

THE INTERNATIONAL CRIMINAL COURT IN AFRICA: IMPARTIALITY, POLITICS, COMPLEMENTARITY AND BREXIT

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I have known and been inspired by Henry J. Richardson III and his scholarship for many years. A hallmark of his work has been his focus upon African-American interests in international law and also upon the rights and interests of African states. In acknowledgement of that intellectual debt, it is my honor to dedicate the following article to this *festschrift* celebrating his life and work.

I. INTRODUCTION

The negotiation of the 1998 Rome Statute¹ of the International Criminal Court (ICC) was a diplomatic achievement, but only a limited one. To build a broad international consensus, many compromises were incorporated into the text of the Statute. Perhaps the most fundamental of these compromises concerns complementarity, a formula for balancing the jurisdiction of the ICC and that of States.² The Court was left with often frustrating limits to its jurisdiction and enforcement powers. Even today the ICC remains very much a work-in-progress.

All the initial cases before the ICC have arisen from states on the African continent,³ and this fact has fed perceptions of partiality and of anti-African bias. It

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1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. See *What is Complementarity?*, INT'L CTR. FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/complementarity-icc/> (last visited Feb. 28, 2017) (explaining the structure of complementarity and providing examples of its impact on the ICC).

3. In addition to the seven African countries in which the ICC has brought individual cases against an accused (Uganda, Democratic Republic of the Congo, Côte d'Ivoire, Libya, Kenya, Sudan, and Central African Republic), there are, as of this writing, nine countries (eight outside Africa) in which the ICC is conducting preliminary examinations (Afghanistan, Burundi, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, Ukraine, and Registered Vessels of Comoros, Greece and Cambodia), as well as a couple of additional countries in which the ICC has situations under investigation (Mali and Georgia.) See, e.g., Mali: Situation in the Republic of Mali, ICC 01/12, <https://www.icc-cpi.int/mali> (last visited Mar. 3, 2017); Georgia: Situation in Georgia, ICC-01/15, <https://www.icc-cpi.int/georgia> (last visited Mar. 3, 2017). This suggests that there will likely be ICC cases outside of the African continent relatively soon. See generally INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/Home.aspx> (last visited Mar. 3, 2017).

also means that all the Court's decisions giving specific meaning to the concept of complementarity have been rendered in the context of cases from that continent. African sensibilities, while perhaps not decisive, should rightly be relevant.

Post-colonial African governments can be sensitive to perceived slights by institutions seen as shaped or controlled by Western powers. African states were strong early supporters of the ICC, but that support has been shaken in the wake of ICC charges brought against two sitting African heads of state, Omar Al Bashir of Sudan and Uhuru Kenyatta of Kenya.⁴ As of 2016, three African states had given official notice of their intent to exit from the ICC's global framework.⁵ In this retreat from internationalism, the political dynamic behind the United Kingdom's (UK's) Brexit vote⁶ has found its expression in Africa and has been invoked there to justify resistance to the jurisdiction and authority of the ICC.

The ICC has a very real problem with Africa, but it is more than a simple matter of anti-African neo-colonial bias. In fact, upon closer examination, the argument that the ICC has targeted African states is quite weak. While it is true that so far the ICC has brought cases in only seven countries, all of which are in Africa, it is also true that the governments of four of those seven states took the initiative to voluntarily self-refer a situation on their territory to the ICC.⁷ These ICC self-referrals are an expression of state consent for which the ICC cannot, in all fairness, be held responsible. Likewise, the situations in Sudan and in Libya were referred to the ICC by the United Nations (U.N.) Security Council, not by decision of the ICC itself.⁸ Thus, of all the ICC cases so far, only the Kenya cases were initiated by decision of the ICC.⁹ The handful of criminal cases brought within this one situation can hardly be evidence of anti-African bias sufficient to justify a possible mass exodus of African states from the ICC. But the ICC has other, very real problems that must be addressed.

From the start, there has been enormous pressure on the ICC and its officials to deliver justice, and such great expectations can be hard to meet. Some degree of

4. Somini Sengupta, *Omar al-Bashir Case Shows International Criminal Court's Limitations*, N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html>.

5. The three African States are: South Africa, Burundi and Gambia. *AP Explains: Why African states have started leaving the ICC*, FOX NEWS (Oct. 26, 2016), <http://www.foxnews.com/world/2016/10/26/ap-explains-why-african-states-have-started-leaving-icc.html>.

6. See Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Feb. 23, 2017), <http://www.bbc.com/news/uk-politics-32810887> (detailing the political dynamic behind the U.K.'s Brexit vote).

7. The four ICC self-referrals were from Uganda, the Democratic Republic of Congo, the Central African Republic, and Mali. *Africa: Should African Countries Quit the ICC?*, ALL AFRICA (Nov. 2, 2016), <http://allafrica.com/stories/201611020460.html>.

8. See Tiina Intelmann, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, HUFFINGTON POST, http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html (last visited Feb. 28, 2017) (discussing the U.N. Security Council's two referral situations in Sudan and Libya).

9. See Karen Rothmyer, *International Criminal Court on Trial in Kenya*, NATION (May 9, 2012), <https://www.thenation.com/article/international-criminal-court-trial-kenya/> ("Kenya was the first ICC initiated case, even though it has never had a single non-African case before it.").

disappointment with the work of the ICC may therefore have been inevitable. Even today, the consensus on certain very central aspects of the ICC is “fragile.”¹⁰ In particular, there is controversy about how the complementary jurisdiction of the Court should balance national and international jurisdiction.¹¹ It is especially in this area that the ICC has clashed with African leaders.

Should the Rome Statute be interpreted broadly, creatively, and in a dynamic and teleological spirit, so as to extend the Court’s effective jurisdiction as far as possible and (hopefully) to achieve, as quickly and as fully as possible, the lofty purposes for which it was created? Or should the admissibility criteria set out in the Rome Statute be interpreted strictly and with deference to the residual sovereign prerogatives of states? These contrasting approaches, and the arguments for and against them, are familiar to legal scholars around the world, and are as relevant to the ICC as they are to interpretation of the United States (U.S.) Constitution or U.S. federal law.

This paper is not an argument against effective international institutions, much less an argument for continuing impunity. There are clear and powerful reasons for wanting to ensure the strongest, most independent and effective ICC possible. These include the belief that impunity for serious international crimes today only encourages those who might be tempted to commit them tomorrow and, of course, because the victims of serious international crimes have a right to expect justice. The Rome Statute was intended to address this problem of impunity.

According to the Vienna Convention on the Law of Treaties (VCLT), the terms of a treaty are first and foremost to be interpreted in accordance with their “ordinary meaning.”¹² This common-sense rule is of limited utility since the Rome Statute often uses ordinary words in very technical and extraordinary ways. The VCLT also recognizes that treaty terms are to be interpreted “in their context and in the light of . . . [the treaty’s] object and purpose.”¹³ This opens the door to the teleological approach to treaty interpretation, mentioned above, which stresses the intended goals of the parties.

10. See Jan Guardian, *Reaching Mutual Consensus: ICC, ICJ, and the Crime of Aggression*, A CONTRARIO ICL: REFLECTIONS & COMMENTARY ON GLOBAL JUST. ISSUES (Oct. 12, 2012), <https://acontrarioicl.com/2012/10/12/crime-of-aggression-international-criminal-court/> (“The consequence of such an occurrence in the cases brought before the ICJ and the ICC appears to be particularly problematic given the highly-charged political atmosphere in which the ICC has been operating during the years, its fragile credibility and a lack of a proper institutional hierarchy within the international legal system.”).

