NOTES AND COMMENTS

ADMISSIBILITY OF THE INTERNATIONAL CRIMINAL COURT

Abstract

Jurisdiction refers to the legal parameters of the courts' operation, in terms of subject matter (*jurisdiction ratione materiae*), time (*jurisdiction ratione temporis*) and space (*jurisdiction ratione personae*). The question of admissibility arises at a later stage and seeks to establish whether matter over which the court properly has jurisdiction should be litigated before it.[1] In reality the line between jurisdiction and admissibility is not always clear, this could be a matter of concern for those involved. The paper makes an attempt to analyse admissibility and the potential challenges before the International Criminal Court.

I Introduction

WHENEVER TWO legal systems or regimes can each exercise jurisdiction over the same issues, some mechanism will usually have to be developed in order to determine which one precedes first. In the case of genocide, crimes against humanity and war crimes, the International Criminal Court operates parallel to the national justice systems, which are also positioned to prosecute the offences in question. The underlying premise of the Rome Statute is that, when national justice systems fail, the International Criminal Court steps in The preamble to the Rome Statute recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Consequently, article 17 of the statute prescribes that the court may take on a prosecution only when national justice systems are 'unwilling or unable genuinely' to proceed. The statute addresses the issue under the rubric of 'admissibility'. The court may well have jurisdiction over a case, in the sense that the alleged international crime was committed subsequent to 1 July 2002, on a territory of a state party to the statute, or by a national of a state party, or where there has been a Security Council referral or a declaration accepting jurisdiction by a non-party state. But, if the case is being investigated or prosecuted by a state with jurisdiction over the crime, the prosecutor must demonstrate that it is 'unwilling or unable genuinely'.[2]

1. William A Schabas , *An Introduction to the International Criminal Court* 68 (2007).
2. *Id*. at 171.

II Scope of article 17 of Rome Statute

Article 17 of the Rome Statute lists three scenarios in which a case is inadmissible before the ICC due to the existence of national proceedings. The article reads thus:

> Article 17: Issues of admissibility
> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> (d) The case is not of sufficient gravity to justify further action by the Court.
> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable

to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

From this, the following can be concluded (assuming that the ICC has jurisdiction and the case is of sufficient gravity): 1) a case which is not being and has not been investigated or prosecuted by a state with jurisdiction is always admissible; 2) a case that is being or has been investigated or prosecuted by a state with jurisdiction is inadmissible unless one or more of the exceptions apply; and 3) when such proceeding exists, the case is presumed inadmissible but is admissible if the state is or has been unwilling or unable to proceed genuinely.[3]

The provision has a negative and a positive effect. A case is inadmissible when two cumulative criteria are met. The case must be or have been investigated or prosecuted by a state with jurisdiction, and the state must not be unwilling or unable to proceed genuinely. Conversely, a case is admissible when one of two alternative criteria is met: the case must not have been investigated or prosecuted by a state with jurisdiction, or the case must be or have been proceeded with by a state unwilling or unable to do so genuinely.

"Sufficient gravity" criterion

In addition to the above, article 17(1) (d) makes a case inadmissible when "the case is not of sufficient gravity to justify further action by the Court". Although technically an admissibility criterion, this criterion is of a very different character than criteria (a) to (c) as it does not presuppose the existence of national proceedings. Further, (d) is not truly an allocation criterion as the result might be that the case is dealt with at neither level.

The criterion was first proposed in the ILC Draft Statute, and it survived the later negotiations, although it was noted on several occasions that the criterion should not be included as an admissibility criterion. A footnote attached to article 15(1)(d) (now article 17(1)(d)) in the preparatory committee's proposal reads thus: "Some delegations believed that this subparagraph should be included elsewhere in the Statute or deleted."[4] The fact that the gravity was retained in article 17 underscores the idea that the ICC shall only deal with

3. Arts. 17(1) (c) and 20 on *ne bis in idem* only refer to the state's unwillingness.

4. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, A/CONF.183/2/Add.1,41(1998). *Available at*: www.un.org/icc/prepcom.htm (visited on 5 Dec, 2011).

the gravest crimes of all. The prosecutor noted thus:[5]

> Crimes within our jurisdiction are by definition grave crimes of international concern. But gravity in our Statute is not only a characteristic of the crime, but also an admissibility factor, which seems to reflect the wish of our founders that the ICC should focus on the gravest situations in the world.

"Complementary"

Article 17 begins with the words "Having regard to paragraph 10 of the Preamble and article 1". These two provisions provide that the ICC "shall be complementary to national criminal jurisdictions". Before interpreting the criteria listed in article 17, it should be determined whether the term "complementary" itself has any bearing on the interpretation or whether it is neutral. The term is not defined in the Rome Statute and article 17 merely provides a recipe for the effectuation of the ICC's complementary nature. It explains the meaning of complementarity in practical terms, related to admissibility (article 53 explains how the ICC eventually shall complement national jurisdictions once the prosecutorial discretion has been exercised). The term "complementarity" was introduced in the ILC discussions. In later negotiations states frequently discussed "the principle of complementarity", referring to "the entirety of norms governing the complementary relationship between the ICC and national jurisdictions".[6] It was noted that the term complementarity "was not an established legal principle".[7] The term (which is not the one actually used in the statute) means "a complementary relationship".[8] A search on the Internet reveals that the term is frequently used in physics referring to wave and particle theories,[9] but rarely in other contexts, save in connection with the ICC. The adjective "complementary" (the term actually used in the statute) is more common.[10] It means "forming

5. Informal meeting of Legal Advisors of Ministries of Foreign Affairs, Statement by Luis Moreno-Ocampo, Prosecutor of the ICC, 24 October 2005, 8-9. *Available at*: http://www.icc-cpi.int/otp/otp_events.html (visited on 12 Jan, 2011).

6. Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* 188 (2008).

7. UN Press Release L/2772: Jurisdiction of Proposed International Criminal Court, discussed in Preparatory Committee on its Establishment, 2 April 1996. *Available at*: http://www.un.org/ news/Press/docs/html (visited on 4 Jan, 2011).

