *Ibid,* 279.

suspect with an international crime, such as crimes against humanity, that is much harder to prove, when he/she can charge a person concerned with a premeditated murder instead.[68]

As Professor William Schabas has argued, it seems unnecessary to reduce admissibility challenges to "a mechanistic comparison of charges in the national and the international jurisdictions, in order to see whether a crime contemplated by the Rome Statute is being prosecuted directly or even indirectly."[69] He suggested that the better approach would be to make "an assessment of the relative gravity of the offenses tried by the national jurisdiction put alongside those of the international jurisdiction".[70]

4. CONCLUSION

This article aimed at identifying the most important explanations provided by the ICC with regards to the complementarity principle while examining the admissibility of Kenyan Cases. This was the first case, where the Pre-Trial Chamber and the Appeals Chamber of the ICC had to contemplate and define the nature and scope of the complementarity principle.

To summarize, it should be noted that the Pre-Trial and Appeals Chambers set extremely high standards in their decisions. Moreover, in a way the ICC even exceeded its complementary jurisdiction and got engaged in an actual "fight for jurisdiction" with the government of Kenya.

The rightfulness of such an approach by the ICC is highly disputable. Perhaps, it would be more reasonable for the ICC to use the "positive complementarity" approach and support the developments in Kenya, monitor the process, and after reasonable time period, if it is needed, to get involved in the situation. However, it is a fact that the Kenyan Cases cleared up and explained a number of very important issues, but it also raised some questions as to the application of the complementarity principle in the future.

68 Jalloh, "International Decision: Situation in the Republic of Kenya", p.122.

69 Schabas, *An introduction to the International Criminal Court,* p.182.

70 *Ibid.*