11. See Oscar Solera, *Complementary Jurisdiction and International Criminal Justice*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/assets/files/other/145-172-solera.pdf> (last visited Feb. 28, 2017) (arguing for necessities and possible solutions to reconcile international and national jurisdictions).

12. “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, ¶ 2, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

13. *Id.*

But what exactly was the goal in creating the ICC? The ICC's function is to prevent impunity for serious international crimes.¹⁴ But was the goal to maximize the Court's effective jurisdiction over those crimes today, or to build more carefully and deliberately towards that goal over time by staying faithful, for now, to that institution's founding consensus? Which approach is more appropriate?

Universality of ICC membership is essential to the success of the ICC, but progress towards that goal is directly undermined when the ICC is perceived to be undermining the legitimate rights and prerogatives of States Parties through jurisdictional overreach. The difficulty is to discern exactly how far the jurisdiction of the ICC should extend in any given circumstance. Complementarity is the agreed formula for balancing national and international jurisdiction, but in practice it could be calibrated in a range of ways. One version of complementarity might attempt to transform the ICC into a robust international court freely sharing concurrent jurisdiction with national justice systems. Another version, more deferential to the jurisdiction of states, might reduce the ICC to a much more restrained and patient international court of last resort. In practice, the difference between the two could turn on little more than the discretion of the ICC Prosecutor.

The experience of the ICC so far suggests that it is reasonably capable of investigating and prosecuting situations that are self-referred to it by the state directly concerned.¹⁵ In contrast, cases emerging from the two situations referred by the U.N. Security Council have largely stalled due to the Council's failure to follow through.¹⁶ But a separate and more delicate set of issue arises when the ICC Prosecutor decides to initiate a case on her own authority (*proprio motu*) under Article 15 paragraph 1 of the Rome Statute.¹⁷ Any interested state may challenge the admissibility of such a case before the ICC,¹⁸ and that challenge raises a multitude of difficult questions concerning the implementation of complementarity.

This paper argues that in its haste to provide answers to all these questions, the Court has failed so far to develop a balanced and viable approach to complementarity. Instead, the ICC's judges have interpreted the Rome Statute's jurisdictional provisions in a manner inconsistent with the essential bargain on complementarity jurisdiction reached at the 1998 Rome Conference.¹⁹ The

14. See *About*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Mar. 5, 2017) ("The Court is participating in a global fight to end impunity, and through international criminal justice, the Court aims to hold those responsible accountable for their crimes and to help prevent these crimes from happening again.").

15. See *Africa: Should African Countries Quit the ICC?*, *supra* note 7.

16. See Rebecka Buchanan, *Security Council Referral to the ICC: A help or a hindrance in achieving peace*, HUMAN SEC. CTR. (Jan. 19, 2015), <http://www.hscentre.org/global-governance/security-council-referral-icc-help-hindrance-achieving-peace/> (discussing difficulties faced by Security Council while referring cases to ICC).

17. Rome Statute, *supra* note 1, art. 15, ¶ 1.

18. *Id.* art. 19 ¶ 2.

19. See *Summary of the Key Provisions of the ICC Statute*, HUM. RTS. WATCH, <https://www.hrw.org/news/1998/12/01/summary-key-provisions-icc-statute> (Dec. 1, 1998)

unintended consequence has been to create a deficit in the perceived legitimacy of the ICC. The existence of this legitimacy deficit is particularly unfortunate because the ICC is still effectively within its initial trial period during which it must, among other things, seek to attract the future support of India, Russia, China, and the U.S., four ICC non-State Parties that govern the vast majority of the world's population. There is justifiable concern that if the ICC does not modify its current tone and approach, it is more likely to lose support of those countries that have accepted it than it is to gain the additional support it will ultimately need to realize its greatest potential.

A different and more careful approach is required based on the text of the Rome Statute, the negotiating history of that treaty, and the practical realities and constraints faced by the ICC. This is especially important during this Brexit era of heightened skepticism regarding international institutions.²⁰ In particular, the ICC needs to both undertake a general recalibration of complementarity and adopt a more patient and cooperative attitude which invites states to contribute, to the greatest extent possible, in the formulation, adjustment, and practical application of ICC standards and procedures. Complementarity should not be a one-way street in which the states learn at the feet of an all-knowing ICC.

Following this introduction, this paper will successively consider: the thorny issue of impartiality; the occasional need for political prudence, even in deciding technical matters such as jurisdiction; the appropriate balance between national and international jurisdiction under the complementarity formula; Africa's critical role in the ICC; the developing African Regional critique of the ICC; and the relevance of Brexit to developments in international criminal justice.

II. IMPARTIALITY VS. POLITICS: A FALSE DICHOTOMY

A. *Impartiality*

The ICC has consistently maintained that its work is completely non-political and impartial. The first ICC Prosecutor, Luis Moreno Ocampo, often invoked the simplified and largely false dichotomy of a court independent of all political considerations (his guiding vision of the ICC)²¹ versus a compromised and

(explaining the challenges facing the admissibility of complementarity jurisdiction).

20. Hunt & Wheeler, *supra* note 6.

21. Ocampo has said elsewhere that the ultimate goal is less to convict criminals than it is to send a message to deter them. Some people would probably see this goal as too political, and inadequately focused on the "technical" goal of a conviction. James Verini, *The Prosecutor and the President*, N.Y. TIMES MAG. (June 26, 2016), <https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html>. "Moreno-Ocampo says he did everything he could to convict Kenyatta, but . . . [t]he message a case sends, the shadow of the court — that was the goal. The problem with courts, Moreno-Ocampo told me, is they 'believe the trials are the most important things. No. The most important thing is the prevention of crime.' He had set out to prevent future political violence in Kenya, and in this sense at least, the Kenyatta case was a success. 'The suspect became president. But there was no violence in the elections.'" *Id.*

illegitimate political court.²² He declared himself the champion of the non-political cause.²³ Fatou Bensouda, the current ICC Prosecutor, also insists that she and her office act in complete independence and impartiality.²⁴

In one interview, Prosecutor Bensouda describes the workings of the ICC as if the institution were ethereally abstracted from any external political reality. She clarified her views in an interview with an Israeli newspaper.

How will you deal with the fact that the Israeli-Palestinian case is a political “hot potato”?

“While I am fully cognizant of the political complexities of this lingering conflict, mine is a legal mandate. All I can and will do is to apply the law in strict conformity with the Rome Statute [of the International Criminal Court], with full independence and impartiality as I have done with all our cases and situations to date. We operate in a highly political world where we will face reactions to the decisions we take based on our legal mandate.”

“Let me reassure you that as prosecutor, political considerations have never, and will never form any part of my decision making. My duty firmly remains to simply apply the law to whatever situation is before the court.”²⁵

The ICC Prosecutor must rightly stress the legal and technical side of her task. To do less would encourage political second-guessing of every decision she makes. But the view of the relationship between law and politics expressed by the

22. Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 224 (2008). “The law will prevail. Remember how difficult it was for national systems to develop automatic compliance with judicial decisions? We can learn from what happened in the United States almost two centuries ago. When the U.S. Supreme Court ruled against Georgia in a conflict about Cherokee lands, Georgia ignored the judicial decision. When asked about the case, President Andrew Jackson reportedly said, ‘John Marshall [the Supreme Court] has made his decision, now let him enforce it.’ Things have changed since then. We are witnessing the beginning of a new legal era. We are building a global criminal justice system to prevent atrocities and end impunity for the most serious crimes. The Prosecutor’s duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law.” *Id.*

23. Asked if he was ‘becoming a politician at the ICC’, Moreno-Ocampo answered, “on the contrary, I am putting a legal limit to the politicians. That is my job. I police the borderline and say, if you cross this you’re no longer on the political side, you are on the criminal side. I am the border control.” Patrick Smith, *Interview: Luis Moreno-Ocampo, ICC Prosecutor*, AFRICAN REPORT (Sept. 21, 2009), <http://www.theafricareport.com/News-Analysis/interview-luis-moreno-ocampo-icc-prosecutor.html>.

