The Practice of the International Criminal Court: Comments on "The Complementarity Conundrum"

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ABSTRACT

Professor Michael Newton advocates for the International Criminal Court (ICC) to proactively adopt positive complementarity, rather than continue the apparent trend toward supranational superiority that endangers the principle of complementarity and the ICC itself. This article explores Newton's concerns over potential ICC hostility to state action in several areas. After closely examining ICC practice and offering alternate interpretations of allegedly problematic positions taken by the ICC, this article concludes that the evidence is mixed. While some ICC practice supports Newton's concerns, it is not clear that the most troublesome positions will apply outside the narrow context of self-referring, inactive states. Where states profess no desire to take action against the accused, it is difficult to extrapolate from ICC decisions on admissibility, statements on gravity, or other issues related to complementarity. Nonetheless, there are sufficient indications of apparent hostility or indifference to state sovereignty to raise concerns. The article

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therefore explores Newton's exhortation of deference to national proceedings. It identifies the complex questions, procedural and substantive, that arise when implementing deference to state proceedings, whether prosecutorial or otherwise. It concludes with brief suggestions on how the ICC might respond to Newton's identification of troubling trends and his challenge to embrace positive complementarity.

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I. Introduction

Professor Michael Newton advocates for a more cooperative and constructive approach to complementarity in his thought-provoking article, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*[2] He contends that current practice at the International Criminal Court (ICC) has strayed from the fundamental principle that national jurisdictions would have primacy over the investigation and prosecution of genocide, war crimes, and crimes against humanity.[3] The ICC would step in only when necessary to end impunity, such as when the state failed to act or acted in bad faith. Under the Rome Statute creating the court, a case is inadmissible based on proper state investigation, prosecution, or decision not to prosecute; prior trial for the same conduct; or insufficient gravity.[4] Newton asserts that the "rhetoric . . . related to complementarity has subtly shifted from a tone of cooperation and consultation to one of competition."[5] In particular, he singles out the practice of various organs of the ICC related to complementarity, especially article 17's admissibility provisions. Newton contends these troubling trends undermine political support for the ICC and therefore should be addressed in order to preserve the long-term viability of the ICC.

First, Newton contends that a Security Council referral of a situation renders subsequent cases admissible automatically.[6] Second, he argues that discretionary

2. Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L 115 (2010).
3. *See* Rome Statute of the International Criminal Court art. 5, 2187 U.N.T.S. 90, July 17, 1998 [hereinafter Rome Statute]. The ICC will have jurisdiction over the crime against aggression if and when a definition of the crime is agreed upon and adopted as an amendment to the statute. *See id.* ¶ 2.
4. Article 17(1) provides that a case is inadmissible if:

> (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.

   Rome Statute, *supra* note 3, art. 17.
5. Newton, *supra* note 2, at 163.
6. *Id.* at 131.

charging is problematic on several grounds relating to the domestic implementation of ICC crimes.[7] He asserts the ICC should "recognize the discretion of the domestic authorities regarding the scope and form of the domestic charges."[8] If the state is acting in good faith, the ICC should defer; under article 17, the case before the ICC would be inadmissible because the state is investigating, prosecuting, or has investigated or prosecuted already. But if the ICC adopts a rigid and narrow approach, it could reject as inadequate any state proceeding that does not exactly match the charges that would be brought under the Rome Statute.[9] In such a scenario, state "decisions to pursue any other charges against an accused other than those that conform precisely to those selected by the ICC prosecutor could be automatically construed as manifesting unwillingness to prosecute within the meaning of the admissibility criteria"[10]—meaning that the case would be admissible at the ICC regardless of the state proceedings.

Third, Newton contends that the Rome Statute's "gravity" requirement[11] has been used to override or at least minimize other admissibility provisions.[12] As he puts it, "[e]arly indications . . . reveal disquieting indications that the ICC may tend to use the gravity threshold as a backdrop for making admissibility of a particular case a subsidiary principle to the exercise of prosecutorial discretion."[13] Finally, Newton asserts that current practice indicates the ICC is erroneously assuming that a state self-referral of a situation effectively waives any subsequent right to challenge admissibility on the basis of state proceedings.[14]

Newton concludes that the hostility toward states illustrated by the ICC's practice to date will undermine the ICC by eroding its political support and discouraging non-state parties from joining. By contrast, "a framework of positive complementarity and cooperative synergy is the only feasible way to ensure long term vitality for the ICC as an autonomous international institution."[15] As a result, "the ICC should work with states to enhance their domestic capacity and defer to domestic investigations or prosecutions in any feasible conditions."[16] Such

7. *Id.* at PartV.A.
8. *Id.* at 150.
9. *See id*. at 157.
10. *Id.*
11. Rome Statute, *supra* note 3, art. 17(1)(d).
12. *See* Newton, *supra* note 2, at 157.
13. *Id*.
14. *Id*. at 162.
15. *Id*. at 164.
16. *Id*.

deference might be implemented by a Commission of Experts on Complementarity, by another mechanism adopted through the Assembly of States Parties, or by amendment to the statute.[17] Whatever the mechanism, the ICC should "defer to the good faith reasoning of domestic officials applying the law of the sovereign, even where the form of the domestic charges varies from the prosecutorial preferences" of the ICC.[18]

Others have advocated for the type of cooperative approach to complementarity supported by Newton.[19] Newton situates his critique within current practice at the ICC, referring to prosecutorial statements and court decisions related to the admissibility or gravity of cases. The evidence, however, seems mixed. At the least, there are competing plausible interpretations of the facts to date that call into question whether ICC hostility to state action is the inevitable conclusion.

On some points, such as the treatment of cases coming under a Security Council referral, the practice to date seems to contradict Newton's position that the ICC is not evaluating admissibility, as discussed in Part II, *infra*. Yet the ICC does seem to set the bar high in assessing state proceedings regarding the "person and conduct" test for admissibility. This leads to difficulties in evaluating state investigations of ICC crimes, as described in Part III, *infra*. With regard to the definition of gravity, the Appeals Chamber has pulled back from the most controversial position of the Pre-Trial Chamber, as explained in Part IV, *infra*. Moreover, the statements of the Prosecutor, concerning gravity and case selection, can be interpreted as a strategy to counter accusations of favoritism. Nonetheless, the most recent admissibility proceedings relating to Uganda and the case of Germain Katanga in the Democratic Republic of the Congo (DRC) can be interpreted to support Newton's concerns about a purist application of the Rome Statute's admissibility provisions, particularly with regard to the self-referrals discussed in Part V, *infra*.

On balance, the attitude of the ICC can appear to be at odds with the desire to encourage—and perhaps aid—states to prosecute international crimes when they are willing and able to do so. Yet it is difficult to extrapolate from much of the

17. Michael Newton, Panel Remarks at Santa Clara Journal of International Law Symposium, *The Future of International Criminal Justice* (Mar. 13-14, 2009).
18. Newton, *supra* note 2, at 164.
19. *See, e.g.*, William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L. J. 53 (2008) (arguing for proactive complementarity, where the ICC cooperates with states to encourage and perhaps assist state prosecution of international crimes).

current practice because of the context: self-referring states that do not intend to take action against the accused. Language that may seem troubling in a vacuum might never be applied in the context of genuine state action. The fears of Newton might not come to pass. Nevertheless, the fact that attentive scholars and defense counsel interpret the current practice as hostile to state action is in itself problematic and should be addressed. Part VI, *infra*, explores Newton's proposal for increased deference to state proceedings with an eye toward raising issues for future consideration in developing mechanisms and standards for such deference. It offers one example of substantive guidelines for deferring to state action to highlight the complex issues raised by a deferential ICC approach: issues that are magnified if the state action takes the form of nonprosecutorial alternative justice mechanisms.