8. The Oxford English Dictionary.

9. Curiously, physicians also frequently refer to something they call the "principle of complementarity"

10. The exact term "complementarity" is not used in the statute.

a complement, completing, perfecting".[11] When one thing is complementary to another, the former is "completing [the latter's] deficiencies".[12] The noun "complement" means "that which completes or makes perfect"; "something which, when added, completes or makes up a whole; each of two parts which mutually complete each other, or supply each other's deficiencies".[13] The verb "to complement" means "to complete or perfect, to supply what is wanting".[14] These definitions reflect the underlying idea that the court shall step in when national jurisdictions have deficiencies or when something is wanting at the national level. With the ICC complementing national deficiency, the two systems create a perfect whole in which perpetrators are brought to justice.[15]

The term "complementary" refers to a quantitative aspect (making up a whole), and a qualitative aspect (completing deficiencies). In an ideal world, the ICC would complement national jurisdictions in both ways by adjudicating all cases where states failed (quantitatively) and by providing genuine justice every time it interfered (qualitatively). Given the vast number of crimes that will fall under the court's jurisdiction, the notorious failure of states to deal genuinely with them, and the court's limited capacity, the court can, however, truly complement national jurisdictions only in the qualitative sense in given cases. The quantitative complement will be modest.[16] The ICC will provide genuine justice only when it is most needed, leaving an impunity gap where justice is dispensed at neither level. In order to do the complementarity principle justice, however, it should be noted that the mere possibility of ICC interference will provide an enhancing effect *vis-à-vis* national judiciary, sometimes obviating the need for interference.[17]

In everyday usage, one would typically say that two things complement each other. In an ICC context, however, it makes more sense to say that the ICC complements national jurisdictions, and not *vice versa*. Paragraph 10 of the preamble and article 1 provide that the ICC "shall be complementary to national criminal jurisdictions", not that the two shall complement each other. The ICC is intended fill the gap left by inactive, unwilling or unable states, whereas national jurisdictions will not fill any gap left by the ICC, at least not in the sense that they will compensate any ICC deficiency (neither can

11. *Supra* note 8.
12. *Ibid.*
13. *Ibid.*
14. *Ibid*.
15. Jo Stigen *supra* note 6 at 188.
16. The ICC prosecutor has estimated that the ICC, with its current resources, has "the capacity to take only two or three situations each year", see Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, *supra* note 5 at 9.
17. Jo Stigen, *supra* note 6 at 189.

the ICC proceedings reasonably be expected to suffer from deficiencies of the kind described in article 17).[18] Moreover, national jurisdictions will, according to article 20(2), never have the authority to investigate or prosecute a case that has already been tried by the ICC, even if the ICC proceeding should be defective.[19] This is not to say, however, that the complementarity principle does not rely heavily upon national jurisdictions; they will still provide the backbone of the enforcement of international criminal law.[20]

"A state which has jurisdiction"

According to article 17(1), ICC interference can only be pre-empted by "a State which has jurisdiction over it".[21] It is submitted that the term "jurisdiction" refers to jurisdiction under international law and not to jurisdiction under national law, although the latter typically will be required by national law.[22] As for the former, international law makes investigation and prosecution contingent on jurisdiction under international law, and the ICC, therefore, cannot defer to a state lacking such jurisdiction.[23] As for national jurisdiction, *i.e.* national penal legislation enabling national courts to avail themselves jurisdiction which they have under international law, this is not required by international law. States may, as far as international law is concerned, base their prosecution of international crimes directly on international law.[24] By illustration, a prosecution of genocide in the suspect's home state without a national genocide provision might violate internal law, but as long as international law gives that state jurisdiction over such crime, the trial does not violate international law. The lack of national jurisdiction

18. *Id*. at 190. One might say, however, that when the ICC steps in to remedy national inability, but the state shares the burden by handling the less important crimes, the national jurisdiction actually fills the gap which otherwise would have been left by the ICC.

19. Art. 20(2) contains one of the Rome Statute's few actual duties: "No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court."

20. Jo Stigen, *supra* note 6 at 190.

21. Further, only a "State which has jurisdiction" may challenge the admissibility under art. 19(2) (b).

22. "Since all States under international law may exercise jurisdiction over the crimes within the Court's jurisdiction, it is likely that paragraph 2(b) meant only to include those states which had provided their own courts with jurisdiction under national law over the case under the relevant principle of jurisdiction, whether based on territory, the protective principle, the nationality of the suspect or the victim or universality."

23.The requirement of jurisdiction is reflected *inter alia* in art. 14(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR), according to which everyone shall be entitled to a fair and public hearing "by a competent, independent and impartial tribunal established by law".

24. Jo Stigen, *supra* note 6 at 191.

might nevertheless become relevant if it results in a non-genuine proceeding reflecting the state's "unwillingness" or "inability". In the latter situation, the state would be considered a "state with jurisdiction" (according to the nationality principle), but the case would be admissible under article 17(1) due to the proceeding's non-genuineness. If the lack of national jurisdiction results in a non-proceeding, the case is automatically admissible.

As for the question as to which states have jurisdiction over the ICC crimes, it should first be decided whether a state must identify a positive rule under international law allowing the jurisdiction, or whether it suffices that the jurisdiction is not expressly prohibited by international law. It is submitted that the former starting point is correct: a positive rule is needed. The dynamic reference to "a state which has jurisdiction" lets the ICC decide the scope of a state's jurisdiction on a case-by-case basis, allowing the court to adjust to a dynamic development of international law. Conversely, it is not inconceivable that the ICC, as it begins to produce findings regarding states' jurisdiction, will influence the development in this field of international law.[25]

There is no general treaty governing states' criminal jurisdiction, and the Rome Statute does not seek to validate or rank jurisdictional bases.[26] Neither is the content of international customary lawfully settled. Some principles have, however, crystallised. The 1935 Harvard Research Draft Convention lists five jurisdictional bases: the principles of territoriality (the state where the crime was committed), nationality (the perpetrator's home state), passive nationality (the victim's home state), protection (states threatened by the crime) and universality (any state).[27] While many commentators claim that the ICC crimes are all subject to universal jurisdiction, there is still much controversy regarding the scope of such jurisdiction. Importantly, it is has not yet been clarified by the ICJ.[28] Some judgements from the two ad hoc tribunals indicate that the crimes in question are subject to universal jurisdiction,[29] but defining the scope of national criminal jurisdiction is not within these tribunals' mandate. As for special conventions, the Genocide Convention (1948) does not appear to establish universal jurisdiction over genocide,[30] whereas the

25. *Ibid.*

26. Sub paras (b) and (c) of art.19(2) presuppose the existence of other jurisdictional bases than that of the territorial state and the state of the perpetrator's nationality. In addition to "[a] State from which acceptance of jurisdiction is required under article 12 (b) [referring to those two states]" reference is made to a "State which has jurisdiction over a case", indicating that those two states are not the only ones with jurisdiction.