24. At a 2015 press conference Prosecutor Bensouda stated, “I wish to underscore here that, without exception, we conduct our investigations in complete independence and impartiality. We have always been, and continue to be, guided by these same principles with respect to our work.” Fatou Bensouda, *Statement at a Press Conference in Uganda: Justice Will Ultimately Be Dispensed for LRA Crimes*, RELIEF WEB (Feb. 27, 2015), <http://reliefweb.int/report/uganda/statement-prosecutor-international-criminal-court-fatou-bensouda-press-conference>.

25. Aeyal Gross, *ICC Prosecutor: Low-ranking Israeli Soldiers, as Well as Palestinians, Could Be Prosecuted for War Crimes*, HAARETZ (May 1, 2015, 3:23 PM), <http://www.haaretz.com/news/diplomacy-defense/premium-1.654516> (alterations in original).

Prosecutor here is positively Manichean²⁶ in that it places law on a pedestal, representing everything virtuous, legitimate, technical, valid, and impartial, and dismisses each and every political consideration as irrelevant or at least presumptively illegitimate. In reality, the ICC must draw a careful line between those political matters that might compromise the functions of the ICC and those considerations of prudence that cannot be excluded consistent with common sense. Prudence is particularly appropriate when addressing questions which could undermine the still-fragile consensus on the Court's formula for complementarity jurisdiction.

Critiques of the ICC often focus on charges of selectivity.²⁷ Why are certain situations before the Court while others are not? Why are some individuals in a country charged and not others? Perhaps more to the point, why have all the situations and cases so far been from the continent of Africa? These are important questions, but it should be recalled that some degree of selectivity is inevitable. Given the limited resources of the ICC, some of those responsible for real crimes must necessarily escape prosecution.²⁸ There will never be enough international courtrooms to try every potential case in every potential situation within the potential jurisdiction of the ICC. The challenge is to determine when there is an unacceptable lack of impartiality.²⁹ At the very least, the perception of selectivity and bias against African states and their leaders has already become a problem that is seriously undermining support for the ICC. Bland assurances of impartiality are unlikely to improve this situation.

B. A Place for Politics: The Importance of International Institutional Prudence

The ICC was created to address the problem of impunity, and it is only right that its judges, prosecutors, and other officials should do their utmost to achieve that end. At the same time, the ICC and its officials should exercise and exhibit "prudence" in pursuing that institution's mandate for international justice.³⁰

26. See M.R. Reese, *Manichaeism - One of the Most Popular Religions of the Ancient World*, ANCIENT ORIGINS (Feb. 9, 2015, 12:29 AM), <http://www.ancient-origins.net/history/manichaeism-one-most-popular-religions-ancient-world-002658> (explaining origins and concepts of Manichaeism).

27. See Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. REVIEW OF BOOKS (Feb. 6, 2014), <http://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/> (emphasizing Africa's critique of ICC for their selective prosecution in Africa).

28. Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT'L L. 323, 336 (2015) (explaining that on any reasonable set of selection criteria, persons from some groups (including well-connected groups) will be responsible for real crimes and yet not warrant selection for prosecution.)

29. "The question is therefore, not whether selective prosecution should occur, as it is almost impossible that it does not, but when selective enforcement is unacceptable. Clearly, selective enforcement would be unacceptable when there is a duty to prosecute all crimes." Ovo Imoedemhe, *Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward*, 23 AFR. J. INT'L & COMP. L. 74, 78-79 (2015).

30. Allen Wiener argues forcefully that the ICC should demonstrate prudence, noting regarding complementarity that "in the case of the ICC in particular, prosecutors should avoid

Although no one wants an ICC compromised by political considerations,³¹ this does not mean that politics cannot in some legitimate way be relevant to the work of the ICC. The ICC prides itself on its impartiality and independence, but mere impartiality may not be enough. In particular, the Court cannot be successful if it ignores the real and persistent sensitivities that complementarity was intended to address and resolve.

Prudence is a term better known to philosophers, political theorists, and foreign policy mavens than to lawyers, judges, or other international officials. The term as it is used here refers to care, caution, and good judgment in anticipating the long-term consequences of the Court's present day activities. Professor Hans Morgenthau defined the realist virtue of prudence as "consideration of the political consequences of seemingly moral action [and] . . . the weighing of the consequences of alternative political actions."³² Prudence can be as important to success in advancing the international rule of law as it is to success in power politics. It would be naïve and counterproductive to ignore the dedication of states to their own interests and perspectives.

States have legitimate rights which include the right to exercise jurisdiction over crimes committed within their territory or by their nationals. If the ICC is to be effective, these important sovereign rights must be carefully balanced against the interests of global justice.

The Rome Statute negotiations aimed to create a modest institution with very narrowly defined jurisdiction. A first and very substantial limit on the ICC resulted from the decision to base its ordinary jurisdiction on the consent of either the territorial state where relevant crimes have allegedly been committed or the state of nationality of the accused.³³ If neither of these states consents and neither is a party to the Rome Statute, only a referral from the U.N. Security Council can establish

taking unduly aggressive positions on complementarity. Where there is a credible case that a state is prepared to hold one of its nationals criminally accountable for crimes related to war-time atrocities, the Court should resist the temptation to go forward with its own prosecution, even though the Court may have invested significant investigative resources in the case. . . . But where some credible form of justice can be done locally—even if it is not precisely the form of justice available at the ICC—there is a danger that the Court will be seen internationally as undermining the goals of complementarity." Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 WASH. U. GLOBAL STUD. L. REV. 545, 559 (2013).

31. "Paradoxically, the ICC's fight against impunity is a fight against politics, with the aim of establishing individual criminal accountability before an independent court that is not compromised by political considerations." Imoedemhe, *supra* note 29 (citing Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUROPEAN J. INT'L L. 941 (2010)).

32. Even Hans Morgenthau, the ultimate proponent of *realpolitik*, counseled prudence as an essential aspect of rational policymaking. "There can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action. Realism, then, considers prudence—the weighing of the consequences of alternative political actions—to be the supreme virtue in politics." HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 12 (revised by Kenneth W. Thompson & David Clinton eds., 7th ed.1992).

33. Rome Statute, *supra* note 1, art. 12, ¶ 2.

ICC jurisdiction.³⁴ Another major limit on the jurisdiction of the ICC is the strict regime of complementarity, which was intended to ensure ICC deference to national investigations or prosecutions.³⁵ This limitation does not apply to cases initiated by decision of the Security Council.³⁶ The ICC itself has “no army, no police force, nor any power to impose economic sanctions on States.”³⁷ From the arrest of suspects to the production of evidence, the ICC depends entirely upon the cooperation of States, and of the Security Council, in order to function. The Council’s referral to the ICC of the situations in Darfur and Libya provides clear evidence of that dependence.³⁸

Thinking in the long term, the strength, effectiveness, and overall influence of the ICC will be determined less by the number of persons it can charge in any given year than by the quality of its work and its apparent legitimacy over the years. The ICC, as an ambitious new project, must develop carefully if it is to succeed in the long run. From this perspective, the task of the ICC today is not to arrogate to itself the broadest possible jurisdiction, but to focus carefully and professionally upon the most serious crimes falling within its jurisdiction. This should be done without infringing upon the legitimate rights (including the “residual” or retained jurisdiction) of States Parties to the Rome Statute. The ICC needs to exercise prudence because it must operate within a concrete and highly restrictive framework which has political as well as legal dimensions.³⁹ An ICC disconnected from the realities of international life could be “impractical or even harmful.”⁴⁰

The judges of the ICC have broad discretion to interpret and apply the Rome Statute.⁴¹ That is a key part of their function and role at the ICC. But to say that the ICC, its judges, and other officials should act according to legal principle is not to

34. *Id.* art. 13(b).