II. Security Council Referral

Newton contends that the obligation of member states to follow decisions of the United Nations Security Council "effectively nullifies the right of complementarity."[20] While states should not use complementarity "as a weapon"[21] to obstruct investigations of the ICC, it does not seem to follow that a state subject to a Security Council referral cannot invoke article 17 admissibility to challenge ICC jurisdiction, at least where the referral is silent regarding the issue.[22] Even if Newton is correct in theory,[23] ICC practice to date regarding the Security Council's one referral of the situation in Darfur, Sudan seems to contradict the assertion. Both the Prosecutor and the Pre-Trial Chamber (PTC) have considered admissibility.

20. Newton, *supra* note 2, at 131.
21. *Id*.
22. The Security Council referral does not address whether Sudan is barred from asserting jurisdiction over the same person and conduct; it does encourage the ICC to "support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur." S.C. Res. 1593, ¶ 4, U.N.Doc. S/RES/1593 (Mar. 31, 2005).
23. The accuracy of Newton's interpretation of the UN Charter is beyond the scope of this article. For a discussion, see, for example, JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 237-45 (Martinus Nijhoff Publishers 2008) (questioning Newton's conclusions regarding this issue as put forth in Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001)).

For example, in the arrest warrant decision regarding the accused from Sudan, Ali Kushayb and Ahmad Harun, the PTC examines the national proceedings (encompassing both the person and the conduct, which is the subject of the case before the court) against Ali Kushayb in particular.[24] It concludes, based on evidence and assertions from the Prosecutor, that the case against both appears to be admissible without prejudice to a subsequent challenge to admissibility under article 19.[25] In the more recent decision regarding the arrest warrant against Sudanese President Omar al Bashir, the PTC declines to address admissibility—not because it was irrelevant due to the Security Council referral, but because it was not raised by the Prosecutor or the facts.[26] Of course, this does not mean that the ICC will necessarily defer if an admissibility challenge is brought by Sudan or the accused in the future. As discussed *infra* Part III, the ICC has interpreted article 17 to require very specific state proceedings in order to establish state action barring ICC prosecution. Regardless, the ICC practice to date does not seem to comport with Newton's assertion that a Security Council referral renders cases automatically admissible.

III. Domestic Implementation of ICC Crimes

In general, a case is inadmissible: if the state is investigating, prosecuting, or has made a decision not to prosecute, unless it is unwilling or unable genuinely to do so; if the person has already been tried for the conduct; or if the case is not of sufficient gravity.[27] Newton raises the issue of charging as it relates to state investigation or prosecution in several contexts. It can be divided into three categories: (1) where the state has failed to implement the Rome Statute into domestic law, and therefore can charge only ordinary crimes; (2) where the state has implemented the Rome Statute but adopted narrower definitions of genocide, war crimes, or crimes against humanity; and (3) where the state has adopted broader definitions of ICC crimes.

Newton fears that under the first category, state action regarding ordinary crimes will never satisfy the ICC. According to the Rome Statute, if a person has

24. *See* Prosecutor v. Harun, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶¶ 11-25 (April 27, 2007).
25. *See id.* ¶ 25.
26. *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecutor's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 51 (Mar. 4, 2009).
27. *See* Rome Statute, *supra* note 3, art. 17(1).

already been tried in a national court for the same conduct as the ICC case, the case is inadmissible under articles 17 and 20 unless the proceedings were meant to shield the person or were otherwise improper.[28] The ICC provision does not specify that a case is admissible if the accused had been tried in another court for ordinary crimes, unlike the statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda. As a result, it is possible that the ICC will take a different approach from the prior tribunals, supporting complementarity rather than undermining it. In her comments on Newton's piece, Professor Linda Carter concludes that the principle of *ne bis in idem* will bar ICC prosecution if prior state proceedings were proper, even if the charges related to the same incident were ordinary crimes.[29] On the other hand, the practice of the ICC (discussed in depth below) may support the concern that the state must investigate or prosecute crimes that match ICC provisions. As a result, state proceedings regarding ordinary crimes related to the conduct under investigation at the ICC may not suffice.

Similarly, state proceedings based on narrower interpretations of ICC crimes of genocide, war crimes or crimes against humanity (category two) may not satisfy the ICC. Yet as discussed *infra*, the potentially troubling ICC interpretations related to the person and conduct test often come in the context of self-referrals, where the state professes no interest in acting against the accused. As a result, it is difficult to predict whether the same narrow approach would be adopted in other circumstances.

With regard to category three, Newton fears that state charges based on broader definitions of ICC crimes also would not suffice because of legality issues. He reasons that if a state uses a broader definition, the defendant might be able to raise objections based on *nullen crimen sine lege*, which prohibits prosecution for behavior that was not a crime at the time of the conduct. He asserts that the ICC could then conclude that the state is genuinely unable to investigate or prosecute because of the principle of legality.[30] It is possible that a successful legality challenge to a controversial state charge, for example, starvation of civilians as a war crime in a non-international conflict, would lead the ICC to deem the state

28. *See id*. art. 20(3).
29. *See* Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: A Response to Professor Newton on the Role of Ne Bis in Idem*, 8 SANTA CLARA J. INT'L L. 165, 196 (2010).
30. Newton, *supra* note 2, at 149-150.

unable to act.[31] Yet it seems more likely that the state would charge more than the controversial war crime; so long as multiple counts included other ICC enumerated acts regarding war crimes, the state would be able to act. The state with a broader definition of ICC crimes is therefore unlikely to face a conflict with the ICC—unless the ICC requires that the state charges be an exact match to the allegations in a case before the ICC.

The current practice can indeed be interpreted to require that state action relate to the precise charges brought before the ICC. ICC practice implies that state investigation or charges of genocide, war crimes or crimes against humanity against the same person are not enough. As discussed below, it seems the state must also be focused on the same predicate act (child soldiers in the case of Lubanga) or same factual basis (a certain village in the case of Katanga). This ICC practice, however, comes in the context of a self-referral from a state (the Democratic Republic of Congo) that indicates, implicitly or explicitly, that it would not now investigate or prosecute the accused. As a result, it is possible that the ICC may be more lenient when considering a case in a different context. For example, if the DRC had been actively investigating or prosecuting Lubanga, the ICC might well have taken a different approach. Because the DRC self-referred the case and turned over Lubanga to the ICC, its prior investigation became suspect in terms of blocking ICC jurisdiction. The ICC may have taken a much less critical approach if the DRC had been asserting jurisdiction based on a current investigation into the same facts being pursued in a prosecutor-initiated case.

At bottom, many of the cases to date seem predicated on the notion that the state is either inactive or unwilling to prosecute as evidenced by the state referral of the case to the ICC and subsequent inaction. The stringent requirements implied in current ICC practice might not apply in other circumstances. A worst-case scenario, where the narrow approach is carried over to other contexts, would support Newton's concerns. Fear of such an approach may lead states to conclude that it is impossible to please the ICC and therefore cease state efforts to bring international criminals to justice through state proceedings. Given the resources required to investigate and prosecute those accused of ICC crimes—not to mention political considerations—the state might use the most worrisome interpretation of ICC practice as an excuse for inaction. For example, a state might point to the Lubanga or Katanga decision and contend that because it cannot predict the acts or

31. *Id.*

incidents the ICC would want covered, it must simply refer the situation to the ICC. Such an attitude would lead to even more self-referrals burdening the ICC, and potentially increase impunity for offenders as the ICC becomes overwhelmed with situations. As a result, although a worst-case interpretation of a "hostile" ICC might not necessarily be warranted by all of the evidence to date, the basis for the allegedly hostile attitude is explored in the subsequent discussion.

As Newton notes, the PTC in the Thomas Lubanga Dyilo (Lubanga) case applied a "person AND conduct" test to determine that the case was admissible.[32] Article 17 refers to state proceedings over the "case," which has been interpreted to mean a specific incident such that the state proceedings must encompass the same person and conduct.[33] The PTC holds that the same conduct element requires that the charges brought by the state include the same enumerated act(s) charged by the Prosecutor. Apparently, state officials are supposed to be able to predict the precise charges that will be brought (and presumably confirmed without any subsequent changes)[34] by the ICC.

