The Complementarity Conundrum: Are We Watching Evolution or Evisceration?

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ABSTRACT

The Rome Statute nowhere defines the term "complementarity," but the plain text of Article 1 compels the conclusion that the International Criminal Court was intended to supplement the foundation of domestic punishment for violations of international norms rather than supplant domestic prosecutions. The practice of complementarity may well be the fulcrum supporting the Court's long term legitimacy; and this principle is all the more important because it is designed to provide intellectual leverage to move non-States Party towards treaty accession. The Rome Statute curtails sovereign authority by displacing domestic trials only in exceptional circumstances, and it includes detailed procedural guidance designed to balance sovereign enforcement against unreasonable extensions of ICC prosecutorial power. In theory, complementarity is an impartial, reliable, and de-politicized process for identifying the cases of international concern, and hence supranational jurisdiction. The early practice of the ICC, however, indicates that the model of a healthy and cooperative synergy between the court and domestic states is in danger of being replaced by a model of

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competition. If complementarity becomes the vehicle for overriding the discretion of domestic officials and displacing their authority based on the preferences of the ICC Prosecutor of Pre-Trial Chambers, the original function of the complementarity principle will have been eviscerated. This Article summarizes the negotiation history of the admissibility regime and assesses its implementation in the early years of the Court. The Article concludes with the caution that the jurisprudence and practice of the ICC should not evolve to the point that domestic prosecutors make charging decisions in the faint hope that the ICC will accept the form of the charges or unduly abrogate prosecutorial discretion. An ICC that routinely overrides the good faith reasoning of domestic officials would inevitably face a crisis of confidence and cooperation.

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I. Introduction

The long term viability of the International Criminal Court [ICC, or the Court] depends upon an implementation of the complementarity principle that preserves cooperative synergy between the Court and domestic jurisdictions. The monumental development in the Rome Statute is that the proponents of international justice established a framework for a permanent supranational prosecutorial authority built on the principle that state sovereignty can, on occasion, be subordinated to the goal of achieving accountability for crimes that most directly challenge the commonality of values and order shared among nations.[1] Indeed, one commentator during the 1998 negotiations in Rome declared that "outmoded notions of state sovereignty must not derail the forward movement" that seeks to achieve international peace and order.[2] Treaty proponents thus see the creation of a supranational court empowered to override the unfettered discretion of some states on some occasions as an overdue step towards a uniform system of responsibility designed to "promote values fundamental to all democratic and peace-loving states."[3] The Rome Statute combines a complex blend of civil law, common law, customary international law, and *sui generis* principles

1. Rome Statute of the International Criminal Court arts. 12-19, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] entered into force July 1, 2002). The extension of potentially unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons the United States was originally unwilling to go forward with the Rome Statute "in its present form." David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 14, 21 (1999). On 31 December 2000, which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. *See* Rome Statute, *supra* art. 125(1) (stipulating that states may accede to the Statute at a later time, but that signature was permissible only until 31 December 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to "remain engaged in making the ICC an instrument of impartial and effective justice in the years to come," and reaffirmed America's "strong support for international accountability." President Clinton, Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), *reprinted in* Sean D. Murphy, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOLUME 1: 1999-2001 384 (2002). Nevertheless, the President's statement made clear that he would "not recommend that my successor submit the treaty to the Senate for ratification until our fundamental concerns are satisfied," *Id.*
2. Benjamin Ferencz, Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (June 16, 1998), http:www.un.org/icc/speeches/616ppc.htm (last visited Nov. 10, 2009).
3. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT'L L. 383, 436 (1998) [hereinafter Brown, *Primacy or Complementarity*].

held together by the notion that the sovereign nations of the world are joined as interdependent components of a larger global civil society in which the principles of justice are a common good.[4] However, the early practice of the Prosecutor and Pre-Trial Chambers may well signal a trend towards replacing the textual model of a healthy synergy between domestic and supranational processes with one built on a presumption of competition. If the textual premises of complementarity become the vehicle for superimposing the prosecutorial preferences of the Court over the good faith reasoning of domestic officials applying the law of the sovereign, the intellectual foundations of the court will have been eviscerated and its long term viability severely undermined.

The complementarity principle is the fulcrum that prioritizes the authority of domestic forums to prosecute the crimes defined in Article 5 of the Rome Statute. Although the delegates to the Rome Conference unambiguously agreed that national jurisdictions have primary responsibility for investigating and prosecuting the crimes enumerated in Article 5 of the Rome Statute, they strove to establish an international judicial institution that would allow supranational justice and accountability to pierce the shield of unconstrained sovereignty.[5] Though the concept of an international criminal court can be traced back to the Middle Ages, and evolved through the thinking of the classical international writers and jurists of the seventeenth and eighteenth centuries,[6] the stone walls of sovereign rights and state consent served as "constraining factors," which restricted the "prescribing, invoking, and applying of international norms."[7] Phrased another way, the right of states to invoke the complementarity principle is intended to preserve the power of

4. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 386 (2000). For an excellent summary of the negotiating dynamic in Rome that resulted in the current Statute, see Ruth Wedgewood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. 20 (Nov.-Dec. 1998). *See generally* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997); Leila Sadat Wexler, *The Proposed International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665 (1996).
5. Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 113, 115 (M. Cherif Bassiouni ed., Association Internationale De Droit Penal 1999) [hereinafter Broomhall, *Checklist for National Implementation*].
6. Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952).
7. JUSTICE ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).

the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balance that supranational power against the sovereign right of states to prosecute their own nationals without external interference.

The complementarity principle is the critical node in ascertaining whether the ICC will trample on the sovereign prerogatives of states, or will coexist in a constructive and beneficial relationship with all nations. It cannot be forgotten that the ICC necessarily functions against the backdrop of state cooperation and support for an array of activities inherent in the pursuit of accountability. The requisite support from sovereign states takes various forms, *inter alia*, providing consistent political and diplomatic backing to the ICC,[8] supporting investigations through information sharing, assisting in relocating witnesses, enforcing sentences of convicted persons, and supporting public outreach efforts. Judge Kirsch, former President of the ICC, has pointed out that "[t]he ICC is founded on two pillars. The Court is the judicial pillar. The operational pillar belongs to States."[9] The textual predicates agreed upon in Rome have now begun to be implemented in the real world of judicial rulings and jurisdictional battles. However, the concept of complementarity remains the focal point of tension between the proponents of the Rome Statute and those who paint its provisions as an unjustified and perhaps even immoral subversion of sovereign prerogatives.

The precept of complementarity embedded in the Rome Statute does not of itself logically lead to a homogenized system of national and supranational concurrent jurisdiction despite its simple formulation. If nothing else, the Rome Statute stands for the proposition that accountability for the array of crimes of most serious concern to the international community as a whole cannot be achieved without impinging upon the traditional criminal jurisdiction of states. Numerous delegates during negotiations pointed out that the ICC is intended and indeed necessitated by rogue states and those who defy international order such as

8. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), Dec. 3, 2008.
9. Philippe Kirsch, President of the ICC, Current Challenges to International Criminal Justice—ICC ten years after adoption of the Rome Statute, Remarks at the Seminar Organized by the Finnish Institute for International Affairs in cooperation with the Ministry of Foreign Affairs, June 12, 2008. As a leading Canadian diplomat during the development of the ICC, Judge Kirsch was one of the most instrumental advocates for the successful completion of the Rome Statute and its implementing documents.

Saddam Hussein's Iraq rather than states with developed jurisdictional systems and demonstrated adherence to the rule of law. Hence, the ICC does not have authority to take a case to trial until the issues associated with domestic jurisdiction and the admissibility criteria have been analyzed and resolved in accordance with the framework of the Rome Statute. Properly understood and implemented in accordance with the Rome Statute, the jurisdictional power between the ICC and sovereign states is best conceived as a tiered allocation of authority to adjudicate. The creation of a vertical level of prosecutorial authority that operates as a permanent backdrop to the horizontal relations between sovereign states in large part depended on a delineated mechanism for prioritizing jurisdiction while preserving sovereign rights and simultaneously serving the ends of justice.

The balance of adjudicative authority between the ICC and states is therefore the bridge that carries the weight of the Rome Statute. The next ten to twenty years will demonstrate whether the International Criminal Court can erode the principles of state sovereignty without itself being swept away by a backlash of indifference and outright opposition from sovereign states. In fact, the complementarity structure was an integral component of the overarching multilateral agreement without which the ICC would not have been created. Over time, the complementarity structure may begin to chafe the ICC Prosecutor and Pre-Trial Chambers who consider that the requirements are merely the vestigial remains of an arcane system of state sovereignty. By extension, corrosion of the complementarity rights of states could erode the political and economic supports that are necessary components of a viable ICC.

This Article identifies three preliminary trends that could endanger the cornerstone complementarity concept: domestic discretion in the choice among potential charges, the gravity threshold that delineates proper ICC authority, and the practice of state self-referrals. Current indicators warrant a thoughtful assessment over the direction that the Court may be taking in light of the accurate appraisal of its legal authority and long term interests. The purpose of this Article is to highlight emerging indicators in the practice of the Court and remind the reader of the hidden dangers of expediency. While it is beyond the scope of this piece to rehash the definitive development of the modern incarnation of the theory of complementarity,[10] it is clear that an obliteration of complementarity in practice

10. *See generally* MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGINS, DEVELOPMENT, AND PRACTICE 59-157 (2008).

would cause a crisis of confidence that would shake the institutional foundations of the ICC. This Article concludes with the uncontroversial premise that preserving jurisdictional compatibility rather than competition is likely to be the decisive determinant whether the ICC successfully coexists with state sovereignty to advance mutually beneficial interests of international peace and security. Such a cooperative and healthy synergy is by no means assured, and could be completely undermined by an overly aggressive erosion of complementarity in practice. If complementarity becomes the vehicle for overriding the discretion of domestic officials and displacing their authority based on the preferences of the ICC Prosecutor of Pre-Trial Chambers, the original function of the complementarity principle will have been eviscerated and the long term effectiveness of the ICC will be predictably endangered.

II. An Overview of the ICC Framework

A. The Nature of Complementarity

Complementarity is designed to serve as a pragmatic and limiting principle rather than an affirmative means for an aggressive prosecutor to target the nationals of states that are hesitant to embrace ICC jurisdiction and authority. The provisions of the Rome Statute preserve a careful balance between maintaining the integrity of domestic adjudications and authorizing a supranational court to exercise power where domestic systems are inadequate. In preserving this delicate balance, complementarity is best viewed as a restrictive principle rather than an empowering one; while the ICC has affirmative powers as a supranational court, the textual predicates necessary to make a case admissible are designed to constrain the power of the Court. Hence the operative language in Article 17 mandates that "the Court shall determine that a case is inadmissible" where the criteria warranting exclusive domestic authority are met as specified in the Statute itself.[11] The prohibition on ICC authority in Article 17 results in a terminological shift by which the concept of complementarity is embedded into treaty provisions that articulate the considerations and criteria for the admissibility of a particular case, which in turn implies that domestic states may have competing claims to jurisdiction without the possibility of ICC interference.

11.Rome Statute, *supra* note 1, art. 17(1).

The complementarity principle was the motivating force behind a court built around a limited and defined authority to take jurisdiction that operates when needed to supplement domestic court systems. The initial limiting function of complementarity derives from the treaty basis of the ICC. As a fundamental premise of treaty law, states should be bound to a treaty only by voluntarily relinquishing part of their sovereign rights manifested through the signing and implementation of the treaty into domestic systems.[12] States ceded some sovereign prerogatives to the Court by ratifying the Rome Statute, but may well find that the Court uses the principle of complementarity over time to infringe state sovereignty in unanticipated ways.

