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William W. Burke-White  
*University of Pennsylvania Carey Law School*

Scott Kaplan  
*University of Pennsylvania*

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**Shaping the Contours of Domestic Justice:**  
**The International Criminal Court and an**  
**Admissibility Challenge in the Uganda Situation**

William W. Burke-White\* & Scott Kaplan\*\*

In December 2003, Ugandan President Yoweri Museveni referred crimes committed in Northern Uganda to the nascent International Criminal Court (ICC).<sup>1</sup> The Rome Statute of the ICC had entered into force one and a half years earlier,<sup>2</sup> and Uganda's referral was the first made under Article 14, which allows States Parties to refer a situation to the Prosecutor for investigation.<sup>3</sup> Although it was originally assumed that this provision would be used by non-territorial states to refer crimes within the Court's jurisdiction to the Prosecutor, Uganda made the first so-called self-referral to the ICC, seeking the Court's assistance with the apprehension and prosecution of the leadership of the Lord's Resistance Army (LRA).<sup>4</sup>

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\* Assistant Professor of Law, University of Pennsylvania Law School. JD (Harv.), Ph.D. (Cambridge). While the author has served as a Visiting Scholar at the International Criminal Court and has advised the Ugandan government on issues related to the cases discussed here, this work represents the individual opinion of the author and is in no way representative of the policy of the ICC or Uganda.

\*\* University of Pennsylvania Law School, J.D. 2009 (expected); Center for Bioethics, University of Pennsylvania Medical School, M.Be. 2009 (expected).

<sup>1</sup> Press Release, International Criminal Court, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, (Jan. 24, 2004) (available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html)). Museveni's decision came after a substantial military campaign, Operation Iron Fist, failed to end – and, in fact, escalated – the conflict. Facing pressure from the international community over the humanitarian crisis that followed the campaign, Museveni's decision to refer the Northern Uganda situation was widely perceived as an effort to regain international support. See UNIVERSITY OF BRITISH COLUMBIA, LIU INSTITUTE FOR GLOBAL ISSUES, CONFLICT AND DEVELOPMENT PROGRAMME, NORTHERN UGANDA – HUMAN SECURITY UPDATE 2 (May 2005).

<sup>2</sup> Ratification of the Rome Statute by the 60<sup>th</sup> member state occurred on 1 July 2002.

<sup>3</sup> Rome Statute of the International Criminal Court art. 14 July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]

<sup>4</sup> See generally, Mohamed El-Zeid, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, 5 INT'L CRIM. L. REV. 83 (2005) (discussing legal implications of Uganda's self-referral); Kasiya Phillip Apuuli, *The International Criminal Court (ICC) and the Lord's Resistance Army (LRA) Insurgency in Northern Uganda*, 15 CRIM. L. FORUM 391 (2004); Håkan Friman, *The International Criminal Court: Investigations into crimes committed in the DRC and Uganda. What is next?*, 13 AFR. SECURITY REV. 19, 21-22 (2004); M. Cherif Bassiouni, *The ICC – Quo Vadis?*, 4 J. INT'L CRIM JUST. 421, 424-25 (2006); Katherine Southwick, *Investigating War in Northern Uganda: Dilemmas for the International Criminal Court*, 1 YALE J. INT'L AFF. 105 (2005). For a critical review of the ICC's role in the Ugandan conflict, see Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFFAIRS 179 (2007).

Since 1986, the LRA has been engaged in a campaign against Museveni's government<sup>5</sup> in northern Uganda that has included abduction and enslavement of children, murder and rape of civilians, attacks on displaced-persons camps, and other atrocities constituting crimes against humanity under the Rome Statute.<sup>6</sup> Despite the longevity of the conflict, its brutal nature, and multiple rounds of negotiations the Ugandan government has been unable to reach either a political or a military solution and the international community had largely neglected the situation.<sup>7</sup> As of early April 2008, such a settlement appears close, but may yet remain elusive.

For Museveni, referral of the situation in Uganda to the ICC was essentially a political calculation that offered several advantages.<sup>8</sup> Referral to the Court provided an opportunity to raise the international profile of the conflict, to pressure the LRA and its supporters—particularly Sudan<sup>9</sup>—and to transfer the political and financial costs of apprehension and prosecution to international actors. Through such a referral, Museveni could make a credible threat to the LRA that, should they remain at large, they would be apprehended and face prosecution, thereby, hopefully, increasing their willingness to negotiate a settlement.<sup>10</sup> Simultaneously, Museveni could make it more costly for the Sudanese government to support the LRA.<sup>11</sup> In addition, Museveni's referral had the benefit of potentially shifting the significant domestic political costs—particularly in

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<sup>5</sup> For a more complete discussion of the conflict between Uganda and the LRA, see Frank Van Aker, *Uganda and the Lord's Resistance Army: the new order no one ordered*, 103 AFR. AFF. 335 (2004). For detailed accounts of human rights violations committed in Northern Uganda, see HUMAN RIGHTS WATCH, *UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA 14-36* (2005). For personal accounts of the effects of the conflict, see UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, REGIONAL SUPPORT OFFICE FOR CENTRAL AND EAST AFRICA, "WHEN THE SUN SETS WE START TO WORRY": AN ACCOUNT OF LIFE IN NORTHERN UGANDA (2004).

<sup>6</sup> Rome Statute art. 7, Crimes Against Humanity

<sup>7</sup> See Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 Am. J. of Int'l L. 403, 410 (2005) (describing international reluctance to become involved in the Northern Uganda situation).

<sup>8</sup> For analysis of a similar self-referral decision in the Democratic Republic of Congo, see *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005).

<sup>9</sup> See, e.g., Mareike Schomerus, Small Arms Survey Working Paper, *The Lord's Resistance Army in Sudan: A History and Overview 24-27* (2007); Northern Uganda And Sudan's Support For The Lord's Resistance Army, Testimony of Jemera Rone, Human Rights Watch, before the United States House Subcommittee on International Operations and Human Rights and the Subcommittee on Africa (July 29, 1998), available at: <http://www.hrw.org/campaigns/sudan98/testim/house-07.htm#TopOfPage>.

<sup>10</sup> See, William W. Burke-White, *Peace vs. Justice or Peace & Justice*, draft manuscript on file with author.

<sup>11</sup> See, e.g., Nick Grono & Adam O'Brien, International Crisis Group, *Opinion: Exorcising the Ghost of the ICC, The Monitor*, Oct. 31, 2006 ("The ICC's intervention . . . complicated Khartoum's continued support of the LRA, helping sever the LRA's supply lines and uproot their secure safe havens.")

Northern Uganda—of prosecuting LRA members away from his government and onto the ICC.<sup>12</sup> Finally, such a referral to the ICC offered the prospect of international acclaim in light of strong pressure from European governments for Uganda to become the first state to refer a situation to the ICC.

Subsequent to the Ugandan referral and an investigation by the ICC, the Court returned indictments against five LRA leaders.<sup>13</sup> Soon thereafter, in late June 2006, the LRA expressed willingness to engage in a new round of peace talks with the Ugandan government.<sup>14</sup> Despite numerous past failures, this latest round of negotiations came to appear far more promising than any of the previous efforts. There are likely a variety of reasons for the relative success of the 2006 negotiations. First, it is possible that the ICC indictments had their intended effect of making the war more costly for the LRA and promoting settlement discussions. Secondly, the peace agreement in Sudan and a new willingness of the South Sudanese government to moderate talks helped catalyze and support the peace process.<sup>15</sup> Finally, newfound international pressure—perhaps also the result of ICC involvement—created incentives for both the LRA and the Ugandan government to soften their stance and consider dialogue.<sup>16</sup>

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<sup>12</sup>See William Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 Mich. J. Int'l L. 1, 50-52 (analyzing East Timor's decision to embrace internationalized judicial panels for prosecutions opposed by Indonesia, thereby externalizing the political costs onto the international community).

<sup>13</sup> The warrants were issued by Pre-trial Chamber II on 8 July of 2005, but remained sealed until 13 October 2005. International Criminal Court, Decision on the Prosecutor's Application for unsealing of the warrants of arrest, ICC-02/04-01/05-52 (Oct. 13, 2005). One of the indictees has since been confirmed dead (see, Press Release, International Criminal Court, Statement by the Chief Prosecutor Luis Moreno-Ocampo on the confirmation of the death of Raska Lukwiya (Oct. 11, 2006)). Two others, Vincent Otti and Dominic Ongwen have been widely reported to have been killed. However, DNA tests on Ongwen's supposed corpse revealed that the body found was not in fact his and the Court considers the warrants against him to remain in force (see Press Release, International Criminal Court, ICC Unseals Results of Dominic Ongwen DNA Tests (Jul. 7, 2006). The Office of the Prosecutor has alerted Pre-Trial Chamber II of the reports of Otti's death, and has requested information from Uganda and the DR Congo (see Office of the Prosecutor, International Criminal Court, Submission of Information Regarding Vincent Otti 2, ICC-02/04-01/05-258 (Nov. 8, 2007).

<sup>14</sup> See, e.g., BBC News, LRA Rebels Arrive for Sudan Talks, June 8, 2006, available at: <http://news.bbc.co.uk/2/hi/africa/5060666.stm> (noting that Joseph Kony's call for an end to the conflict came after a promise of safety under the threat of ICC indictments).

<sup>15</sup> See H.E. Salva Kiir Mayardit, President of Southern Sudan and First Vice President of Sudan, Remarks at The Role of Southern Sudan in Regional Peace and Security, Woodrow Wilson Center for International Scholars (July 24, 2006), available at: [http://www.wilsoncenter.org/index.cfm?fuseaction=events.event\\_summary&event\\_id=195133](http://www.wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=195133) (discussing Southern Sudan's role in peace negotiations involving the LRA).

<sup>16</sup> See, e.g., Council of the European, Council Conclusions on Uganda, Document No. 9357/06, at ¶¶3-6 (May 15, 2006) (Reaffirming the Council's positions that "The Government of Uganda has the primary

Whatever its ultimate cause, the relative success of the peace negotiations quickly changed the preferences and negotiating positions of the LRA and the Ugandan government. Early in the negotiations, it became clear that, notwithstanding the fact that the ICC indictments may have forced the LRA to the negotiating table, they would be a stumbling block in any potential peace agreement. The LRA leadership repeatedly stated that the withdrawal of ICC indictments was a prerequisite to ultimate settlement.<sup>17</sup> In late June 2007, the Ugandan government and the LRA reached an agreement laying out the principles of justice and accountability for settlement of the conflict, which contemplated domestic proceedings with alternative sentences and possibly even the use of traditional justice mechanisms. The agreement's section on sentencing highlights the delicate balance necessary for LRA approval, noting the need for a novel sentencing scheme involving "a regime of alternative penalties and sanctions, which shall . . . replace existing penalties, with respect to serious crimes and human rights violations committed by non-state actors."<sup>18</sup> It defined the purpose of these alternative penalties in terms of promoting reconciliation, rehabilitation and reparations, while "reflect[ing] the gravity of the crimes."<sup>19</sup>

Despite the flexibility with respect to justice and accountability indicated in the agreement reached at the peace talks, almost to the day the ICC Prosecutor took an extremely firm line in a major public address in Nuremberg, Germany, essentially excluding any possibility that his office would seek to have the warrants withdrawn.<sup>20</sup> In the words of the Prosecutor: "for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the

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responsibility for addressing the conflict [in Northern Uganda] and the grave humanitarian impact it has had" and welcoming "the increased involvement of the UN with regard to the conflict with the LRA, and in particular UN Security Council (UNSC) Resolutions 1653 and 1663 which call for UN Secretary General recommendations for tackling illegal armed groups, including the LRA.")

<sup>17</sup> See Charles Mwanguhya Mpagi, Institute for War and Peace Reporting, ICC Looms over Peace Negotiations, Jan. 7, 2008 ("LRA negotiators . . . contend that as long as the indictments exist, no peace deal will be signed, nor will they come out of the bush.").

<sup>18</sup> Agreement on Accountability and Reconciliation between the Government of The Republic of Uganda and the Lord's Resistance Army/Movement ¶6.3, June 29, 2007 (on file with author).

<sup>19</sup> *Id.* at ¶6.4.