35. The fundamental importance of complementarity to the functioning of the ICC is discussed *infra* Section III.A. *See also* *What is Complementarity?*, *supra* note 2 (explaining the importance and procedure of complementarity).

36. Rome Statute, *supra* note 1, art. 18.

37. Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 INT’L L. & POL. 855, 882 (1999).

38. *See* Imoedemhe, *supra* note 29, at 75 (discussing the Security Council’s situation referrals).

39. *See* Sarah M.H. Nouwen & Wouten G. Werten, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 946 (2010) (“A sound normative assessment of the Court should be based on an acknowledgement and understanding of the political aspects of the ICC. Defining away the ICC’s political dimensions eventually undermines the Court by making it look either hypocritical or utopian.”).

40. *See* Robinson, *supra* note 28, at 326 (“A commonly-associated connotation is that, being too unconnected to power, one lacks effectiveness, making the initiative impractical or even harmful.”).

41. *See* Artur Appazov, ‘Judicial Activism’ and the International Criminal Court, (iCourts, Working Paper Series, No. 17, 12, 2015), <https://ssrn.com/abstract=2566136> (describing how ICC judges, despite the limiting language of Article 21 of the Rome Statute, take interpretive liberties in their cases).

say that politics and prudent policy should be irrelevant to its actions. As a relatively new institution, the ICC is still learning to calibrate its jurisdiction relative to that of its member states. This could prove to be a continuing challenge for the Court.

III. DEFINING THE ICC'S BASIC JURISDICTION: INTERPRETATION, SCOPE AND APPLICATION OF COMPLEMENTARITY/ADMISSIBILITY

A. The Concept of Complementarity and the Negotiations on the Rome Statute ICC

Complementarity was the essential political compromise formulation in Rome regarding the relationship between national and international criminal jurisdiction under the Rome Statute.⁴² Without it, there would be no ICC.⁴³ Developments regarding the complementary jurisdiction of the Court in general, and in particular the application of that standard in the Kenya cases, to be addressed below, are cause for real concern. The basic thrust of the principle of complementarity is to hold individual violators responsible for international crimes, without unnecessarily undermining the sovereignty, rights and other legitimate interests of states.⁴⁴ As important as it was, the principle was only imperfectly rendered into the text of the Statute.

The *ad hoc* international criminal tribunals that had preceded the ICC were granted "primacy" over national courts by decision of the Security Council.⁴⁵ This meant that these international tribunals had jurisdiction superior to that of the states where the crimes had been committed, and that those states were required by Security Council decision to defer to the jurisdiction of these international tribunals.⁴⁶ In preliminary negotiations on the Rome Statute, it became clear that

42. Sharon A. Williams, *Article 17, Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVER'S NOTES, ARTICLE BY ARTICLE 613 (O. Triffterer ed., 2008).

43. Sharon Williams flatly states that complementarity is "one of if not the cornerstone of the Rome Statute. It strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement." *Id.* (internal citations omitted).

44. See Charles Chernor Jalloh, *Kenya vs. The ICC Prosecutor*, 53 HARV. INT'L L.J. 269, 276 (2012). As Jalloh notes: "While discussions of the complementarity principle divided delegates, the main impetus and implication for its inclusion was clear and predicated on pragmatism: it would protect national sovereignty and increase the willingness of states to accept the Court's jurisdiction." *Id.*

45. See, e.g., Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 394 (1998).

46. The Statute of the International Criminal Tribunal for the Former Yugoslavia, as adopted by the Security Council, is an Annex to the Secretary-General's report on the Tribunal prepared for the Council. U.N. Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at 36, U.N. Doc. S/25704 (May 3, 1993). The concept of primacy has been described as follows:

The term "primacy" was used in an attempt to convey a somewhat complicated notion of jurisdictional hierarchy in which States were encouraged to assume a substantial portion of the responsibility for the prosecution and trial of the apparently large number of perpetrators of reported atrocities, while at the same time preserving the inherent supremacy of the

states would not grant this sweeping primacy to a permanent ICC.⁴⁷ Thus, a key task in negotiating the Rome Statute was to determine exactly what the balance would be between the ICC's jurisdiction and the national jurisdiction of states, and just how such a balance could be implemented and maintained.

Fundamental elements of the complementarity formula include the presumptive priority of national jurisdiction over the jurisdiction of the ICC (the latter is only to complement the former); the prior right of states to investigate and, if appropriate, prosecute any case, rendering that case inadmissible before the ICC; and the notion that the ICC was to operate only as a "court of last resort" or failsafe mechanism with jurisdiction to investigate or prosecute a case only if and when there was no state willing and able to do so in a genuine, unbiased, and credible way.⁴⁸

The importance of complementarity is manifold but the focus here is on only three interrelated aspects. First of all, complementarity represents the foundational and essential compromise in negotiating the ICC Statute.⁴⁹ Without complementarity, there could not have been any consensus at the 1998 Rome Conference.⁵⁰ Secondly, complementarity was a fundamental "selling point" or justificatory argument for the entire ICC.⁵¹ In this capacity, it addressed the fears of states at the stage of negotiation and ratification regarding the possible loss of sovereignty. Furthermore, at the stage of practical application, complementarity was intended to act as a safeguard against ICC prosecutorial abuse by ensuring that states could step in and prosecute crimes under the jurisdiction of the ICC, thereby rendering the cases inadmissible before the ICC.⁵²

jurisdiction of the International Tribunal which may need to be asserted for various reasons in particular cases-not in the usual sense of reviewing the decisions of "lower" courts but rather to exercise jurisdiction in the first instance as a trial court.

VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 n. 378 (1995).

47. MORRIS & SCHARF, *supra* note 46, at 127.

48. Jalloh, *supra* note 44, at 272. "In any event, the complementarity principle gives states a first right to carry out investigations and prosecutions in their own courts before the ICC jurisdiction would be triggered. That creates a presumption in their favor that should not be easily displaced in the absence of overwhelming evidence to the contrary. If the idea of complementarity underpinning Article 17 of the Rome Statute is to mean anything, it necessarily implies that member states must have a degree of flexibility to exercise their discretion in deciding whom to prosecute." *Id.*

49. See Williams, *supra* note 42, at 613 ("The complementarity principle strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement.").

50. *Id.*

51. Jalloh, *supra* note 44, at 271.

52. *Id.* at 272. "In any event, the complementarity principle gives states a first right to carry out investigations and prosecutions in their own courts before the ICC jurisdiction would be triggered. That creates a presumption in their favor that should not be easily displaced in the absence of overwhelming evidence to the contrary. If the idea of complementarity underpinning Article 17 of the Rome Statute is to mean anything, it necessarily implies that member states must have a degree of flexibility to exercise their discretion in deciding whom to prosecute." *Id.*

The possibility of prosecutorial abuse was much discussed at the Rome Conference, in part because the Statute was negotiated amidst concerns that the ICC Prosecutor might turn out to be an international Kenneth Starr (referring to former U.S. Whitewater Independent Counsel who relentlessly pursued investigation and prosecution of President Bill Clinton over arguably trivial matters ultimately focusing on sexual misconduct).⁵³ Unfortunately, the ICC's decisions on admissibility have thus far done nothing to allay concerns that it might similarly extend or abuse its jurisdiction.