In the Lubanga case, the same person was under arrest in the Democratic Republic of Congo (DRC) for genocide and war crimes at the time the Prosecutor sought the arrest warrants.[35] The state warrants related to war crimes whose predicate acts apparently included murder, illegal detention, and torture,[36] but not the conscription or use of child soldiers.[37] The PTC therefore concluded that the state was not acting in relation to the same case before the ICC, as defined by the conduct that constitutes the basis of the Prosecutor's application for an arrest warrant.[38] The lesson from this determination is that if a state wants to live up to the Rome Statute's preamble regarding a state's duty to prosecute international crimes,[39] it must not only investigate or prosecute the same person but the same conduct as the Prosecutor deems fit to charge. It must not only investigate the same

32. *Id*. at 155; *see also Prosecutor v. Harun*, *supra* note 24, ¶¶ 24-25. The discussion regarding admissibility of the case against Ali Kushayb was less extensive due to less information regarding Sudan's investigation, particularly an arrest warrant.
33. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Prosecutor's Application for Warrants of Arrest, art. 58, ¶ 31 (Feb. 10, 2006) [hereinafter *Lubanga Warrants Decision*].
34. *See infra* notes 40-43 and accompanying text.
35. *See Lubanga Warrants Decision*, *supra* note 33, ¶ 33.
36. *See id.*
37. *See id.* ¶ 39.
38. *See id.* ¶¶ 38, 40.
39. *See* Rome Statute, *supra* note 3.

temporal and geographical area for war crimes, it must also focus on the specific enumerated act(s) as subsequently charged by the Prosecutor. Yet as noted above, the DRC had stopped any proceedings against Lubanga and turned him over to the ICC. As Newton recognizes, it is not clear that the ICC would require such state prescience or matching charges in other contexts.

Assuming that the narrow approach applies outside the context of inactive self-referring states, it is problematic. It is difficult to understand how a state could predict the precise charges eventually brought by the Prosecutor, particularly in situations of mass atrocities. Even within the ICC, there has been tension over specific charges. In *Lubanga*, the PTC determined that the conflict in the DRC could be characterized as international due to Uganda's involvement.[40] Although the Prosecutor had initially charged child conscription only in the context of a non-international armed conflict, the PTC effectively modified the charges to include child conscription in an international conflict.[41] Similarly, in the Bemba case, the PTC induced a change in the relevant criminal conduct alleged by the Prosecutor. The PTC suspended the confirmation of charges hearing and requested the Prosecutor amend the charges to add another ground of criminal responsibility based on command (military) or superior responsibility.[42] In the end, the PTC confirmed only charges based on criminal responsibility of a military superior—a mode of responsibility not originally charged by the Prosecutor.[43]

Another facet of the specificity required in state proceedings is explored in the recent admissibility challenge brought by Germain Katanga. The court's decision can be read to require that the state investigation must focus on one particular village on one particular day even when investigating the accused for multiple attacks.[44] But, again, the context here is a state (the DRC) that ceased investigation against the accused and turned him over to the ICC for investigation and prosecution. It is difficult to glean general rules of admissibility based on these

40. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803-tEN, Decision on the confirmation of charges (Jan. 29, 2007).
41. *See id.*
42. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute (Mar. 3, 2009).
43. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 184 (June 15, 2009).
44. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1213-tENG, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), ¶¶ 69-71 (June 16, 2009) [hereinafter *Katanga Reasons for Oral Decision*].

circumstances. It is interesting, however, that the defense counsel's concerns regarding the ICC's practice of complementarity echo the worries voiced by Newton, while Newton himself distinguishes Katanga as an easy case because of the DRC's inaction.[45] Even if the ICC practice is not intended to express hostility to state proceedings, it is open to being interpreted that way. In the case against Katanga, the Prosecution charged, and the PTC confirmed, counts of war crimes and crimes against humanity related to an attack on Bogoro village on February 24, 2003.[46] The defense for Katanga challenged admissibility, arguing that at the time of the ICC warrant issued against him, he was under arrest and investigation in the DRC for the same conduct.[47]

The defense contends that the ICC's current interpretation of complementarity

> negates the concerns raised by States at the Rome conference, defeats the principle's object and purpose and turns it on its head; the current regime -as developed by the Court's early practice. . . . is *de iure* one of complementarity, but *de facto* is nothing less than primacy of the ICC over national courts.[48]

It stresses the costs on the defendant related to ICC jurisdiction, including physical relocation away from family and expected length of proceedings at the ICC.[49] The defense further argues that the "same conduct" test is flawed in its "absolute requirement of identical charges."[50] Instead, complementarity should be about ICC partnership and dialogue with the states, with a duty on the Prosecutor to assist states rather than take over.[51] The defense argues that a better test would give states a "margin of appreciation in selecting crimes," and proposes a combination of a "comparative gravity" and "comprehensive conduct" test.[52] It asserts that the DRC investigations were of crimes with the "same or greater gravity" as the ICC charges and that they were "comprehensive" compared to the ICC charges.[53] Even if the same conduct test is applied, the defense claims there is evidence that the

45. *See* Newton, *supra* note 2, at 161.
46. *See* Case Information Sheet, Prosecutor v. Katanga, Case No. ICC-01/04-01/-07, http://www.icc-cpi.int/NR/rdonlyres/EB9A6468-C81F-403F-86A1-BB01A002199F/281173/Katanga_Chui_ENG1.pdf.
47. *See* Prosecutor v. Katanga, Case No. ICC-0 1/04-01/07-949, Motion Challenging Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a) of the Statute, ¶ 53 (Mar. 11, 2009) [hereinafter *Katanga Admissibility Challenge*].
48. *Id.* ¶ 19.
49. *See id.* ¶¶ 23, 25.
50. *Id.* ¶¶ 31, 33.
51. *See id.* ¶¶ 32-33.
52. *Id.* ¶¶ 40 - 51.
53. *Katanga Admissibility Challenge*, *supra* note 47, ¶¶ 15, 51.

DRC had charged Katanga with crimes against humanity related to the attack on Bogoro.[54] Finally, the defense argues that the DRC cannot be considered unable or unwilling because the relevant time-frame is the time of the arrest warrant application, when it was investigating and detaining Katanga.[55]

The Prosecution counters that the DRC never focused substantively on Bogoro and therefore the same conduct test fails.[56] It responds to Katanga's accusation that the ICC is implementing ICC primacy by noting that "while States parties retain primary responsibility for the investigation and prosecution of the crimes described in Article 5, once a case has been found admissible before the Court, the latter has primacy over concurrent domestic proceedings with respect to that particular case, until determined otherwise by the Court."[57]

The Prosecution further contends that "[t]here is no duty on the Prosecutor to assist states in their investigations."[58] It points to "substantial reasons based on the object and purpose of the Statute why such a burden, even if remotely conceivable under the statutory language, should be avoided."[59] Specifically, the ICC was not intended to be "an international investigative bureau with resources to support national authorities."[60] At the same time, the Prosecution noted that it had not refused any cooperation or assistance sought by the DRC.[61]

The Office of Public Counsel for Victims (OPCV) also weighs in with its interpretation of article 17(1)'s requirement of a state investigation or prosecution of the same case. It asserts that a local police investigation including police reports, arrest warrants, witness interviews, victim interviews, etc., is insufficient where "the balance of the evidence" supports unwillingness or inability.[62]

The positions of the Prosecution and the OPCV can be interpreted to buttress Newton's concern, echoed by the defense in Katanga, that the ICC is moving away

54. *See id.* ¶ 53.
55. *See id.* ¶¶ 63-64.
56. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1007, Public Redacted Version of the 19th March 2009 Prosecution Response to Motion Challenging Admissibility of the Case by the Defence of Germain Katanga, pursuant to Article 19(2)(a), ¶¶ 3-4 (Mar. 30, 2009).
57. *Id.* ¶ 76.
58. *Id.* ¶ 98.
59. *Id.* ¶ 100.
60. *Id.*
61. *See id.* ¶ 102.
62. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1007, Observations of the OPCV on the Defence for Germain Katanga's Motion Challenging Admissibility of the Case with one Confidential *ex parte* OPCV only Annex and three Public Annexes, ¶ 27 (Apr. 28, 2009).

from the cooperative approach to complementarity. The Prosecution, while asserting that it did not refuse to cooperate with the DRC, does not seem particularly interested in affirming the ICC's desire to assist state proceedings; on the other hand, this could stem from an understanding that the DRC did not actually wish to pursue a case against Katanga. The OPCV puts forth a narrow view of investigation. However, it balances that view with the assumption of state unwillingness or inability.