<sup>20</sup> See Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address at Building a Future on Peace and Justice, June 25, 2007.

situations on the ground. . . . These proposals are not consistent with the Rome Statute. They undermine the law that states committed to.”<sup>21</sup>

As a result, the ICC was seen by many as a roadblock on the path to peace.<sup>22</sup> The withdrawal of warrants was a prerequisite to settlement for the LRA and the Prosecutor refused to use his powers under Article 53 of the Rome Statute to seek to have those warrants withdrawn.<sup>23</sup> A peace deal appeared elusive. The Ugandan government and various mediators began to explore other options to possibly relieve the pressure on the LRA that stemmed from the ICC warrants without entirely sacrificing the goals of accountability. The possibility of some form of domestic proceedings in Uganda rendering the case inadmissible at the ICC, pursuant to the complementarity provisions of Article 17 of the Rome Statute, emerged as the most promising alternative. According to Article 17, as long as such a domestic proceeding was a genuine effort to bring the indictees to justice, it would bar the case from being heard by the ICC and, thereby, make settlement a more promising alternative for the LRA. To that end, in late February 2008, an Annexure to the Agreement was reached between the LRA and the Ugandan government, expressly providing for the establishment of a special division of the High

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<sup>21</sup> *Id.*

<sup>22</sup> Such sentiments have been expressed by a wide range of commentators, including NGOs, regional commentators and the international press. *See e.g.*, John Prendergast, Enough Project, What to do about Joseph Kony, Enough Strategy Paper 8 (October 2007) (“until there is agreement about how to deal with Kony and his top deputies -- all indicted by the International Criminal Court (ICC) for crimes against humanity -- there will be no peace deal”); *Kony Demands Peace*, 43 Africa Research Bulletin: Political, Cultural & Social Series 16659B (2006) (“[P]rospects for peace are complicated by the arrest warrants issued by the international criminal court for Kony and four of his commanders in 2005. Betty Bigombe, Uganda's negotiator with the LRA, pointed out that this left no incentive for the indicted men to lay down their arms.”); BBC News, Uganda Rejects Key Peace Demand, Feb. 28, 2008, available at: <http://news.bbc.co.uk/2/hi/africa/7268529.stm> (noting Kony’s refusal to demobilize without assurances that the ICC warrants are dropped); André-Michel Essoungou, *Chantage à la paix en Ouganda*, LE MONDE DIPLOMATIQUE, April 2007 at 13 (recounting the hostile reaction of Ugandans in an internally-displaced persons camp towards the ICC and their view that the Court was a barrier to peace).

<sup>23</sup> Rome Statute, *supra* note 11, at art. 53(2)(c) (Allowing the prosecutor to conclude, after investigation, that no reasonable basis for prosecution exists because “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”). This decision can be challenged either by the referring state or the Pre-Trial chamber (*Id.* at art. 53(3)(a)&(b)), but in the Uganda situation neither is likely to challenge such a conclusion. The prosecutor is able to revisit this decision “at any time” in light of “new facts or information.” (*Id.* at art. 53(4)). This would imply that there are limited costs to such a deferral, however the language of section 2(c) implies a balancing based on the temporal and physical proximity of the perpetrator to the crimes and the magnitude of the crimes committed. It does not articulate balancing factors based on the prospects for future peace, and, indeed, none of the factors are forward-looking.

Court of Uganda for the purposes of investigating and prosecuting crimes committed during the conflict.<sup>24</sup>

Domestic criminal proceedings, as alternatives to ICC investigation and prosecution, are clearly consistent with the goals of the ICC as a court of complementary jurisdiction.<sup>25</sup> Indeed, in a 2003 speech to States Parties to the Rome Statute of the ICC, Prosecutor Luis Moreno Ocampo noted that “the first task of the prosecutor’s office [is to] make its best effort to help national jurisdictions fulfill their mission.”<sup>26</sup> Moreover, the Pre-trial Chamber’s (PTC) initial determination that the case was admissible before the Court in part rested on the fact that Uganda was unable to achieve physical jurisdiction over the indictees, who had sought refuge in Congo.<sup>27</sup> Should those indictees reach a peace agreement with the Ugandan government and return to Ugandan territory to face criminal proceedings, the case against them could become inadmissible under the Rome Statute.

While domestic proceedings against LRA indictees in Uganda offers a possible compromise to avoid ICC prosecution without completely sacrificing accountability, it also raises a number of important questions not answered in the Rome Statute, by the Court itself, or yet subject to significant scholarly inquiry. For example, given Uganda’s self-referral, can the Ugandan government still challenge the admissibility of a case? How much flexibility in terms of the procedure and sentencing in any domestic prosecution will the ICC PTC still deem to constitute a genuine investigation or prosecution? Can such a domestic prosecution be devised that would satisfy both the LRA leadership and the PTC? How should the PTC evaluate Ugandan domestic justice efforts? These questions have become all the more pressing after the June 2007 Agreement on Accountability and Reconciliation between the Ugandan government and

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<sup>24</sup> Annexure to the Agreement on Accountability and Reconciliation Between the Lords Resistance Army/Movement and the Government of Uganda, Feb. 19, 2008 [hereinafter February 2008 Agreement]

<sup>25</sup> William Burke-White, *Proactive Complimentarity: The International Criminal Court and National Courts in the Rome Statute*, 49 HARV. INT’L L. J. 53 (2008).

<sup>26</sup> Luis Moreno Ocampo, Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court ICC-OTP-20030502-10-En (Apr. 22, 2003).

<sup>27</sup> *Prosecutor v Kony, Otti, Lukwiya, Odhiambo & Ongwen*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (July 5, 2005).

the LRA and the February 2008 Annexure that clearly call for domestic prosecutions with alternative sentences and, perhaps, even elements of traditional justice.<sup>28</sup>

This chapter responds to these questions raised by the prospect of a domestic prosecution of the LRA leadership in Uganda and the possibility of an admissibility challenge before the ICC. In so doing, the chapter advances a framework for understanding admissibility and evaluating any admissibility challenge that might be brought. Moreover, the chapter suggests that the decision of the PTC on the admissibility of the Uganda cases, in light of a domestic investigation or prosecution, gives the ICC an extraordinary opportunity to define the contours of acceptable national prosecutions under Article 17 of the Rome Statute and, particularly, to develop a framework for balancing the legitimate desire of national governments to achieve peace and justice after a conflict with the international legal duty of states parties to the Rome Statute to undertake genuine investigations and prosecutions of international crimes.

The article proceeds as follows. Part I considers the law and practice of admissibility challenges before the ICC, particularly in the case of self-referrals. Part II offers three distinct visions of the concept of admissibility with implications for the PTC's analysis of any challenge in the Uganda cases. Part III considers the negotiations between the LRA and the Ugandan government as of April 2008 and analyzes the range of potential domestic justice mechanisms that might be available to Uganda, taking into consideration both the requirements of Article 17 of the Rome Statute and the agreements between the government and the LRA. Part IV evaluates the prospects for admissibility challenges either by the Ugandan government or by a particular indictee in light of the three visions of admissibility developed in Part II, and suggests that the PTC has a critical role both in resolving the conflict in Uganda and setting the contours of acceptable domestic justice efforts.

## **I. THE LEGAL BASIS FOR CHALLENGING ADMISSIBILITY**

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<sup>28</sup> Agreement on Accountability, *supra* note 18.



The Rome Statute appears to offer relatively clear rules as to the admissibility of cases and the procedures for challenging admissibility. Articles 17, 18, and 19 of the Statute provide both the circumstances in which cases will be admissible and the means through which particular states or the accused can challenge admissibility. The Uganda situation, however, raises important new questions about admissibility, largely because Uganda self-referred the situation on its territory to the ICC. Such self-referrals were not generally contemplated during the drafting of the Rome Statute and, therefore, the Statute does not clearly articulate the implications of self-referrals for complementarity and the admissibility of cases before the ICC. Yet, the admissibility of cases in circumstances of self-referrals has implications for the operation of the Court far beyond Uganda as the majority of the Court's caseload to date has come through such self-referrals.<sup>29</sup> Namely, the situations in the Democratic Republic of Congo (DRC), Uganda and the Central African Republic have all come through self-referrals and the Prosecutor has indicated a desire for the enhanced state cooperation that is likely to come with self-referrals.<sup>30</sup>

The possible legal implications for self-referral on complementarity and admissibility are numerous. First, when a case has been self-referred, do the Prosecutor and the PTC nonetheless have to evaluate admissibility pursuant to Article 17 prior to the opening of an investigation or the issuance of arrest warrants? Second, would a change in the factual circumstances on the ground that initially precluded the territorial state from undertaking a genuine national investigation or prosecution and, hence, made the case initially admissible, preclude the Court from proceeding with the case? Third, does the act of self-referral waive either the right of the state or the right of the accused to subsequently challenge admissibility? More generally, how much flexibility should the PTC give to national governments to design their own domestic proceedings consistent with Article 17 of the Rome Statute, particularly in the context of efforts to bring an ongoing conflict, such as that in Northern Uganda, to a peaceful conclusion?

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<sup>29</sup> See, e.g., Claus Kress, 'Self-referrals' and Waivers of Complementarity': *Some Considerations in Law and Policy*, 2 J. INT'L CRIM. JUST. 944, 944 (describing the move from state-referrals as a "rare exception" in any situation to the promotion of self-referrals).

<sup>30</sup> OFFICE OF THE PROSECUTOR, ICC, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (2003), available at [http://www.icc-cpi.int/otp/otp\\_policy.html](http://www.icc-cpi.int/otp/otp_policy.html) (examining the various areas where cooperation is essential to the function of the Office of the Prosecutor).

Each of these questions alone is significant. Taken collectively, they raise an even more fundamental question about the very nature of admissibility as a legal construct. Is admissibility a statutory limitation on the power of the ICC, a legal entitlement of states parties to the Rome Statute, or a right of defendants before the Court? Understanding and answering this deeper legal question provides an important framework for exploring the implications of self-referrals for the admissibility of cases before the ICC and any subsequent admissibility challenges. Moreover, the nature of admissibility provides critical perspective on the relationship of the ICC and states parties to the Rome Statute.

#### *A. The Statutory Basis of Admissibility*

Article 17 of the Rome Statute limits the admissibility of cases before the Court. In order for a case to be admissible, the Court must first satisfy itself that the domestic authorities of some state are not already meaningfully pursuing the case. Specifically, the Rome Statute provides that cases are 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...<sup>31</sup>

A state is deemed unwilling to prosecute if the proceedings are “undertaken . . . for the purpose of shielding the person concerned from criminal responsibility;”<sup>32</sup> or in cases where there is either an unjustified delay in the proceedings or the proceedings are not independent and impartial in a manner “inconsistent with an intent to bring the person concerned to justice.”<sup>33</sup> Inability is based on a consideration of “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to

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<sup>31</sup> Rome Statute, art. 17(1)(a)-(c).

<sup>32</sup> *Id* at 17(2)(a).

<sup>33</sup> *Id* at 17(2)(b)&(c).

obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>34</sup>

Admissibility determinations arise at a number of stages in any investigation and prosecution and involve both the Office of the Prosecutor (OTP) and the PTC. First, even before formally seeking to open an investigation, the Prosecutor must determine that any case he would likely bring would presumably be admissible. In his decision to initiate an investigation or prosecution, the Prosecutor must, under Article 53, “consider whether the case would be admissible under Article 17.”<sup>35</sup> Even after the initiation of an investigation, the Statute further requires the Prosecutor to engage in a continuing evaluation of national judicial efforts and to inform the Pre-Trial Chamber if there are no grounds for prosecution because a genuine national proceeding has made the case inadmissible.<sup>36</sup>

The principle of complementarity has different legal implications for the Prosecutor at two separate phases of investigation. The first phase, the situational phase, arises when the Prosecutor makes an initial decision to investigate a particular situation. The second phase, the case phase, arises subsequently, when the Prosecutor identifies a particular suspect and develops an investigative hypothesis as to the crimes that suspect may have committed.<sup>37</sup> At both of these stages, the Prosecutor must scrupulously consider actions by states that might bar admissibility.