From the Prosecutor's point of view, jurisdiction under the provisions of Article 12 and admissibility under Article 17 are both mandatory prerequisites for ICC authority.[13] This scheme is a significant evolution from earlier drafts that allowed an "inherent" ICC jurisdiction over some crimes.[14] The United States was on record as supporting such an inherent jurisdictional scheme for the genocide offenses.[15] In fact, the 1994 International Law Commission Draft included a

12. Vienna Convention on the Law of Treaties art. 12, 14, May 23, 1969, *reprinted in* 8 I.L.M. 679. This foundational truth is echoed in the provisions that a treaty does not create obligations for a third state without its consent. *Id.* art 34. Thus, for example, States Parties have an affirmative obligation to cooperate with the Court and abide by the decisions of the Assembly of States Party or the International Court of Justice in the resolution of disputes among themselves or between a state or group of states and the Court. Rome Statute, *supra* note 1, art. 119(3).
13. Sadat & Carden, *supra* note 4, at 417.
14. Brown, *Primacy or Complementarity, supra* note 3, at 417-28 (describing the advantages and disadvantages of such an inherent supranational scheme).
15. David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation for the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State, Testimony Before the Subcommittee on International Operations of the Senate Foreign Relations Committee, Washington, D.C., July 23, 1998, S. Hrg. 105-724, at 13 (Ambassador Scheffer referred to a regime of "automatic jurisdiction over the crime of genocide" in describing the inherent regime of the ILC Draft.). *See also* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. VI (providing that persons charged with genocide shall be tried by a competent tribunal of the state in 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 1948 debates over the Genocide Convention, the United States actually made a proposal that sounded remarkably close to the modern formulation of complementarity in the ICC context. The proposal would have added an additional paragraph to Article VII of the Genocide Convention to read as follows: "Assumption of jurisdiction by the international tribunal shall be subject to a finding that the State in which the crime was committed has failed to take adequate measures to punish the crime." U.N. Econ. & Soc. Council [ECOSOC], Ad

provision that allowed the ICC to have automatic jurisdiction over the crime of genocide, which would have created a truly concurrent jurisdiction, at least over these offenses.[16] Unlike the *ad hoc* tribunals that are grounded in the Chapter VII authority of the United Nations Security Council, a system built on a straight assertion of supranational primacy was not a "politically viable alternative for a permanent ICC."[17] A straightforward scheme of concurrent jurisdiction would almost certainly have resulted in ever present jurisdictional clashes between the ICC and one or more states with valid claims based on established principles such as nationality, territoriality, or passive personality.[18] Rather than a flawed system of inherent or explicit concurrent jurisdiction, the Rome Statute's jurisdictional scheme requires the progressive factual inquiries and judicial findings that implement an appropriate balance of authority between the supranational court and domestic states. The principle of complementarity (as implemented in the admissibility regime) carries the legal weight of this fundamentally important allocation of adjudicative authority.

The prevailing opinion around the world is that the creation of the ICC as a court of limited and defined jurisdiction based on a multilateral treaty manifests the sovereign right possessed by individual states to transfer cases over which they may exercise jurisdiction to the Court.[19] As former ICC President Kirsch wrote, the Rome Statute "does not bind states that are not parties to the Statute. It simply

Hoc Comm. on Genocide, *Report and Draft Convention Prepared by the Ad Hoc Committee on Genocide*, U.N. Doc. E/794 (1948), *reprinted in* Memorandum Submitted by the Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction, 142, U.N. Doc. A/CN.4/7Rev.1 (1949). The proposal was rejected by a vote of five votes to one with one abstention (the USSR) on the basis that such a paragraph would prejudice the question of the court's jurisdiction. *See id.*

16. Int'l L. Comm'n, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, art. 21(1)(a), 25(1), U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc A/49/10 (1994) [hereinafter *ILC Draft Statute*].
17. Brown, *Primacy or Complementarity, supra* note 3, at 431.
18. M. Cherif Bassiouni & Christopher Blakesly, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 170 (1992).
19. *See generally* Michael Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 74-75 (2001). A possible exception to this statement may be a Security Council referral to the Court made under Article 13(b), as a Security Council Chapter VII resolution technically embodies the preexisting consent of states pursuant to Article 25 of the UN Charter that obligates states "to accept and carry out the decisions of the Security Council." U.N. Charter, art. 25. In addition, this statement is controversial in light of the argument that the Court may exercise jurisdiction in cases where only one party has consented to the jurisdiction of the Court.

confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in territories to which they travel, including laws arising from treaty obligations."[20] This reframing of complementarity operates against the backdrop that at both the state and international level, there is general agreement that individual states should be the primary forum for investigation and adjudication.

B. Textual Limitations on the scope of ICC Authority

State Parties have agreed to delegate their sovereign right to investigate and adjudicate to the ICC should they not adequately pursue the case themselves and undertake obligations of cooperation and assistance to the Court. However, this transfer of sovereign authority is neither unlimited in scope nor unrestricted in content. Only when the state forums are dysfunctional due to inherent incapacity or due to politicized paralysis does the international institution assume primacy under complementarity. The complex and interconnected provisions of Articles 12 (specifying ICC jurisdiction), 13 (delineating the grounds for initiating an ICC case), and 17 (providing the textual basis for making the requisite rulings on admissibility) together form a composite regime to balance ICC power against the residual responsibilities of states. In particular, the text of Article 17 articulates the agreed upon framework for assessing the balance of authority and implicitly preserves the preference of the drafters for domestic power. If every state around the world implemented a range of domestic legislation to prosecute crimes of genocide, crimes against humanity, and war crimes committed during armed conflicts, then the dream of ICC proponents for an end to impunity for those offenses would have been achieved even in the absence of any ICC action.

1. Article 12 Limitations on the Jurisdiction of the Court

In order to ensure the preservation of individual state sovereignty and fulfill the promises of complementarity, the Rome Statute contains specific restraints on the exercise of the Court's power. Article 12 sets out the preconditions for exercise of the Court's jurisdiction, and thereby provides the preconditions which permit an

20. Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment,* ASIL Newsletter (Am. Soc'y of Int'l Law, Washington, D.C.) Nov.-Dec. 1998, at 1, 8.

involved party to appropriately transfer jurisdiction to the Court.[21] First, and perhaps most importantly, any state becoming party to the Rome Statute accepts the jurisdiction of the Court where the case is admissible.[22] In addition, the Court will have jurisdiction in a case where either (a) the *actus reus* for the alleged crime occurred on the territory of a State Party to the Rome Statute; or (b) the perpetrator[23] is a national of a State Party.[24] Finally, any state who is not party to the ICC but consents to the Court's jurisdiction will serve as adequate means to transfer jurisdiction to the ICC.[25]

The practical effects of Article 12 are significant as they embody the theory that the Court should not have jurisdiction where states involved have not consented to it. On its face, Article 12 operates to preserve the jurisdictional primacy of sovereign states. The preconditions under Article 12 serve as a limitation on the Court; at a minimum, one state that would normally be able to exercise jurisdiction over the case will have manifested consent to the jurisdiction of the Court. Should all states involved in a conflict refuse to consent to the power of the Court,[26] the conditions of Article 12 have not been met and the ICC is powerless to hear the case in the absence of a Security Council referral of the situation using the scope of Chapter VII authority. A contentious aspect of Article 12 is that when a case is initiated through state referral or through the initiative of the Prosecutor, *all* states

21. The preconditions for jurisdiction in Article 12 seem to only apply when a case is referred to the Court by a State Party or when the Prosecutor initiates an investigation. *See* Rome Statute, *supra* note 1, art. 13(a), (c) (indicating that Article 12(2) is not applicable in the case of a Security Council Referral under Article 13(b)).
22. *Id.* art. 12(1).
23. There was extensive debate during the drafting of the Elements of Crimes for the International Criminal Court over the relative merits of the terms "perpetrator" or "accused." Though some delegations were concerned that the term perpetrator would undermine the presumption of innocence, the delegates to the Preparatory Commission (PrepCom) ultimately agreed to use the former in the Elements after including a comment in the introductory chapeau that "the term 'perpetrator'" is neutral as to guilt or innocence. *See* Preparatory Comm'n for the ICC, *Report of the Preparatory Commission for the International Criminal Court, Addendum Part II: Finalized draft text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000), *reprinted in* KNÜT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 14 (2002).
24. Rome Statute, *supra* note 1, art. 12(2).
25. *Id.* art. 12(1), (3).
26. Under Article 12, signing and ratifying the Rome Statute signifies consent of that state to the Court's jurisdiction. *Id.*

involved in the conflict need not consent to ICC jurisdiction.[27]Article 12 only requires that "*one* or more" states have accepted the jurisdiction of the Court.[28]

This distinction is important, because the Rome Statute does not require *all* parties to consent before the Court exercises jurisdiction. In effect, if nationals of a state that is not a party to the treaty commit crimes on the territory of a State Party, then that state has agreed *a priori* that the ICC can exercise its jurisdiction as an extension of the uncontroverted right of the territorial state to punish all persons who have committed crimes on its soil, regardless of their nationality. However, there is nothing in the text that describes jurisdiction to indicate that the overarching right of the territorial state to exercise its own judicial authority is in any way waived or undermined absent its express consent.

2. Article 13 Limitations on ICC Authority

Careful examination of Article 13 reveals that the ICC is not a court of universal jurisdiction. Universal jurisdiction in its pure form is an all inclusive form of jurisdiction which empowers national courts operating on a horizontal plane of authority to investigate and/or prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim, or the absence of any links to the state where the court is located.[29] However, despite the arguments of some fierce Court critics, [30] Articles 12 and 13

27. *See, e.g.*, Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 869 (1999) ("The U.S. government claims that the Statute violates this rule because, in some cases, it could allow the ICC to try individuals for serious international crimes without the consent of their national governments. The theory apparently is that if the ICC tries an *individual* for a crime, that individual's home *state* in some extended sense is being subjected to obligations under the Statute.").
28. Rome Statute, *supra* note 1, art. 12(2).
29. The justification for universal jurisdiction maintains that "certain crimes [including, specifically, genocide, crimes against humanity, war crimes, torture, extrajudicial executions and 'disappearance'] are so serious that they amount to an offence against the whole of humanity and therefore all states have a responsibility to bring those responsible to justice." Amnesty International, Universal Jurisdiction, http://www.amnestyusa.org/international-justice/universal-jurisdiction/page.do?id=1041148 (last visited Nov. 10, 2009).
30. *Cf.* John R. Bolton, Under Secretary for Arms Control and International Security, *The United States and the International Criminal Court*, Remarks to the Federalist Society, Nov. 14, 2002 (arguing that "the ICC's authority is vague and excessively elastic, and the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature. This is most emphatically *not* a Court of limited jurisdiction . . . The ICC statute

do not embed a theory of universal jurisdiction into every action by the Office of the Prosecutor. Instead, Article 13 sets out three circumstances in which the Court may take authority over a case provided that the jurisdictional prerequisites of Article 12 have been met. The first situation arises when a State Party refers the situation to the Prosecutor.[31] On its face it may seem axiomatic that a case arising from a situation in which the state has consented to the exercise of ICC jurisdiction also may bypass the admissibility analysis. However, there are many unanswered dimensions to what is likely to be a recurring dilemma faced by the ICC. For example, if a State Party refers a case to the Prosecutor, has the state completely relinquished all control over the case, or may it withdraw the referral at a later time? Essentially, the threshold inquiry is whether a state referral should be a "reversible right."[32]

Treating a state referral as a "reversible right" would have an inevitable effect on the capability of ICC mechanisms to properly function. Superficially, a "reversible right" does not directly strip the Court of any power. A state that refers a case to the Court and then demands that the case be returned to its domestic jurisdiction would nevertheless remain subject to the possibility of a *proprio motu* investigation initiated by the Prosecutor.[33] Although the Court may exercise jurisdiction over the state, the existence of a "reversible right" would so greatly politicize the process outlined in Article 13(a), that this mechanism would lack any real significance. If a state could defeat the jurisdiction of the ICC by simply revoking its previous consent to the Court, there would be no limit to the politicization and polarization that would accompany any state referral. Therefore, a state could invoke its "reversible right" on any pretext, even if it merely disagreed with a specific charge or the person being investigated; such a legal posture would create an untenable imbalance of power in that states would be empowered to simply dictate charges and perpetrators to the ICC.

claims jurisdiction over every individual in the world for war crimes, genocide, crimes against humanity and aggression—even over persons from non-ratifying countries.").

31. Rome Statue, *supra* note 1, art. 13(a); *see also id.* art. 12(2) (reading this provision in conjunction with Article 12(2), the State Party must also have nationality or territorial jurisdiction over the crime).
32. The issue presented here of a "reversible right" of referral is precisely that unfolding in the present circumstances of the Ugandan referral of the situation in Northern Uganda. *See* Fabius Okumu-Alya, *The International Criminal Court and its Role in the Northern Uganda Conflicts – An Assessment,* 4 UGANDA LIVING L. J. 16 (2006).
33. Rome Statute, *supra* note 1, arts. 13(c), 15.