The Trial Chamber (TC) dismissed Katanga's challenge to admissibility.[63] As discussed further below, its determination relies on the lack of state action since the self-referral, where the DRC indicated its lack of readiness to go forward with the case. But the TC's opinion may also imply that the state proceedings must be based on the same conduct. It holds that it does not need to rule on the "same conduct" test in light of the DRC's inaction: specifically its refusal to prosecute "this case."[64] When discussing the "case," however, the TC refers to one specific attack. It relies on the fact that at the time of the ICC warrant application, the DRC was not investigating Katanga with regard to the Bogoro attack.[65] Although Katanga was initially under investigation and arrest for many crimes, evidence of which included a document referring to Bogoro, the defense did not show sufficient focus on the attack on Bogoro on February 24, 2003.[66] Thus, the TC decision on the Katanga admissibility challenge to some extent sustains the contention that the ICC might require the same precise conduct to be covered by the state proceedings.

Furthermore, it is even possible, albeit unlikely, that the ICC will require a match regarding the mode of individual criminal responsibility. For example, if a state had previously investigated and charged Bemba with war crimes as a joint

63. The defense appealed. *See generally* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1234, Appeal of the Defense for Germain Katanga against the Decision of the Trial Chamber *'Motifs de la décision orale relative a l'exception d'irrecevabilité de l'affaire'* (June 22, 2009). As this article was in the final editing stages, the Appeals Chamber confirmed the Trial Chamber's decision. Prosecutor v. Katanga, Case No. ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (Sept. 25, 2009). It stressed two key findings: (1) unwillingness and inability are considered only when, at the time of the admissibility challenge, there are current domestic investigations or prosecutions or a prior investigation and decision not to prosecute; (2) state inaction renders a case admissible, subject to the gravity requirement.
64. *Katanga Reasons for Oral Decision*, *supra* note 44, ¶ 95.
65. *Id.* at ¶¶ 69-71.
66. *Id.* at ¶ 70 (noting lack of clear attribution of Bogoro attack on specified date to Katanga).

perpetrator but not as a superior, would the PTC have determined that this was not the same case as that before the ICC?

Or perhaps the ICC would require that the proceedings themselves resemble those provided for in the Rome Statute. The Trial Chamber in Katanga inquired into whether the DRC would provide a fair trial and appropriate punishment if Katanga were sent to the DRC for trial.[67] Moreover, the OPCV intimates that the state proceedings must provide the same level of victims' rights as those provided for under the Rome Statute.[68]

The ICC practice to date can be interpreted to support Newton's contention that the ICC is undermining complementarity via a rigid interpretation of state action on the same case. In particular, it seems problematic that states conducting wide-ranging investigations into war crimes, crimes against humanity, and genocide might be required to include the specific enumerated act that would be chosen by the Prosecutor and/or confirmed by the PTC. The apparent trend is troubling, particularly where the Prosecution itself seems to have difficulty predicting the actual charges that will be tried at the ICC. As noted by Newton in the context of the Katanga admissibility challenge, however, it is not clear whether the narrow interpretation of the "same case" would be used in cases that were not self-referred by a subsequently inactive state. It is possible that the ostensible tendency toward supranational primacy merely reflects the inevitable growing pains of a young institution dealing with complicated issues. These concerns may not come to pass if the current approach is limited in context to cases where the state self-refers and ceases action. If the narrow approach to same person, same conduct is applied in other contexts, however, it may intimate hostility to state action, particularly when combined with the statements made regarding gravity of crimes.

67. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-T-65-ENG, Transcript of Hearing on 1 June 2009 regarding Admissibility Challenge, ¶ 99 (June 1, 2009). *See also* Newton, *supra* note 2, at 163 (noting "a prima facie demonstration that the [state] proceedings will be fair, impartial and in accordance with international standards" should suffice).

68. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Observations on behalf of victims pursuant to article 19(1) of the Rome Statute, ¶ 32 (Nov. 18, 2008) (victims are of the view that Ugandan prosecution would deprive victims of rights granted in Rome Statute, "unless the Ugandan Authorities carefully implement the said rights" in its prosecution of the accused).

IV. Reliance on "Gravity"

In addition to assessing state action regarding a case, the ICC also considers the gravity of the case.[69] If a case is not of sufficient gravity, the case is inadmissible. There are some potentially troubling statements regarding gravity in the early decisions of the PTC, but the Appeals Chamber has rejected them. Similarly, while some statements regarding gravity can be interpreted to support Newton's contention that gravity is overwhelming the other provisions of the article 17 admissibility test, there are other plausible interpretations of those statements. In particular, it seems that "gravity" is often used as a defense mechanism to justify prosecutorial actions in the face of criticism.

As Newton notes, the PTC adopted a very stringent definition of gravity in the Lubanga case, wherein the PTC considered requests for warrants against both Thomas Lubanga Dyilo and Bosco Ntaganda.[70] It required that the conduct be systematic or large-scale, including the extent of social alarm caused in the community.[71] It effectively established a three-part test for gravity: (1) is the conduct systematic or large-scale with due consideration given to social alarm?; (2) is the accused one of the most senior leaders of the situation under investigation?; and (3) is the accused also suspected of being most responsible based on his role in the relevant group and the role of the group in the commission of crimes within the situation? A case may be deemed sufficiently grave if all three questions are answered in the affirmative.[72] With regard to the accused, Ntaganda, the PTC found that despite Ntaganda's command position as Deputy Chief of General Staff for military operations within the Forces Patriotiques pour la Libération du Congo (FPLC), he was not among the most senior leaders within the DRC situation.[73] As a result, the PTC found the case against Ntaganda inadmissible for lack of sufficient gravity, while issuing the arrest warrant against Lubanga.[74]

69. Rome Statute *supra* note 3, arts. 17, 53.3.
70. Newton, *supra* note 2, at 158-59.
71. *Lubanga Warrants Decision*, *supra* note 33, ¶ 36.
72. *See id.* ¶ 63.
73. *See id.* ¶¶ 85-89.
74. *See id.* ¶ 89. The PTC found the case against Lubanga admissible. Lubanga's initial appeal of the decision to grant the arrest warrant was later dismissed as abandoned. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-722, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006 (Dec. 14, 2006)

This test sets the bar quite high for gravity. The result of using this test, though, seems to be to enhance, rather than undermine, the principle of complementarity in that it would encourage more state action. The more significant problem is that it would likely enhance impunity as well, because it would leave anyone but the most senior leaders of the most significant groups to states that may well be unwilling or unable to address the crimes. The PTC asserted that the ICC would maximize deterrence by requiring all cases to be against the most responsible senior leaders of significant groups in a situation.[75] The Appeals Chamber rejected this reasoning, along with the PTC's entire gravity test.[76]

The Appeals Chamber rejected the test for several reasons. First, it contradicts the drafters' intent to require that all crimes be systematic or large-scale in order to pass the gravity threshold. The definitions of crimes include requirements of systematic or large-scale conduct in specific crimes such as crimes against humanity (requiring a widespread or systematic attack). It is improper to expand those requirements to every crime before the ICC.[77] Second, the Appeals Chamber finds no basis in the statute for the subjective and conjectural requirement of social alarm in the international community.[78]

Third, the focus on only those most responsible leaders would more likely decrease, rather than increase, deterrence by excluding all other categories of perpetrators. The "predictable exclusion of many perpetrators" based on the PTC test would undermine the preventive role of the ICC.[79] Moreover, "individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes."[80] And unlike other international instruments establishing criminal tribunals, "the Rome Statute mentions the 'most serious crimes' but not 'most serious perpetrators.'"[81]

(affirming PTC decision rejecting defendant's challenge to jurisdiction based on alleged abuse of process).