The Rome Statute provides that if a state pursues a case, that case will be inadmissible before the ICC unless that state is "unwilling or unable" to genuinely prosecute the case.⁵⁴ Accordingly, it was commonly understood at the Rome Conference that the general rule and presumption was to favor national jurisdiction whenever it was genuinely in play, leaving the ICC Prosecution with a clear burden of rebutting this presumption before it could rightfully proceed.

B. The ICC in Kenya: Case Study on the Devaluation of Complementarity

1. The ICC Kenya Cases

The Kenya cases resulted from the first investigation ever to be launched *proprio motu*, or under the sole discretionary authority of the ICC Prosecutor.⁵⁵ The cases unfolded as six political leaders from two opposing political factions in Kenya, (the so-called "Ocampo 6") were charged by the ICC with crimes against humanity after post-electoral violence led to the death of over 1,000 people.⁵⁶ The government of Kenya challenged the jurisdiction of the ICC by asserting its prior right to deal with the cases under its national law.⁵⁷ The ICC ultimately ruled that the cases were admissible because the government of Kenya had apparently not taken any concrete steps towards investigating them.⁵⁸

The merits of the admissibility arguments in these cases will be discussed in detail below.⁵⁹ For now, it is sufficient to note that instead of proceeding so swiftly with the prosecution of its own cases in Kenya, the ICC might have chosen instead to prioritize working cooperatively with the Kenyan government to build a solid national capacity for investigation and prosecution of the serious crimes committed. Furthermore, the ICC was dismissive of Kenya's arguments against

53. See Mimi Swartz, Opinion, *Ken Starr's Squalid Second Act*, N.Y. TIMES (June 27, 2016), <http://www.nytimes.com/2016/06/27/opinion/ken-starrs-squalid-second-act.html> (stating that Mr. Starr's brief on the Whitewater real estate venture expanded to investigating the sex life of Monica Lewinski, leading to Clinton's soiled legacy).

54. Rome Statute, *supra* note 1, art. 17.

55. See Jalloh, *supra* note 44, at 270 ("The ICC's involvement in Kenya began on March 31, 2010 when the Pre-Trial Chamber authorized then Prosecutor Luis Moreno-Ocampo to commence a formal investigation into the situation.")

56. *Id.*

57. *Id.*

58. Prosecutor v. Kenyatta, ICC-01/10-02/11 OA, Opinion of Judge Nsereko, ¶ 40 (Aug. 30, 2011).

59. See *infra* Section III.B.1.a–b.

admissibility, at one point even refusing to allow the Kenyan government to file additional written submissions and evidence in support of its challenge.⁶⁰

a. Judge Christine Van den Wyngaert's Outspoken Critique of the ICC Prosecution

From the very start, the ICC Prosecutor's office made many fundamental errors in its management of the Kenyatta case and received scathing reviews not only from African Union (AU) members but eventually from ICC Judge Christine Van den Wyngaert of Belgium as well.⁶¹ In a concurring opinion on a procedural matter, she identified a litany of Prosecution errors in that case. Her principal critique was that the Prosecution had failed to investigate the case properly before presenting it to the judges for confirmation.⁶² This, she said, resulted in an unusually large number of witnesses being interviewed for the first time after confirmation, by the very fact of which the Prosecution had "violated its obligation under article 54(1)(a) of the Statute to fully respect the rights of persons arising from the Statute."⁶³

Worse still, she called out the Prosecutor for having a "negligent attitude towards verifying the untrustworthiness of its evidence," and for "grave problems in the Prosecutions system of evidence review, as well as for a serious lack of proper oversight by senior Prosecution staff."⁶⁴

From the beginning, the case against Kenyatta had been characterized as "a weak one based on hearsay,"⁶⁵ but the ICC Prosecutor pushed on nonetheless even as Judge Van den Wyngaert requested to withdraw from the Kenyatta case, citing personal reasons.⁶⁶

60. *Kenyatta*, ICC-01/10-02/11 OA, at ¶¶ 47, 80–83.

61. *Prosecutor v. Kenyatta*, ICC-01/09-02/11-728-Anx2, Concurring Opinion of Judge Wyngaert (Apr. 26 2013). *See also African Union Agrees on ICC Immunity for Heads of State*, TELEGRAPH (Oct. 12, 2013, 1:51 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10374538/African-Union-agrees-on-ICC-immunity-for-heads-of-state.html> (stating that the AU called for the ICC to defer the case against Kenyatta).

62. *Kenyatta*, ICC-01/09-02/11-728-Anx2, ¶ 1.

63. *Id.* ¶ 5.

64. *See id.* ¶ 4. "Finally, there can be no excuse for the Prosecution's negligent attitude towards verifying the untrustworthiness of its evidence. In particular, the incidents relating to witness 4 are clearly indicative of a negligent attitude towards verifying the reliability of central evidence in the Prosecution's case. . . . However, what all these explanations reveal is that there are grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff." *Id.*

65. *See* Murithi Mutiga, Opinion, *Fumbling Justice for Kenya*, N.Y. TIMES (Dec. 27, 2014) <http://www.nytimes.com/2014/12/27/opinion/mutiga-fumbling-justice-for-kenya.html> ("From an early stage, prominent officials, such as the former U.S. assistant secretary of state for African affairs, Jendayi Frazer, had warned that the Kenyatta case was a 'weak one based on hearsay.'").

66. Tome Maliti, *Judges Decline to Stop Kenyatta Case*, INT'L JUST. MONITOR, <https://www.ijmonitor.org/2013/05/judges-decline-to-stop-kenyatta-case-part-2/> (last visited Feb. 27, 2017).

b. The Collapse of the Kenya Cases

The ICC proceedings became so unpopular in Kenya that two of those charged used anti-ICC rhetoric as a campaign vehicle.⁶⁷ It worked so well that one of them, Uhuru Muigai Kenyatta, was elected President of Kenya, and another, William Samoei Ruto, who had previously been Kenyatta's ethnic and political adversary, was elected Vice President.⁶⁸ Once they took office, the cases against them would languish. Widespread problems with witness intimidation and threats of violence and bribery by the government, both directly and indirectly, led to charges being dropped early against many of the Ocampo 6,⁶⁹ and ultimately, the case against Kenyatta collapsed when the ICC Trial Chamber ordered the Office of the Prosecutor to dismiss the case unless it was ready to present its case against him.⁷⁰ All charges against Kenyatta were then withdrawn,⁷¹ and the ICC was very publicly humiliated. The case against the still-sitting Vice President Ruto was also eventually dropped, leaving the ICC Prosecutor's Office with nothing to show for its years of effort in Kenya except for a few residual witness-tampering cases.⁷²

The international community will not soon forget this debacle, nor should it. The Kenya cases revealed some very fundamental problems with the ICC and the lessons of this experience should be heeded. The ICC had failed spectacularly in its mission to convict, but the damage done went far beyond the ICC's tarnished image. There were real people who suffered from the ICC's botched efforts in Kenya. After the ICC effectively withdrew from Kenya, many of the victims, witnesses, and others who had supported the Court's efforts faced persecution.⁷³ In an interview, former ICC Prosecutor Ocampo expressed remorse about the fate of those the ICC Kenya cases left behind.⁷⁴

67. Michela Wrong, *Indictee for President!*, N.Y. TIMES: LATITUDE (Mar. 11, 2013), <http://latitude.blogs.nytimes.com/2013/03/11/being-prosecuted-by-the-i-c-c-helped-uhuru-kenyattas-chances-in-kenyas-election/>.

68. *Id.*

69. See Prosecutor v. Ruto, ICC_01/09-01/11, Decision on Defence Applications for Judgments of Acquittal, 118 (Apr. 5, 2016) (specifically citing online intimidation and releasing witnesses' identities).

70. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on the Withdrawal of Charges against Mr. Kenyatta, ¶ 3 (Mar. 13, 2015).