At the situational phase, complementarity requires the OTP to undertake a general examination of whether the cases the Prosecutor might decide to undertake are already being investigated or prosecuted by national authorities.<sup>38</sup> Where efforts by states to

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<sup>34</sup> *Id.* at 17(3).

<sup>35</sup> Rome Statute, *supra* note 11, art. 53(1)(b).

<sup>36</sup> *Id.* art. 53(2).

<sup>37</sup> For the distinction between situations and cases, see Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ¶ 65 (Jan. 17, 2006). See also Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 175, 180-82 (Roy S. Lee ed., 1999). On the same distinction, but in the context of Security Council referrals, see Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 147-148 (Roy S. Lee ed., 1999).

<sup>38</sup> Pursuant to Article 53(1)(b), when seeking to initiate an investigation, the Prosecutor “shall consider whether . . . the case is or would be admissible.” Such a preliminary admissibility determination requires the Prosecutor to have reasonable grounds for believing that admissibility would not be barred by reasons of complementarity. Rome Statute, *supra* note 11, art. 53(1)(b).

investigate or to prosecute within a given situation are sufficient and genuine, the complementarity analysis at this phase would suggest that investigation by the OTP is inappropriate. In contrast, where national proceedings have not been initiated, have been initiated only with respect to certain groups of suspects (such as lower level perpetrators), or where there is reason to believe national proceedings are less than genuine, there would be a reasonable basis for the OTP to proceed with an investigation.<sup>39</sup>

At the case level, which arises when the Prosecutor develops an investigative hypothesis with respect to particular suspects and factual events, admissibility requires a more specific and detailed analysis of any prosecutions occurring at the national level involving that particular suspect. Article 17 requires that the Prosecutor determine whether the specific case he intends to bring is being or has been investigated or prosecuted by national authorities. To do so, the Prosecutor must determine whether national authorities have investigated or prosecuted the individual subject to potential prosecution by the OTP for the same underlying factual events.<sup>40</sup> Where no such investigation has been or is being undertaken, the case would be admissible. If an investigation or prosecution has been or is being undertaken by a state, the Prosecutor must consider whether the national investigation is genuine or not, based on the criteria set forth in Article 17(2).<sup>41</sup> If the national proceedings are not genuine or the state is unable to prosecute, then the OTP may proceed with an investigation and prosecution.

At both the situational and case phases, the PTC also has a role in making admissibility determinations. When a situation has been referred to the Court by another state or by the Security Council, the Prosecutor must inform the Pre-Trial Chamber

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<sup>39</sup> This statement assumes the other requirements of Article 53(1) are met.

<sup>40</sup> See Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ¶ 65 (Jan. 17, 2006). While evaluating a domestic judiciary may be difficult, the benefit of the formulation adopted by the Office of the Prosecutor is that the test is considerably narrower than the “unable or unwilling” examination found in Article 17 of the Rome Statute and requires the Prosecutor to determine merely whether a national investigation of the same individual based on the same factual basis has been initiated. See Rome Statute, *supra* note 11, art. 17.

<sup>41</sup> The Prosecutor is required to determine whether the investigation or prosecution was undertaken for the purpose of shielding the accused from criminal liability, whether there was an unjustified delay in the proceedings, whether the proceedings were not independent and impartial, or whether they were being undertaken in a manner inconsistent with bringing the person concerned to justice. In this second step of analysis, the Prosecutor may also consider whether the state is unable to prosecute pursuant to Article 17(3) due, for example, to a “total or substantial collapse or unavailability of its national judicial system.” Rome Statute, *supra* note 11, art. 17(2), (3).

(PTC) of his decision not to proceed with an investigation due to admissibility limitations.<sup>42</sup> Where the Prosecutor seeks to proceed with an investigation initiated under his *proprio motu* powers, the PTC must approve his decision and may take admissibility into account in deciding whether to authorize the investigation.<sup>43</sup> Specifically, The Rome Statute then requires that all states that “would normally exercise jurisdiction” be notified of the impending investigation.<sup>44</sup> Such states have one month to inform the Court that they are or have investigated the situation and may request that the Prosecutor defer investigation.<sup>45</sup> The PTC can allow such a deferral based on national prosecutorial efforts<sup>46</sup> or can render the situation inadmissible as a general matter.<sup>47</sup>

At the case phase, the PTC also has to make determinations of admissibility in its decisions to issue arrest warrants. Specifically, the PTC must decide whether the particular crimes charged in the Prosecutor’s indictment have already been investigated or prosecuted at the national level. Likewise, the PTC must make such a determination when either an accused or a state party challenges admissibility before the opening of an actual trial.<sup>48</sup> Where the PTC grants a deferral, the Prosecutor can request a review of the decision after six-months or in the event of a “significant change of circumstances” of the states ability or willingness to “genuinely” investigate and prosecute.<sup>49</sup> If at either the situational or case phase of an investigation or prosecution the PTC finds the case to be inadmissible, the Prosecutor must cease the investigation of that case and indictments will not be confirmed against those accused whose crimes have already been investigated or prosecuted.

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<sup>42</sup> See Rome Statute, *supra* note 11, art. 53(1). Where the Prosecutor has initiated action based on referral by a state or the Security Council, the referring party can request the Pre-Trial Chamber to review the Prosecutor’s decision. *Id.*

<sup>43</sup> Rome Statute, *supra* note 11, art. 15.

<sup>44</sup> *Id.* at art. 18(1).

<sup>45</sup> *Id.* at 18(2).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at art. 19(1).

<sup>48</sup> For Pre-Trial Chamber jurisprudence on the admissibility determination at the arrest warrant stage and reference to further consideration of the issue at the trial phase, see Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest Under Article 58, ¶¶ 17–18 (Feb. 10, 2006).

<sup>49</sup> *Id.* at 18(3).

As noted above, admissibility can be considered by the PTC both on its own accord<sup>50</sup> and in response to particular challenges to admissibility by states that might have jurisdiction over the case or by the accused himself. Article 19 allows a challenge to the admissibility of a case by the accused or by a state with jurisdiction “on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.”<sup>51</sup> While the Statute grants the accused and the state the right to challenge admissibility, they may only do so once and the challenge must come prior to or at the commencement of the trial.<sup>52</sup> After a challenge has been mounted or the trial has begun, the Court’s leave is required for any subsequent challenge to be brought, and any such challenge after the commencement of trial must be based on a double jeopardy claim.<sup>53</sup>

#### *B. The Problem of Admissibility Challenges in the Case of Self-Referrals*

Though the Rome Statute provides a relatively clear and detailed set of guidelines for the admissibility of cases, the Statute does not specifically address questions of admissibility in the case of self-referrals, which were not generally contemplated at the time of drafting. However, the text of the Rome Statute and general principles of international law suggest that there may be potential difficulties with admissibility in the case of self-referrals for three reasons: first, an earliest opportunity requirement; second, a prohibition on shielding, and third, the general principles of estoppel and good faith.

The statutory problem arises first from Article 19(4) of the Rome Statute, according to which a state must “make a challenge [to admissibility] at the earliest opportunity.”<sup>54</sup> Where a state self-refers a case and then subsequently seeks to challenge admissibility, a compelling argument can be made that the state has failed to act at the “earliest opportunity.” Where the challenge to admissibility arises because of a subsequent factual development—such as a new ability to secure the custody of the accused—the earliest opportunity requirement might present less of a problem as long as the state challenging admissibility acted at the earliest opportunity after that change of

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<sup>50</sup> *Id.* at art. 19(1)

<sup>51</sup> *Id.* at art. 19(2)(a)&(b).

<sup>52</sup> *Id.* at art. 19(4).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at art. 19(5).

circumstances. If the earliest possible opportunity requirement were not satisfied, the state's admissibility challenge would, presumably, fail.

The second statutory problem with a subsequent challenge to admissibility after a self-referral arises from the requirement in Article 17 of the Rome Statute that for any domestic accountability efforts to bar admissibility, they cannot be intended to shield the accused from criminal liability.<sup>55</sup> It may well be that where a state initially self-refers to the Court and then seeks to challenge admissibility, the state is in fact attempting to avoid complete accountability for the accused due, for example, to political developments since the self-referral. In this case of possible shielding through an admissibility challenge, the state would remain able to challenge admissibility, but the PTC might give careful scrutiny of the reasons for that challenge and possibly even start with a presumption that the admissibility challenge was intended to shield the accused from complete criminal responsibility.

A third potential problem with a subsequent admissibility challenge in the case of a self-referral arises not from the statute itself, but from the general principle of estoppel and the international legal duty to act in good faith.<sup>56</sup> While the principle of estoppel has its historic origins in territorial disputes,<sup>57</sup> the basic elements are applicable in any reliance-creating international situation. Estoppel attaches when a state makes a clear and voluntary commitment and the other party relies in good faith on that representation to their detriment.<sup>58</sup> A self-referring state certainly meets the clear and voluntary requirements, and a case could be made that, at least in the Ugandan situation, the ICC had relied on Uganda's self-referral and would be harmed if Uganda were allowed to reassert jurisdiction. The ICC's investment of significant financial, personnel, and political efforts in Uganda could well be detrimentally undermined by a reassertion of Ugandan territorial jurisdiction, thereby raising the possibility that Uganda could be estopped from a subsequent admissibility challenge.

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<sup>55</sup> *Id.* at art. 17(2)(a) & art. 20(3)(a).

<sup>56</sup> See C. MacGibbon, *Estoppel in International Law*, 7 Int'l Comp. L. Quarterly 468, 468 ("Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation.")

<sup>57</sup> See, e.g., *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (April 5); *Concerning the Temple of Preah Vihear* (Cam. v. Thai.), 1962 I.C.J. 6 (June 15).

<sup>58</sup> D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence* 33 BRIT. Y.B. INT'L L. 176, 176 (1957).

Further, the requirement of good faith, articulated in article 26 of the Vienna Convention on the Law of Treaties<sup>59</sup> and the General Assembly's Draft Declaration on the Rights and Duties of States<sup>60</sup> requires at the very least that states perform their treaty obligations to the best of their abilities and that what "has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."<sup>61</sup> To the degree that a state seeks to use the admissibility requirements of the Statute to manipulate the Court or subvert the object and purpose of the Rome Statute and its accountability requirements, such actions would breach the state's duty of good faith. As a result, even if the admissibility challenge were otherwise justified, the PTC could deem it to fail as a result of the state's breach of good faith.

Given the potential legal problems with an admissibility challenge after a self-referral, a deeper inquiry into the nature of admissibility as a legal principle is needed. Such an understanding of the functions of admissibility in the Rome Statute and its impact on the operation of the Court provides a critical framework for evaluating the legality of admissibility challenges in cases of self-referral.

## II. THREE VISIONS OF ADMISSIBILITY

Both the text and *travaux preparatoires* of the Rome Statute are suggestive of three very different visions of admissibility and corresponding purposes of the complementarity regime found in Article 17. More specifically, the admissibility requirements of the Statute can be understood as a fundamental right of the accused, a means to protect state sovereignty, or a basic limitation on the power of the Court. Each of these visions of the purposes of admissibility provide insight into the appropriateness of an admissibility challenge after a self-referral and may suggest different answers to whether the PTC should allow such challenges in the Uganda situation and beyond.

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<sup>59</sup> "Every treaty in force is binding upon the parties to it *and must be performed by them in good faith.*" VIENNA CONVENTION ON THE LAW OF TREATIES, 1115 U.N.T.S 331 art. 26 (emphasis added).

<sup>60</sup> See Draft Declaration on Rights and Duties of States, G.A. Res. 375(IV), annex, art. 13, U.N. GAOR 4th Sess. (Dec. 6, 1949).

<sup>61</sup> *Codification of International Law* 29 AM. J. INT'L L. (SUPP.) 1, 981 (1935).



Complementarity and challenges to admissibility were considered in great detail at the Rome Conference, with states presenting a range of opinions on both the purpose and legal structure of complementarity.<sup>62</sup> The language contained in the Statute represents a series of compromises about the general nature of complementarity and how it fits in the schema of the Rome Statute. While there was near universal agreement that complementarity was an important and necessary component of the Statute,<sup>63</sup> states differed on its purposes, the appropriate requirements for rendering a case inadmissible,<sup>64</sup> and the procedure for establishing and challenging admissibility. While each of the three visions of admissibility discussed below highlights different elements of admissibility, the approach likely to be taken by the Pre-Trial Chamber will presumably represent a combination of and compromise amongst these competing visions of admissibility.