27. Jo Stigen, *supra* note 6 at 192.

28. *Ibid*.

29. *Ibid*.

30. Art. 6 only refers to the territorial state and an envisaged international jurisdiction.

Geneva Conventions (1949) with Additional Protocol No. 1 (1977) and the Convention against Torture (1984) appear to establish such jurisdiction among the states parties.[31] As for customary law, national legislation and jurisprudence exercising universal jurisdiction can be found in increasing numbers, but there still does not seem to exist a sufficient basis for concluding that states have a customary right to exercise universal jurisdiction over the ICC crimes, except perhaps for war crimes.[32]

Accordingly, states parties to the Geneva Conventions, Additional Protocol No. 1 and the Convention against Torture may exercise universal jurisdiction over the respective crimes *vis-à-vis* other states parties. Further, arguably, states may exercise universal jurisdiction over grave breaches of the Geneva Conventions. Otherwise, states must base their jurisdiction on one or more of the other jurisdictional bases listed above (among which the principle of passive nationality admittedly appears to be more controversial than the others). Having said this, the attitude among international criminal law judges remains to be seen[33] As to the exercise of universal jurisdiction, when such is allowed, it has been suggested that international law requires that the alleged perpetrator be present in the territory of the state exercising jurisdiction.[34] Such requirement would, if it exists, pertain to the exercise and not to the existence of jurisdiction. Thus, a state which has jurisdiction according to the universality principle will still be a state "which has jurisdiction", even if the perpetrator is outside its territory. The suspect's continued absence will, however, be a relevant circumstance for the determination of the national proceeding's genuineness (in particular for the state's ability to "obtain the accused").[35]

Another possible requirement pertaining to the exercise of universal jurisdiction is that the state in question first requests states that would normally exercise jurisdiction as to whether they wish to proceed. Again, the requirement, if it exists, pertains to the exercise and not the existence of jurisdiction, and the question remains whether the state is willing and able to proceed genuinely. It should be noted that both this requirement and (even more often) a presence requirement is reflected in the legislation of many states, with a similar potential effect regarding the proceeding's genuineness. If the state lacks jurisdiction, the case is admissible *ipso facto* under article 17

31. Arts. 49, 50, 129 and 146 of the Geneva Conventions 1-4, Additional Protocol No. 1, and arts. 7(1) and 5 of the Convention Against Torture.

32. Jo Stigen *supra* note 6 at 192.

33. *Id.* at 193.

34. *Ibid*.

35. Art. 17(3) of the Rome Statute refers to whether the state is "unable to obtain the accused" as one of the factors for the "inability" determination.

vis-à-vis that state, irrespective of whether an existing proceeding otherwise is genuine. If the state has completed a "trial" without jurisdiction, there is no true *ne bis in idem* situation (as regulated by article 20) as the "trial" will be void and effectively a non-trial. If the ICC subsequently tries the same person for the same conduct, that person will not be tried *de novo*, but for the first time by a competent court.[36]

Whether the ICC will ever interfere *vis-à-vis* an otherwise genuine "conviction" on the ground that the state lacks jurisdiction is an open question.[37] If the ICC should interfere, the point will not be to remedy the violation of that person's right to be judged by a competent court, but to ensure that impunity does not prevail as a result of a subsequent invalidation of the conviction due to the lack of jurisdiction.[38]

If the person concerned has already spent time in detention before, under or following the void national trial, the question arises as to whether this time should be deducted by the ICC. Article 78(2) provides that the court "may deduct any time otherwise spent in detention in connection with conduct underlying the crime". There is no express requirement that the imprisonment must have been pursuant to a valid judgement, and it is submitted that the time should be deducted. The net result might, however, be that an ICC proceeding no longer will serve the "interests of justice" according to article 53. If the person was acquitted in a void trial the case will be admissible, but if the trial was otherwise genuine, the prosecutor would have to study the national judgment carefully as it might indicate the person's innocence.[39]

In the context of national jurisdiction over the ICC crimes it seems pertinent to discuss a particular problem. Which role may the ICC, first of all the prosecutor, play when more than one state has jurisdiction and wants to proceed with a case? Is the prosecutor able to somehow channel the case from one state to another which seems more suited to deal with it? The office of the prosecutor noted thus:[40]

> Close co-operation between the office of the prosecutor and all parties concerned will be needed to determine which forum may be the most appropriate to take jurisdiction in certain cases, in particular where there are many States with concurrent

36. Jo Stigen, *supra* note 6 at 194.

37.The question would be subject to the prosecutor's discretion under art. 53(1)(c) and (2)(c).

38. ICCPR art. 14.

39. Such interpretation is supported by art. 21(3) which provides that any application and interpretation of the ICC law "must be consistent with internationally recognised human rights".

40. "Paper on some policy issues by the office the Prosecutor" *available at*: www.amice.org/docs/ocampopolicy paper 9_03 pdf(visited on 12th Jan 2011).

> jurisdiction, and where the prosecutor is already investigating certain cases within a given situation.

The statements seem to raise two problems: First, can the ICC prosecutor dictate the transfer of a person from the willing and able state A to state B which is the state best qualified to proceed? Second, if state A is unwilling or unable, does the prosecutor have the authority to request the surrender of a person from state A to the ICC in order to subsequently transfer him or her to the willing and able state B?