Accepting, *arguendo*, that states may not revoke consent to jurisdiction over a situation, does not resolve the underlying tension regarding admissibility.[34] In other words, debate remains open whether the specific cases within a larger situation are severable and thus subject to prosecution in *either* the domestic courts or the ICC in accordance with the complementarity principles. Furthermore, it is conceivable that states could even envision prosecution of some individuals domestically, while consenting to ICC authority over other perpetrators facing charges for the same conduct under the same circumstances. Allowing states to sever a situation may have the same effects as a "reversible right" of referral—the adjudication becomes subject to political pressures of the state. The consistency and fairness of adjudications could easily be undermined if the referring state were able to dictate to the Court the specific circumstances and offenders over which the self-referral empowers the Court. This could lead to the conclusion that a situation should not be severable: either a state refers the entire situation or does not refer the case at all. On the other hand, there is no textual support at all in the Rome Statute for a presumption that a state referral operates as a wholesale abandonment of the preexisting right of the state to prosecute selected offenders under the complementarity principle.

Secondly, the ICC may exercise its jurisdiction when the case has been referred to the Prosecutor by the Security Council under Chapter VII of the Charter of the United Nations.[35] On those occasions, the ICC Prosecutor must confront a conceptual dilemma generated by the interface between the complementarity principle and Security Council actions under its Chapter VII authority. Article 13(b) is particularly relevant as it defines the outer limits of the complementarity principle. This path was embodied in the 1994 Draft Statute prepared by the International Law Commission[36] and represents the simplest and least controversial track towards ICC adjudication of a particular case. The Security Council has absolute authority to define the territorial, temporal, or normative scope of the Prosecutor's license to proceed based on its plenary power with regard to actions designed to maintain or restore international peace and security. With regard to the

34. Patrick Dowd & Michael P. Scharf, *No Way Out? The Question of Unilateral Withdrawals of Referrals to the ICC and Other Human Rights Courts*, 9 CHI. J. INT'L L. 573 (2009).
35. Rome Statute, *supra* note 1, art. 13(b).
36. *ILC Draft Statute*, *supra* note 16, art. 23.

state prosecutorial prerogatives, a Chapter VII referral should override a state's inherent national authority to insist on using its own judicial processes.[37]

Even though jurisdiction under Article 13 is a legal inquiry distinct from admissibility under Article 17 (which implements complementarity via the admissibility regime), a Security Council referral should supersede the state's right to use its own courts as the forum of first resort. Again, as in the case of ICC jurisdiction noted above, this proposition proceeds from the premise that state sovereignty is impinged based upon treaty-based consent.[38] While the text of the Rome Statute ostensibly preserves a state's authority to implement complementarity following a Security Council referral (which is precisely what the Sudanese have argued in the aftermath of Resolution 1593), the obligation of all states to "accept and carry out the decisions of the Security Council"[39] effectively nullifies the right of complementarity. Furthermore, all members of the United Nations are obligated to comply with orders of the Security Council, even if the Rome Statute or any other international agreement would impose conflicting obligations.[40]

Hence, in practice, the gap between the primacy approach of the ICTY and ICTR and the diametrically opposed complementarity principle of the ICC will likely be minimal in situations arising under Article 13(b). Therefore, the states involved may not invoke the prospect of criminal proceedings using complementarity as a weapon to undermine the interests of justice or obstruct the operations and investigations of the Court.[41] A Security Council referral, therefore,

37. U.N. Charter, art. 2(7) (empowering the Security Council to interfere with matters that would otherwise remain within the realm of purely internal affairs governed by internal law with the adoption of a Chapter VII resolution).
38. *See infra* notes 10-20 and accompanying text.
39. U.N. Charter, art. 25.
40. *Id.* art 103.
41. An example of a Security Council referral where the individual state will not submit to the jurisdiction of the Court is the current situation in Sudan. *See* Elena Baylis, Univ. of Pittsburgh Sch. of Law, *Why the International Criminal Court Needs Darfur (More Than Darfur Needs the ICC)*, JURIST, http://jurist.law.pitt.edu/forumy/2005/06/why-international-criminal-court-needs.php ("On March 31, 2005, the United Nations Security Council adopted Resolution 1593, referring the ongoing conflict in Darfur to the International Criminal Court . . . The systematic attacks on defenseless villages that have occurred in Darfur are classic examples of war crimes and crimes against humanity, and, depending on the intent of the attackers, may constitute genocide as well . . . Although Sudan (the state on whose territory the attacks occurred and the state of nationality of most potential defendants) is not a party to the Rome Statute and has not accepted the ICC's exercise of jurisdiction, the Security Council's resolution confers jurisdiction on the court in this case .

has the practical effect of creating jurisdictional primacy for the ICC similar to that enjoyed by the ICTY and ICTR. Nevertheless, the primacy principle has reinforced the procedural and legal impact of Security Council action regarding the relative authority of international and domestic judicial systems. As will be seen below, this exception is all the more striking because it should represent the *lex specialis* rather than the default principle that overrides the normal admissibility criteria

The final circumstances warranting ICC authority include situations where the Prosecutor exercises the discretion of his/her office to initiate an investigation with respect to the states involved.[42] Under Article 15, which governs the procedure for *proprio motu* investigations, the Prosecutor can initiate investigations for crimes falling within the jurisdiction of the Court.[43] Once the Prosecutor determines that there is a reasonable basis to proceed with an investigation, he must submit a request for authorization to the Pre-Trial Chamber.[44] By allowing the Prosecutor to initiate investigations *proprio motu*, states are unable to prevent the most serious of perpetrators to go unpunished.[45] With regards to conflict-torn areas, many states are simply incapable of enforcing the law after surviving the preceding hostilities. As such, the legal mechanism allowing the Prosecutor to initiate a case, while the state turns its efforts to rebuilding, best serves the interests of justice.[46]

The *proprio motu* powers of the Prosecutor represent one of the most potent flashpoints of previous criticisms of the ICC, and could in fact quickly overwhelm the prosecutorial capacity and political viability of the Court.[47] Although the

. . In particular, Sudan's opposition to the ICC's involvement represents both practical and fundamental obstacles for the court. On a practical level, no international tribunal can operate without a state's cooperation in turning over defendants and evidence and permitting investigation. If Sudan shields its citizens from the ICC, the court will be hard pressed to proceed against them.").

42. Rome Statute, *supra* note 1, art. 13(c). Like Article 13(a), this provision is subject to the requirements of Article 12(2).
43. *Id.* art. 15(1).
44. *Id.* art. 15(3).
45. This is one of the legal mechanisms allowing the Rome Statute to fulfill its purpose. *See* Rome Statute, *supra* note 1, pmbl. (stating the purpose of the creation of the International Criminal Court).
46. *See* Statements by Justice Louise Arbour, Prosecutor for the International Criminal Tribunals for Yugoslavia and Rwanda, to the Preparatory Committee on the Establishment of an International Criminal Court, Fifth Session, New York, 8 Dec. 1997 (arguing that a strong prosecutorial office is necessary, because the Prosecutor is often working against the backdrop of States that are not properly functioning or not willing to cooperate after recently emerging from armed conflicts marked by massive human rights violations).
47. As of February 2006, the Office of the Prosecutor (OTP) had received 1732 communications from individuals or groups in at least 103 different countries; the

Prosecutor has stated that he "remains ready to exercise his *proprio motu* power with firmness and responsibility,"[48] the exercise of investigative power by the ICC in the absence of either Security Council mandate or state consent remains the most visible point of friction between domestic and supranational jurisdiction. Nevertheless, despite the reality that the Prosecutor might have expended significant amounts of limited human capital in a particular investigation, in cases where the initiation of the Prosecutor's *proprio motu* powers causes the domestic state to investigate the same crimes and to initiate prosecutions in appropriate cases, it appears incontrovertible that the case would be inadmissible in the ICC.

3. The Admissibility Framework

Complementarity has been affirmed by the international community as the best form of jurisdiction for an international adjudicatory institution.[49] The challenge, however, is defining complementarity in terms of legal mechanisms with binding force that preserve the balance between domestic and international power. The admissibility requirements, unlike the jurisdictional predicates, do not speak to the Court's power to hear a case, but rather serve as a mechanism to give state jurisdictions primacy over the supranational forum. The admissibility requirements are important in part because they were so carefully negotiated by states in order to preserve the primacy of domestic jurisdictions, but they also serve to focus scarce

communications include reports alleging crimes in 139 countries in all regions of the world. *See* The Office of the Prosecutor of the ICC, Update on Communications Received by the Office of the Prosecutor of the ICC (Feb. 10, 2006) (Eighty percent of these communications were found by the OTP to be manifestly outside the jurisdiction of the Court). The number of requests has skyrocketed in recent years, and by the end of January 2009, the OTP had received 7832 communications, determining that 3490 of them "manifestly do not provide any basis for the Office of the Prosecutor to take further action." U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: REPORT OF AN INDEPENDENT TASK FORCE, AMERICAN SOCIETY OF INTERNATIONAL LAW 18-19 (March 2009), *available at* http://www.asil.org/icc-task-force.cfm (last visited February 9, 2010).

48. The Office of the Prosecutor of the ICC, Update on Communications Received by the Office of the Prosecutor of the ICC (Feb. 10, 2006).

49. John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT AND THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS 41, 73-74 (Roy S. Lee ed., 1999) ("Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court . . . The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime . . . it remains clear to those most active throughout the negotiations that any shift in the balance struck in Rome would likely have unravelled [sic] support for the principle of complementarity and, by extension, the Statute itself.").

ICC resources on the cases where its role is most beneficial. Indeed, the capacity limitations of the ICC indicate that where state forums can adjudicate cases equally as well, the domestic court is preferable.[50] In short, though they represent some of the most important political dimensions of ICC operation, the admissibility criteria also represent some of its most important pragmatic constraints.

As a preliminary matter, the substantive jurisdiction of the ICC is limited to only "the most serious crimes of concern to the international community as a whole."[51] This threshold is a subtle, yet potentially powerful, constraint on the Prosecutor's power *vis à vis* sovereign forums. To that end, Article 17(1)(d) of the Rome Statute restates that a case is inadmissible where there "is not sufficient gravity to justify further action by the Court."[52] Operating in tandem with the Article 17 gravity criteria, Article 53(1)(c) permits the Prosecutor to take into account the gravity of the crime when determining whether to proceed with an investigation.[53] These provisions were especially notable in the aftermath of more than 240 communications received by the Prosecutor raising allegations related to the 2003 invasion of Iraq by coalition forces. The Prosecutor restated the criteria for launching formal investigations, and emphasized that any investigation must also serve "the interests of justice" in accordance with Article 53(1)(c). The Prosecutor declined to initiate an investigation, and explained in the penultimate paragraphs explaining his decision that:

Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.... In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office has collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.[54]

50. Hakan Friman, *The International Criminal Court: Investigations into crimes committed in the DRC and Uganda. What is next?*, 13(4) AFR. SEC. REV. 19, 23 (2004).
51. Rome Statute, *supra* note 1, pmbl., para. 4 & art. 5(1). *See also* Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, Sept. 2003, 6-7.
52. Rome Statute, *supra* note 1, art. 17(1)(d).
53. *Id.* art. 53(1)(c) (stating that in deciding whether to open an investigation the prosecutor must take "into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice").
54. Letter from Luis Moreno Ocampo, Chief Prosecutor of the International Criminal Court, Response to inquiries concerning Iraq 9 (Feb. 9, 2009), http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-

In this circumstance, the Prosecutor invoked the gravity requirement as the necessary predicate for assessing other elements of admissibility. This ad hoc development of a tiered and sequential approach to admissibility is striking in light of the parallel structure of Article 17, which makes the admissibility criteria coequal at least on paper. The paradigmatic language of Article 17(1) sets out the admissibility framework that implements the underlying principle of complementarity. Article 17 declares in full that:

> 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.

The formulation that a case is inadmissible unless the domestic state is "unwilling or unable genuinely" to carry out the investigation or prosecution, has often become shorthand for admissibility, and the inherently subjective nature of the test has generated much debate over the best method for constraining the power of an overweening Prosecutor. To that end, paragraphs 2 and 3 of Article 17 attempt to provide specific factors the Court shall consider in evaluating the effort of the domestic jurisdiction with respect to its unwillingness or inability to investigate or prosecute.[55] The factors enumerated for determining if a state is *unwilling* to prosecute include whether the proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility,[56] whether there was an unjustified delay in the proceedings,[57] or whether the proceedings were not being conducted independently or impartially.[58] The determination of the

B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Nov. 8, 2009).