### *1. Admissibility as a Personal Right of the Accused*

A first vision of admissibility is as a personal right of the accused. This vision of admissibility is derived from the idea that an accused has a right both to be free of multiple, overlapping proceedings and to be tried by his natural or home court where such a court is able and willing to act.<sup>65</sup> First, multiple trials in differing fora are clearly

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<sup>62</sup> See John T. Holmes, *The Principle of Complementarity* 41, 45-56, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* (Roy S. Lee ed. 1999) (recounting the key issues in admissibility prior to the adoption of the Rome Statute) [hereinafter *Principle of Complementarity*]. For a background on the development of the principle of complementarity, see Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 *MICH. J. INT'L L.* 869 (2002).

<sup>63</sup> In his introduction of the admissibility issue at the 1998 Diplomatic Conference, Coordinator John Holmes stated “virtually all States had indicated [in Preparatory Committee discussions] the importance which they attached to the inclusion of the principle of complementarity in the Statute.” M. Cherif Bassiouni, 3 *LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY OF THE 1998 DIPLOMATIC CONFERENCE* 188 (2005) [hereinafter *DIPLOMATIC CONFERENCE*].

<sup>64</sup> While most states expressed a desire to adhere to the compromise reached on the Admissibility article (see, e.g. *DIPLOMATIC CONFERENCE* 193 (noting the Polish delegations view that “the compromise text of [the Admissibility] article had been achieved through long negotiations and should remain in tact”), several states voiced concern that the Admissibility article relied too heavily on subjective evaluations of national courts, favoring more deference to such courts (see, e.g. *DIPLOMATIC CONFERENCE* 195, Comments of Ms. Li Yanduan (noting that the Chinese delegation considered that “the judicial systems of most countries were capable of functioning properly” and proposing limiting a determination of unwillingness to cases in which national law and procedure were not followed)).

<sup>65</sup> A basic formulation of this right appears as early as the Magna Carta, which guaranteed that “[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land.” (Richard Thompson translation, *AN HISTORICAL ESSAY ON THE MAGNA CARTA OF KING JOHN* (1829)). While the exact meaning of this is subject to widespread debate, a common understanding is

inappropriate and would violate the accused's fundamental rights such as the right to a free and fair trial found in, among other sources, the International Covenant on Civil and Political Rights.<sup>66</sup> In addition, this construction of the complementarity regime suggests that the accused has a right to be judged by the court which has the best ties to him and the acts for which he is accused, presumably the territorial or national state. Removal of the accused from his home court is only justified as a last resort when the home court is unavailable.

In the drafting of the Rome Statute, there was general agreement that at least an accused person should have a right to challenge the admissibility of a case. Most disagreement at Rome on this point focused on whether a "suspect" under investigation but not yet indicted should be able to challenge admissibility.<sup>67</sup> The ultimate choice of allowing the right to challenge admissibility to an accused or one "for whom a warrant or arrest or summons to appear has been issued"<sup>68</sup> emphasizes that the accused's right to challenge admissibility attaches at the point where the Court's position relative to the accused interferes with that person's liberty through, for example, summoning them to a foreign locale.

The text of the Rome Statute suggests that such a right of the accused to challenge admissibility is not unlimited. An accused only has an automatic right to challenge admissibility once and such a challenge must be mounted prior to the initiation of trial, unless leave of the Court is granted and the challenge is based on a double jeopardy claim.<sup>69</sup> This limitation reflects a balancing between the right of the accused to a trial in his home forum and the need to prevent the waste of judicial time and resources that

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that a person has a right to be tried by members of his/her community, implying physical proximity. See, e.g., RACHEL WACHETER, LAW REFORM COMMITTEE, PARLIAMENT OF VICTORIA, JURISPRUDENTIAL AND HISTORICAL ASPECTS OF JURY SERVICE, 3 JURY SERVICE IN VICTORIA, at Chapter 1, §1.8 (the phrase 'trial by one's peers' requires that the jury be representative of the community). Similarly, one of the grievances noted in the United States Declaration of Independence was "transporting us beyond Seas to be tried for . . . offenses" (at ¶20). More recently, the Princeton Principles for Universal Jurisdiction lay out nine factors for determining the appropriate resolution for competing jurisdictional claims, five of those factors are locational. PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION (Stephen Macedo, ed.) 2001 at Principle 8  
<sup>66</sup> Art. 14, para. 7 (1966).

<sup>67</sup> Suspect remained in brackets (indicating its potential to be used in lieu of "accused") in the 1997 reports from the Preparatory Commission sessions, the 1998 "Zutphen Draft" submitted at the Preparatory Committee's final session, and the draft considered at the 1998 Diplomatic Conference. See M. Cherif Bassiouni, 2 LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE FROM 1994-1998 155-160 (2005) [hereinafter EVOLUTION OF THE STATUTE].

<sup>68</sup> Rome Statute art. 19(2)(a).

<sup>69</sup> See *supra* I.A.

would accompany removal of a case after trial had started.<sup>70</sup> Thus while the concept of admissibility as a right of the accused is clearly an important element of the complementarity regime, this right of the accused can be subordinated to the need for proper functioning of the Court.

While a vision of admissibility as a right of the accused is compelling, there are reasons to doubt that it fully justifies the principle. To the degree that the Rome Statute is viewed as transferring territorial or national jurisdiction of states parties to the Court, there is no reason for the accused to expect to be tried by his home court. States have in a variety of circumstances transferred their jurisdictional entitlements to other states or entities through, for example, status of forces agreements, without jeopardizing the rights of the accused.<sup>71</sup> In addition, the principle of universal jurisdiction expressly embraces the idea that certain crimes such as those contained in the Rome Statute are so heinous that any state has a right to try the perpetrators, regardless of any connection to the state itself.<sup>72</sup> Hence, to the degree that the right of the accused to trial in his natural court is the justification for complementarity, the Rome Statute must be viewed as conferring new rights or supplementing existing rights of the accused with respect to the appropriate forum for prosecution. At the very least, the vision of admissibility as a right of the accused suggests that irrespective of the method through which the case was referred to the Court, the accused maintains an actionable interest in preventing the Court from hearing his case where a domestic court is able and willing to undertake a genuine

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<sup>70</sup> See *Principle of Complementarity* 62 (the balance of preventing procedural misconduct and allowing some form of redress applied also to States).

<sup>71</sup> See *Madeline Morris, The United States and the International Criminal Court: High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *LAW & CONTEMP. PROB.* 13, 44-45 (2001). For examples of status of forces agreements that include a transfer of jurisdictional entitlements, see *Facilities and Areas and the Status of United States Armed Forces in Korea*, art. xv, paras. 1, 8 (July 9, 1966) (allowing Republic of Korea to exercise jurisdiction over United States citizens and corporations in Korea pursuant to military contracts, and reserving the right to try such persons by United States military authority if Korean courts declined to exercise jurisdiction). But see *Diane Marie Amann, The International Criminal Court and the Sovereign State*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 187-98 (Wouter G. Werner & Ige F. Dekker eds., 2004) (arguing that the transfer of jurisdiction is illegitimate). Some states have limited their own exercise of universal jurisdiction to be a subsidiary principle which can only be invoked when the territorial and national states have failed to prosecute themselves. That approach would seem to reflect the right of the accused to trial by the courts of the home state where they are available.

<sup>72</sup> *Kenneth Randall, Universal Jurisdiction Under International Law*, 66 *TEXAS LAW REVIEW* 785 (1988); *PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION* (Stephen Macedo, ed.) 2001.

investigation as long as such a challenge does not undermine the operation of the Court itself.

## 2. *Admissibility as the Protection of the Rights of States*

A second vision of admissibility is as a means to protect the rights of states embodied in the principle of state sovereignty.<sup>73</sup> This view was perhaps the dominant frame of complementarity and admissibility voiced at Rome and would be fully consistent with the Statute itself being viewed as a transfer of jurisdictional entitlements from the national and territorial states to the ICC.<sup>74</sup> According to this view, states parties transferred jurisdiction through the Rome Statute, but did so in a limited way, only transferring a jurisdictional entitlement to the Court where the territorial or national state was unable or unwilling to prosecute itself. In contrast, states retain any and all rights not transferred to the Court and the exercise of jurisdiction by the Court beyond those transferred powers would be a breach of the state's sovereign rights and exceed the Court's power under the Statute.<sup>75</sup>

Once again, the text of the Statute reflects a compromise as evidenced by the *travaux*. In the initial stages of the discussions at Rome, several States were skeptical of any intrusion on state sovereignty, seeking to retain for themselves the right to prosecute domestically except where the national or territorial state was truly unable to act.<sup>76</sup> In contrast, other states favored a larger scope of admissible cases, encompassing ineffective state action in addition to inaction.<sup>77</sup>

The divergent views of the delegations expressed in the 1995 Report of the Ad Hoc Committee on the Establishment of the International Criminal Court, underscore this vision of the complementarity in the Rome Statute as a protection of state sovereignty. On one end, some States preferred a “strong presumption in favour of national jurisdiction,” citing advantages of established procedure, law and punishment, as well as administrative efficiencies and the interest in maintaining State responsibility and

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<sup>73</sup> U.N. Charter art. 2, para. 7. (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter”).

<sup>74</sup> See Morris, *supra* note 71, at 44.

<sup>75</sup> The Case of the S.S. “Lotus”, (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10.

<sup>76</sup> See *Principle of Complementarity* 41-42.

<sup>77</sup> *Id.*

accountability for prosecuting crimes.<sup>78</sup> At the other end of the spectrum was a call for the ICC to serve as the only venue for prosecuting extremely grave crimes. This approach was based on the idea of universal jurisdiction and that with respect to “a few ‘hard-core’ crimes” states no longer retained an exclusive right to prosecute.<sup>79</sup>

Eventually, the Preparatory Committee settled on language based on the initial ILC proposal, but with a more nuanced delineation of when a case would be inadmissible. This validated the intrusion of the Court into a domestic prosecution even when national proceedings had been undertaken or were taking place, but only if the proceedings were not genuine.<sup>80</sup> After this proposal with respect to admissibility, an “alternative approach” was offered with a notation of the need for “further discussion.” The alternate admissibility language read simply: “The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.”<sup>81</sup> However, the vast majority of delegations rejected this approach.<sup>82</sup>

A further proposal by the United States, first introduced at the 1998 Preparatory Committee sessions demonstrated the strength of the state sovereignty frame in the course of the Rome Statute negotiations. The United States proposal, eventually incorporated in Article 18, shifted the admissibility evaluation to the beginning stages of the investigative work of the Prosecutor.<sup>83</sup> The US delegation framed the need for this adjustment as a protection, at the outset of a referral, of a state’s right to fully investigate the crimes concerned itself.<sup>84</sup> The US proposal touched off a debate between delegations that considered this proposal to add unnecessary obstacles to the Court’s exercise of jurisdiction<sup>85</sup> and those, which argued that the proposal strengthened the protection of state sovereignty.<sup>86</sup> Reflecting the US efforts in consultations with other delegations and resultant adjustments of the original proposal, the US proposal became, for many

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<sup>78</sup> EVOLUTION OF THE STATUTE 150-51.

<sup>79</sup> *Id.* at 152.

<sup>80</sup> *See Principle of Complementarity* 44.

<sup>81</sup> *See* EVOLUTION OF THE STATUTE 145.

<sup>82</sup> *See Principle of Complementarity* 52-53.

<sup>83</sup> For a detailed discussion of the United States proposal, see *id.* at 68-72.

<sup>84</sup> *See* DIPLOMATIC CONFERENCE 189.

<sup>85</sup> *Id.* at 190, 193 (noting the stance in favor of deleting the proposed article by Belgium and Poland).