As for the first question, looking at the statements of the prosecutor, the prosecutor fails to suggest whether it would be possible to dictate the transfer of a person from the willing state A to state B which is considered the most appropriate forum. Arguably, statements such as "[c]lose co-operation [...] will be needed" and "the prosecutor should consult with those States" merely suggest consultations. Indeed, if the custodial state is willing and able, that state cannot, under the Rome Statute, be forced to surrender the person to the ICC as the case will not be admissible. Even less can the state be dictated to extradite to another state; when there is *vis-à-vis* a willing and able state on the grounds that the ICC would have done the job better. The transfer to a state that would do the job better cannot be dictated. As for the second question, whether the ICC might transfer a person to a third state, which may or may not be a state party, once he or she is in the ICC's custody, article 102 (a) defines "surrender" as the "delivering up of a person "by a state to the court", and sub para (b) defines "extradition" as the delivering up of a person "by one State to another as provided by treaty, convention or national legislation". As for the transfer of a person from the ICC to a state, this is contemplated in another situation under article 103 which provides that a sentence of imprisonment "shall be served in a State designated by the Court".[41] Further, the court may, under article 104(1), at any time decide to "transfer a sentenced person to a prison of another State". Following the completion of a sentence, a person may also, under article 107(1), be "transferred to a state which is obliged to receive him or her, or to another State which agrees to receive him or her".[42] A transfer from the ICC back to the state of origin or another state with jurisdiction is, however, contemplated in article 19(4) which provides that a state may challenge the admissibility "prior to or at the commencement of the trial" and in "exceptional circumstances" even later. A successful challenge may thus result in the person's transfer from the ICC to a willing and able state with jurisdiction.[43]

Thus, before a trial is initiated at the ICC, any state with jurisdiction

41. Jo Stigen, *supra* note 6 at 195.
42. *Id*. at 196.
43. *Ibid.*

may challenge the admissibility with a view to take over the case. If the prosecutor at an earlier point has notified states of his decision to investigate,[44] the question can be raised, however, as to whether this right might be precluded. Article 19(5) provides that the state "shall make a challenge at the earliest opportunity". Reference is made to the discussion of this provision in the chapter on the complementarity procedures which concludes that the ICC prosecutor cannot disregard a genuine national proceeding even if he or she has been informed of it by means of an untimely challenge.[45]

The above does not, however, mean that the ICC Prosecutor is authorised to request the surrender of a suspect from state A for the purpose of subsequently surrendering him or her to state B. The only purpose for which the ICC can request surrender is the subsequent prosecution before the ICC. The fact that, as noted above, the eventual result of the surrender to the ICC may nevertheless be that the suspect is surrendered to a third state which is willing and able to proceed genuinely does not change that. Another interpretation would effectively circumvent a state's right under international law not to extradite unless it has a duty to do so *vis-à-vis* that state. It would represent a mechanism which was never contemplated under the Rome Statute.[46]

National inaction: automatic admissibility

The most straightforward scenario is where no state has investigated a given case; then the case is automatically admissible (provided it is of sufficient gravity). In his report to the Security Council regarding the Darfur situation, the ICC prosecutor concluded that "there are cases that would be admissible [for the purpose of article 53(1) (b)] in relation to the Darfur situation". It was noted thus:[47]

> It is important to emphasise that this decision does not represent a determination on the Sudanese legal system, but is essentially a result of the absence of criminal proceedings relating to the cases on which the OTP is likely to focus.

The reason why national inaction leads to admissibility is evident: if the ICC prosecutor suspects that a crime within the ICC's jurisdiction has been committed and there is no investigation and there is a danger that impunity prevails. The reason for the inaction might be unwillingness or inability to

44. Art. 18(1) and (2).
45. Jo Stigen, *supra* note 6 at 196.
46. *Ibid*.
47. Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593, 29 June 2005 at. 4 *Available at* : http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_ Report_29-06-05_EN.pdf (visited 28 Jan, 2011).

proceed genuinely, but a state may also have legitimate reasons. The decision not to proceed may or may not be a decision against criminal proceedings as such. It is not a decision against criminal proceedings as such if the state fails to proceed due to the geopolitical aspects involved, such as a threat to the peace or the potential straining of inter-state relationships. Inaction might even reflect a preference for proceedings in another state or before the ICC. The office of the prosecutor has noted:[48]

> Groups bitterly divided by conflict might oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial.

Further, the state's inaction might be based on practical considerations, such as difficulties in obtaining the suspect or establishing a *prima facie* case due to the remoteness to the scene of the crime or to victims. No prosecutor will initiate an investigation if he or she realises that he or she will not be able to conduct it genuinely. Another practical obstacle might be the custodial state's unwillingness to extradite the suspect. The ICC prosecutor has noted:[49]

> There might also be cases where a third state has extra-territorial jurisdiction, but all interested parties agree that the court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum.

The territorial state might recognise that the ICC, or another state, for various reasons is in a better position to investigate and prosecute. As noted by the Prosecutor:[50]

> There might be cases where inaction by states is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes might agree that a consensual division of labour is the most logical and effective approach.

Whether the cause of the inaction is "unwillingness", "inability" or neither might be interesting, and it may certainly be relevant to the discretional "interests of justice" determination under article 53. For the purpose of determining the admissibility, however, it is irrelevant. It is, therefore, misleading when some commentators note that the ICC may exercise jurisdiction over a case only when states are unwilling or unable to act genuinely.[51] The fact that inaction makes a case admissible *ipso facto* has a practical implication and that is that

48. Paper on some policy issues before the Office of the Prosecutor, Office of the Prosecutor, Sep.2003 at 5. *Available at:* http://www.icc-cpi.int/otp/otp_policy.html. (visited on 20 Jan, 2011).

49.*Ibid*.

50.*Ibid*. The term "incapacitated" appears to indicate an "inability" scenario.

51.Jo Stigen, *supra* note 6 at 201.

the potentially time-consuming admissibility determination is avoided. This does not mean, however, that the reason why the state has not proceeded will not be of interest. It might be highly relevant for the decision as to whether proceeding with a given case will serve the "interests of justice". If the state has legitimate reasons for not proceeding, these might be relevant before the ICC as well. The failure to proceed should be "attributed" only to states with a particular incentive to act. This would typically include the territorial state, the suspect's home state and, arguably, the custodial state. These are the states that "would normally exercise jurisdiction".[52] The question as to which state inaction is "attributed" appears to have few legal implications, but there will often be a considerable stigma involved which should be properly placed. It should be noted that after the ICC prosecutor has decided to proceed due to national inaction but before the ICC trial starts, any state with jurisdiction may initiate an investigation and then invoke the admissibility criteria according to article 19(2) (b).[53]

Relevant national proceedings

As noted above, article 17 of the Rome Statute applies only when one of the listed proceedings exists. In the following, the different stages at which the ICC will have to assess the state's will and ability to proceed genuinely will be outlined.