55. Rome Statute, *supra* note 1, art. 17(2)-(3).
56. *Id.* art. 17(2)(a).
57. *Id.* art. 17(2)(b).
58. *Id.* art. 17(2)(c).

inability of a domestic court to adjudicate the case is "whether due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[59]

In sharp contrast, the subjective requirement "genuinely" is left completely to the Court to ascertain. This gap caused a distinguished international scholar to observe that this aspect of Article 17 is "enigmatic."[60] Accepting the reality that some external standard of review was needed to prevent illusory efforts by states, delegates rejected a series of proposed phrases such as "ineffective," "diligently," "apparently well founded," "good faith," "sufficient grounds," and "effectively" on the basis that such formulations remained too subjective.[61] In the final analysis, the formulation "genuinely" was accepted by delegations as being the least subjective concept considered, while at the same time eliminating external considerations of domestic efficiency in the investigation or prosecution.[62]

As a logical extension of these provisions, Article 18 implicitly places control of investigations with states, unless the Prosecutor can otherwise show that such a decision does not serve the interests of justice. Article 18 requires that when the Court exercises jurisdiction through a State Party referral or by a *proprio motu* investigation, the states involved have one month to respond with their own investigation.[63] If a state notifies the Court of its investigation, the domestic investigation is automatically given primacy unless the Prosecutor submits an application to the Pre-Trial Chamber.[64] The language is unequivocal: "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."[65] The burden thus lies with the Prosecutor to prove that the state investigation is insufficient. This structure further implements state primacy by

59. *Id.* art. 17(3).
60. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 67 (2001).
61. Rod Jensen, *Complementarity, "Genuinely" and Article 17: Assessing the Boundaries of an Effective ICC*, *in* COMPLEMENTARY VIEWS ON COMPLEMENTARITY 147, 155 (Jann Kleffner & Gerben Kor eds., 2006).
62. John Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (A. Cassesse et. al. eds., 1st ed. 2001).
63. Rome Statute, *supra* note 1, art. 18(2).
64. *Id.*
65. *Id.*

making the state investigation the default response of the Court. If the Prosecutor wants to proceed with the case, he must apply to the Court and then prove that the state's investigation is inadequate.

III. Procedural Aspects of Complementary Jurisdiction

While the clear preference of the ICC is to maintain the sovereign authority of individual states, the Court does not view these considerations as simply a matter of policy; rather, there are specific legal mechanisms built into the Rome Statute that uphold the principle of complementarity. Legal mechanisms are integrated into all three departments of the Court—the Office of the Prosecutor, the Pre-Trial and Trial Chambers, and the Appellate Chamber—to ensure that the Court is only exercising proper authority with the possibility of review, albeit entirely internal institutional review. Furthermore, the legal mechanisms built into the treaty serve complementarity in two different respects: on the one hand, complementarity assures respect for the sovereignty of individual states by allowing them primacy of jurisdiction; on the other hand, complementarity allows the Court to assume a case when domestic jurisdictions refuse to prosecute or are incapable of prosecuting, halting impunity.

As one of his most internationally sensitive and significant roles, the Prosecutor serves as an intermediary between the Court and the states with the authority to investigate and prosecute offenses within the jurisdiction of the Court. Article 18(1) requires that the Prosecutor notify all states that would normally exercise jurisdiction over the case when he commences an investigation.[66] This requirement extends not only to State Parties, but as the provision explicitly notes "all State Parties *and those states which . . . would normally exercise jurisdiction over the crimes concerned*,"[67] implying that the Court wants to put all relevant domestic states on notice. Importantly, the right to jurisdictional primacy attaches to states irrespective of their status as a State Party. Complementarity is in no way limited to the nationals of states who are parties to a given case. The notification requirement protects the right of other domestic courts to assume jurisdiction under complementarity if the domestic state initiates its own national investigation.[68] The

66. *Id.* art. 18(1).
67. *Id.* (emphasis added).
68. *See id.* art. 18(2) (explaining that within a month of receiving notification from the Prosecutor, a state may notify the Court that it is conducting an investigation to which the Prosecutor must defer unless the case is determined to be admissible before the Court).

notification requirement, therefore, provides a legal mechanism that encourages communication, but more importantly, mandates notice of a potential investigation and/or adjudication by the Court, allowing the state to exercise jurisdiction by invoking complementarity.[69]

The ICC Prosecutor is also equipped with the power to determine if a state is adequately investigating or adjudicating a case when the state claims jurisdiction. According to Article 18, the Prosecutor may require periodic updates from a state regarding pending investigations, which states are required to provide without undue delay.[70] If the Prosecutor is not satisfied that a state is sufficiently investigating a case, the Prosecutor may submit a request to Chambers for review of the decision on admissibility, arguing that new facts have arisen negating the basis for which the case was previously found to be inadmissible.[71] Allowing the Prosecutor to approach Chambers after a prior ruling on admissibility ensures that once a state assumes jurisdiction, it must proceed with legitimate efforts to bring the perpetrators to justice. Hence, a sovereign state may not simply invoke its right to complementarity in order to obtain control over a case and then refuse to proceed with an investigation or conduct an investigation without intending to bring the perpetrators to justice.

The threshold question for the Prosecutor in determining whether a state is adequately handling a case turns on whether the Prosecutor determines if there is a reasonable basis to proceed.[72] If the Prosecutor determines that a state's investigation of a case complies with the expectations of the Court, then he should subsequently determine in accordance with the language of the Rome Statute, that there is no reasonable basis to proceed with an investigation on behalf of the Court.[73] This decision, however, is left solely to the discretion of the Prosecutor;

69. "If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the State's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber." Michael P. Scharf, Wash. Univ. Sch. of Law, Int'l Debate Series No. 1: The Case for Supporting the International Criminal Court (2002).
70. Rome Statute, *supra* note 1, art. 18(5).
71. *Id.* art. 19(10).
72. *Id.* art. 18(1).
73. An example of the successful functioning of complementarity, where the Prosecutor deferred to the successful investigation and prosecution of the State is demonstrated by *R v. Sec'y of State for Def.* The case involved the conduct of British soldiers in Iraq who were thought to have unlawfully killed and tortured Iraqi civilians during their occupation. The case was brought to the attention of the ICC, but the British government readily assumed

there are no structural mechanisms within the Rome Statute that provide for collaboration in this decision. While the Pre-Trial Chambers must authorize the Prosecutor to continue with his own investigation, nothing in the Statute prevents the Prosecutor from announcing, on behalf of the Court, that a state investigation was determined to be inadequate.[74] This could have important and far-reaching repercussions for states. Such a determination by the Prosecutor implicitly speaks to a state's apparent willingness to cooperate with the Court or resolve the situation, which could lead to tension in the international community.

The Pre-trial and Trial Chambers are given significant authority before and during a trial which in effect provide some degree of limitation on the power of the Prosecutor in the interests of domestic primacy. First and foremost, the Pre-trial and Trial Chambers must provide affirmative authorization to permit continuation of a *proprio motu* investigation.[75] The Prosecutor must convince Chambers that "there is a reasonable basis to proceed with an investigation" after presenting an application for authorization along with any supporting material collected.[76] The duality of roles allows the Pre-trial and Trial Chambers to maintain flexibility needed for the successful functioning of complementarity. In many cases, complementarity will require restraint by the Court and deference to domestic jurisdictions; meanwhile, other instances will require the Court to take an active role in investigation and adjudication. These provisions diffuse control of investigatory powers that impede state sovereignty beyond a single person or office, and in theory operate to depoliticize the Court.

Article 19 mandates that the Pre-Trial Chambers examine the question of jurisdiction regardless of whether or not a party raises the issue.[77] Similar to the issue of jurisdiction, the Court may also review admissibility *sua sponte,* which is fast becoming the norm in actual practice.[78] Review of admissibility, though, is not

jurisdiction over the case and proceeded with an investigation and prosecution of the soldiers. The ICC Prosecutor did not request authorization to conduct a subsequent investigation, finding the British adjudication sufficient to meet ICC standards under complementarity. *See generally* R v. Sec'y of State for Def., (2007) 3 W.L.R. 33 (H.L.).

74. Rome Statute, *supra* note 1, art. 18(1).
75. *Id.* art. 15(3).
76. *Id.*
77. *Id.* art. 19(1).
78. *See* BLACK'S LAW DICTIONARY 1464 (8th ed. 2004) (defining *sua sponte* as "Without prompting or suggestion; on its own motion <the court took notice sua sponte that it lacked jurisdiction over the case>.").

mandated on the face of the Rome Statute,[79] meaning that if a State Party fails to raise the issue of admissibility before the Pre-trial or Trial Chambers, the Court may still proceed without deciding the issue on its own initiative. If a state wants the case removed to its domestic jurisdiction, the burden lies with the state to raise the issue of admissibility, providing incentives for the state to stay involved in the ICC process.[80]

Finally, under Article 57(3), Chambers may authorize the Prosecutor to take investigative steps within the territory of a State Party without previously securing cooperation from domestic officials.[81] This provision has significant implications as it allows the Chambers to authorize the Prosecutor to enter sovereign territory without the agreement of the state. Yet, there is an explicit grant of sovereign authority to enter state boundaries insofar as this provision only applies to States Parties.[82] Therefore, by signing and ratifying the Rome Statute, states agree to defer to the ruling of Chambers on whether the Prosecutor needs to enter the territory of that domestic jurisdiction without prior state authorization.

The Appellate Chamber is the final source of review under the Rome Statute and as such another legal mechanism built into the Rome Statute to promote complementarity. Similar to the Pre-trial and Trial Chambers, the Appellate Chamber may also provide a source of review for issues of jurisdiction and admissibility. Article 19 permits that "decisions with respect to jurisdiction and admissibility may be appealed to the Appeals Chamber."[83] The Appellate Chamber may review any decision regarding the "granting or denying release of a person being investigated or prosecuted"[84] and any decision by the Pre-Trial Chamber to act on its own initiative.[85] The Appellate Chamber may also hear an Article 57(3)(d) challenge on an expedited basis following the ruling of the Pre-Trial

79. *See* Rome Statute, *supra* note 1, art. 19(1) (indicating that for jurisdiction the helping verb is "shall" but for admissibility the verb is "may").
80. *See id.* art. 19(2)(b)-(c), 19(4) (allowing a state to challenge the admissibility of a case before the Court).
81. Rome Statute, *supra* note 1, art. 57(3)(d).
82. *Id.* ("[Chambers may] authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State.").
83. *Id.* art. 19(6).
84. *Id.* art. 82(1)(b).
85. *Id.* art. 82(1)(c) (granting the Appellate Chamber authority over initiatives the Pre-Trial Chamber can undertake on its own authority in Article 56(3)).

Chamber, which would include actions to review rulings related to admissibility as appropriate[86]

IV. Criticisms Raised Against the Complementarity Structure

Complementarity is a manifestation of the best practical relationship between an international judicial institution and sovereign states, and is intended to validate the important interests of both entities. This is due to the pragmatic limitations inherent in transplanting a particular criminal case across continents and cultures, and in no small measure to the irreducible capacity constraints of an international institution. Not coincidentally, the same theoretical allocation of adjudicative authority is replicated in the context of human rights enforcement, trade litigation, and in other multinational forums. On a more philosophical level, complementarity reflects the reality that justice must be rooted in the perceptions and perspectives of the domestic population that hosts the victims of the crimes to represent an authentic and inherent virtue.

However, one of the most frequently cited criticisms of the Court is that complementarity is merely an illusion—a theoretical principle that has no real effect in practical application and actually discourages states to pursue individual responsibility.[87] Critics argue that while the principle ostensibly protects the primacy of domestic jurisdictions, the Court gives only superficial deference to domestic authorities, while using complementarity as a textual hurdle that serves as little more than a fig leaf to cover the political and personal manipulations of the Court.[88] The Court does not follow any standardized procedures for deferring to domestic jurisdictions, so there is no authoritative precedent or template to indicate when a situation would better be handled domestically.[89] The Court has already

86. *Id.* art. 82(2).
87. *See* William J. Haynes II, General Counsel of the Department of Defense, Explanation of U.S. position on the ICC, Address at the San Francisco World Affairs Council (May 30, 2002), http://www.defenselink.mil/speeches/speech.aspx?speechid=246 (arguing that "besides trampling on the authority of sovereign states, the treaty creates a regime that facilitates the abdication of state responsibility").
88. Diane Sabom, *ICC fails tests of American justice; critics say there is no system in place for holding the International Criminal Court accountable and warn that it could pose a significant threat to U.S. sovereignty*, INSIGHT ON THE NEWS, May 27, 2002, http://findarticles.com/p/articles/mi_m1571/is_19_18/ai_87024941.
89. *See, e.g.*, Rome Statute, *supra* note 1, art. 20(3)(b) (permitting adjudication by the ICC if the perpetrator has already been tried by another court so long as the ICC determines that the trial was either "for the purpose of shielding the person from criminal responsibility" or the proceedings "were not conducted independently or impartially . . . [consistent] with the

demonstrated a trend away from a purely textualist approach in interpreting the admissibility criteria found in Article 17,[90] which from some perspectives could be seen as validation of the larger criticisms of the ICC itself. In fact, the President of the Court, Judge Phillipe Kirsch, publicly acknowledged that the ICC "will really have to invent, create, and define the meaning of a state that is unable or unwilling to conduct genuine proceedings."[91] The tension in practice, therefore, is between the politicized exploitation of a purported textual constraint designed to prioritize domestic jurisdiction, and the natural evolution of a treaty provision which is undertaken with due deference to the competing interests of sovereign states and the normative interests that gave rise to the very concept of complementarity.