<sup>86</sup> *Id.* at 194 (reporting that Japan’s delegation “considered that [the proposed article] should be retained, since the principle of complementarity applied even in the early stages of an investigation.”)

delegations, “key to their acceptance of the complementarity regime and the *proprio motu* role of the Prosecutor.”<sup>87</sup>

Several other compromises addressed the concerns of those states that viewed the complementarity provisions as tipping the scales too heavily in favor of state’s rights. For example, a state challenge to admissibility under what would eventually become Article 18 subsequently limits future challenges under Article 19 to instances of significant change in situation.<sup>88</sup> Rather than allow a recalcitrant state to use the article as a means to obstruct the work of the Prosecutor, the balance struck by the final version of admissibility in the statute gives states opportunities and incentives to address crimes through national jurisdictions but retains for the Court the authority to proceed when the clear intention of the state was to shield perpetrators from justice or the circumstances of the state made it impossible to investigate or prosecute.

A compromise was also reached between the polar extremes of those delegations that preferred any state—including non-party states which had only been asked to cooperate in a particular investigation or arrest—to challenge admissibility and delegations that wanted admissibility challenges limited to states-parties to the Statute.<sup>89</sup> Agreement was reached on a more moderate states’ rights position, allowing for any state with jurisdiction to challenge admissibility.<sup>90</sup> Allowing even non-party states to challenge admissibility demonstrates a commitment to protecting the rights of a state with jurisdiction and suggests that negotiators were uncomfortable with granting the Court authority unchecked by state action. So long as a state acted in good faith, the delegations at Rome allowed that state to challenge admissibility and handle proceedings domestically, trusting the bar on prosecutions aimed at shielding the accused was sufficient protection to warrant deference to national prosecutions.

The language eventually adopted in the Statute thus appears to reflect both the desire of at least some states parties to retain sovereign prerogative over the investigation and prosecution of international crimes and the need to create a court with the authority

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<sup>87</sup> *Principle of Complementarity* 71.

<sup>88</sup> Rome Statute art. 18(7).

<sup>89</sup> *Principle of Complementarity*, *supra* note 51, at 62.

<sup>90</sup> *Id.* at 66. The eventually adopted language allows challenges to be made by “A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted.” Rome Statute, *supra* note 11 at art. 19(2)(b).

and capacity to effectively “put an end to impunity.”<sup>91</sup> The vision of the admissibility as a protection of states’ rights stresses the first element of this balancing and suggests that states retain all rights not expressly transferred to the ICC in the Rome Statute. Such a reading of admissibility results in a narrow interpretation of the powers transferred to the Court and would perhaps preference state challenges to admissibility notwithstanding self-referrals.<sup>92</sup>

### *3. Admissibility as a Limitation on the Power of the ICC*

A third potential vision of admissibility is as a fundamental limitation on the power of the ICC. This vision is closely linked to the protection of state sovereignty discussed above, but emphasizes the limitations on the Court’s power rather than the protection of state’s rights. This vision of admissibility also rests on the idea that through the Rome Statute, states parties transferred strictly limited jurisdictional entitlements to the ICC. The Court, as a creation of the states parties themselves, has no powers beyond those expressly transferred to it and lacks any capacity to act beyond the narrow confines of the powers granted to it in the Rome Statute. This perspective provides perhaps the narrowest vision of complementarity and would presumably be most favorable to a state challenging admissibility because, should the case be deemed inadmissible, the Court would have no statutory power to act.

While not the dominant frame as expressed by the drafters, the notion of a court of limited powers reappears repeatedly in the drafting of the Statute. Admissibility as a limitation on the powers of the ICC is most apparent with respect to statutory language addressing when and how often the Court should investigate admissibility on its own accord. Notably, the Preparatory Committee draft of the eventual Article 19 required that the Court “[a]t all stages of the proceedings . . . satisfy itself as to jurisdiction over a case.”<sup>93</sup> Such a continuing obligation to scrutinize admissibility suggests that the Court has no power to act when a case is inadmissible, even if the admissibility requirements might have been initially satisfied. However, the continuing scrutiny language was

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<sup>91</sup> Rome Statute, *supra* note 11, at preamble para. 5.

<sup>92</sup> If a State’s rights vision is adopted as an object of the Rome Statute, the plain language of the admissibility rules would favor a State retaining its right to an admissibility challenge even in the case of self-referral. VIENNA CONVENTION, *supra* note 59, at art. 31 (1969).

<sup>93</sup> EVOLUTION OF THE STATUTE 157.

eventually abandoned in favor of a statutory requirement that that the Court satisfy itself as to jurisdiction and admissibility up to the point where a trial actually begins.<sup>94</sup> This revision might be seen as undermining the view of complementarity as a limitation on the Court's power because, should a case become inadmissible after the start of the trial, it would appear that the ICC would retain the power to prosecute, notwithstanding the subsequent change of circumstances on the ground that would have otherwise rendered the case inadmissible. At the very least, this language suggests a balancing between the fundamental limitations on the Court's power and the need for an institution that can operate effectively within its sphere of authority.

A further reason to question the view of admissibility as a fundamental limitation on the Court is the restriction on challenges to admissibility found in the Rome Statute. In the drafting of the Statute, the Committee as a Whole accepted without great controversy the limitation of one challenge to admissibility each for states and the accused prior to commencement of the trial, and the requirement, though perhaps underspecified, that States challenge admissibility at the "earliest opportunity."<sup>95</sup> Indeed, the largest source of controversy was over whether non-party states would be able to avail themselves of the right to challenge. The Italian delegation's position, for example, was summarized as being "reluctant to allow States not parties, which did not share the burden of obligations under the Statute, to share the privilege of challenging the jurisdiction of the Court."<sup>96</sup> While negotiations eventually gave non-party states the ability to challenge, that right was limited to states with jurisdiction, protecting the Court from bad-faith efforts to delay action on a case.<sup>97</sup> If admissibility were in fact a fundamental limitation on the power of the Court, it would seem to have been appropriate to allow numerous challenges to admissibility—at least those based on new developments—and to allow such challenges to be made even by states without jurisdiction over the crime.

The evolution of the Rome Statute's provisions for challenging admissibility demonstrate a desire on the part of the negotiators to ensure that the Court would have enough authority that its prosecutorial efforts would not easily be derailed once

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<sup>94</sup> Rome Statute art. 19(1).

<sup>95</sup> *Id.* at 1995.

<sup>96</sup> UNITED NATIONS, 2 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT 220, A/CONF.183/13 (Vol.11) (1998).

<sup>97</sup> *Principle of Complementarity* 62.



commenced. Thus while admissibility was a limitation on the Court's authority, it was a limitation that established clear boundaries for the Court's exercise of jurisdiction and retained for the Court the powers necessary to effectively carry out its functions.<sup>98</sup> Once admissibility had been determined and sustained on challenge, the Court would retain the authority to prosecute notwithstanding new developments on the ground. After the commencement of trial, admissibility could only be challenged if the accused were actually convicted in another jurisdiction and the continuation of proceedings before the ICC would breach the accused's rights to avoid double jeopardy.<sup>99</sup> In other words, the Court appears to have functional authority after the commencement of trial with respect to cases that might otherwise have become inadmissible. It is difficult to square that residual admissibility with a vision of complementarity solely as a fundamental limitation on the power of the Court, although some notion of a court of limited powers is clearly evidenced in the complementarity regime.

#### *4. Visions of Admissibility in the Practice of the ICC*

While the case law on admissibility is still in its earliest stages, the decisions of the PTC in its first cases provide some insight into how the ICC Chambers understand admissibility and balance the three visions of admissibility identified in the Rome Statute. The primary decisions on admissibility to date arise in the case of Thomas Lubanga in the situation concerning the Democratic Republic of Congo (DRC), but arise only at the earliest stages of the proceedings against him.<sup>100</sup> The Union of Congolese Patriots (Union des partroites Congolais (UPC)), under Lubanga's leadership<sup>101</sup> was implicated in widespread violence and human rights abuses in the DRC, including abducting children and forcing them to participate as "fighters, cooks, carriers and sex slaves."<sup>102</sup> The Ituri situation was self-referred by the DRC in 2004. Prior to the issuance of an ICC warrant,

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<sup>98</sup> This is similar to the extension of international legal personality to the United Nations. While such an extension fell beyond the scope of the United Nations Charter, it was deemed necessary in order for the UN to carry out its essential functions. *See* Reparation for Injury Sustained in the Service of the United Nations, 1949 ICJ 174.

<sup>99</sup> Rome Statute art. 20.

<sup>100</sup> *Prosecutor v. Thomas Lubanga Dyllo*, International Criminal Court, Case No. ICC-01/04-01/06.

<sup>101</sup> For a history of the origins of the Ituri conflict, see Human Rights Watch, *Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern Democratic Republic of Congo* (2003).

<sup>102</sup> Marlise Simons, *Congo Warlord's Case Is First for International Criminal Court*, N.Y. TIMES (Nov. 10, 2006)

Lubanga was arrested and imprisoned in Kinshasa on domestic charges of murdering nine MONUC peacekeepers in March 2005.<sup>103</sup> He was subsequently charged by the ICC with genocide, crimes against humanity, murder, illegal detention and torture<sup>104</sup> in a warrant issued on February 10, 2006,<sup>105</sup> and was transferred to The Hague a month later.<sup>106</sup>

In its initial decision as to whether to issue an arrest warrant, the PTC had to decide whether the case against Lubanga remained admissible, notwithstanding the fact that he was in domestic custody facing prosecution in Kinshasa. While the DRC did not challenge admissibility, the PTC noted that it had to consider admissibility on its own accord before issuing arrest warrants: “an initial determination on whether the case against Mr. Thomas Lubanga Dyilo . . . is admissible is a prerequisite to the issuance of a warrant of arrest for him.”<sup>107</sup>

The PTC found the case against Lubanga admissible because he was being charged by the ICC, based on separate facts, with crimes distinct from those alleged in the domestic Congolese warrant against him. Specifically, the Congolese warrant addressed Lubanga’s role in the MONUC killings, whereas the ICC warrant focused on his conscription of children into his militia group.<sup>108</sup> The PTC noted that while inability under Article 17(1) & (3) no longer appeared to be a barrier to the DRC asserting national jurisdiction,<sup>109</sup> because the proceedings in the DRC did not specifically reference the conscription of children into hostilities, the case remained admissible.<sup>110</sup> In order for a case to be inadmissible “national proceedings must encompass both the person and the conduct which is the subject of the case before the Court.”<sup>111</sup> Having affirmed that no domestic case against Lubanga for the same charges had been initiated, the Chamber

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<sup>103</sup> Press Release, United Nations, Security Council Condemns Murder of Nine UN Peacekeepers, SC/8327/Rev.1 (Mar. 2, 2005).

<sup>104</sup> International Criminal Court, Case No. ICC-01/04-01/06, Prosecutor’s Application ¶¶184, 187 (2006).

<sup>105</sup> *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, Case No. ICC-01/04-01/06, Warrant of Arrest, (Feb. 10, 2006).

<sup>106</sup> Press Release, International Criminal Court, First Arrest for International Criminal Court, (Mar. 17, 2006).

<sup>107</sup> *Prosecutor v. Thomas Lubanga Dyilo*, International Criminal Court, ICC-01/04-01/06-06-37, Decision on the Prosecutor’s Application for a warrant of arrest, Article 58 ¶¶19 (Feb. 24, 2006).

<sup>108</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest 4. For an interesting account of the issues facing the Court in its first prosecution, see Janet Anderson, Institute for War and Peace Reporting, ICC Enters Uncharted Territory (Mar. 24, 2006) (available at: <http://globalpolicy.igc.org/intljustice/icc/2006/0324uncharted.htm>).

<sup>109</sup> *Id.* at ¶36.

<sup>110</sup> *Id.* at ¶38-39.