75. *See Lubanga Warrants Decision, supra* note 33, ¶ 55.
76. Prosecutor v. Lubanga, Case No. ICC-01/04-169-PUB-Exp, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," (July 13, 2006) (this document was reclassified as public)[hereinafter *Lubanga Appeals Decision*].
77. *See id.* ¶¶ 69-72.
78. *See id.* ¶ 72.
79. *Id.* ¶¶ 73-74.
80. *Id.* ¶ 77.
81. *See id.* ¶ 79.

The Appeals Chamber declined the Prosecutor's request to establish a proper test for determining gravity under article 17(1)(d).[82] It was not necessary for the Appeals Chamber to assess the gravity provision because it held that the PTC erred in finding an admissibility determination to be a prerequisite for a warrant of arrest.[83] The Appeals Chamber noted that the PTC will generally not have sufficient information to determine admissibility at the warrant stage.[84] Moreover, the PTC should typically not make an initial determination of admissibility because it may be detrimental to the accused; the accused would face some degree of predetermination if he later raises an admissibility challenge where the PTC has already determined admissibility against him.[85] Where the Appeals Chamber reverses a PTC finding of inadmissibility at the warrant stage, "the suspect would be faced with a decision by the Appeals Chamber that the case is admissible. The right of the suspect to challenge the admissibility of the case before the Pre-Trial and—potentially—the Appeals Chamber thus would be seriously impaired."[86]

While the PTC has discretion under article 19 to determine admissibility at the warrant stage, it should do so "only when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect."[87] The circumstances include "instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of [*propio motu*] review . . . bearing in mind the rights of other participants."[88] The Appeals Chamber therefore reversed the PTC's determination of inadmissibility and remanded the application for the arrest warrant to the PTC.[89] The PTC subsequently issued a warrant of arrest against Ntaganda in August of 2006, a decision that was unsealed in April of 2008.[90]

Although Newton's criticisms of the PTC gravity test are well-founded, the Appeals Chamber has already rejected that test. It is possible those subsequent courts will dismiss this rejection as dicta or that the ICC will adopt another arguably problematic test for gravity, but that remains to be seen.

82. *See Lubanga Appeals Decision*, *supra* note 76, ¶ 89.
83. *See id.* ¶ 42.
84. *See id.* ¶ 45.
85. *See id.* ¶¶ 46-50 (noting that "[a] degree of predetermination is inevitable." *Id.* ¶ 50.).
86. *Id.* ¶ 50.
87. *Id.* ¶52.
88. *Lubanga Appeals Decision*, *supra* note 76, ¶52.
89. *See id.* ¶58.
90. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2-Anx-tENG, Warrant of Arrest (Aug. 22, 2006).

Newton's other concern is that the gravity prong of the admissibility test is overtaking other considerations. While some of the practices of the ICC do support this, the ICC is also addressing other parts of the admissibility test. As discussed *supra* Part III, the ICC has looked at state action regarding a case; this consideration goes to article 17(1)(a-c) rather than the gravity provision in article 17(1)(d). Nonetheless, there have been some potentially disturbing statements made that could be interpreted to elevate gravity over the other admissibility requirements.

For example, in the situation in Uganda, the Prosecutor emphasized gravity of crimes as selection criteria, asserting that he opened the investigation into the Lord's Resistance Army (LRA) but not into Ugandan forces because of the severity of crimes of the LRA.[91] Similarly, the Prosecutor singled out conscription and use of child soldiers in the Lubanga case as an offense of special concern to the international community and therefore particularly grave.[92] In expanding the investigation in Sudan to focus on rebel attacks on peacekeepers in Haskanita, the Prosecutor again chose to focus on a particular type of conduct in the midst of other more widespread offenses.[93] As Newton describes it, it seems that the Prosecutor and PTC "colluded to put the ICC stamp of moral and prosecutorial disapproval on selected atrocities based only on the nature of the offenses."[94] He concludes that this presumes "supranational superiority" based solely on the gravity of the offense, with the ICC practically daring a state to attempt to reclaim jurisdiction.[95]

Much of Newton's concern about singling out these particular crimes stems from the definition of gravity in terms of "social alarm," a definition that seems to have been rejected by the Appeals Chamber. Moreover, the emphasis on gravity might stem from other reasons, such as a perceived need to counter criticism regarding the exercise of prosecutorial discretion.

With regard to the situation in Uganda, the Prosecutor faced accusations of favoritism from the start. The Prosecutor appeared at a press conference with President Museveni of Uganda, where Museveni announced his referral of the

91. *See* Newton, *supra* note 2, at n. 143.
92. Press Release, Child soldier charges in the first International Criminal Court Case, ICC-OTP-20060828-157, http://www.icc-cpi.int/Menus/Go?id=a486dedd-0b1a-4cb2-814b-3969d616f4e9&lan=en-GB.
93. *See* Newton, *supra* note 2, at 158.
94. *Id*. at 159.
95. *Id* at 160.

situation in Northern Uganda concerning the LRA. The Prosecutor was criticized for appearing to endorse Ugandan wishes that the ICC investigate the LRA, but not Ugandan forces. He subsequently reassured the public that he would investigate all parties to the conflict, but this did not quiet accusations of partiality. Some commentators accused the Prosecutor of cutting a deal with Museveni, agreeing to limit his investigation to the LRA if Uganda referred the case to the ICC.[96] When the Prosecutor focused on the crimes of the LRA, bringing charges against Joseph Kony and other rebel leaders, he justified the one-sided nature of the charges by pointing to the gravity of crimes of the LRA as compared to the Ugandan forces.[97] Thus, it is plausible that "gravity" was being used as a defense mechanism to counter charges of favoritism—not as a mechanism to overwhelm all other admissibility considerations.[98]

Similarly, the Prosecutor faced criticism for charging Lubanga for conscription and use of child soldiers, but not for other crimes allegedly committed. In particular, advocates for women's rights agitated for charges based on the widespread sexual violence in Ituri allegedly attributable to Lubanga.[99] Again, as Newton notes, the Prosecutor turned to the notion of gravity to defend his choice of charges.

Although the Prosecutor's charging choices may be troubling, it does not necessarily follow that these references to gravity foreshadow a refusal to consider other grounds of admissibility. Nonetheless, it might raise concerns in conjunction with the interpretation of "same person, same conduct" as discussed above. If the Prosecutor singles out a predicate act, like child conscription, as particularly grave and all the ICC counts against an accused relate to that specific conduct, then the state proceedings must also cover that conduct. It seems to undermine the principles of complementarity, deterrence, and an end to impunity for the ICC to reject state proceedings that bring multiple charges of genocide, war crimes and crimes against humanity against an accused—covering the bulk of alleged

96. *See, e.g.*, William Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L. J. 25, 31 (2006).
97. *See* Newton, *supra* note 2, at n. 143.
98. *Cf.* William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. OF INT'L CRIM. JUSTICE 731, 738 (2008) (discussing sudden emphasis on gravity when "Prosecutor found that he was required to defend his initial choices of whom to target in prosecutions" with example of Ugandan case selection).
99. Women's Initiatives for Gender Justice, Letter to Prosecutor Luis Moreno Ocampo, ICC-01/04-313-Anx1 (Nov. 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc252017.pdf (last visited Dec. 17, 2009).

international crimes—but not the particular predicate act of child conscription. This is especially problematic when the ICC charges are seen by many to cover less serious crimes; as William Schabas has noted, child soldier recruitment may be less grave than other crimes.[100] Yet it remains to be seen whether the ICC will take this attitude outside the context of an inactive self-referring state, such as the DRC.