Though it is far beyond the scope of this Article to review the range of arguments surrounding ICC policy and prospects, two key criticisms of the court are directly relevant in assessing the future of complementarity as a viable limitation on the reach of the Court. Firstly, critics argue that the Rome Statute fails to adequately protect sovereign rights against the appropriate reach of supranational institutional power. This is often framed as a generalized argument that the Court imposes obligations on states that are not party to the ICC. This argument is seldom articulated precisely, though the Rome Statute does impose a range of obligations on states as a matter of treaty law such as assistance in finance, investigation, and facilities.[92] The provisions of the Rome Statute, which are the legal source of obligations, only apply to States Parties. The gravamen of the objection appears to be that the Court may exercise jurisdiction over nationals of non-States Party to the ICC under the current formulation of Article 12. These critics suggest that no principle of international law would allow an institution such as the ICC, a treaty based Court, to exercise jurisdiction over nationals of a state that has not expressly consented to the jurisdiction of the Court.[93] In addition, the

intent to bring the person concerned to justice"). There are no further guidelines, however, to standardize this determination; instead, it is left solely to the opinion of the Court.

90. Gregory McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT'L L. 325, 330-34 (2006).

91. Phillipe Kirsch, John Tait Lecture in Law and Policy (Oct. 7, 2003), *cited in* McNeal, *supra* note 90.

92. *See, e.g.*, Rome Statute, *supra* note 1, arts. 87, 93, 115 (specifying the obligations of State Parties as signatories of the treaty).

93. *See* Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840, 845-46 (2002); Lee A. Casey, Wash. Univ. Sch. of Law, Int'l Debate Series No. 1: The Case Against Supporting the International Criminal Court (2002) (The ICC undermines the "right of self-government—the first human right, without which all others are simply words on paper, held by grace and favor, and no rights at all.").

"ICC exercises the powers of a governing authority but has no mechanism to represent the consent of the governed."[94] This line of reasoning would logically lead one to conclude that the Court would seek to impose its legal determinations related to its jurisdictional authority as a validation of its institutional prerogatives, even against a non-States Party.

A second closely related critique is the argument that the legal and procedural mechanisms in the Rome Statute are insufficient to provide adequate checks on the power of the Prosecutor.[95] The extreme extension of this position claims that there is no protection against an overly aggressive Prosecutor who simply chooses to prosecute based on political motivations.[96] Alternatively, some have supported textually vague constraints based on the premise that the legal mechanisms granting powers to the Prosecutor are not strong enough. Working with broken, uncooperative states, past tribunals have demonstrated that the Prosecutor needs strong abilities and resources to pursue successful investigations and prosecutions, which are not adequately granted by the Rome Statute, and some experienced jurists have intimated that there may be an inevitable temptation on the part of a constrained ICC Prosecutor to seek an expansion of power in relation to states. [97]

94. *Id.*; *see also* Haynes, *supra* note 87 (claiming "the ICC and its prosecutor are accountable neither to any democratically elected body nor to the United Nations Security Council"). *But see* Munaf et. al. v. Geren et. al., 128 S. Ct. 2207, 2222 (2008) (in which a unanimous Supreme Court permitted extradition of American citizens to the courts of Iraq based on evidence that crimes related to terrorism were committed on Iraqi soil with the express acknowledgement that American citizens who commit crimes after traveling abroad remain within the territorial jurisdiction of the foreign state "whether or not the pertinent criminal process comes with all the rights guaranteed by our Constitution").
95. *See* Haynes, *supra* note 87 ("The Office of the ICC prosecutor, although created by a multilateral treaty, is an autonomous, largely unchecked, unilateral agency possessing virtually sweeping authority to prosecute offenses."); *see also* Bolton, *supra* note 30 ("Political checks are either greatly attenuated or entirely absent. They are effectively accountable to no one. The Prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The Prosecutor is answerable only to the Court, and then only partially.").
96. *See* Sabom, *supra* note 88 ("There are not 'sufficient safeguards in place [to] prevent purely political prosecutions.'").
97. Justice Louise Arbour, Address to the Preparatory Committee on the Establishment of an International Criminal Court (Dec. 8, 1997), *in* Press Release, ICTY, The Prosecutor of the International Tribunals for the Former Yugoslavia and for Rwanda, Urges that the International Permanent Court "Be Strong and Well Equipped to Operate as an Authoritative Mechanism," CC/PIO/271-E (December 8, 1997) (warning that the ICC should not become a "weak and powerless institution that would lack legitimacy," and telling delegates that "there is more to fear from an impotent than from an overreaching

Critics of the admissibility regime argue that the Pre-trial, Trial and Appellate Chambers are wholly ineffective mechanisms for the protection of state prerogatives related to the pursuit of complementarity. The Pre-trial, Trial, and Appellate Chambers, staffed with domestic judges from around the world, often lack expertise in international law generally and in almost no instance will articulate an interest in representing the interests of states to oppose actions by the Office of the Prosecutor; thus, many argue that cases would be better adjudicated in domestic courts, giving decisions more legitimacy.[98] Moreover, international judges have themselves been portrayed as targeting the perpetrator in pursuing their own political agenda.[99] Lastly, the Chambers of the Court are arguably insufficient to check politicized processes due to their very nature as integral aspects of the Court structure. This argument proceeds from the premise that internal legal procedures that ostensibly constrain prosecutions do little more than create a source of concentrated power that can operate based on the Court's agenda.[100] According to this view, some system of external legal checks on the Prosecutor is the only valid mechanism for protecting the rights of states to exercise their primacy of jurisdiction.[101]

These criticisms do not necessarily vitiate the principle of complementarity as a viable theory for defining the relationship between domestic courts and the ICC. Rather, they question the validity of legal mechanisms built into the Rome Statute

prosecutor") (the current efforts related to the Darfur situation are, at the time of this writing, demonstrating the accuracy of Justice Arbour's cautionary tale).

98. *See, e.g.*, Wasil Ali, *ICC Counsel Proposes Special Tribunal for Darfur War Crimes*, SUDAN TRIBUNE, September 11, 2007, http://www.sudantribune.com/spip.php?article23703 (arguing that the ICC judges do not have significant experience in Sudan to handle the case).

99. *See* Lauren Etter, *Call for ICC to Learn ICTY Election Lessons*, INSTITUTE FOR WAR AND PEACE REPORTING, November 26, 2004, http://www.iwpr.net/?o=163339&p=&s=f&apc_state=hena-Call%20for%20ICC%20to%20Learn%20ICTY%20Election%20Lessons_1_____publish_date_1_10_compact (suggesting that the appointment of ICC judges has been the result of political pressure and lobbying).

100. Casey, *supra* note 93 ("The ICC will act as policeman, prosecutor, judge, jury, and jailor—all of these functions will be performed by its personnel, with nothing but bureaucratic divisions of authority, and no division of interest. There would be no appeal from its judgments. If the ICC abuses its power, there will be no recourse. From first to last, the ICC will be the judge in its own case. It will be more absolute than any dictator.").

101. Sabom, *supra* note 88; *see also* Haynes, *supra* note 87 (stating that "because the ICC reserves for itself the power to judge the "unwillingness" or "inability" of States to prosecute their nationals, no effective mechanism exists to check a politically motivated decision as to whether a domestic investigation or prosecution was adequate.").

and their ability to facilitate successful implementation of complementarity as a settled nexus between states and the ICC.[102] There is a distinct danger that the routine practices of the Court, each perhaps justifiable in isolation or in the context of a peculiar case or situation, will, in the aggregate, erode complementarity to its vanishing point. If complementarity continues to have any force in the future (and the reader would do well to remember that the ICC is intentionally structured as a permanent institution) the ICC should defer to the good faith reasoning of domestic officials applying the law of the sovereign. In practice, if the ICC bows to the demands of expediency in the name of institution building or aggrandizement of power at the expense of domestic criminal jurisdictions, the critics may prove to have been prescient.

Section V will detail three emerging indications that the textual power of complementary may be eviscerated. In other words, future jurisprudence could well include long recitations that pay lip service to the concept of complementarity, and in fact apply the textual predicates of the admissibility regime, but do so adopting jurisprudential inferences developed by the Court as self serving justifications to subordinate state jurisdiction.

V. The Substantive Flashpoints

There is a distinct danger that the ICC of the future will ignore valid claims of state primacy based on its own jurisprudence of convenience. There are three evolving rationales by which complementarity could even be reframed as a positive basis for ICC adjudication. Contrary to the very precept of complementarity, the practice of prosecutorial discretion related to the choice of charges and the validity of one charge over another could be centralized in the

102. For an interesting discussion of the tension between domestic legal structures and the ICC, see Casey, *supra* note 93 ("Under Article 17, the Court can pursue a case wherever it determines that the responsible State was "unwilling or unable to carry out the investigation or prosecution." In determining whether a state was "unwilling", the Court will consider whether the national proceedings were conducted "independently or impartially." The United States can never meet that test as an institutional matter. Under the Constitution, the President is both the Chief Executive, i.e., the chief law enforcement officer, and the Commander-in-Chief of the armed forces. In any particular case, both the individuals investigating and prosecuting, and the individuals being investigated and prosecuted, work for the same man. Moreover, under command responsibility theories, the President is always a potential—indeed, a likely, target of any investigation. The ICC will simply note that an individual cannot "impartially" investigate himself, and it will be full steam ahead. As a check on the ICC, complementarity is meaningless.").

ICC. The methodology for this approach would simply be to reject a state investigation or prosecution because the form of the charges does not perfectly mirror those selected by the Office of the Prosecutor from the available range of options. Secondly, there is a discernable trend toward permitting the perceived gravity of crimes to serve as a basis for bypassing other indicia of inability or unwillingness. Lastly, there may be an evolving blindness towards a binding rule that a self referral of a case automatically extinguishes complementarity rights in perpetuity, irrespective of changing circumstances or subsequent events. These three trends will be analyzed below.

A. The Problem of Discretionary Charging

1. Domestic Implementation Rationales and Regimes

It is essential for states to criminalize the conduct that makes up the crimes listed in Article 5 for two main reasons. The first, and most important to an individual state, is the maintenance of the state's right to primacy jurisdiction under complementarity. The second, and from the perspective of the ICC equally important, is ensuring that the burden of international criminal cases is not displaced onto the Court which could in time buckle under the weight of raised expectations and disproportionate burdens. There are other factors that may lead a state to criminalize these crimes, including preventing a state from being used as a safe haven for those individuals who are fleeing prosecution and helping strengthen the international criminal justice system to ensure that atrocity crimes do not go unpunished. [103]

While the Rome Statute does not require States Parties to criminalize the ICC crimes in domestic law, in order to preserve the right to investigate and prosecute these crimes, it is essential that states adequately implement the ICC crimes.[104] As

103. Roy S. Lee, *State's Responses: Issues and Solutions*, *in* STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 22 (Roy S. Lee ed., Transnational Publishers 2005). *See also* Marc Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, D.C., May 6, 2002. (Articulating the formal U.S. policy with respect to the ICC – "We will take steps to ensure that gaps in United States' law do not allow persons wanted or indicted for genocide, war crimes, or crimes against humanity to seek safe haven on our soil in hopes of evading justice.").

104. *See generally* Mydna G. Ohman, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005); Doug Cassel,

an aside, while treaty proponents argue that complementarity itself provides protection for U.S. nationals against an overweening or politicized Prosecutor, the lack of statutory authority that parallels ICC crimes has led to recent warnings that legislative amendments are needed in light of fears that the ICC could find current U.S. law inadequate to bar ICC proceedings.[105] In any event, without acceptable implementation of the substantive ICC crimes, the Prosecutor or Pre-Trial Chamber may have no other alternative but to find that a state is "unable genuinely" to investigate or prosecute, since the state's legal system will not allow such a prosecution.