<sup>111</sup> *Id.* at ¶37.

declined to make a formal analysis of “unwillingness or inability” beyond its earlier reference.<sup>112</sup>

While it remains possible that admissibility will be challenged or further examined as the case against Lubanga proceeds to trial, thus far the PTC has balanced two of the distinct visions of admissibility presented above—admissibility as a protection of states’ rights and admissibility as a limitation on the powers of the Court—with the functional needs of the Court to maintain the power to fulfill its mandate. On the one hand, the PTC scrupulously examined the admissibility of the case against Lubanga on its own accord before issuing arrest warrants and thereby ensured that the Court was not stepping beyond the limited powers provided for in the Statute or encroaching on the rights of states. On the other hand, the Chamber imposed the requirement, not necessarily evident from the statute, for a case to be inadmissible, domestic proceedings must include the same conduct charged by the ICC. That element of the PTC’s decision ensured the Court sufficient leeway to carry out its functions. While, as yet, the Chamber has not adopted the vision of complementarity as a right of the accused, should an accused himself challenge admissibility, that element of complementarity might well become more apparent in the Court’s jurisprudence. As the jurisprudence of the PTC stands to date, the ICC appears to view admissibility primarily as a means to protect states’ rights, however the limitations imposed by such a vision are not absolute and may be circumscribed by the functional needs of the institution.

### **III. THE POTENTIAL UGANDAN ADMISSIBILITY CHALLENGE**

Throughout late 2007 and early 2008, events on the ground at the peace negotiations between the LRA and the Ugandan government in Juba, South Sudan, have been unfolding rapidly. At the time of writing in mid April 2008, it is difficult, if not impossible, to predict the ultimate outcome of those negotiations, though a final peace agreement is supposed to be signed and may lead to a complete demobilization of the

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<sup>112</sup> *Id.* at ¶40.

LRA.<sup>113</sup> For the purposes of argument, the sections that follow assume that such a peace deal is ultimately signed and that Uganda and the LRA proceed to implement the June 2007 and February 2008 agreements on accountability and reconciliation. This part of the chapter first considers the terms of the two agreements reached between the LRA and the Ugandan government and then turns to the range of possible domestic accountability options available to Uganda in light of those agreements.

*A. Domestic Justice: The June 2007 and February 2008 Accountability Agreements*

As part of ongoing efforts to bring about a peaceful settlement to the conflict in northern Uganda, the LRA and the Ugandan government reached an initial agreement on justice and accountability in June 2007. The agreement seeks to promote “lasting peace with justice” through a balancing of the need for peace with the obligation to “prevent... impunity” and the “requirements of the Rome Statute.”<sup>114</sup> The agreement anticipates the establishment of a domestic criminal justice mechanism to provide accountability for the most serious crimes committed during the conflict in the north. Specifically, the agreement calls for “formal criminal and civil justice mechanisms” to “be applied” to those responsible for “serious crimes or human rights obligations” through a “legal framework in Uganda.”<sup>115</sup> Such language appears fully consistent with the exercise of Uganda’s primary jurisdiction over Kony and other LRA indictees. In fact, the language of the agreement appears to anticipate an admissibility challenge, noting “Uganda has institutions and mechanisms ... provided for and recognized under national laws capable of addressing the crimes and human rights violations committed” in the conflict.<sup>116</sup>

This first agreement however offers two key concessions to the LRA leadership that may have troubling implications for a Ugandan challenge to admissibility. First, the agreement suggests that, notwithstanding the use of “formal courts,” “alternative penalties and sanctions...shall apply and replace existing penalties with respect to serious

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<sup>113</sup> At the time of writing, it remains far from clear whether Kony will in fact sign such an agreement. *See Ugandan Rebel too Ill for Peace*, *BBC News*, April 1, 2008, available at <http://news.bbc.co.uk/2/hi/africa/7324045.stm>.

<sup>114</sup> Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and The Lords Resistance Army/Movement, June 29, 2007 [hereinafter June 2007 Agreement]

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

crimes.”<sup>117</sup> While such penalties are supposed to “reflect the gravity of the crimes,” they remain unspecified in the initial agreement. Depending on how such penalties are ultimately crafted, they might or might not meet the admissibility tests specified in Article 17 of the Rome Statute, namely that the proceedings were not intended to shield the accused and that they were consistent with “an intent to bring the person concerned to justice.”<sup>118</sup> Second, the June 2007 agreement calls for the use of “traditional justice mechanisms” such as *mato oput* “as a central part of the framework for accountability.”<sup>119</sup> Such traditional justice mechanisms generally are based around forgiveness ceremonies rather than criminal sanction and, as such, would presumably not meet the intent to bring to justice standard of Article 17.<sup>120</sup> Again, the June 2007 Agreement does not specify the scope of applicability of such traditional justice mechanisms, but they are clearly intended to be a significant component of accountability.

After months of negotiation and consultations within the LRA and the Ugandan government, a second and more detailed Annexure to the Agreement on Accountability and Reconciliation was concluded in February 2008. This agreement seeks to provide the specific frameworks for the implementation of the principles articulated in the June 2007 agreement. More specifically, the Annexure calls for the establishment of a “special division of the High Court of Uganda” to “try individuals who are alleged to have committed serious crimes during the conflict.”<sup>121</sup> The anticipated special division is supposed to undertake investigations under the authority of the Director of Public Prosecutions for war crimes and crimes against humanity. While the Annexure does not specifically mention alternative sentences, that language as contained in the June 2007 Agreement would appear to remain applicable. In addition, the Annexure again notes that the special division may recognize “traditional and community justice processes in proceedings.”<sup>122</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> Rome Statute, Art. 17.

<sup>119</sup> June 2007 Agreement.

<sup>120</sup> UGANDAN COALITION FOR THE INTERNATIONAL CRIMINAL COURT, APPROACHING NATIONAL RECONCILIATION IN UGANDA: PERSPECTIVES ON APPLICABLE JUSTICE SYSTEMS (2007).

<sup>121</sup> February 2008 Agreement.

<sup>122</sup> *Id.*

In light of these developments, the PTC submitted a request to the Government of Uganda on 29 February 2008, seeking further information on the steps Uganda was taking to implement the agreements, the proposed competence of the special division of the High Court, the categories of offences subject to traditional or alternative justice, and the impact of the agreements on the ICC arrest warrants.<sup>123</sup> In a response dated 27 March 2008, Uganda clarifies that “formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations.”<sup>124</sup> The letter further specifies that the government will appoint a task force for determining the necessary implementing legislation and will proceed with the establishment of the special division after a final peace agreement is signed. With respect to issues of admissibility, the Government’s response provides insight into the potential interactions between the ICC and the Ugandan High Court. The Solicitor General’s letter notes: “The special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly those individuals who were indicted by the International Criminal Court will have to be brought before the special division...”<sup>125</sup> The letter further provides the basis for a future Ugandan challenge to admissibility, noting that “Uganda’s inability to have the LRA leadership tried” was due to the fact that the LRA leaders were “beyond the borders of Uganda.” The letter continues: “It is expected that once the agreement is signed and the Lord’s Resistance Army submits to Ugandan jurisdiction as required, the perpetrators of atrocities in northern [sic] [Uganda], the indictees inclusive, shall be subject to the full force of the law.”<sup>126</sup>

### B. *Mechanisms of Domestic Justice*

The agreements reached to date between the LRA and the Ugandan government as well as the exchange between the Ugandan Government and the ICC suggest that Uganda will pursue a dual track strategy with respect to accountability. Those most

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<sup>123</sup> Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, ICC-02/04-01/05, 29 February 2008.

<sup>124</sup> Letter from Jane F. Kiggundu, Acting Solicitor General, to the Registrar of the International Criminal Court, 27 March 2008.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

responsible for international crimes committed in the conflict who have not yet received amnesty will face formal justice with special procedures and, possibly, alternative sentences. Given that Uganda has already granted amnesty to members of the LRA who have been demobilized, such formal justice would likely apply only to those LRA members who remain at-large, including the ICC indictees.<sup>127</sup> Those who committed lesser offences will, presumably, face limited accountability through an alternative form of justice based around traditional justice ceremonies. Any Ugandan challenge to admissibility will relate only to the justice mechanisms utilized for LRA officials indicted by the ICC, presumably the formal justice provided by the yet-to-be-developed special division of the High Court. The key question, then, is whether the domestic justice utilized for ICC indictees will meet the complementarity requirements of the Rome Statute. A number of options are available to Uganda in this process with considerably different implications for such an admissibility challenge.

### *1. Amnesty*

The present legal framework in Uganda provides for what is essentially a blanket amnesty for demobilizing rebels who apply for amnesty through a simple process with the Amnesty Commission.<sup>128</sup> The Amnesty Act of 2000 was extended by the Government of Uganda in May 2006 for an additional two-year period and remains applicable. Under existing law, even ICC indictees who submit to Ugandan domestic jurisdiction could apply for amnesty and would, thereby, be immune from Ugandan domestic jurisdiction.<sup>129</sup> While there are many deficiencies in the existing amnesty process in Uganda, as long as such amnesty applies only to non-ICC indictees, the Amnesty Act would not present a problem for an admissibility challenge. It would, nonetheless, limit the use of formal justice mechanism to those members of the LRA who have yet to apply for amnesty. If, however, amnesty is offered to or, perhaps even if it is statutorily available to ICC indictees, it would presumably deprive Ugandan courts of domestic

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<sup>127</sup> See Amnesty Act (2000) [Uganda].

<sup>128</sup> Amnesty Act (2000) [Uganda].

<sup>129</sup> At least some readings of an amended version of the Amnesty Act of 2000 would appear to give the Minister of Justice authority to limit a grant of amnesty so as not to preclude the exercise of domestic jurisdiction over ICC indictees. Personal Interview, El Hajji Miro, Amnesty Commissioner, Kampala, Uganda, January 8, 2008.

jurisdiction and thereby render any Ugandan admissibility challenge moot. Hence, should Uganda seek to implement the February 2008 Annexure plan for a special division of the High Court, it must reform the Amnesty Act so as, at the very least, to exclude ICC indictees from amnesty.

## 2. *Courts martial*

Perhaps the most effective means to provide domestic accountability for ICC indictees would be to conduct a trial through Uganda's military tribunals, which are already well established and clearly have the competence to undertake such investigations. This has been the preferred method of trying sensitive, politically implicated crimes in the past. There are, however, two problems with such an approach. First, the February 2008 Annexure specifies that military courts will not be used as a mechanism for accountability for serious crimes.<sup>130</sup> Second, the constitutionality of using military tribunals to prosecute individuals not in the military is questionable. In 2005, the trial of the opposition leader Dr. Kizza Besigye provoked a constitutional conflict when he was detained by the military to face a Court Martial on charges of terrorism and illegal-weapon possession.<sup>131</sup> Uganda's High Court ruled that the exercise of military jurisdiction over civilians was unconstitutional<sup>132</sup> under Article 126(1) of the Ugandan Constitution.<sup>133</sup> Hence, despite the potential effectiveness of military courts martial as a means of accountability for the LRA, it appears highly unlikely they will play a role in the process.

## 3. *A Special Division of the High Court*

By far the most likely means of formal accountability for the LRA will be through the use of a special division of the High Court. Considerable implementing legislation will be needed in Ugandan domestic law to provide for the operation of such a special division in conformity with the June 2007 and February 2008 Agreements, though a potentially effective framework for such trials does exist in Ugandan law. Three key

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<sup>130</sup> February 2008 Agreement.

<sup>131</sup> He was charged under Ugandan People's Defence Forces Act No. 7 of 2005, Section 119(1).

<sup>132</sup> See *Uganda Law Society v. Att'y Gen.*, Constitutional Court of Uganda, Constitutional Petition 18 (2005).

<sup>133</sup> *Id.* at 38.



issues must be addressed to ensure the effective functioning of a special division of the High Court and to provide a reasonable likelihood that such domestic trials would bar admissibility before the ICC: 1) potential charges under Ugandan law; 2) the operating procedures of the special division; and 3) the range of possible sentences. How the Ugandan government deals with these three issues is likely to have significant bearing on the ultimate success of an admissibility challenge.

The ICC indictment against Joseph Kony contained 33 separate charges involving nine international criminal acts: enslavement, sexual enslavement, rape, inducing rape, attack against civilians, cruel treatment, inhumane acts, pillaging, and murder.<sup>134</sup> Under Uganda's Penal Code, these ICC charges could be translated into the following domestic charges: kidnapping or abducting in order to subject person to grievous harm; slavery;<sup>135</sup> detention with sexual intent;<sup>136</sup> rape;<sup>137</sup> doing grievous harm;<sup>138</sup> theft;<sup>139</sup> and murder.<sup>140</sup> The Penal Code also establishes that any person who "does or omits to do any act for the purpose of enabling or aiding another person to commit the offense" is a principal offender, deemed guilty of performing the act, as is any person who procures another to commit the act.<sup>141</sup> If Uganda charged Kony with all of the above crimes, it could likely meet the requirement cited by PTC-I in the Lubanga case that each person and count charged in the ICC warrant be charged in the domestic proceedings. Thus the question would simply be whether or not the Chamber is willing to allow Uganda to retake ownership of the LRA trials if it intends to genuinely pursue domestic justice.