Ongoing investigations

According to article 17(1) (a), first alternative, a case is inadmissible if a state with jurisdiction is investigating the case in question, unless the state concerned is "unwilling or unable genuinely to carry out the investigation". The inadmissibility ground is obvious: when a case is being genuinely investigated by the state, there is no need for the international community to interfere. If the investigation remains genuine throughout, it will, by definition, ensure that impunity does not prevail. The inadmissibility ground also reflects a general reluctance to adjudicate a matter that is already being adjudicated elsewhere. Whether there is an actual duty to respect ongoing proceedings in other judicial systems depends upon the existence of international obligations to that effect, of which article 17(1) (a) is an example.[54] This inadmissibility ground is conceptually related to the *ne bis in idem* principle, motivated both by sovereignty concerns and concerns for the suspect's integrity. There is a risk that the ICC prosecutor might have erred in his or her assessment of the national investigation or that a genuine proceeding later becomes non-genuine. Therefore, and in order to make it easier for the prosecutor to defer,

52. Art. 18(1).
53. Art. 19(4).
54. Art. 17(1) (a).

the statute authorises the prosecutor to "request that the state concerned periodically inform the prosecutor of the progress of its investigations and any subsequent prosecutions".[55] Based on such information, the prosecutor may review the deferral when there has been a "significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation".[56]

Decisions against prosecution

According to article 17(1) (b), a national decision not to prosecute makes a case inadmissible "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute". The rationale for this inadmissibility ground is this: if the state has genuinely decided not to prosecute, there is no need for the international community to interfere. A national prosecutor might have legitimate grounds for a non-prosecution: first, from a basic prosecutorial perspective, the national investigation may have failed to establish a *prima facie* case; second, although there is sufficient evidence and from a discretional perspective, a prosecution might not be considered to serve the "public interests" as defined by the state; and third, a decision not to prosecute might reflect a preference for prosecution elsewhere.[57] While such grounds might be legitimate from a national perspective, they will not all necessarily have to be respected by the ICC in the sense that the case is found inadmissible. The difference between formal decisions based on an investigation and mere d*e facto* decision not to proceed, *i.e.* inaction, is significant: Where the state has investigated, the case is presumed inadmissible. When there is inaction, the case is admissible *ipso facto*. In order for a national decision against prosecution to bar ICC interference, the decision further has to pertain to the case with which the ICC prosecutor considers proceeding.[58]

The wording "genuinely to prosecute" is somewhat peculiar. Syntactically, it seems to refer to a non-genuine prosecution rather than a non-genuine decision not to prosecute. A more suitable wording would have been "to make a genuine decision", alternatively "genuinely to proceed" or simply "to prosecute". The wording "genuinely to proceed" might have been preferable as it would expressly have included situations where the decision as to whether to prosecute as such was genuine but the preceding investigation was non-genuine. In such situations, the national prosecutor might have no choice but to decide against prosecution as no *prima facie* case has been established. Once the investigation has been completed, article 17(1) (a) no longer applies,

55. Art. 18(5).

56. Art. 18(3).

57. These issues are similar to the ones that the ICC prosecutor must consider under art. 53.

58. Jo Stigen, *supra* note 6 at 204.

leaving only subpara (b) applicable. Read in context, the meaning is clear: the question is whether the national proceeding so far, including the completed investigation and the decision not to prosecute, has been genuine.[59]
If the decision against prosecution is non-genuine, the prior investigation will often have been non-genuine, but not necessarily. The situation might have been that a genuine investigation has revealed that the perpetrator is a state official, and the executive branch might then have instructed the prosecutor not to prosecute.[60]

Ongoing prosecutions

According to article 17(1)(a), second alternative, an ongoing national prosecution bars ICC interference unless the state is unwilling or unable to prosecute genuinely. When there is a genuine national prosecution, impunity will not prevail. Just as with ongoing investigations, the inadmissibility ground reflects a general reluctance to interfere in a matter that is being adjudicated elsewhere due to sovereignty and fair trial concerns. A reason why a state seeking to shield the perpetrator would opt for a sham trial instead of inaction might be internal or external pressure. The purpose would be to create the false impression that the perpetrator is being brought to justice.[61]
The term "prosecution" means "to follow up, pursue; to persevere or persist in, follow out, go on with (some action, undertaking, or purpose) with a view to completing or attaining it".[62]In a legal context, "prosecution" means "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime". A prosecution starts when the case is transferred to the court, *i.e.* when the responsibility for the case and the competence to decide on its progress is transferred to a judge.[63]
According to the definition referring to "a competent tribunal", it might be argued that a national "prosecution" must take place before a regular criminal court. It is, however, submitted that the realities and not the formalities must be decisive. What is essential is that the criminal law must be applied by an organ with a law-based authority to mete out punishment, including administrative sanctions as "punishment" for the purpose of the *ne bis in idem* principle.[64]

59. *Ibid.*
60. *Ibid*.
61. *Id*. at 205.
62. Jonathan Power, *Conudrums of Humanity: The Quest for Global Justice* 205(2007).
63. Black's Law Dictionary
64. Jo Stigen, *supra* note 6 at 206.