The complementarity criteria are uniformly stated in either present or past tense—future good intentions, or even pending legislation that has been introduced, do not bar ICC action in a given case. The lack of adequate domestic legislation thus jeopardizes the state's exercise of jurisdiction over cases within its jurisdiction and may cause the case to be placed in the hands of the ICC.[106] Uganda, for example, is actively moving its domestic legislation forward in an effort to provide a viable domestic forum for crimes committed in Northern Uganda and currently within the jurisdiction of the ICC. States that have not criminalized the substantive crimes specified in the Rome Statute may be forced to either defer to ICC authority or to prosecute the perpetrator using preexisting crimes articulated in domestic criminal codes. For example, where a national has committed genocide but the domestic forum has not criminalized genocide, the state may either refrain from prosecution, or may choose to prosecute the person for murder or another inferior crime. In either situation, the ICC Prosecutor may arguably be permitted to step in and prosecute that state's national due to the inability of the state to prosecute the full conduct under its criminal system.

Where a state simply refrains from prosecuting due to lack of criminalization, it is clear that this is an inability to prosecute, and therefore, this case would become admissible in the ICC. The more complex question involves a situation where a

Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court, 35 NEW ENG. L. REV. 421, 436-47 (2001). *See also* Michael P. Hatchell, *Closing the Gaps in United States Law and Implementing the Rome Statute*, 12 ILSA J. INT'L & COMP. L. 183 (2005).

105. David Scheffer, Dir., Ctr. for Int'l Human Rights, No Safe Haven: Accountability for Human Rights Violators in the United States before Subcommittee on Human Rights and the Law, Committee on the Judiciary, U.S. Senate (November 14, 2007) (Gaps in U.S. Law Pertaining to Atrocity Crimes Summary Recommendations).

106. *See generally* Amnesty Int'l, The International Criminal Court: Checklist for Effective Implementation, (July 2000).

state prosecutes the same conduct using another criminal formulation. The principle of *ne bis in idem* included in Article 20 does not permit the Court to try a person "who has been tried by another court for conduct also proscribed" unless it was not a genuine trial.[107] Article 20 on its face does not implement the complementarity principle because a case need not be prosecuted to be inadmissible in the ICC. Article 20 does make the question of conformity of charges more complex by its use of the term "conduct" rather than "offense", and it is unclear in these circumstances whether the prosecution of a what is termed an "ordinary" crime would suffice. If the domestic charges proceeded on grounds more restrictive (or simply using different articulations of the charged conduct) than those permitted under the Rome Statute, it is unclear whether the Prosecutor or Pre-Trial Chambers would nevertheless determine that the state is unable or unwilling to prosecute the ICC charges. Indeed, a superficial appraisal of the facts would indicate PRECISELY the opposite in that the perpetrator WAS prosecuted, but in point of fact, the ICC could disregard that exercise of domestic jurisdiction on the premise that the only viable prosecution is one based on the identical charges.[108]

Further complicating these concerns is the reality that there is simply no cookie-cutter template for a satisfactory domestic criminal code that suffices in itself to preserve primary domestic jurisdiction. Some states have simply adopted the substantive crimes of the Rome Statute into their domestic codes either explicitly or by reference.[109] Using the identical definition from the Rome Statute does not

107. Rome Statute, *supra* note 1, art. 20.

108. *See generally* HUMAN RIGHTS WATCH, MAKING THE INTERNATIONAL CRIMINAL COURT WORK: A HANDBOOK FOR IMPLEMENTING THE ROME STATUTE (2001), (information regarding Human Rights Watch's concerns in the implementation process).

109. *See, e.g.*, International Crimes Act of 2003, § 2 Stb. 2003 No. 270 (June 19, 2003), Stb. 2003, No. 340, *available at* http://www.nottingham.ac.uk/shared/shared_hrlcicju/Netherlands/International_Crimes_Act__English_.doc (last visited Feb 10, 2009). In explaining that it was deemed "undesirable" for the provisions of Dutch law to deviate from the "internationally accepted concept of the offenses" the Explanatory Memorandum of the Dutch government noted that "Dutch courts should also adopt and international law orientation when dealing with the various aspects of the crimes (objective and subjective) and with the limits of criminal responsibility as laid down, inter alia, in the Statute of the International Criminal Court and the Elements of Crimes drawn up on the basis of Article 9 of the Statute, which serve as an aid to the interpretation of the crimes." 34 NETH. Y.B. INT'L L. 233, 236-7 (2003). The Australian legislation is termed the International Criminal Court (Consequential Amendments) Act 2002 No. 42, 2002, and is available at http://scale.law.gov.au/cgi-bin/download.pl?/scale/data/comact/11/6514 (last visited Feb 2, 2010).

complicate ICC analysis of the potential for primary domestic jurisdiction because the identical definitions ensure that the judicial system is "able" to prosecute. The effect of using the identical definition was exemplified by the United Kingdom. The UK enacted the International Criminal Court Act in 2001 which criminalized the Article 5 crimes. Subsequently, the UK was able to try a case for war crimes under its right to domestic adjudication through complementarity.[110] By enacting a law which mirrored the Rome Statute, the UK was able to try its own citizens on its own soil instead of placing them in the hands of the ICC. Of course, the hidden danger is that the ICC could automatically decide that domestic officials who fail to allege the same charge that the Court deemed appropriate are "unwilling genuinely" to prosecute the perpetrator.

If the ICC adopts a purist posture that demands precise compliance with the structure of the Rome Statute, other nations face more daunting hurdles in exercising their right to complementarity because they have implemented varying definitions of the ICC crimes into their domestic law. Many states have criminalized certain conduct under national processes that is not criminalized under the Rome Statute as a deliberate response to the perceived dilution of offenses during the negotiations of the Rome Statute.[111] For example, Bosnia and Herzegovina included in their war crimes definition acts such as the devaluation of domestic currency, the unlawful issuance of money, and the forced conversion to another nationality or religion.[112] A number of states, such as Argentina, Germany, and Ecuador have defined the act of inflicting starvation on civilians as a war crime in non-international conflicts. Others, such as France, have expanded the victim groups for genocide and crimes against humanity. These domestic definitions of crimes deviate from the structure of the Rome Statute and create a risk that a prosecution, especially for an extraterritorial offense, [113] could conflict with the principle of *nullum crimen sine lege.* Thus, the prosecutor or Pre-Trial Chambers Court could use the deviation of the domestic legislation as the basis for a subsequent admissibility ruling favoring ICC authority over the state statute.

110. *See generally* R v. Sec'y of State for Def., (2007) 3 W.L.R. 33 (U.K.) (where British soldiers were accused of committing war crimes and the case was brought to the attention of the ICC prosecutor. U.K. stepped in and prosecuted the soldiers, which they were able to do since they had the proper domestic legislation. Subsequently, the ICC prosecutor found the prosecution sufficient and did not try the soldiers under the ICC).
111. *See* HUMAN RIGHTS WATCH, *supra* note 108, at 16.
112. *See* Criminal Code of the Federation of Bosnia and Herzegovina [FBiH] ch. 17 app. at C.
113. *See generally* Broomhall, *Checklist for National Implementation, supra* note 5, at 148-51.

Conversely, a number of states have chosen not to criminalize all of the conduct prohibited by the ICC. Leading ICC proponents such as Canada have not expressly criminalized each and every provision of the Rome Statute, and instead rest jurisdictional primacy on the strength of conduct proscribed under the narrower definition of the national legislation. Again, the Court could determine that the failure to allege the precise crime under ICC authority itself may be deemed a genuine inability to prosecute; in effect, such states could be viewed by the Court through the same lens as states that simply lack any domestic implementation. These cases could be deemed admissible before the court, and states would have no recourse other than the appeals specified in the Rome Statute. Similarly, arguing that a domestic conviction for a lesser crime[114] does not preclude charges for the "real crime," the ICC Prosecutor could simultaneously circumvent the principles of *ne bis in idem*[115] and complementarity, which are preserved in the Rome Statute to protect the rights of perpetrators and the prosecutorial prerogatives of states respectively.

2. The Character of the Crimes Alleged

The ICC Prosecutor's ultimate position on the concept of "ordinary crimes" may well be the hidden weakness in the complementarity regime as an effective limit to supranational power. If the ICC Prosecutor dictates to states the "acceptable" charges for particular conduct, the vitality of complementarity as a functional component of ICC practice will be severely weakened. As noted above, the complementarity principle was designed to preclude such micromanagement by the supranational institution and the accompanying interference with national judicial processes. In theory, complementarity would require the ICC to recognize the discretion of the domestic authorities regarding the scope and form of the domestic charges. In reality, complementarity may be an incomplete restraint on a zealous ICC Prosecutor, motivated by a strong awareness of moral and legal obligations to serve the needs of international accountability, who could use the form of domestic charges as a pretext to exert ICC authority.

Those who are the most familiar with, and presumably the most supportive of, the Court are likely to dismissively disregard the potential danger that the Office of the Prosecutor could subsume the prosecutorial discretion of states. On the surface,

114. Some states refer to these as "cognate offenses" and "minor offenses."
115. Rome Statute, *supra* note 1, art. 20.

it seems ludicrous to propose, as this paper suggests, that the complementarity principle can be subordinated simply by adopting a different legal characterization for the charged offense. The presumption in favor of domestic judicial action does not depend on strict compliance with the crimes articulated in the Rome Statute, or with charging those offenses using the precise terms and conditions outlined therein.

In a regime based on concurrent jurisdiction between domestic forums and an international court, the international court would have had preexisting jurisdiction in its own right regardless of the characterization of the crime under domestic law. Under a regime of concurrent jurisdiction, even if the domestic courts decide a particular case, the principle of *ne bis in idem* would not preclude a subsequent trial before the international tribunal if "the characterization of the act by the national court did not correspond to its characterization" in the international forum.[116] In fact, the ICTY wrote in dicta that an international criminal tribunal "*must* be endowed with primacy over national courts" because human nature will create a "perennial danger of international crimes being characterized as ordinary crimes."[117]

Both the ICTY and ICTR were grounded in the Chapter VII authority of the Security Council.[118] They are most analogous to the exercise of ICC authority pursuant to a referral under Article 13(b). As a result, the *ad hoc* tribunals were intellectually grounded on a jurisdictional superiority that defers to domestic forums only where the charges conform perfectly to those contemplated in the international forum. The ICTY and ICTR contain a specific Rule of Procedure that creates almost identical standards for the transfer of pending cases to domestic courts. Rule 11*bis* requires first, that the state have jurisdiction in one of three

116. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 66, *delivered to the Security Council and the General Assembly*, U.N. Doc. S/25704 (May 3, 1993) (describing the overlap of domestic prosecutorial authority with the concurrent jurisdiction and presumption of primacy under the International Criminal Tribunal for the Former Yugoslavia).

117. *See* Prosecutor v. Tadic, Case No. IT-94-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Oct. 2, 1995), (this path-breaking opinion discussed the range of conduct punishable in both international and non-international armed conflict and noted the distinctions in charging that warranted the primacy of ICTY jurisdiction even though the case had already begun in Germany at the time the tribunal invoked its jurisdiction).

118. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993) [hereinafter ICTY Statute]; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8,1994), *reprinted in* 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute].

ways: (1) the crime was committed in the state, (2) the accused was arrested in the state, or (3) the state has jurisdiction and is willing and adequately prepared to accept the referral.[119] Additionally, Rule 11*bis* requires that the state possess a legal framework criminalizing the alleged conduct of the accused and providing an adequate penalty structure. The ICTR decision in *Bagaragaza* clarified that the criminalization requirement must be for a crime of the same nature as the crime accused in the ICTR, providing:

> [i]n assessing whether a State is competent within the meaning of Rule 11*bis* to accept one of the Tribunal's cases, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure". The Tribunal only has authority to refer cases where the State "will charge and convict [or acquit] only for those international crimes listed in its Statute" as opposed to "ordinary crimes" such as homicide.[120]

Beginning in 2006, the *Bagaragaza* case was the subject of two separate requests for deferral to state officials, and was ultimately the first such transfer for the ICTR. The first request, initiated by the Prosecutor, sought to remove the case to Norway.[121] The Trial Chamber held that Norway did not have a comparable law under which to try Bagaragaza, and the Appellate Court upheld the decision.[122] Norway would have tried Bagaragaza under its murder law, and claimed that the addition of the crime was unnecessary after ratification of the 1948 Genocide Convention.[123] The Appeals Chamber held that it lacked the ability to refer to Norway under Rule 11*bis* because Bagaragaza would be tried under a crime other than the ones listed in the ICTR statute:

119. ICTY R. P. & EVID. R. 11*bis* (July 24, 2009). *See, e.g.*, Prosecutor v. Pasko Ljubicic, Case No. IT-00-41-PT, Decision to Refer the Case to Bosnia and Herzegovina Pursuant to Rule 11*bis* (Apr. 12, 2006). The referral bench in Ljubicic provided background on the adoption of Rule 11*bis* in the ICTY. *Id.* The rule was adopted on 12 November 1997, revised on 30 September 2002, and amended 10 June 2004, 28 July 2004, and 11 February 2005. *Id.*; Prosecutor v. Zeljko Mejakic, Momcilo Gruban, Dusan Fustar, and Dusko Knezevic, IT-02-65-PT, Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11*bis* (July 20, 2005).
120. Prosecutor v. Bagaragaza (Bagaragaza Netherlands), ICTR-2005-86-11*bis*, 2007 WL 2417255, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, ¶ 11 (Apr. 13, 2007) (citing Prosecutor v. Bagaragaza (Bagaragaza Norway), Case No. ICTR-05-86-AR11bis, Decision on Rule 11*bis* Appeal (AC), ¶ 16, (Aug. 30, 2006)).
121. *See id.* ¶ 15.
122. *See* Prosecutor v. Bagaragaza (Norway), Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal (AC), ¶ 16, (Aug. 30, 2006).
123. *See id.* ¶ 13.