Second, Uganda will have to develop an appropriate procedural framework for the trial of the LRA leadership in the proposed special division. Such a procedural framework is indicated, at least in broad terms, in the February 2008 Annexure and would have to comply both with the Ugandan constitution and key procedural guarantees

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<sup>134</sup> ICC, Warrant for the Arrest of Joseph Kony 12-19.

<sup>135</sup> Uganda Penal Code Act, Chapter 24 Section 245 (punishable by up to 15 years of imprisonment).

<sup>136</sup> *Id* at Chapter 14 Section 134 (punishable by up to 7 years of imprisonment).

<sup>137</sup> *Id* at Chapter 14 Section 219 (punishable by death).

<sup>138</sup> *Id* at Chapter 21 Section 219 (punishable by up to 7 years of imprisonment).

<sup>139</sup> *Id* at Chapter 25 (Section 261 prescribes general punishment of theft as not more than 10 years imprisonment).

<sup>140</sup> *Id* at Chapter 18 Section 188-89 (persons convicted of murder "shall be sentenced to death").

<sup>141</sup> *Id* at Chapter 4 Section 19(1)(b)&(2).

of international human rights instruments. More specifically, that procedural framework would have to guarantee that certain key elements of Article 17 of the Rome Statute are met, namely that the proceedings are conducted “independently and impartially” and that there is not “an unjustified delay” in the proceedings.<sup>142</sup> As soon as practical after the signing of a final peace agreement, Uganda will need to pass appropriate implementing legislation for the operation of the special division of the high court.

Perhaps the most challenging element of the legal framework for domestic prosecutions relates to the sentences to be imposed by the special division. The June 2007 Agreement clearly references the establishment of a “regime of alternative penalties and sanctions.”<sup>143</sup> The nature of the negotiations between the LRA and the Ugandan government during late 2007 and 2008 suggests that this regime of alternative sentences is a *sine qua non* of any peace deal and a strong incentive for Kony and his followers to submit to Ugandan domestic jurisdiction.<sup>144</sup>

Under existing Ugandan law, the likely charges Kony and others would face could carry sanctions up to and including death,<sup>145</sup> whereas the ICC could apply a maximum sentence of life in prison.<sup>146</sup> Hence, under existing law, it appears likely that the range of sentences Kony and others might face would be fully consistent with the intent to bring to justice requirement of Article 17 of the Rome Statute. However, should the Ugandan government revise the applicable penalties available to the special division, as suggested by the June 2007 Agreement and demanded by the LRA, to provide far lighter sentences or even house arrest, it is possible such a sentencing regime could be seen by the PTC as a means of shielding the accused from the ICC or as inconsistent with an intent to bring the accused to justice. As a result, the Ugandan admissibility challenge might fail.

The key for implementation of meaningful domestic justice that would render the cases inadmissible before the ICC is to find a sanction regime that encourages the LRA to surrender but that still meets the tests of Article 17. Article 17 requires domestic proceedings are based on an intent to bring the accused to justice. As it is extremely

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<sup>142</sup> Rome Statute, Art. 17(2)(b) and (c).

<sup>143</sup> June 2007 Agreement.

<sup>144</sup> Personal Interview, LRA Representatives, January 7, 2008, Kampala, Uganda.

<sup>145</sup> See Ugandan Penal Code art. 189.

<sup>146</sup> See Rome Statute, art. 77.

difficult to parse the intent of a state in such regard, the PTC may have reference to the penalties available under a domestic proceeding as a proxy for the state's genuine intent to bring the accused to justice. At present, however, such a regime of penalties must be designed with little guidance from the PTC as to what kinds of sanctions would meet the Article 17 threshold. It is further unclear the extent to which the Chamber's decision on the genuineness of the domestic process would be based on the outcome of the trial. The language of the Rome Statute seems to indicate that a *result* that shields the accused from justice would be impermissible, yet it makes reference only to the "proceedings" to determine willingness to prosecute.<sup>147</sup> It is therefore difficult to tell if the Court's decision would be based on the process undertaken or the final verdict reached or sentence given.<sup>148</sup>

A purely process-focused inquiry might be problematic due to the inherent difficulty of assessing the genuineness of the process without reference to the results. It would appear inconsistent with Article 17 for the accused to nominally face severe penalties but to be discretionally sentenced to terms that do not match the severity of the crimes. Therefore, if the PTC makes its determination after a trial, it may look at the difference between the verdict reached and typical sentences within a jurisdiction to determine if a "national decision was made for the purpose of shielding the person concerned from criminal responsibility,"<sup>149</sup> and may look at any pre-trial agreements reached between the government and the accused. In the Uganda case, this may be particularly relevant as a national decision has been made on accountability and it will be incumbent upon the Government to demonstrate that the agreement was *not* reached to shield the indictees from responsibility. In order to do so, it may be necessary to demonstrate that any gap between a typical sentence for the crimes charged and an actual sentence given is consistent with normal variations in sentencing, or, at least, that the gap

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<sup>147</sup> Id. at art. 17(2)

<sup>148</sup> In theory a full and fair trial leading to an acquittal would satisfy complementarity. However, this may set up a bizarre scenario where, in absence of any evidence that an acquittal was the result of a concerted effort to shield the accused from justice, an acquittal provides a stronger challenge to admissibility than a conviction with an inexplicably light sentence. The latter would present a *prima facie* evidence of an agreement on the criminal responsibility between the jurisdictional state and the accused, whereas the former is only an indication that the process was carried out to a decision and does not necessarily point to collusion.

<sup>149</sup> Id. at 17(2)(a)

does not reflect an unwillingness to hold the accused accountable for their crimes. If, in contrast, the PTC rules on admissibility before the domestic trial is completed, the ultimate result of the domestic process will still be undetermined. In such a circumstance, the PTC will have no choice but to focus its inquiry on the domestic process, rather than result. In that circumstance, the PTC may look at the sentences available to the domestic court as a proxy for the intent to bring the accused to justice and consider whether the range of available domestic sentences in the particular proceeding diverges from those available in typical domestic cases.

#### 4. *Traditional Justice*

A third option available to Uganda is the use of traditional justice, as called for in both the June 2007 Agreement and February 2008 Annexure. Such traditional justice mechanisms are clearly the strong preference of the LRA indictees and might include modified versions of various local processes such as *Mato Oput*, *Cuol Kwor*, *Kayo Cuk*, *Ailuc* and *Tonu ci Koka*.<sup>150</sup> These mechanisms generally seek community healing and reintegration through confession, repentance and token restitution, aimed at demonstrating remorse and signaling a new start for all involved.<sup>151</sup> They do not, however, generally provide for criminal sanction.

The March 2007 Letter from the Ugandan Solicitor General to the ICC Registrar suggests that these traditional justice mechanisms will only apply to lower level offenders and would not constitute a part of the formal justice mechanisms applicable to ICC indictees. While there are serious concerns about the appropriateness of traditional justice mechanisms for serious offences committed in a conflict and with respect to the frequent exclusion of women from these ceremonies, as long as traditional justice is only utilized for offenders who have not been indicted by the ICC, the use of traditional justice would be irrelevant to any admissibility considerations.

Should, however, traditional justice be used as part of the formal justice mechanism applicable to ICC indictees, it could present significant problems for a

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<sup>150</sup> For an analysis of the different mechanisms of traditional justice in Northern Uganda, see UGANDAN COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *APPROACHING NATIONAL RECONCILIATION IN UGANDA: PERSPECTIVES ON APPLICABLE JUSTICE SYSTEMS* (2007).

<sup>151</sup> *Id.*

Ugandan challenge to admissibility. Specifically, should the participation in a traditional justice ceremony constitute a part of the sentences handed down by the special division of the High Court, such a sentence could be viewed as inconsistent with an intent to bring the accused to justice. Similarly, should the procedures adopted by the special division incorporate elements of traditional justice, it is possible the ultimate proceedings might not be deemed independent and impartial. Hence, the separation of traditional justice mechanisms from the formal court proceedings envisioned by the February 2008 Annexure might be critical to the success of any admissibility challenge.

#### **IV. CONCLUSION: EVALUATING ADMISSIBILITY, SHAPING DOMESTIC JUSTICE**

Assuming a final peace deal is reached and the LRA disarms to face domestic accountability, an admissibility challenge will, presumably, be brought before the PTC, on the grounds that the crimes committed by ICC indictees are being investigated and prosecuted in a domestic forum and that Uganda is both able and willing to provide accountability domestically. The approach taken by PTC II to such a challenge will have considerable implications both for the pursuit of peace and justice in Uganda and for the broader contours of acceptable domestic processes under Article 17. Given the circumstances of Uganda's referral and the on-going peace negotiations, the results of such a challenge may significantly impact the Court's legitimacy and future effectiveness. On one hand, rejecting a challenge to admissibility, particularly if a peace agreement has been reached that is conditional on removal of the ICC warrants, may result in a perceived lack of respect for state sovereignty and may undercut state support for the Court. On the other hand, if the Court is seen as compromising justice by allowing the LRA leaders to escape meaningful justice, it may seriously weaken both the moral authority of the ICC and its deterrent effect. Such a ruling might also create incentives for States and suspects to use the ICC as a negotiation tool, rather than an institution of justice.

This final section of the chapter first considers two potential admissibility challenges that could be brought in the Uganda situation—one by the Ugandan Government and one by an indictee such as Joseph Kony. The section then turns to the

broader implications of any potential PTC ruling on admissibility and the ways in which the PTC may be able to help shape domestic justice processes in the future.

*A. An Admissibility Challenge by the Government of Uganda*

Uganda has jurisdiction over any crimes committed by ICC indictees and, pursuant to Article 19(2)(b) of the Rome Statute, is therefore empowered to challenge admissibility on the grounds that “it is investigating or prosecuting the case.”<sup>152</sup> Such a challenge brought by the Ugandan government would likely raise three key questions for consideration by the PTC: (1) is Uganda estopped from challenging admissibility or has it somehow waived the right to challenge admissibility through its self-referral? (2) has Uganda raised the admissibility challenge at the earliest possible opportunity? and (3) do the proposed domestic proceedings in Uganda meet the tests laid out in Article 17 of the Rome Statute?

Framed in terms of the visions of admissibility noted above, a Ugandan admissibility challenge would assert that, given Uganda’s newfound ability and willingness to prosecute, any enforcement action by the ICC would interfere with Uganda’s sovereignty and would exceed the jurisdictional entitlements transferred to the ICC through the Rome Statute. Such an argument would adopt the visions of admissibility as a protection of state sovereignty and as a limit on the powers of the Court discussed in Pat II, above.

Should the PTC approach the question from the perspective of admissibility as a fundamental limitation on the power of the Court, the estoppel argument carries little weight. If the Court lacks the power to proceed where a domestic court is able and willing to undertake its own investigation and prosecution, then the Ugandan self-referral should have little or no bearing on the ultimate powers of the Court or its determination of admissibility. In contrast, if the PTC views admissibility as a protection of state sovereignty, then the estoppel argument may be more convincing. By self-referring the case, it may be that Uganda has waived the rights it would have otherwise had to challenge admissibility.

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<sup>152</sup> Rome Statute art. 19(2)(b).

As noted above, however, the vision of admissibility as a protection of state sovereignty appears to be balanced against the need for the proper functioning of the Court. Assuming that any Ugandan challenge to admissibility is appropriately made before the commencement of trial, it is unlikely that a PTC finding of inadmissibility would in any way interfere with the effective operation of the Court or undermine the goals articulated in the preamble to the Rome Statute of ending impunity. Thus, even from the perspective of admissibility as a protection of state sovereignty, the estoppel claim should not stand in the way of the PTC rendering the case inadmissible based on genuine domestic proceedings.