Completed trials

According to articles 17(1) (c) and 20(3), a case is inadmissible if the same person has already been tried nationally for the same conduct, unless the trial was "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court" or otherwise "not conducted independently or impartially in accordance with the norms of due process recognized by international law" in a manner which was "inconsistent with an intent to bring the person concerned to justice". Again, if the proceeding is genuine, the perpetrator has, by definition, been brought to justice even if some acquittals inevitably will be materially wrong.[65]

III Legal basis for challenging admissibility

Articles 17-19 of the Rome Statute provide both the circumstances in which cases will be admissible and the means through which admissibility can be challenged. The Uganda situation, however, raises new questions about admissibility because Uganda self-referred the situation to the ICC. Such self-referrals were not generally contemplated during the drafting of the statute. Yet, the admissibility of cases in circumstances of self-referrals has wide implications as the majority of the court's caseload to date has come through such self referrals and the prosecutor has indicated a desire for the enhanced state cooperation that often follows self-referrals.[66]

The possible legal implications for self-referral on admissibility are numerous. First, when a case has been self-referred, must the prosecutor and PTC nonetheless evaluate admissibility prior to the opening of an investigation or the issuance of arrest warrants? Second, would a change in the factual circumstances that initially precluded the territorial state from prosecuting result in the case becoming inadmissible? Third, does the act of making a self-referral waive either the right of the state or the right of the accused to challenge admissibility? Taken collectively, these questions raise an even more fundamental issue about the nature of admissibility as a legal construct. Is admissibility a statutory limitation on the power of the ICC, or the legal entitlements of states parties to the Rome Statute, or the rights of defendants

65. *Ibid*. It may be noted that the wording of art. 17(1)(c) does not differentiate between a previous trial before a national court and a trial before the ICC (or any other court). Further, art. 20(1) prevents a person from being tried twice for the same conduct before the ICC, whereas art. 20(2) prevents a national retrial of a person tried before the ICC. The two latter situations are not aspects of the complementarity principle, but rather special versions of the *ne bis in idem* principle.

66. Office of the Prosecutor, ICC, Paper on Some Policy Issues before the Office of the Prosecutor at 2 (2003). *Available at*: http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25- 60AA962ED8B6/143594/030905_Policy_Paper.pdf (visited 22 February 2011).

before the court?[67]

Statutory basis of admissibility

In order for a case to be admissible under article 17, the court must satisfy itself that domestic authorities are not already pursuing the case. Even if it is prosecuting the case, a state is deemed unwilling to prosecute if the proceedings are 'undertaken .... for the purpose of shielding the person concerned from criminal responsibility' (article 17(2)(a) ICC Statute), 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' (article 17(2)(b) and (c) ICC Statute). 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 obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings' (article 17(3) ICC Statute).[68]

Admissibility determinations arise at a number of stages in any investigation or 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 'consider whether the case would be admissible under article 17' (article 53(1)(b) ICC Statute). Even after the initiation of an investigation, article 53(2) further requires the prosecutor to engage in a continuing evaluation of national judicial efforts and to inform the PTC if there are no grounds for prosecution because a genuine national proceeding has made the case inadmissible.

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 and requires a general examination of whether national authorities are making an effort to investigate or prosecute (article 53(1)(b) ICC Statute). The second phase, the case phase, arises subsequently, when the prosecutor identifies a particular suspect and develops an investigative hypothesis. At this point, determining admissibility requires a more specific 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. Where no such investigation has been or is being undertaken, the case remains admissible. If an investigation or prosecution has been undertaken by a state, the prosecutor must consider whether the national investigation is genuine (article 17(2) and (3) ICC Statute).

67. William W.Burke-White and Scott Kaplan, "The International Criminal Court and an Admissibility Challenge in the Uganda Situation" 7 *JICJ REV* 259 (2009).

68. *Id.* at 260.

If the national proceedings are not genuine then the OTP may nonetheless proceed with an investigation.[69]

At both the situational and case phases, the PTC also has a role to play in admissibility determinations. When a situation has been referred to the court by another state or by the Security Council, the prosecutor must inform the PTC of his decision not to proceed with an investigation due to admissibility limitations (article 53(1) ICC Statute). 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 (articles 15(3) and (4) ICC Statute). The PTC can allow a deferral based on national prosecutorial efforts or can render the situation inadmissible (articles 18, 19 ICC Statute). 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 challenges admissibility before the opening of an actual trial. 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' in the state's ability or willingness to 'genuinely' investigate and prosecute (article 18(3) ICC Statute). 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.[70]

Problem of admissibility challenges in self-referrals

Though the Rome Statute provides relatively clear and detailed guidelines for admissibility of cases, it does not specifically address admissibility in self referrals. The text of the statute and general principles of international law suggest that there may be difficulties with admissibility in self-referrals due to an earliest opportunity requirement, a prohibition on shielding, and the general principle of estoppel.

The first statutory problem arises from article 19(5) ICC Statute, according to which a state must 'make a challenge [to admissibility] at the earliest opportunity'. Where a state self-refers a situation and then subsequently seeks to challenge the admissibility of a case, 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 custody of the accused at the earliest opportunity requirement might present less of a problem so long as the state

69. *Id.* at 261.
70. *Ibid*.

challenging admissibility acted at the earliest opportunity after that change of circumstances. If the earliest possible opportunity requirement were not satisfied, the state's admissibility challenge would, presumably, fail.

The second statutory problem with an admissibility challenge after self referral arises from the requirement that for any domestic accountability efforts to bar admissibility, they cannot be intended to shield the accused (articles 17(2)(a) and 20(3)(a) ICC Statute). It may well be that where a state initially self-refers to the court and then seeks to challenge admissibility, the state is attempting to avoid complete accountability for the accused, for example due to domestic political developments since the self-referral. In this case of possible shielding, the state would remain able to challenge admissibility, but the PTC might give heightened scrutiny to its reasons.[71]

A third potential problem with a subsequent admissibility challenge in the case of a self-referral arises from the general principle of estoppel and the international legal duty of good faith.[72] While the principle of estoppel has its historic origins in territorial disputes, the basic elements are applicable in any reliance-creating situation. Estoppel attaches when a state makes a clear and voluntary commitment and the other party relies in good faith on that representation to its detriment.[73] 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 by Uganda's assertion of jurisdiction.

Further, the requirement of good faith, articulated in article 26 of the Vienna Convention on the Law of Treaties and article 6 of the Draft Declaration on the Rights and Duties of States of 1949 requires 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'. 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 statute, such actions would breach the state's duty of good faith and could preclude an admissibility challenge.[74]

Three visions of admissibility

Both the text and *travaux preparatoires* of the Rome Statute are suggestive of three different visions of admissibility and corresponding purposes of the

71. *Id.* at 262.