> Article 8 specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute "serious violations of international humanitarian law". In other words, this provision limits the Tribunal's authority, allowing it only to refer cases where the State will charge and convict for those international crimes listed in its Statute.[124]

The Chamber clarified that it considered "case" to be a broad term, allowing some variation from the crime that would be tried in the ICTR:

> The Appeals Chamber agrees with the Prosecution that the concept of a "case" is broader than any given charge in an indictment and that the authorities in the referral State need not necessarily proceed under their laws against each act or crime mentioned in the Indictment in the same manner that the Prosecution would before this Tribunal.[125]

However, the Chamber reasoned that under Norwegian law the crime of murder is an "ordinary crime" unlike the crime of genocide, which falls within the category of "serious violations of international humanitarian law."[126] In addition, "the penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives."[127] Given these differences, the Chamber found that it could not transfer jurisdiction to Norway as it could not "sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law."[128]

In the second attempt, the Prosecutor amended the complaint and sought to have the case removed to the Netherlands.[129] The Netherlands clarified that they would have jurisdiction to try genocide under Dutch Genocide Convention Implementation Act of 1964 if Bagaragaza qualified as a person "against whom prosecution has been transferred from a foreign state to the Netherlands on the basis of a treaty from which the power of the Netherlands to prosecute follows."[130] The court accepted Dutch assurances that the ICTR would qualify as a "state" for the purposes of this statute.[131] Next the Chamber sought assurances that

124. *Id.* ¶ 16.
125. *Id.* ¶ 17.
126. *Id.*
127. *Id.*
128. Prosecutor v. Bagaragaza (Norway), Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal (AC), ¶ 1, (Aug. 30, 2006).
129. *See* Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, ¶ 2 (Apr. 13, 2007).
130. *Id.* ¶ 13; *See* Wetboek van Strafreht (SR) art. 4(a) (Neth.).
131. *See* Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-11*bis*, Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands, ¶ 22 (Apr. 13, 2007).

Bagaragaza would receive a fair trial and would not be subject to the threat of the death penalty.[132] Finally, the Trial Chamber III held that Bagaragaza be transferred to the Netherlands under Rule 11*bis*, noting that it retained the power to observe proceedings.[133]

The Rome Statute, by contrast, makes no distinction regarding the nature of the charge in the provisions implementing the principle of complementarity. The form of the charge in domestic states does not affect the latitude that the supranational court must accord national processes. The detailed admissibility criteria apply regardless of the form of the charges in the domestic forum or their precise symmetry with the words of the Rome Statute. At the same time, if a state does not have a criminal code that exactly replicates the range of offenses under the Rome Statute, the ICC Prosecutor could be at liberty to simply consider that the state is unable to prosecute the crimes. It is conceivable that in egregious cases the ICC itself would informally ask a particular state to fill perceived gaps in its domestic legislation, and then determine that the delay in doing so manifested a genuine unwillingness to prosecute or investigate a particular accused. This judicially validated approach would eviscerate the substance of complementarity, even while appearing to honor its provisions.

As noted above, the Security Council acting under Chapter VII is empowered to override the domestic right to exercise its domestic jurisdiction in lieu of deferring to ICC authority.[134] In a similar vein, it is entirely consistent that the *non bis in idem* provisions of both the ICTY and ICTR provide that the international forum cannot prosecute a person who was previously prosecuted in a national court unless "the act for which he or she was tried was characterized as an ordinary crime."[135] However, the cases arising pursuant to Article 13(b) authority are not the norm under the ICC jurisprudence to date, and it therefore follows that extrapolating the practice of the ad hoc tribunals into the ICC should be considered as *lex specialis* in those limited situations that are legally analogous. Moreover, though the parallel provision of the Rome Statute included the same reference to ordinary crimes in its early drafts, the final text precludes ICC authority where the

132. *See id.* ¶ 31-35.
133. *See id.* ¶ 39.
134. *See supra* text accompanying notes 35-40; Rome Statute, *supra* note 1, art. 13(b); *ILC Draft Statute*, *supra* note 16, art. 23; U.N. Charter, arts. 2(7), 25, 103.
135. ICTY Statute, *supra* note 118, art. 10(2)(a); *See also* ICTR Statute, *supra* note 118, art. 9(2)(a).

perpetrator was tried in domestic court for "conduct also proscribed" by the Rome Statute.[136]

In the early practice of the ICC, although the presumption of supranational supremacy is not warranted under the normal operation of the complementarity provisions, its shadow has already crept into ICC caselaw. The Pre-Trial Chambers have uniformly engaged in an analysis of both jurisdiction and a preliminary assessment of admissibility prior to issuing a warrant for the arrest of any perpetrators.[137] In the first case to go to trial in the ICC, the Pre-Trial Chamber implicitly modeled its perspective on the interface of national and supranational jurisdiction on the practice of the ad hoc tribunals.[138]

The *Lubanga* opinion granting the warrant of arrest states that

> The first part of the test relates to national investigations, prosecutions and trials concerning the case at hand insofar as such case would be admissible only if those States with jurisdiction over it have remained inactive in relation to that case or are unwilling or unable, within the meaning of article 17(1)(a) to (c), 2 and 3 of the Statute. The second part of the test refers to the gravity threshold which any case must meet to be admissible before the Court.[139]

Addressing the first prong of the test, whether another court is already exercising jurisdiction under Article 17, the Chamber noted that the other court must be handling the same person AND conduct as the ICC. Ultimately, the decision in *Lubanga* hung on this distinction. In defining the rule (which presumably set the template for future cases), the Chamber noted that

136. Rome Statute, *supra* note 1, art 20(3). *See also* Gerard Conway, *Ne Bis in Idem and the International Criminal Tribunals*, 14 CRIMINAL LAW FORUM 351, 358 (2003) (special thanks to Linda Keller for this insight).
137. *See* Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony (issued on 8th July 2005 as amended on 27th September 2005); Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti (July 8, 2005); Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo (July 8, 2005); Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Case No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen (July 8, 2005).
138. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr 17-03-2006, Lubanga Decision to Issue Arrest Warrant (Feb. 24, 2006).
139. *Id.* ¶29

> it is a condition *sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.[140]

Applying its test that admissibility is satisfied in circumstances where the national proceedings do not encompass the same charges, the *Lubanga* case was held to be admissible because the previous genocide proceedings in the Democratic Republic of Congo made no reference to Lubanga Dyilo's alleged policy or practice of conscripting child soldiers, and in light of the fact that no other state appeared to have motivation to investigate or prosecute the offenses charged by the ICC Prosecutor.[141] This, in itself, might be rather amazing to a casual observer. The Pre-Trial Chamber felt wholly justified in substituting supranational authority over what every rational observer would perceive as lesser charges in lieu of domestic prosecution on allegations of genocide, and displayed no self consciousness in so ordering. However, the Pre-Trial Chamber appeared to conflate the requirement that the conduct be addressed by the domestic state with a legal duty that the same charges be filed. This conclusion in no way flows from the textual requirements of complementarity, and in fact fails to consider that prosecution in domestic forums directly advances the ICC aspiration to eliminate impunity for egregious conduct, irrespective of the precise charges alleged or prosecuted.

In retrospect, *Lubanga* could be distinguishable on the grounds that it was a self referral and hence the admissibility determination was, at least from the Prosecutor's perspective, more *pro forma*. Nevertheless, there is no acknowledgement in the Decision that other states that would normally exercise jurisdiction were even offered the opportunity to investigate or charge Lubanga Dyilo as required by Article 18. Another added wrinkle to this potential problem is the fact that the Pre-Trial Chamber itself can, and has, amended the charges filed by the Office of the Prosecutor. The practice of the Pre-Trial Chambers to date therefore appears to have put sovereign states in the position of playing a dangerous guessing game with respect to domestic investigations or prosecutions.

The subordination of domestic charging prerogatives to the prosecutorial discretion of the ICC Prosecutor would simply turn the principle of complementarity on its head. Unlike the ICTY and ICTR, the ICC does not enjoy an inherent jurisdictional primacy. Although the Rome Statute allows the

140. *Id.* ¶¶ 31, 37.
141. *See id.*

Prosecutor to select from a wide array of potential charges, and includes some offenses that could be charged under several overlapping provisions, domestic officials are not thereby reduced to hoping that their selection of charges is sufficient to withstand ICC oversight. In such a scenario, states whose criminal codes duplicate the range of offense in the Rome Statute may very well face a prosecutorial paradox in that, while they are automatically presumed to be able, decisions to pursue any other charges against an accused other than those that conform precisely to those selected by the ICC Prosecutor could be automatically construed as manifesting unwillingness to prosecute within the meaning of the admissibility criteria. Such an embedded ICC practice would violate the very purposes of the precepts embedded in Articles 17-19 of the Rome Statute. The jurisprudence or practice of the ICC should not evolve to the point that domestic prosecutors make charging decisions based on the faint hope that the ICC will accept the form of the charges.

B. The Gravity Threshold in Theory and Application

The undercurrent of thought that supranational jurisdiction is inherently preferable to domestic adjudication has also begun to flavor the rhetoric related to the gravity threshold. Early indications from the *Lubanga* and *Kony* cases, as well as the Darfur situation, reveal disquieting indications that the ICC may tend to use the gravity threshold as a backdrop for making admissibility of a particular case a subsidiary principle to the exercise of prosecutorial discretion. The provisions of Article 17 make the gravity test a parallel provision to the other admissibility criteria. In other words, even the cases of extreme gravity that clearly warrant international prosecution based on their implications for the international community as a whole are inadmissible in any circumstances where one or more domestic states with prosecutorial and judicial capacity is willing to open genuine efforts aimed at investigating or prosecuting the case. Although Article 17(1)(d) changed only slightly in the various diplomatic drafts leading to the adoption of the Rome Statute,[142] it cannot constitute an independent basis for bypassing state enforcement authorities.

To date, the Prosecutor has relied on the gravity criteria as the primary rationale for moving ahead on particular cases. In the context of the Uganda investigations

142. M. CHERIF BASSIOUNI, 2 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE BY ARTICLE EVOLUTION OF THE STATUTE 140-153 (2005).

that led to the warrant of arrest for Joseph Kony and other leaders of the Lord's Resistance Army, the Prosecutor flatly acknowledged that

> The criteria [*sic*] for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.[143]

Similarly, the Prosecutor justified the investigation into Bahar Idriss Abu Garda on the grounds that the alleged attacks against African Union peacekeepers at a place called Haskanita in Darfur were inherently a matter of international concern and therefore an appropriate subject matter for ICC enforcement. Apparently seeking to create the impression of moral equivalence between the perpetrators who killed either ten or twelve peacekeepers and the Sudanese leadership that has killed an estimated 300,000 people and destroyed thousands of villages, the Prosecutor maintained that "[b]y killing peacekeepers, the perpetrators attacked the millions of civilians who those soldiers came to protect. They came from Senegal, from Mali, from Nigeria, from Botswana, to serve and protect. They were murdered. Attacking peacekeepers is a serious crime under the Statute and shall be prosecuted."[144]

The Prosecutor later reported to the United Nations Security Council in relation to the case against Abu Garda that[145]

> The gravity of the crimes is related to the nature, manner and impact of the attack. An attack was intentionally directed at international peacekeepers and AMIS operations were severely disrupted, thus affecting its mission to protect millions of civilians in need of aid and security. Both this Council and the African Union (AU) emphasized the seriousness of the attack.