Perhaps a more difficult consideration with respect to a Ugandan challenge to admissibility relates to the timing of such a challenge. Statutorily, Uganda is only entitled to one admissibility challenge.<sup>153</sup> Such a challenge must be based on clear evidence that Uganda is both able and willing to prosecute in its own courts in satisfaction of the requirements of Article 17. Yet, such a challenge must also be made at the “earliest opportunity.”<sup>154</sup> This suggests a potential contradiction, or at least an inconsistency, in the operation of Article 19. For example, should Uganda challenge admissibility prior to conducting a trial, it might not be able to satisfy the Court that it in fact was “willing,” in the Article 17 sense, to genuinely prosecute the accused. However, if Uganda waits to challenge admissibility after starting a domestic trial, the PTC could surely find that the challenge was not made at the earliest possible opportunity.

The purpose of the earliest possible opportunity requirement in Article 19(5) is presumably to both maximize the efficiency of proceedings, such that the ICC does not waste resources on an investigation or prosecution only to have the case subsequently deemed inadmissible when such an admissibility challenge could have been brought at an earlier time, and to incentive states with jurisdiction to promptly assume responsibility for prosecuting indictees or potential indictees. While these are both valid goals, the object and purpose of the Rome Statute is to create a court of complementary jurisdiction that preferences national prosecutions where they are possible. Reading the earliest possible opportunity requirement consistently with that intent and purpose of the Statute

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<sup>153</sup> See Rome Statute art. 19.

<sup>154</sup> Rome Statute art. 19(5).

suggests allowing some leeway in terms of the timing of a challenge and not using the timing requirement to block otherwise genuine assertions of national jurisdiction. As long as the Ugandan challenge is brought before the ICC expends further resources in apprehending or prosecuting the accused, the purpose of Article 19(5) would likely be satisfied and the ICC would not be harmed by an unnecessary delay by the Ugandan government.

However, this does not resolve the problem of when such a challenge would be resolved. It is unclear how the Chamber would decide an Article 19 challenge without reference to the proceedings as a whole, including the result/verdict. As a result, the “earliest opportunity” to challenge may not correspond with the earliest opportunity for the Court to decide such a challenge. It may be that the only practical way to proceed is for the Court to require that the challenge be made as soon as a threshold showing can be made that a genuine process is underway, but to defer deciding on the challenge until more evidence, in the form of actual progress towards justice is shown. This possibility of a delayed decision on admissibility would have the added benefit of involving the territorial state and the PTC in a potential dialogue as to the nature of domestic proceedings and creating on-going pressure on the territorial state to provide meaningful justice.

If this is the case, in order to meet the standards of Article 17, Uganda will have to provide compelling evidence that it is in fact undertaking genuine domestic proceedings. That, in turn, will require far more than just an illusive signature on a peace deal. Specifically, it is likely that the PTC would demand evidence that the accused are in fact in Ugandan custody and that the Ugandan judiciary has taken action against them, presumably in the form of a domestic investigation or even domestic indictment. Ideally, then, before initiating an admissibility challenge, the Ugandan government would wait until it had the necessary legal framework in place to prosecute, had a signed final peace deal, had secured custody over the accused, and had initiated domestic proceedings. Although such a challenge could, theoretically be made at an earlier time, waiting until a compelling case can be made that the government is in fact able and willing to prosecute will probably be the most effective strategy to convince the PTC to render the case inadmissible.



Finally, the PTC will have to consider whether the proposed Ugandan domestic proceedings meet the tests of admissibility in Article 17 of the Statute. Given the limited information presently available about the actual structure of such proceedings and the scant jurisprudence on admissibility from the ICC to date, detailed speculation as to how the PTC will rule is inappropriate. On one end of the spectrum, however, it would appear that accountability based solely on traditional justice would be insufficient to meet the requirements of Article 17. On the other end of the spectrum, a standard domestic trial with the full range of potential sanctions ordinarily available for equivalent charges would likely satisfy Article 17. The difficulties, of course, arise with respect to the far more likely result, namely a special domestic trial before the High Court with alternative sanctions.

In that likely middle ground, the critical questions for PTC analysis will likely be whether the sentences available to the special division of the High Court are indicative of an intent to bring the accused to justice and whether the special division's procedures can result in an independent and impartial proceeding. Should either the ultimate sentences rendered or the range of sentences available to the special division appear too limited, the PTC could well determine that the case remains admissible. Should the sentences appear too severe, the LRA may fail to submit to Ugandan jurisdiction at all. In order to sustain an admissibility challenge, then, the legislation implementing the proposed special division must ensure that, even if a regime of alternative sentences is adopted, those sentences retain the potential severity to indicate a clear intent to bring the accused to justice. To that end, the Ugandan government would be well advised to ensure that the low end of penal sanctions available to the special division is not out of proportion with the low end of sentences regularly available for such crimes and that the special division maintain the flexibility to impose severe punishments (though not necessarily the death penalty) should it so choose.

#### *B. An Admissibility Challenge by an Indictee*

Article 19 of the Rome Statute also allows an indictee of the Court to bring an admissibility challenge to the PTC. Such a challenge by an indictee raises many of the same questions as would a challenge by the Ugandan Government. However, in the case

of a challenge by an indictee, the PTC may well adopt a vision of admissibility based around the rights of the accused himself, rather than on the protection of state sovereignty. This alternate vision of admissibility could well have important consequences for the ultimate outcome of the challenge. The estoppel argument, which might limit the success of an admissibility challenge by the government would be inapplicable in the case of a challenge by an accused, precisely because the accused was not involved in the self-referral and could not be said to have waived his rights to trial in the natural or home forum. Similarly, the earliest opportunity requirement may be less problematic for the accused since the accused would only know that he would be prosecuted in a domestic forum once he was indicted by domestic authorities. As long as the indictee's challenge was timely brought after the filing of domestic charges against him, he should be able to satisfy the earliest opportunity requirement.

With respect to the evaluation of the proposed domestic proceedings in an admissibility challenge brought by an indictee, the basic tests of Article 17 would remain the same as they were in the case of an admissibility challenge by the government. However, the vision of admissibility as a protection of the rights of the accused might change the perspective of the PTC. Specifically, the PTC might look somewhat more forgivingly on procedural deficiencies in the domestic forum. After all, the accused's challenge to admissibility would be a clear reflection of his preference for prosecution in the domestic forum despite any eminencies that such a forum might have. That said, in the case of a challenge by an accused, the PTC might well examine more strictly whether the domestic forum was indicative of a genuine intent to bring the accused to justice. The PTC might, for example, want to fully satisfy itself that the accused was not challenging admissibility simply out of a desire for a perhaps lighter sentence available in a domestic forum. Such stricter scrutiny of the intent to bring the accused to justice could lead the PTC to find that a regime of alternative sentences under domestic law would leave the case admissible before the ICC.

In the case of a challenge by the accused, one further issue arises: must the accused already be in custody before bringing an admissibility challenge. This is a particularly important consideration in Uganda, where Kony might well prefer to challenge admissibility before submitting to Ugandan jurisdiction such that he could not

be transferred to the ICC upon surrender. The accused's right to challenge admissibility would appear to attach at the time that the ICC's activities interferes with the accused's personal liberty, namely at the time an arrest warrant is circulated against him.<sup>155</sup> From that perspective, the accused would be entitled to challenge admissibility from the time the arrest warrant is issued. However, the success of any challenge by the accused ought to require that the accused be in custody of either the state seeking to prosecute or the ICC. Unless the accused is in custody, the state seeking to prosecute can not effectively do so and, hence, the admissibility challenge should fail.

### *C. Admissibility as an Opportunity to Shape Domestic Justice Processes*

The Preamble to the Rome Statute makes clear that the ultimate goal of the ICC is to “put an end to impunity.”<sup>156</sup> As one of the authors has argued extensively elsewhere, to the degree that the goal of ending impunity can be achieved through domestic institutions, the ultimate purpose of the ICC is still served and, perhaps can even be achieved far more effectively and efficiently than it could be by the Court operating alone.<sup>157</sup> In fact, the Preamble to the Rome Statute recognizes the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>158</sup> Given the limited resources available to the ICC and the fact that such an international tribunal can, at best, prosecute a few individuals each year,<sup>159</sup> the ultimate goal of ending impunity may be best served through a policy of positive or proactive complementarity, whereby the ICC seeks to encourage and perhaps even assist national jurisdictions in undertaking their own investigations and prosecutions as an alternative to international prosecution.<sup>160</sup>

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<sup>155</sup> This was the approach taken by the International Court of Justice in the Arrest Warrant Case, in which the very circulation of an arrest warrant against a Congolese government official was deemed to interfere with Congo's rights and the rights of the accused. *See Arrest Warrant of April 11th 2000* (Democratic Republic of the Congo v. Belgium), Judgment, Merits, para. 78.D.2, 41 ILM 536 (2002).

<sup>156</sup> Rome Statute at Prmb1.

<sup>157</sup> For a full discussion of proactive complementarity, see Burke-White, *supra* note 25.

<sup>158</sup> Rome Statute at Prmb1.

<sup>159</sup> See Burke-White, *supra* note 25.

<sup>160</sup> See Burke-White, *supra* note 25.

While the implementation of a policy of proactive complementarity might ordinarily be seen as falling within the remit of the Prosecutor who could, for example, use the threat of ICC investigation to encourage national jurisdictions to investigate and prosecute international crimes themselves, in the case of an early admissibility challenge, such as that which may be brought in the Uganda situation, the PTC may have a key role to play in promoting the shape and structure of domestic justice efforts. More specifically, national governments will look to the jurisprudence of the PTC to determine the acceptable range of domestic proceedings that can satisfy Article 17 of the Rome Statute. Particularly where states in on-going conflicts seek to design judicial mechanisms that balance the need to secure the peace with the obligation to provide justice, they will look to decisions from the PTC to determine the flexibility they retain to satisfy those two potentially conflicting goals. The Ugandan case will likely provide that critical precedent.

From this perspective of balancing peace and justice in conflict and post-conflict environments, an admissibility challenge from Uganda gives the PTC an extraordinary opportunity to begin to map out the contours of acceptable domestic proceedings. In setting those contours, however, the PTC must tread carefully. If its reading of the Statute is too restrictive as to the design of domestic proceedings, the PTC runs the risk of destabilizing a much needed peace process and perhaps exposing the Court to accusations of prolonging conflict and standing in the way of international peace and security. In contrast, should the PTC grant Uganda too much leeway, for example by allowing the government to undertake domestic prosecutions with maximum sentences of, for example, limited house arrest, it could undermine the goals of justice and accountability at the heart of the Rome Statute and irreparably damage the Court's reputation.

Should the Uganda situation result in an admissibility challenge, the PTC will face perhaps its greatest test to date. But, it also has an exceptional opportunity. The PTC will have to strike the right balance between granting states freedom to design domestic judicial responses to help end a conflict and the legitimate demands for justice and accountability. In the Uganda case, that balance may well lie in finding the right regime of alternative sanctions. Uganda will have to present a far more detailed proposal for domestic accountability to the PTC and the Court will have to respond. Ideally, both sides

will recognize the goal of a mutually acceptable solution, constrained on one hand by the requirements of justice in the Rome Statute and on the other by the need for peace and stability. That recognition will hopefully lead the Ugandan government to aim higher than it otherwise would with respect to justice and sentencing and lead the PTC to accept something less than perfect accountability.

The difficulty for both sides in this process is that they are operating largely in the dark with little guidance as to either the PTC's interpretation of Article 17 or the ultimate outcome of a domestic process in Uganda. If the Ugandan government's proposed domestic process presented in an admissibility challenge is inadequate, the PTC will be fully justified in deeming the case still admissible before the ICC. The PTC should, however, take that opportunity to provide guidance as to what would constitute a sufficient domestic proceeding to satisfy Article 17, grant the Government the opportunity to revise the domestic proceedings if need be, and allow a second admissibility challenge as appropriate. In the process, however, the PTC will send a powerful signal to states and the international community as to the flexibility states retain to resolve internal conflicts despite being party to the Rome Statute, the acceptability of compromises between peace and justice, and the Court's perception of its own role at the intersection of law and politics, peace and justice.