72. C. MacGibbon, "Estoppel in International Law" 7 *International & Comparative Law Quarterly* 468. (1958).

73. D.W. Bowett, "Estoppel Before International Tribunals and Its Relation to Acquiescence" 33 *British Year Book of International Law* 176 (1957).

74. "Codification of International Law" 29 *AJIL* (Supp.) 981 (1935).

complementarity regime found in article 17. 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. While some of these visions of the admissibility requirement overlap, each provides insight into the appropriateness of an admissibility challenge and may lead to different dispositions by the PTC.[75]

Admissibility as a personal right of the accused

A first vision of the admissibility phase is that it is a method of protecting the personal rights of the accused. This vision of admissibility is derived from the idea that an accused has a right to be free of double jeopardy and multiple, overlapping proceedings. Multiple trials in different form would violate the accused's right to a free and fair trial found in, among other sources, the International Covenant on Civil and Political Rights (ICCPR).[76]

In the drafting of the statute, there was general agreement that the accused should have a right to challenge the admissibility of the case against him. Most disagreement at Rome on this point focused on whether a 'suspect' under investigation but not yet indicted should be able to challenge admissibility. The ultimate choice of allowing anyone 'for whom a warrant of arrest or summons to appear has been issued' (article 19(2)(a) ICC Statute), emphasizes that the accused's right to challenge admissibility attaches at the point where the court interferes with that person's liberty through, for example, summoning him/her to a foreign locale.[77]

The text of the 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 prior to the initiation of trial, unless leave is granted and the challenge is based on a double jeopardy claim. This limitation reflects the need to prevent the waste of judicial resources that would accompany removal of a case after trial had started.While the concept of admissibility as a right of the accused is clearly an important element of the complementarity regime, it may be subordinated to the proper functioning of the court. This vision of admissibility as a right of the accused may be a partial justification for complementarity, but it is not complete. There is no reason for the accused to expect to choose the court of his trial. 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.The principle of universal jurisdiction embraces the idea that certain crimes are so heinous that any state has a right to try the perpetrators, regardless of any connection to the state itself. At the very

75. William W. Burke, *supra* note 67 at 262.
76. Art. 14(7) ICCPR.
77. William W.Burke, *supra* note 67 at 263.

least, this vision of the admissibility requirement suggests that irrespective of the method of referral, the accused maintains an actionable interest in avoiding multiple proceedings.[78]

Admissibility as the protection of the rights of states

A second vision of the admissibility requirement is as a means to protect states' rights and respect sovereignty. This view was perhaps dominant in Rome and is consistent with the statute itself being viewed as a transfer of jurisdictional entitlements from states to the ICC. According to this view, states parties transferred a limited jurisdictional entitlement to the court only where the territorial or national state was unable or unwilling to prosecute. In contrast, states retain all rights not transferred to the court and the exercise of jurisdiction beyond those transferred powers would breach the state's sovereign rights. Once again, the statute reflects a compromise as evidenced by the *travaux préparatoires*. In the initial discussions at Rome, several states were sceptical of any intrusion on state sovereignty, seeking to retain the right to prosecute domestically except where the national or territorial state was truly unable to act. In contrast, other states favoured a larger scope of admissible cases, encompassing ineffective state action in addition to inaction.[79]

The divergent views of the delegations expressed in the 1995 Report of the ad hoc Committee on the Establishment of the ICC underscore this vision of complementarity as a protection of state sovereignty. On one end of the spectrum, some states preferred a strong presumption in favour of national jurisdiction', citing the advantages of established procedure, law and punishment, as well as administrative efficiencies and the interest in maintaining state responsibility for prosecuting crimes. At the other end of the spectrum was a call for the ICC to serve as the only venue for prosecuting 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 exclusive authority.[80]

Eventually, the preparatory committee settled on language based on the initial International Law Commission (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. After this proposal with respect to the admissibility requirement had been drafted, an 'alternative approach' was offered with a notation of the need for 'further discussion'. The alternate language on admissibility read simply: 'The court has no jurisdiction where the case in question is being investigated

78. *Ibid*.
79. *Id*. at 264.
80. *Ibid*.

or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.'[81] The vast majority rejected this approach.

A further proposal by the United States shifted the admissibility evaluation to the beginning stages of an investigation. The US delegation framed the need for this adjustment as a protection of a state's right to fully investigate the crimes concerning itself. The US proposal touched off a debate between delegations that considered this proposal to add unnecessary obstacles to the court's exercise of jurisdiction and those which argued that the proposal strengthened the protection of state sovereignty.[82] The US proposal became, for many delegations, 'key to their acceptance of the complementarity regime and the *proprio motu* role of the prosecutor'.

A compromise was also reached between the extreme positions of delegations that preferred any state to challenge admissibility and those that wanted challenges limited only to states parties. Ultimate agreement allowed for any state with jurisdiction to challenge. Allowing non-party states to challenge admissibility suggests that negotiators were uncomfortable with granting the court authority that interfered with the rights of non-party states. The language eventually adopted appears to reflect both the desire to retain sovereign prerogative over the investigation and prosecution of international crimes and the need to create a court with the authority and capacity to effectively 'put an end to impunity' (preamble paragraph 5 ICC Statute). The vision of 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. Such a reading of admissibility results in a narrow interpretation of the powers transferred to the court and would give preference to state challenges to admissibility notwithstanding self-referrals.[83]

Admissibility as a limitation on the power of the ICC

A third potential vision of the admissibility requirement is as a fundamental limitation on the power of the ICC. This vision is the logical converse of the second vision of admissibility as a means of protecting state sovereignty, but shifts the emphasis and may result in different dispositions of a case. This vision of admissibility also rests on the transfer of limited jurisdictional entitlements to the ICC. The court, as a creation of the states parties themselves, has no

81. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Draft Statute of the International Criminal Court', UN Doc. A/CONF.183/2/ Add.1 (1998), at Art. 15(3). *Available at:* http://www.un.org/law/n9810105.pdf (visited 12 Jan. 2011).

82.United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 'Summary Records of the meetings of the Committee of the Whole', UN Doc. A/CONF/183/13, 189 (1998). *Available at*: http://untreaty.un.org/cod/icc/rome/proceedings/E/ (visited on 11 Dec. 2010).