71. Prosecutor v. Kenyatta, ICC_01/09-02/11-983, Notice of Withdrawal of the Charges against Uhuru Muigai Kenyatta (Dec. 5, 2014).

72. *Ruto*, ICC-01/09-01/11, at 118.

73. See Verini, *supra* note 21 (discussing incidences of violence toward individuals who experience violence by those who tried to banish the ICC from Africa).

74. See *id.* (interviewing former Prosecutor Moreno-Ocampo)

In Vienna, I told Moreno-Ocampo about Eric, the man attacked by Mungiki in his home. The day after the attack, Eric woke up in a Nakuru hospital to find that half of his left arm had been amputated. . . . Police officers rushed to their home and took the family to the hospital, where they lived for weeks, because it was too dangerous to leave.

They traveled across the country to the home of Eric's mother, who still supports them. Eric can't find work. Hoping for some compensation, he joined the case against Kenyatta. I asked him what he thought when he learned the case had been withdrawn. "I have not seen any justice," he said.

The second time I saw Moreno-Ocampo express remorse was when I told him this.

Part of the problem with all the Kenya cases can certainly be attributed to the Kenyan government's failure to cooperate with the ICC.⁷⁵ Initially, both Kenyatta and Ruto attempted to avoid a direct confrontation with the ICC, and they appeared voluntarily when required to do so by the Court, even while challenging its jurisdiction.⁷⁶ Kenyan President Kenyatta and Vice-President Ruto personally appeared before the ICC when formally required.⁷⁷ After all, Kenya is a state party to the Rome Statute, and is therefore subject to the duty to cooperate with the ICC.⁷⁸ This is understood to mean that each State Party must comply with the court's decisions, orders, and requests. As the cases moved forward, the Kenyan government's attitude hardened, after which it failed to provide access to documentation and witnesses requested by the ICC.⁷⁹ This basically made it impossible to collect any more evidence from within Kenya, and was fatal because the pre-confirmation investigations had been inadequate.

"It's awful," he said, his face dropping. "I remember a lady in [Kenya] who, the only hope for her was us. And now I imagine how bad she felt. That I feel badly about."

Id.

75. See Wahome Thuku, *Kenya's President Uhuru Kenyatta owns no land: ICC told*, STANDARD DIGITAL (July 10, 2014), <http://www.standardmedia.co.ke/article/2000127656/kenya-s-president-uhuru-kenyatta-owns-no-land-icc-told>. "It was a stormy session at the International Criminal Court (ICC) as the prosecution locked horns with the Kenya Government over alleged failure to co-operate in the trial of President Uhuru Kenyatta. The Office of the Prosecution accused the Government of failing to provide substantial, personal information touching on President Kenyatta, including his business and political associates. But the Government, led by Attorney General Githu Muigai, rebutted, accusing the prosecution of providing vague requests that could not be acted on." *Id.*

76. See *ICC drops Uhuru Kenyatta charges for Kenya ethnic violence*, BBC NEWS (Dec. 5, 2014), <http://www.bbc.com/news/world-africa-30347019> (explaining Kenyatta's and Ruto's contempt for the ICC when Ruto's case was still before the Court).

77. See *Kenyatta Appears before ICC Court*, AL JAZEERA (Oct. 8, 2014), <http://www.aljazeera.com/news/africa/2014/10/kenyatta-netherlands-hague-face-icc-charges-201410802514574650.html> (explaining that Kenyatta handed power over to his Deputy to appear before the ICC); Faith Karimi & Laura Smith-Spark, *William Ruto, Kenya's Deputy leader, On Trial for Alleged Crimes Against Humanity*, CNN (Sept. 10, 2013, 11:11 AM), <http://www.cnn.com/2013/09/10/world/africa/kenya-icc-trial/> (stating that Ruto faced trial before the ICC).

78. Rome Statute, *supra* note 1, art. 86. This article on the general obligation to cooperate provides that "[s]tates Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." *Id.*

79. Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

The Kenyan cases highlight the difficulties in bringing to justice senior officials who have been charged with atrocities, and underscore what specialists call the Achilles' heel of the court: its dependence on cooperation from governments. With no enforcement agency at its disposal, it cannot execute arrest warrants, get access to crime scenes or search official records without the cooperation of the national authorities.

Id.

2. The Devaluation of Complementarity in the Kenya Cases

Article 17 of the Rome Statute expresses the general rule that the ICC should find any case to be inadmissible where the case is being investigated by a State Party or has been investigated by a State Party that has decided not to prosecute.⁸⁰ The only exceptions to this general rule apply if the state party concerned is unwilling or unable genuinely to prosecute the case,⁸¹ or if there is a situation of inactivity, i.e., if there is no national investigation or prosecution of the case concerned.⁸² If these exceptions are applied too broadly, and if the specific case is defined too narrowly, the effect will be eventually to undermine the basic principle of complementarity, and the fundamental safeguard it was to provide for legitimate state interests.

a. The Appeals Chamber Ruling on the State Admissibility Challenge

In an important 2011 judgment, the ICC Appeals Chamber did much to clarify the Court's standards governing admissibility and complementarity.⁸³ The judgment was rendered after the ICC Prosecutor, acting *proprio motu*, initiated an investigation into the situation in Kenya and the Pre-Trial Chamber issued summonses in multiple cases.⁸⁴ The government of Kenya was the first state ever to challenge the Court's determination of admissibility on appeal under the ICC Statute.⁸⁵ A careful examination of that judgment reveals how, in practice, complementarity has been rendered useless as a safeguard against prosecutorial excess.

Ultimately, the Appeals Chamber modified and reaffirmed its previously stated formula, which holds that "for such a case to be inadmissible under article 17 (1) (a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court."⁸⁶ The Court then affirmed that an admissibility challenge was needed only when there was a jurisdictional conflict, but that there was no such conflict between the ICC and Kenya because, in the Court's view, there had been no Kenyan investigation or prosecution.⁸⁷

The Appeals Chamber conceded that the Statute does favor domestic proceedings, but it nonetheless concluded that admissibility proceedings under Article 17 must focus only on whether there actually are, or have been, genuine investigations and/or prosecutions at the national level.⁸⁸ The Appeals Chamber further ruled that it has no discretion to consider any additional factors in those

80. Rome Statute, *supra* note 1, art. 17.

81. *Id.* art. 17(1)(a)–(b).

82. Prosecutor v. Ruto, ICC-01/09-01/11 OA, Judgment, ¶ 67 (Aug. 30, 2011).

83. *Id.*

84. *Id.*

85. *Id.* ¶ 6.

86. *Id.* ¶ 40.

87. *Id.* ¶ 43.

88. Ruto, ICC-01/09-01/11 OA, at ¶ 44.

proceedings.⁸⁹ In concrete terms, this precluded any consideration of the Kenyan government's detailed plans to establish a new special court to address the situation.⁹⁰

Perhaps most troubling, the Appeals Chamber notes without comment the Prosecution's argument that it is quite possible "for the Court and the relevant state to concurrently exercise jurisdiction over different suspects for crimes arising out of the same events."⁹¹ If this "possibility" becomes the rule, it will endow the ICC with functionally parallel and largely independent jurisdiction equal to that of ICC States Parties. Such a result would stand the concept of complementarity on its head.

b. Judge Anita Ušacka's Dissent on Admissibility

One ICC Appeals Judge, Anita Ušacka from Latvia strongly dissented from the Appeals Chamber's rulings on admissibility and complementarity.⁹² The Judge stressed that a State Party admissibility challenge is not a criminal proceeding as such.⁹³ Her opinion, unlike that of the majority, stresses that these challenges raise issues of state sovereignty, a concept that the majority decision largely avoids.⁹⁴ She then notes that complementarity, as a "core guiding principle" of the ICC,

89. As the Appeals Chamber noted:

Kenya also argues that there should be a "leaway [sic] in the exercise of discretion in the application of the principle of complementarity" to allow domestic proceedings to progress. This argument has no merit because, as explained above, the purpose of the admissibility proceedings under article 19 of the Statute is to determine whether the case brought by the Prosecutor is inadmissible because of a jurisdictional conflict. Unless there is such a conflict, the case is admissible. The suggestion that there should be a presumption in favour of domestic jurisdictions does not contradict this conclusion. Although article 17 (1) (a) to (c) of the Statute does indeed favour national jurisdictions, it does so only to the extent that there actually are, or have been, investigations and/or prosecutions at the national level. If the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible.