The Prosecutor's selection of a rebel group's attack on African Union peacekeepers at Haskanita is more complicated. It could be argued that the focus on a rebel group, rather than defendants linked to the government of Sudan, is in itself a response to criticism of one-sided case selection in the situation in Darfur. On the other hand, it could be said that the Prosecutor is not using gravity as a defense mechanism; rather he could be accused of misusing the gravity criterion by singling out an attack where 12 people were killed in the midst of widespread killings and other crimes. The Prosecutor has argued that the attack is of exceptional seriousness because of its target (peacekeepers under a U.N. mandate) and impact on the African Union Mission in Sudan; in effect, he argues that the crimes are particularly grave because they are attacks on the international community.[101] This seems more in line with Newton's concern that the ICC is effectively anointing certain crimes with an imprimatur of gravity such that admissibility challenges would be futile or at least disfavored.

In sum, the ICC does not seem to be relying on gravity to exclude all other admissibility factors in its current practice, and the Prosecutor's emphasis on gravity might be explained as a defense mechanism rather than an attempt to circumvent complementarity. At the same time, when the Prosecutor's gravity-based charging decisions are combined with the ICC's interpretation of "same person, same conduct," the net result may be seen as a possible move toward supranational supremacy, as Newton puts it.

100. *See* Schabas, *First Prosecutions at the International Criminal Court*, *supra* note 96, at 743-744, 760 (noting implicit evidence in Rome Statute that war crimes are less serious and terming child soldier recruitment as arguably "closer to the *mala prohibita* than the *mala in se* end of the spectrum," and therefore not necessarily significant enough for the first trial at the ICC).

101. Prosecutor v. Abu Garda, Case No. 02/05-02/09-16 Annex 1, Filing in the Record of Prosecution's Public Redacted Version of the Prosecutor's Application under Article 58, pursuant to the request contained in the Decision on the Prosecutor's Application under Article 58, dated 7 May 2009, ¶¶ 7, 173-75 (May 20, 2009).

V. Self-Referrals and Complementarity

The appearance of ICC supremacy may be enhanced, or perhaps explained if not justified, by the unexpected practice of state self-referrals. Newton contends that the ICC has effectively concluded that a self-referral automatically establishes that a state is unwilling and unable to genuinely investigate or prosecute, regardless of subsequent events. In practice, the ICC has recognized changed circumstances after referrals. It could be said, however, that the ICC went out of its way to proclaim its power to determine whether state action after a self-referral will render a case inadmissible. This does not support Newton's assertion that self-referrals lead to automatically admissible cases. Nonetheless, it could be interpreted to support Newton's contention in part by buttressing his claim that the ICC is hostile to state proceedings after a self-referral.

First, the ICC's practice does not establish that self-referrals render a case admissible in perpetuity. In the case of Lubanga, the PTC concluded that the DRC's letter of referral established that the state was unable to investigate or prosecute at that time.[102] The PTC went on to acknowledge that the DRC judicial system had expanded its capacity since the date of the referral and had issued warrants for the accused.[103] The PTC did not rely on the self-referral itself to reject any assertion of state jurisdiction over the case. Instead, it held that the DRC was not acting with regard to the accused's alleged conscription and use of child soldiers.[104] Because there was no state action, there was no need to discuss whether the state was unwilling or unable to genuinely investigate or prosecute.[105]

With regard to Uganda's self-referral, the ICC has not assumed that the state waived its right to challenge admissibility. Indeed, the PTC *sua sponte* raised the issue of admissibility in reaction to Uganda's unsigned peace deal with the LRA, which apparently requires Kony and the other ICC accused to be prosecuted within a special division of the High Court of Uganda.

When the arrest warrants against Kony et. al. were sought in July of 2005, the PTC was satisfied that the case "appears to be admissible."[106] At this stage, there

102. *See Lubanga Warrants Decision*, supra note 33, ¶ 36.
103. *See id*. ¶ 37.
104. *See id*. ¶ 39.
105. *See id*. ¶ 41.
106. Prosecutor v. Kony, Case No. ICC-02/04-01/05-1-US-Exp, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, 2 (July 8, 2005) [hereinafter *Kony Warrants Decision*].

was apparently little discussion of admissibility, probably because of the self-referral. In February of 2008, however, the PTC noted the recent agreement and annexure between the LRA and Uganda. The PTC also noted the agreement's implications for state prosecution and for Uganda's execution of the ICC arrest warrants.[107] Uganda responded by first noting that the necessary legislation regarding domestic prosecution in the High Court will not be finalized until Kony actually signs the agreement and annexure. It also stated, "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 of the High Court for trial."[108] In assessing admissibility, the PTC noted that this response seemed internally contradictory. At a minimum, it reflected apparent confusion over who has the power to interpret and apply the provisions governing complementarity.[109]

Despite public statements indicating that Uganda would prosecute Kony and the other ICC accused, Uganda has not challenged admissibility at this time. Nonetheless, the PTC engaged in a long process to determine admissibility on its own. The PTC could have given Uganda the opportunity to pass implementing legislation, or it could have waited to see if Uganda was able to obtain custody over Kony et. al., either via the peace process or otherwise. Instead, the PTC appointed defense counsel for Kony and the others, which raised a host of contentious issues.[110] It received observations and responses from the prosecutor, counsel for the defense, Uganda, the Office of Public Counsel for Victims and amicus curiae. The PTC distinguished the Appeals Chamber's decision in Ntaganda, where it established appropriate circumstances to determine admissibility *sua sponte* such as based on established jurisprudence, uncontested

107. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, 5 (Feb. 29, 2008).
108. Prosecutor v. Kony, Case No. ICC-02/04-01/05-286-Anx.2, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, 3 (Mar. 27, 2008).
109. Prosecutor v. Kony, Case No. ICC-02/04-01/05-377, Decision on the admissibility of the case under article 19(1) of the Statute, ¶ 45 (Mar. 10, 2009) [hereinafter *Kony Admissibility Decision*].
110. *See generally* Prosecutor v. Kony, Case No. ICC-02/04-01/05-350, Submission of observations on the admissibility of the Case under article 19(1) of the Statute, Counsel for Defense (18 Nov. 2008) (questioning mandate of counsel and noting potential ethical violations related to possible conflicts of interest among defendants and inability to communicate with accused).

facts or ostensible cause. The PTC held that the judgment in Ntaganda related to the arrest warrant stage and was therefore inapplicable here. It implicitly rejected the Appeals Chamber's concerns about the negative effect of determining admissibility in early stages of the case.[111] The PTC noted that, as multiple admissibility determinations are possible, the defendants retained the right to challenge admissibility.[112]

In the end, the PTC concluded that there had been no change since the warrant stage and therefore no reason to review the positive determination of admissibility made at that time.[113] The PTC stated that "the purpose of the Proceedings remains limited to dispelling uncertainty as to who has ultimate authority to determine the admissibility of the Case: it is for the Court, and not for Uganda, to make such a determination."[114]

Thus, the PTC triggered a long process requiring substantial effort from multiple parties with the apparent aim of proclaiming its power. While the PTC's position that the ICC determines admissibility is correct and Uganda's public statements did seem to indicate confusion on this point, it can be argued that it was excessive to initiate an entire process simply to announce this straightforward interpretation of the statute. The PTC's actions can be interpreted to support Newton in terms of characterizing the ICC's attitude as one of competition rather than cooperation. Uganda may, of course, bring an admissibility challenge of its own, although there might be issues with regard to timing.[115] Regardless, there is the specter of prejudgment as noted by the Appeals Chamber in relation to the Ntaganda admissibility determination.[116]

111. *See supra* notes 84-85 and accompanying text.
112. *See Kony Warrants Decision*, *supra* note 106, ¶¶ 20-29.
113. *See id*. ¶ 52.
114. *Id.* ¶ 51. The defense appealed. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05-379, Defense Appeal against "Decision on the admissibility of the case under article 19(1) of the Statute" dated 10 March 2009 (Mar. 26, 2009). As this article was in the final editing stages, the Appeals Chamber dismissed the appeal. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05 OA 3, Judgment on the appeal of the Defense against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009 (Sept. 16, 2009).
115. A state with jurisdiction over a case that brings a challenge under article 19(2)(b) on the ground that it is investigating or prosecuting shall make a challenge at the earliest opportunity. Rome Statute, *supra* note 3, art. 19(5).
116. *See supra* notes 84-86 and accompanying text.