143. ICC Office of the Prosecutor, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (Oct. 14, 2005). *See also* Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties (Nov. 28, 2005), at 2 ("In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity. Between July 2002 and June 2004, the Lord's Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.").
144. Coalition for the International Criminal Court News, http://www.iccnow.org/?mod=newsdetail&news=3347 (last visited Nov. 10, 2009).
145. *See* ICC, *Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, ¶ 42, (June 5, 2009). The Abu Garda case is significant in that it represents the first time in ICC practice that a perpetrator has voluntarily surrendered to the Court based on a summons to appear.

In discussing the *Lubanga* case, the Prosecutor spoke of the necessity for singling out the conscription and use of child soldiers as special circumstances that warranted the use of ICC resources and adjudicatory authority. He appeared to take pride in the role of the ICC in shaping international perceptions and in raising the visibility of the offenses he selected as being worthy of enhancing international concern and concerted action. In upholding the Prosecutor's exercise of discretion, the Pre-Trial Chamber expanded upon the textual prominence of the gravity criteria in Article 17 as opposed to the larger premise that all of the substantive crimes within ICC jurisdiction are by definition the crimes of concern to the international community as a whole:

> The Chamber. . . observes that this gravity threshold is in addition to the drafters' careful selection of the crimes included in articles 6 to 8 of the Statute, a selection based on gravity and directed at confining the material jurisdiction of the Court to the "most serious crimes of international concern." Hence, the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be *admissible before the Court.*[146]

Following this logic, the Pre-Trial Chamber undertook to make what it termed a "contextual interpretation," of the gravity threshold determining that "the fact that the gravity threshold of [A]rticle 17(1)(d) of the Statute is in addition to the gravity-driven selection of crimes included in the material jurisdiction of the Court indicates that the relevant conduct must present particular features which render it especially grave."[147] Finally, the Chamber opined as to when a case is admissible:

> The Chamber holds that the following two features must be considered. First, the conduct which is the subject of a case must be either systematic (pattern of incidents) or largescale. If isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-driven selection of the crimes . . . included within the material jurisdiction of the Court. Second, in assessing the gravity of the relevant conduct, due consideration must be given to the social alarm such conduct may have caused in the international community.[148]

While these characterizations seem perfectly plausible when seen in isolation, they potentially create a sense of moral and legal inevitability that colors further

146. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ¶ 42 (Feb. 10, 2006), *in* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006, Annex I (Feb. 24, 2006) (emphasis added).
147. *Id.*
148. *Id.* ¶ 46.

admissibility analysis. Indeed, in both the *Lubanga* and Haskanita investigations, the Prosecutor chose to focus on a particular species of criminal conduct that occurred only against the backdrop of far more widespread and egregious offenses. It is as if the Prosecutor and Pre-Trial Chamber together colluded to put the ICC stamp of moral and prosecutorial disapproval on selected atrocities based only on the nature of the offenses. It is also notable that the discussion of admissibility or the recognition of domestic jurisdiction is either ignored or merely observed with passing disdain.

Thus, in the view of PTC I, conduct "must be" either systematic or large-scale to satisfy the gravity threshold of Article 17(1)(d). When paired with the requisite "social alarm" it seems as if the ICC is implicitly daring some state to attempt to reclaim jurisdiction over the cases. This presumption of supranational superiority based solely on the gravity of the offenses may well be morally justifiable, but it contravenes the plain text of the Rome Statute. While the end result may be warranted in light of further analysis under the admissibility criteria on a case-by-case and perpetrator-by-perpetrator basis, the articulation of firm prosecutorial resolve and ICC outrage cannot justify a *per se* obviation of the admissibility criteria.

C. Complementarity Following State Self-Referrals

Unlike the flashpoints discussed above, the third point of tension remains theoretical at this early juncture of ICC practice. As noted above, there have been several instances in which states have referred situations to the ICC for investigation and potential prosecution.[149] On its face it may seem axiomatic that a case arising from a situation in which the state has consented to the exercise of ICC jurisdiction also may bypass the admissibility analysis. However, there are many unanswered dimensions to what is likely to be a recurring dilemma faced by the ICC.

While a self-referral is implicit acknowledgement of inability or unwillingness to undertake domestic jurisdiction at a specific point in time, such a determination

149. *See supra* text accompanying notes 51-55; Rome Statute, *supra* note 1, pmbl., para. 4 & arts. 5(1), 17(1)(d), 17(2)-(3), 53(1)(c); Letter from Luis Moreno Ocampo, Chief Prosecutor of the International Criminal Court, Response to inquiries concerning Iraq 9 (Feb. 9, 2009), http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited Nov. 8, 2009).

should not bind a state for the entire span of its relationship with the ICC. Article 14(1) of the Rome Statute states only that a State Party may refer a particular situation to the Court in circumstances in which one or more crimes within the jurisdiction of the Court appear to have been committed.[150] There is no textual evidence in the Rome Statute that such a self-referral serves as a waiver for the right of a sovereign state to reclaim its preexisting authority to adjudicate at any subsequent point. Complementarity creates a regime of primary domestic jurisdiction with supranational jurisdiction exercised on an exceptional basis. For example, if a State Party refers a case against a particular perpetrator to the Prosecutor for a specific offense, it would be difficult to construct a legally tenable argument that it also surrendered sovereign authority to prosecute other offenses against that same individual. Similarly, a state self-referral should not be construed as automatically extinguishing its right to invoke complementarity in all cases deemed by the ICC to arise from a particular situation. By extension, the Court must be diligent to apply the admissibility criteria irrespective of the manner in which the investigation was initiated.

Trial Chamber II subtly recognized this principle in denying a motion filed by Germain Katanga challenging the admissibility of his case:

> The Chamber is of the opinion that what must be taken into account when determining whether a State is unwilling to act pursuant to the provisions of Article 17 and is unwilling to seize itself of the case, what is important is to determine the intention of the State to institute proceedings against the persons in question. The State can demonstrate this intention either within the specific framework of proceedings or before a court or in a general manner. This intention can also be inferred from factual and unequivocal elements .... If the Chamber is to decide whether a State has the intention to institute proceedings against someone or not, the Chamber believes that this should be decided on a case-by-case basis and the precise circumstances of the case must be taken into consideration. With this regard, it is particularly interesting to point out that in the case in hand, it is the State that is concerned that referred the situation to the court and did not oppose having the accused delivered to the court and did not make any challenges to admissibility. One should also take into consideration in order to assess the real intentions of the State the degree and form of cooperation of the State with the court with regard to a given case. [151]

In *Katanga*, the admissibility issue was mooted by the conduct of the Democratic Republic of Congo. Hence it is an easy case and the Trial Chamber

150. Rome Statute, *supra* note 1, art. 14(1).
151. Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Open Session Hearing, 8-9 (Jun. 12, 2009).

dismissed the admissibility challenge raised by the perpetrator. Similarly, in the *Lubanga* case, the Pre-Trial Chamber ignored the domestic development of prosecutorial capacity in the aftermath of a self-referral by accepting the prosecution argument that admissibility was warranted on the strength of a March 2004 letter from the Democratic Republic of Congo stating that the DRC did not feel capable of handling the case.[152] Attempting to decrease the feasibility that a state might be successful in reclaiming its jurisdiction over a particular perpetrator, the Prosecutor's Informal Expert Paper on Complementarity ICC concluded "[w]here there has already been a specific finding of admissibility in relation to the particular case, any subsequent challenger should carry the burden of displacing that earlier finding." Displacement of the burden to prove admissibility from the Court to the domestic sovereign is nowhere referenced in the Rome Statute.

There are a number of pragmatic and legal reasons why a state self-referral should not be automatically equated to a waiver of admissibility. In fact, if a state is able to successfully implement a domestic jurisdictional scheme and to improve the operation of its domestic courts, the strong policy preference ought to be to recognize and to commend such developments as positive steps towards implementing a universalized adherence to the goals of the ICC. Secondly, the premise of complementarity is that the domestic officials are best positioned to be able to evaluate the interests of justice and the needs of victims, as well as the likely contributions of a particular trial to the larger needs of peace and reconciliation within society. The passage of time may well moot the reasons that spawned the self-referral, and sovereign states should not be estopped from asserting their prosecutorial prerogatives on behalf of their citizens.

In Uganda, in the years following the referral that led to the charges against Joseph Kony and other key members of the Lord's Resistance Army, the Juba Accords changed the dynamic on the ground entirely.[153] In addition, at the time of this writing, Ugandan legislators are on the verge of enacting a domestic crimes bill to ensure domestic prosecutorial capacity. In light of these positive

152. *See* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for a warrant of arrest, Article 58, ¶ 34 (Feb. 10, 2006), *in* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006, Annex I (Feb. 24, 2006) (emphasis added).

153. *See* Fabius Okumu-Alya, *The International Criminal Court and its Role in the Northern Uganda Conflicts – An Assessment,* 4 UGANDA LIVING L. J. 16 (2006).

developments, Uganda should not be forced to bear an unreasonable burden in demonstrating that the interests of justice and peace are served by the proper use of its own courts in prosecuting those who terrorized the nation for more than two decades. Apart from a prima facie demonstration that the proceedings will be fair, impartial, and in accordance with international standards, Uganda and any other similarly situated state in the future should find a cooperative Court. Complementarity was never intended to institute a system of competition in which the domestic authorities face a hostile supranational forum intent on preserving its own prestige and power at the expense of endangering lasting peace and stability in countries already ravaged by mass atrocity. Given that the right of a state with an articulable claim of jurisdiction is nowhere constrained by the manner of referral, there should never be a judicially created rule of implicit waiver in which a self-referral obviates the need for a careful admissibility analysis on a case by case, perpetrator by perpetrator basis.

VI. Conclusion

The rhetoric from Court officials related to complementarity has subtly shifted from a tone of cooperation and consultation to one of competition in the early years of ICC operation. Complementarity is in theory an impartial, reliable, and de-politicized process for identifying the cases of international concern, and hence international jurisdiction. The plain meaning of Article 17 in light of the object and purpose of the Statute indicates that states have primacy of jurisdiction, and that the institutional interests of the ICC cannot supersede good faith decisions by domestic officials. The text of the Statute in conjunction with the clearly manifested intent of its drafters indicates that the Court should preserve a strong preference for domestic enforcement of the substantive crimes covered by Article 6, 7, and 8. In fact, there are strong pragmatic reasons for preserving the preference in the Rome Statute for domestic authority in light of the demonstrated need for the Court to improve the cooperation of states in the collection of evidence and the transfer of persons subject to warrants of arrest.

Though the early indications discussed in this Article may be regarded as fanciful or unduly alarmist, they could represent the crystallization of an institutional mindset that could lead to disastrous results in the long term. The ICC cannot long sustain an adversarial posture *vis a vis* sovereign states that are working in good faith to prosecute perpetrators. A position of latent hostility towards sovereign states that seek to develop and implement their own

prosecutorial capacity would force the Chambers to engage in distorted readings of the admissibility provisions of the Rome Statute. Such a distortion of the cornerstone principle of complementarity could not help but erode the political support for the Court. As a corollary, a framework of positive complementarity and cooperative synergy is the only feasible way to ensure long term vitality for the ICC as an autonomous international institution.

However, the thicket of subjective provisions designed to implement complementarity allows treaty opponents to argue that national justice systems are threatened with displacement at the hands of an unrestrained international prosecutor backed by unaccountable international judges. Because the ICC does not have any external checks and balances, there is no institutional mechanism for controlling a Court that seeks to expand supranational power over domestic forums in order to vindicate considerations of international justice. Early decisions by the Office of the Prosecutor have demonstrated some political deftness, but progress could well be unraveled by a purist application of the admissibility regime.

Though the jurisprudential entrails might lead to other outcomes over the next five years of institutional maturation, the ICC should work with states to enhance their domestic capacity and defer to domestic investigations or prosecutions in any feasible conditions. Such cooperation in the future should be predicated on the establishment of consultative and constructive relations between domestic officials and the representatives of the Court. The ICC should in fact defer to the good faith reasoning of domestic officials applying the law of the sovereign, even where the form of the domestic charges varies from the prosecutorial preferences of the Office of the Prosecutor or the Pre-Trial Chamber. The jurisprudence and practice of the ICC should not evolve to the point that domestic prosecutions are displaced due to the discretion of the ICC Prosecutor or the perception that the domestic investigation or adjudication is somehow less desirable than ICC disposition.