Id. ¶ 44 (footnotes omitted).

90. *See id.* ¶ 125 (holding the ICC will hear the case).

91. *Id.* ¶ 32.

92. Prosecutor v. Ruto, ICC-01/09-01/11 OA, Dissenting Opinion of Judge Ušacka (Sept. 20, 2011).

93. Judge Ušacka states:

Proceedings under article 19 of the Statute **are ... not criminal proceedings, but proceedings of their own kind, primarily serving the purpose of resolving conflicts of jurisdiction.**

....

[I]n proceedings under article 19 (2) (b), the State's right to investigate and prosecute a case itself, which forms the basis of the principle of complementarity, is immediately at issue.

Id. ¶¶ 16, 18 (emphasis added).

94. A search of the Appeals Chamber Judgment found only a single reference to "sovereign" rights or "sovereignty" in the entire judgment of twenty-seven pages. In contrast, Judge Ušacka's shorter (eighteen pages) Dissenting Opinion (including footnotes) mentions these terms eleven times. *Id.*; Ruto, ICC-01/09-01/11 OA.

calls for reconciling the sovereignty of the state with the interests of global justice.⁹⁵

In her view, it is to accommodate these sovereign rights that the ICC rules provide for a version of “due process” for States Parties, the details of which will develop over time.⁹⁶ Her concern seems to be that the majority’s narrow and rigid approach to admissibility challenges may preclude this type of gradual and organic development.

Judge Ušacka criticized the Trial Chamber for setting the procedure “merely according to procedural minimum requirements,” and for rejecting reasonable efforts by Kenya to add to this procedure by, for example, presenting some of its arguments in an oral hearing, and/or by the submission of additional legal briefs as it had requested.⁹⁷ A key theme of Judge Ušacka’s dissent is that the Pre-Trial Chamber, in its rush to decide the admissibility challenge, “did not sufficiently take into account” that it was called upon to address many new, unresolved yet pivotal issues such as the definition of “investigation” and “prosecution.”⁹⁸ Over-emphasis on the need to expedite the proceedings led the Chamber to deny Kenya’s request for a hearing on these and other unresolved issues and not to seek specific submissions from the litigants on these crucial issues.⁹⁹

Hers is a telling critique of the majority judgment. At the very moment when a careful approach to complementarity was most required, the ICC Pre-Trial Chamber had instead plowed ahead and ruled precipitously on a range of difficult and sensitive issues raised by the admissibility challenge, all within less than a few months after the issuance of the initial summons to appear.¹⁰⁰ On top of all this, the Prosecutor’s Office was not prepared to make its case when the time came to do so.¹⁰¹

c. From Complementarity to the Effective Primacy of the ICC

The “same person” and the “same conduct” test favors the ICC by narrowly

95. *Ruto*, ICC-01/09-01/11 OA, Dissenting Opinion of Judge Ušacka, ¶ 19.

That complementarity is a core guiding principle for the relationship between States and the Court is confirmed by its prominent place in the Statute (article 1 and Preamble) as well as by the drafting history of the Rome Statute Complementarity reinforces the principle of international law that it is the sovereign right of every State to exercise its criminal jurisdiction; but it also ensures that the Court can step in to give effect to the goals of international criminal justice.

Id. ¶ 18.

96. *Id.* ¶ 22.

97. *Id.* ¶ 24.

98. *Id.* ¶ 25.

99. *Id.* ¶ 28.

100. *See id.* (“The Admissibility Challenge was rejected within eight weeks of the date of filing. The period between the issuance of the decision summoning the persons in question and the Impugned Decision did not even amount to three months.”).

101. *See supra* Section III.B.1.a–b, especially footnotes 60, 64, 70, and 71 and accompanying text.

defining each “case.”¹⁰² Thus, in theory, even if the same accused is already being prosecuted by a State Party, the ICC can still concurrently charge and prosecute that person for different specific acts of a similar nature, as this would constitute a separate and therefore admissible case. Any state hoping to claw back to its national courts a case already initiated by the ICC would need carefully to mirror the ICC’s charges in exercising this right, citing the very same persons and conduct addressed by the ICC. If there was any discrepancy between them, the case under national law would not render the ICC case inadmissible. This standard radically alters the balance of national to international jurisdiction that is at the heart of complementarity, and indeed, at the very heart of the consensus at the Rome Diplomatic Conference.

That safeguard function of complementarity has been neutralized by the shift towards the effective primacy of the ICC over national jurisdictions. Primacy, the priority of international jurisdiction over national jurisdiction (as known to the previous ad hoc international criminal tribunals), was specifically rejected in the ICC treaty negotiations, to be replaced by complementarity.¹⁰³ Clearly then, the Rome Statute’s rules on admissibility should not be interpreted and applied so as to effectively transform the court’s limited complementary jurisdiction into primacy over the jurisdiction of national courts. An ICC with primacy would probably be more effective than an ICC with only complementary jurisdiction, but this is not what was agreed to in the Rome Statute. The judges of the ICC, by judicial interpretation, clearly seem to have granted the ICC greater authority than was agreed to by states at the Rome Conference.¹⁰⁴

Having ruled so broadly, decisively, and precipitously on the legal and technical aspects of admissibility, the ICC is now faced with a political problem. The Court’s prevailing standard of admissibility is inconsistent with the true consensus on the basic concept of complementarity,¹⁰⁵ and until this has been corrected, it will be difficult to restore the perceived legitimacy and credibility of the ICC. How can the effectiveness of the ICC be enhanced for the future given the cross-cutting pressures which threaten to undermine its support and even its continued existence? Prudence, and greater fidelity to the Rome consensus on complementarity, will be essential.

102. See Prosecutor v. Ruto, ICC-01/09-01/11 OA, Judgment, ¶ 40 (Aug. 30, 2011).

103. Brown, *supra* note 45, at 423–27.

104. See Jalloh, *supra* note 44 (“By taking jurisdiction under the current framework, the appeals court seems to continue the logic of accountability in a purposive way which is laudable, although some might see this as taking it beyond what states would have initially anticipated as the proper role of ICC during the Rome Conference.”).

105. Jalloh, *supra* note 44, at 272. Jalloh points out, “[i]f the idea of complementarity underpinning Article 17 of the Rome Statute is to mean anything, it necessarily implies that member states must have a degree of flexibility to exercise their discretion in deciding whom to prosecute.” *Id.*

IV. AFRICA AND THE ICC

At the end of the 1998 Rome Diplomatic Conference, African States overwhelmingly endorsed the Rome Statute, and to this day there are more ICC States Parties from Africa than from any other single region.¹⁰⁶ African support for the ICC was evident when the ICC's first case was a "self-referral" in which the government of Uganda invited the ICC onto its own territory to investigate and prosecute the Lord's Resistance Army (LRA) and its leader Joseph Kony.¹⁰⁷ Before that happened, few had anticipated the possibility. It had been assumed that no state would ever favor ICC jurisdiction over that of its own national courts.¹⁰⁸ Thus, the self-referral was an African (and Ugandan) innovation, which was soon followed by other African States.¹⁰⁹ Thus far, the ICC has achieved its greatest successes in cases based on self-referrals.