The time and effort spent on an admittedly premature[117] process could have been spent consulting with Uganda to ensure that the state would not be deemed unwilling or unable to investigate or prosecute based on the envisioned special division of the High Court. The ICC's practice with regard to Uganda does not necessarily confirm Newton's fear that self-referring states will be deemed eternally "unable," but it may buttress his contention that the ICC seems hostile to state assertions of jurisdiction after a self-referral.

This conclusion may be supported by the Katanga case. In its decision rejecting Katanga's admissibility challenge, the Trial Court (TC) emphasized that the DRC had referred the situation to the ICC and did not itself challenge admissibility.[118] The TC noted, in the hearing on Katanga's motion, that the DRC indicated the state had referred the case in order to end impunity and would not now start proceedings against Katanga.[119] The TC concluded that "the DRC clearly intends to leave it up to the Court to prosecute Germain Katanga and to try him for the acts committed on 24 February 2003 in Bogoro."[120] The TC locates an unexpressed form of "unwillingness" in article 17, where a state does not want to shield the person from responsibility, but nonetheless rejects state action.[121] "This second form of 'unwillingness', which is not expressly provided for in article 17 of the Statute, aims to see the person brought to justice, but not before national courts."[122] The state acts in accordance with complementarity by referring a situation to the ICC if it considers it opportune to do so, for reasons such as circumstances unfavorable to state proceedings.[123]

The TC effectively endorses state inaction for a variety of reasons, so long as the state cooperates with the ICC.[124] It is likely that in most situations, the state will also refer the case to the ICC. Thus, self-referrals can be equated with unwillingness, although the gravity and *ne bis in idem* provisions of article 17 may still block admissibility.[125] Of course, it is unlikely that there has been a prior state

117. *See Kony Admissibility Decision, supra* note 109, ¶ 51.
118. *Katanga Reasons for Oral Decision, supra* note 44, ¶¶ 94-95.
119. *See* i*d*. ¶ 94.
120. *Id*. ¶ 95.
121. *Id*. ¶ 77.
122. *Id*.
123. *See id*. ¶ 80.
124. *See id*. ¶ 79 (noting that state can fulfill Preamble's duty of exercising criminal jurisdiction if it "considers that it is more opportune for the Court to carry out an investigation or prosecution" so long as it surrenders a suspect it has in custody to the Court and cooperates fully).
125. *See id*. ¶¶ 81, 86-87.

prosecution in this scenario. The possible impact of the gravity aspect was discussed in Part IV, *supra*.

The Katanga decision, with its expanded definition of unwillingness, seems to put the defendant in a particularly difficult situation.[126] Even if, as the defense contended, the state had investigated and detained a suspect for years for similar conduct, the ICC could step in simply by making slightly different prosecutorial choices after a self-referral.[127] Where the state subsequently disavows any intention of investigating the accused, the desire to end impunity might clash with the rights of defendants. The tension is tempered somewhat by the extensive protections accorded to accused in the Rome Statute. Yet the statutory protections do not necessarily avoid the hardships highlighted by Katanga, such as lengthy detention far from family. Regardless, the Katanga TC determined that the defense's concerns regarding the conditions of ICC trials are irrelevant to admissibility.[128]

Again, in practice the DRC self-referral did not block an inquiry into admissibility. Nonetheless, it appears that a self-referral generally weighs heavily in favor of ICC jurisdiction. The referral itself implies that the state is unwilling or unable to act. It seems that the state would bear a heavy burden to subsequently prove to the ICC that it is investigating or prosecuting genuinely the same person for the exact same conduct. This is particularly true if the state must show that it is investigating the same event (such as one attack on one village, in the midst of many such attacks allegedly committed by the accused) and/or plans to charge the same enumerated act as the ICC (such as child conscription), possibly with the same mode of liability (criminal responsibility as a military superior rather than joint perpetrator). The level of detail required for the state proceedings does give the impression that the ICC may be reluctant to allow states, particularly self-referring states, to (re)assert primacy. Thus, the effect of self-referrals combines with practice regarding charging choices and an emphasis on grave crimes to yield

126. For an extensive discussion of interpreting admissibility through the lens of the accused (and as a way to protect state sovereignty or a limit on the power of the ICC), see William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, 7 J. INT'L CRIM. JUST. 257 (2009).
127. *See Katanga Reasons for Oral Decision, supra* note 44, ¶ 88.
128. *See id*. at ¶ 84.

the appearance of a competitive rather than cooperative spirit.[129] This presumes, however, that the state actually wants to compete with the ICC by asserting jurisdiction. In many of the cases to date, the state has disavowed any interest in prosecuting the accused subsequent to the referral. It remains to be seen how the ICC will react to state competition for primacy, but any challenge will raise issues of how the ICC should assess deferrals to national proceedings.

VI. Deference to National Proceedings

To remedy the supposed reluctance of ICC actors to allow state proceedings related to an ICC case, Newton advocates that the ICC "should defer to domestic investigations or prosecutions in any feasible conditions."[130] Even if the domestic charges do not perfectly match the "prosecutorial preferences" of the ICC, the ICC should defer to the "good faith reasoning" of state officials who are applying national law.[131] In order to implement this deference, Newton has mentioned a Commission of Experts on Complementarity or another mechanism adopted through the Assembly of States Parties or by amendment to the statute.[132]

This proposal raises many intriguing questions, both procedural and substantive. With regard to the potential body of experts, factors to consider include the necessity of a new body; how it would fit within the current structure of the ICC; the nature of the commission, such as whether it should be ad-hoc or permanent, with full or part-time experts and rules on conflicts of interest; its make-up, including whether members are appointed or elected and by whom (e.g., the Assembly of States Parties or the Court), etc.

With regard to the level of deference, it will be challenging to develop standards for assessing "good faith reasoning" or "feasible conditions." Does the evaluation include an examination of the independence or impartiality of the relevant state officials or the judicial system as a whole; an assessment of the support of the citizens, including victims groups, for domestic rather than international proceedings; an exploration of the democratic nature of the state, the level of

129. This conclusion regarding to self-referrals does not assert a state right to unilaterally withdraw a referral. For a discussion of this issue, see, e.g., Michael P. Scharf & Patrick Dowd, *No Way Out? The Question of Unilateral Withdrawals or Referrals to the ICC and Other Human Rights Courts*, 9 CHI. J. INT'L L. 573 (2009).
130. Newton, *supra* note 2, at 164.
131. *Id.*
132. Michael Newton, Panel Remarks at Santa Clara Journal of International Law Symposium, *The Future of International Criminal Justice* (Mar. 13-14, 2009).

partiality or corruption within state government? Would the review mechanism approach this akin to a *de novo* review, where it examines the state's evidence, investigation, and charges from scratch, or would a more deferential abuse of discretion-type standard of review be used?