83. William W. Burke, *supra* note 67 at 265.

powers beyond those expressly transferred to it and must be limited to its enumerated powers.[84]

While not the dominant frame as expressed at Rome, the notion of a court of limited powers reappears repeatedly in negotiations. 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. 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'[85] and conduct on-going reviews of admissibility.[86] Such a continuing obligation to scrutinize jurisdiction and 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. While the language requiring continuing scrutiny was eventually altered to a lesser statutory requirement that the court satisfy itself as to jurisdiction and admissibility up to the point where a trial actually begins, the language suggests a court of limited powers. At the very least, this language indicates a balancing between the fundamental limitations on the court's authority and the need for an institution that can operate effectively.[87]

A further reason to question this view of admissibility as a fundamental limitation on the court is the restriction on challenges to admissibility found in the statute. The committee as a whole accepted without much controversy the limitation of one challenge each for states and the accused prior to commencement of trial, and the requirement that states challenge admissibility at the 'earliest opportunity' (article 19(5) ICC Statute). 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.

As adopted, the provisions for challenging admissibility demonstrate a desire on the part of the negotiators to guarantee that the court would have sufficient authority to ensure its prosecutorial efforts would not easily be derailed once commenced. Thus, while admissibility limits the court's authority, it retains for the court the powers necessary to effectively carry out its functions. In other words, the court appears to have functional authority after the commencement of a trial with respect to cases that might otherwise have become inadmissible. It is difficult to square that residual right to prosecute with a vision of complementarity solely as a limitation on the power

84. *Id.* at 266

85. Draft Statute, art. 17(1).

86. *Id*. The Prosecutor is also required to determine that the case is admissible under art.17(1) ICC Statute.

87. Art. 19(1) ICC Statute.

of the court.[88]

While all three visions of the admissibility requirement may be at play, the concept of admissibility as a protection of states' rights appears most compelling. That vision of admissibility appears to favour admissibility challenges, but recognizes that in the transfer of jurisdictional powers to the court, states may have also conferred certain implicit powers that may limit their subsequent rights to challenge admissibility where such a challenge would undermine the court's effective operation[89]

Visions of admissibility in the practice of the ICC

While the case law on admissibility is still developing, the decisions of the PTC in the first cases before the ICC provide some insight into how the chamber understands and balances the three visions of admissibility. The primary decisions on admissibility to date arise in the early phases of the case of Thomas Lubanga Dyilo in the situation concerning the Democratic Republic of Congo (DRC).[90] Prior to the issuance of an ICC warrant, Lubanga Dyilo was arrested in Kinshasa on domestic charges of murdering nine MONUC[91] peacekeepers in March 2005.[92] He was subsequently charged by the ICC with genocide, crimes against humanity, murder, illegal detention and torture, in a warrant issued on 10 February 2006.[93]

In its initial decision as to whether to issue an arrest warrant, the PTC had to decide whether the case against Lubanga Dyilo 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'. The PTC found the case against Lubanga Dyilo admissible because he was being charged by the ICC with crimes distinct from those alleged in the domestic warrant against him and based on separate facts. Specifically, the Congolese warrant addressed Lubanga Dyilo's role in the

88. William W.Burke, *supra* note 67 at 266.

89. *Ibid.*

90. Decision on the Prosecutor's Application for aWarrant of Arrest, Art.58, Lubanga Dyilo (ICC-01/ 04-01/06), Pre-Trial Chamber I, 10 February 2006, at 30-40. *Available at*:. www.icc-cpi.int (visited on 10 Jan, 2011).

91. United Nations Mission in the Democratic Republic of Congo.

92. Press Release, United Nations, 'Security Council Condemns Murder of Nine UN Peacekeepers', 2 March 2005, UN Doc. SC/8327/Rev.1.*Available at*: www.un.org/documents/ga (visited on 15 Dec. 2010).

93. Warrant of Arrest, Lubanga Dyilo (ICC-01/03-01/06), Pre-Trial Chamber I, 10 February 2006, at 4. *Available at*: Jicj.oxfordjournals.org (visited on 12 Feb. 2011).

MONUC killings, whereas the ICC warrant focused on conscription of child soldiers. The PTC noted that while inability under articles 17(1) and 17(3) no longer appeared to be a barrier to the DRC asserting national jurisdiction, as the proceedings in the DRC did not specifically reference the conscription of children into hostilities, the case remained admissible. The PTC decided that 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'.[94]

While it remains possible that admissibility will be challenged as the Lubanga Dyilo case proceeds, thus far the PTC has treated admissibility as a protection of states' rights and admissibility as a limitation on the powers of the court with regard to the functional needs of the court to fulfil its mandate. On the one hand, the PTC scrupulously examined admissibility of the case against Lubanga Dyilo before issuing arrest warrants and thereby ensured that the court was not stepping beyond the limited powers provided 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, that 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.[95]

IV Conclusion

The jurisdictional compromise established criteria linking the court to situations where crimes under its purview are suspected. Under complementarity, however, a case is inadmissible to the court if a responsible state is investigating or prosecuting the case, has decided after investigation not to prosecute, or has tried the case already, unless such investigation or trial was carried out to shield the suspect. This deferral to state authority continues an old pattern, of both unsuccessful and successful attempts to create international jurisdictions, of subordinating international to state authority.

Discussions in the ICC ad hoc committee and at the prepcom meetings sought a formula that would enable the court to act if no state-level prosecutions were taking place or if prosecutions that were undertaken were somehow fraudulent. Long negotiations produced an agreement that for the court to take a case, it would have to be convinced that the state(s) that should be prosecuting were "unwilling or unable genuinely" to do so.[96]

Unwillingness would be shown when proceedings were not being pursued

94. Decision, Lubanga Dyilo, 10 February 2006, *supra* note 90 at 18.
95. William W.Burke, *supra* note 67 at 268.
96. Benjamin Schiff, *Building the ICC* 81(2008)

or appeared to be intended to shield the person from responsibility, were unjustifiably delayed, were not conducted ''independently or impartially'' or were conducted in a manner ''inconsistent with an intent to bring the person concerned to justice.'' Inability considerations would include ''whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'' For a case to go to trial, the prosecutor would need to convince a pre-trial chamber that the case was admissible. Thus, state jurisdiction is primary and the ICC is complementary.

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