Others have attempted to offer procedural or substantive guidelines as well, although Newton's assessment that is more recent has the advantage of taking into account more evidence of the practice of the ICC to date. For example, I have attempted to offer some guidelines for the ICC in the context of deferring to nonprosecutorial alternatives: suggestions that would apply equally to state prosecutorial proceedings.[133] In addition to article 17's admissibility provisions discussed above, I examined the other possible avenues for deferring to state proceedings in order to implement complementarity: article 16's Security Council deferral request (providing for a twelve-month renewable suspension of an ICC investigation or prosecution); article 20's *ne bis in idem* prohibition; and article 53's prosecutorial discretion provision (allowing the Prosecutor to decide not to go forward with an investigation or prosecution in the interests of justice).I concluded that while none of these provisions require deference to nonprosecutorial alternatives such as a truth commission or a traditional justice mechanism like Uganda's Acholi *mato oput* ceremony, the provisions are sufficiently ambiguous to allow for such deference.[134]

Given the emphasis of the international community on prosecution in ending impunity, any domestic nonprosecutorial alternative must first be shown to be necessary and legitimate. If so, the ICC should evaluate the alternative justice mechanism on the merits. Rather than attempt to assess whether these alternative justice mechanisms are worthy of deferral in a vacuum, the ICC should defer if the state process will further the purported goals of the ICC. *Although* contested, the most commonly accepted goals of the ICC include retribution, deterrence, expressivism and restorative justice. If the alternative justice mechanism can further these goals as well as (or as poorly as) ICC prosecution, then the ICC

133. *See* Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209 (2008); *see also* Linda M. Keller, *The False Dichotomy of Peace versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. No. 1 (2008) *available at* http://www.haguejusticeportal.net (in English with French translation).

134. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, *supra* note 133, at 237-59.

should defer.[135] Similarly, one might argue that the ICC should defer to state criminal investigation or prosecution if such proceedings advance the goals of international criminal justice. The ICC, including the proposed commission of experts, might assess to what extent the state investigation or prosecution furthers retribution, deterrence, expressivism, and restorative justice, as compared to ICC proceedings.

One could apply this test to state criminal investigation or prosecution in light of the current practice at the ICC. For example, assuming the DRC had continued investigating and prosecuting Lubanga for numerous counts of genocide and war crimes, should the ICC defer even where the DRC's prosecutorial choices of crimes do not include conscription and use of child soldiers? Newton's general principle of deferring to good faith prosecution would say yes. One might elaborate on the underlying reasons for such deference by looking at the goals of the ICC. On the one hand, the prosecution of the accused for conscription and use of child soldiers strongly furthers expressivism; it sends a message that the international community is particularly interested in ending impunity for this crime. Yet state prosecution for multiple other crimes would likely advance expressivism as well, although it would send the condemnatory message for different crimes. If the crimes charged were based on the rampant gender-based violence in the DRC, the expressivist message would arguably be as valuable as sending a message confined to child soldiers. Ideally, of course, one body—the ICC or the state—would be in a position to send both messages. This is where cooperation between the ICC and states would come into play; consultations between the two parties might lead to state prosecutions that also include the charges preferred by the ICC, particularly if the ICC were to share evidence with the state and take other capacity-building steps.[136]

With regard to retribution, it could be argued that more is more—if the DRC were ready, willing and able to pursue genocide and war crimes based on many enumerated acts (as compared to the ICC's charges related solely to child soldiers), the greater scope of crimes and victims might yield more retributive justice. The numbers might be relevant to an assessment of deterrence as well; if a broader range of crimes are charged in a state proceeding, then state prosecution for

135. *See id.* at 259-78.

136. *See* Rome Statute, *supra* note 3, art. 93(10) (providing that the Court may, upon request, cooperate and provide assistance to the state investigating or prosecuting relevant crimes, such as transmitting evidence obtained in course of investigation at the ICC).

multiple counts of genocide and war crimes might have a deterrent impact equal to (or greater than) ICC prosecution for conscription and use of child soldiers.

Similarly, restorative justice might be advanced more by state prosecution of a wider scope of activity than the narrow conduct covered by the ICC charges. Many victims currently excluded from the Lubanga case at the ICC might be covered by broader state proceedings. Moreover, if selective charging at the ICC leads to some crimes being charged against only one group in a multi-group conflict, restorative justice might be undermined. As one women's rights organization noted in a letter to the ICC Prosecutor objecting to the exclusion of crimes of sexual violence in the face of ample evidence against Lubanga, it is likely that future gender-based crimes in the DRC would be alleged against members of militias other than Lubanga's group.[137] It wrote, "Our concern is that if gender-based crimes are charged in cases for example brought against [a different militia] in which the victims are Hema women, this will be perceived by Lendu victims [of Lubanga's militia] as a double persecution. Such a result would not be conducive to the restoration of peace and reconciliation in the region, and could be a cause of future tensions."[138]

This brief analysis may raise more questions than it answers, but it offers an example of the complicated calculus that anyone must perform to determine whether the ICC should defer to state proceedings, whether criminal prosecution or alternative mechanisms. Newton argues for a preference for state criminal investigation and prosecution. It is not clear whether the same preference should be accorded to state nonprosecutorial alternatives. Does positive complementarity require that the ICC also defer to good faith efforts to address international crimes via a conditional amnesty, truth commission or traditional justice mechanism? What sort of criteria or guidelines should be used here, and is there a different, perhaps lower, level of deference to nonprosecutorial methods? These questions remain to be explored, but Newton's article is an excellent starting point for thinking about the difficulties of interpreting and implementing complementarity in practice.

137. *See* Women's Initiatives for Gender Justice, *supra* note 99.
138. *Id.* at 5.

VII. Conclusion

Newton is concerned that the ICC will effectively omit the article 17 admissibility test or at least ignore important components of it, particularly when dealing with self-referrals. He asserts that once the Security Council refers a case to the ICC, it is automatically admissible. Moreover, he fears that the ICC has intimated that once it deems a crime particularly grave, the case will be considered automatically admissible. In a related line of argument, he fears that if the ICC does perform a full admissibility assessment, it will take an improperly narrow view of state charging decisions and thereby find too many states unable or unwilling to investigate or prosecute the case. He therefore advocates that the ICC should defer to state investigations or prosecutions whenever feasible.

It seems that the current practice of the ICC offers some support for Newton's thesis, although questions can be raised regarding the details, as noted above. Overall, it seems that there is a trend toward statements and decisions at the ICC that can be interpreted as hostile to state proceedings. Yet it should be noted that the ICC could be said to currently embrace state wishes by keeping cases at the ICC after a self-referral. In the DRC cases, the end result comported with the state's desire for the ICC to investigate and prosecute. Even in the Uganda situation, the state has yet to formally challenge the admissibility of the case against Kony *et. al.* despite its preparations to prosecute Kony before a special division of its high court.

Nonetheless, the admissibility decisions to date do not necessarily coincide with the wishes of defendants like Katanga. The current practice seems to give the impression of a trend away from cooperation and toward competition even if the various players at the ICC do not intend to implement complementarity such that it tends toward supranational primacy. The mere existence of language that can be interpreted to pose such a challenge to complementarity is in itself problematic. It gives rise to the arguments made by Newton and Katanga, voicing concerns over ICC hostility to state proceedings. This in turn may lead to state inaction, overwhelming the ICC, and yielding increased impunity. Therefore, Newton's work is particularly valuable in revealing the appearance of such a trend and offering some nascent thoughts on how to counter this impression through subsequent ICC practice. Newton advocates the adoption of positive complementarity, in the form of deference to states. The above discussion of the current practice of the ICC, in the form of statements of various arms of the ICC as well as case law, yields several other suggestions.

For example, the ICC could refrain from discussing the same person, same conduct test in terms that can be misinterpreted as requiring states to predict ICC charges or to investigate/prosecute the same behavior down to the precise time, place, and predicate act. The ICC, particularly the Office of the Prosecutor, could avoid references to gravity that seem to elevate the gravity consideration to the exclusion of other article 17 factors. Finally, the ICC can clarify the "unwritten" unwillingness provision, particularly as it relates to self-referrals. It might concomitantly emphasize its activities related to building state capacity, such as any consultations with states like Uganda regarding domestic proceedings acceptable under the Rome Statute. Ideally, it could promulgate standards for deference to states, in order to enhance predictability and transparency, thereby encouraging state action and minimizing impunity.

The implementation of a critical but undefined principle like complementarity necessarily poses challenges for a new tribunal. Professor Newton's article illustrates the potential concerns raised by ICC practice to date and creates an opportunity for the ICC to respond to possible misimpressions regarding an attitude of supranational superiority and ICC hostility toward states.