More recently, however, the ICC's working relationship with African States has deteriorated. The debilitating tension between Africa and the ICC began when the Security Council referred the situation in Darfur to the ICC, and an arrest

106. See Verini, *supra* note 21.

When the court was formed, it was, one observer wrote, "an international epiphany." It was also, it seemed, a great moment for Africa. Senegal was the first country to ratify the court's founding treaty, the Rome Statute. Archbishop Desmond Tutu called the I.C.C. "Africa's court." Today, 34 of the court's 124 member states are African, the largest contingent after Europe's.

Id.

107. The Solicitor General of Uganda explained, as summarized by the ICC's Pre-Trial Chamber that:

[W]hilst the national judicial system of Uganda was "widely recognised for its fairness, impartiality, and effectiveness", it was the Government's view that the Court was "the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation". This view was based on several considerations, including (i) the scale and gravity of the relevant crimes; (ii) the fact that the exercise of jurisdiction by the Court would be of immense benefit for the victims of these crimes and contribute favourably to national reconciliation and social rehabilitation; (iii) Uganda's inability to arrest the persons who might bear the greatest responsibility for the relevant crimes.

Prosecutor v. Kony ICC-02/04-01/05-377, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, ¶ 37 (Mar. 10. 2009).

108. See Nouwen & Werner, *supra* note 39, at 947–48.

The Ugandan government triggered the Court's jurisdiction in a way which is provided for in the Rome Statute, a referral by a state party, but few at the Rome Conference had anticipated that a state would refer to the Court a situation on its own territory and concerning its own nationals. The debate had focused on how states could prevent ICC intervention. It had been assumed that states would consider such intervention as costly to their sovereignty and reputation.

Id.

109. In addition to Uganda, several other African states have self-referred situations on their territory to the ICC, including the Democratic Republic of the Congo, Mali, and the Central African Republic (twice). See *Situations Under Investigation*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 3, 2017) (listing situations currently under investigation in the ICC).

warrant was issued for Sudanese President Al Bashir.¹¹⁰ Today, the tension grows primarily from two sources: 1) the fact that the ICC has charged sitting African heads of state, and 2) a dispute over the interpretation and implementation of complementarity in Africa.¹¹¹

A. The AU Challenge to the Legitimacy of the ICC

As the South African government, formerly one of the ICC's strongest supporters in Africa, was preparing to host a Summit meeting of AU national leaders in 2015, trouble was on the horizon. Sudanese President Al-Bashir wanted to attend this meeting, but the ICC had issued a warrant for his arrest for crimes against humanity and genocide.¹¹² The EU weighed in before the AU summit, issuing a statement that EU states expected South Africa to arrest Al-Bashir if he showed up in South Africa.¹¹³ In the end, the government of South Africa decided to ignore its legal obligation to execute the ICC arrest warrant against Al-Bashir.¹¹⁴ In deference to notions of anti-colonialism and of African regional solidarity, a decision by the South African Courts that he should be arrested was also ignored.¹¹⁵ The damage done to the ICC's reputation for legitimacy was readily apparent.

As the ICC continues to focus on Africa, seemingly to the exclusion of other continents, it feeds the perception that Africa is being made a scapegoat as the guilt

110. Imoedemhe, *supra* note 29, at 75.

Relations between the ICC and the African Union (AU) deteriorated from cooperation to conflict following the indictment of President Omar Hassan Ahmad Al-Bashir of Sudan for crimes against humanity and genocide. The basis for the tension seems to have been the involvement of the United Nations Security Council . . . in the referral of the situation in Darfur, Sudan to the ICC and its subsequent refusal to defer the case, as requested by the AU.

Id.

111. *Id.* at 91.

Arguably, the current hostility between the ICC and the AU stems from new legal principles whose interpretations and implications remain unclear, though they are evolving. **Fundamental to this ambiguity is the interpretation and implementation of complementarity**, the application of which, as a mutually inclusive concept, would involve both national authorities and the ICC equally sharing the responsibility of prosecuting international crimes.

Id. at 91 (emphasis added) (citing Mohammed El Zeidy, *The Genesis of Complementarity*, in 1 COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: FROM THEORY TO PRACTICE (Carsten Stahn & Mohammed El Zeidy eds., 2011)).

112. Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), <https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html>.

113. See Statement, Statement by Spokesperson on South Africa and the International Criminal Court (June 14, 2015), http://eeas.europa.eu/statements-eeas/2015/150614_02_en.htm (emphasizing both EU support for ICC and expectation that South Africa will comply with executing outstanding arrest warrants within territory).

Id.

114. Onishi, *supra* note 112.

115. *Minister of Justice & Constitutional Dev. v. S. Africa Litig. Centre* 2016 (3) SA 317 (SCA) at 74 (S. Afr.).

of the world is symbolically transferred to that continent,¹¹⁶ or that perhaps Africa is being used as a test laboratory for the new institutions of international criminal law.¹¹⁷ The AU has pushed back against the ICC in various ways, such as by opposing the prosecution of sitting African heads of State, requesting the suspension of proceedings against Sudanese President Al Bashir, calling upon AU members not to arrest and surrender him to the ICC,¹¹⁸ and suggesting that African states should withdraw from the ICC.¹¹⁹

Miscues in the Kenya cases have undermined international confidence in the ICC as Kenya itself went from one of the ICC's biggest supporters in Africa to one of its biggest opponents.¹²⁰ The exercise of greater prudence might have precluded the development of this problem.

In February 2016, the AU Summit adopted a proposal from President Kenyatta to give the Committee of African Ministers on the ICC "a new mandate to develop a roadmap for withdrawal from the Rome Statute as necessary."¹²¹ This was a far cry from all the AU countries agreeing to withdraw from the ICC as had been feared, and some observers were even encouraged that Kenyatta seemed to

116. Imoedemhe, *supra* note 29, at 78–79 (citing JAMES FRAZER & ROBERT FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 557 (Oxford University Press, reissued ed., 2009)).

117. *Id.* at 82. "[T]he ICC starts with Africans in order to cut its teeth before promising to sink its talons on bigger prey." *Id.* at 82 (citing Edwin Bikundo, *The International Criminal Court and Africa: Exemplary Justice*, 23 L. & CRITIQUE 21, 23 (2012)).

118. "The African Union, however, has continually opposed the prosecution by the ICC of heads of states during their term of office. The AU has requested the suspension of proceedings against President Bashir and called upon AU members not to arrest and surrender him." Miša Zgonec-Rožej, *Bashir Flight Leaves ICC in Stalemate*, CHATHAM HOUSE (June 26, 2015), <http://www.chathamhouse.org/expert/comment/bashir-flight-leaves-icc-stalemate>.

119. Neil MacFarquhar & Marlise Simons, *Bashir Defies War Crime Arrest Order*, N.Y. TIMES (Mar. 6, 2009), <http://www.nytimes.com/2009/03/06/world/africa/06sudan.html?ref=collection%2Ftimestopic%2FInternational%20Criminal%20Court>. "Sudan called on the 30 members of the 53-member African Union who have joined the I.C.C. to withdraw, with the country's United Nations ambassador, Abdalmahmood Abdalhaleem, saying the court represented 'the same Euro-American justice that destroyed Iraq, Afghanistan and most recently Gaza.'" *Id.*

120. Mehari Taddele Maru, Opinion, *The Future of the ICC and Africa: The Good, the Bad, and the Ugly*, AL JAZEERA (Oct. 11, 2013), <http://www.aljazeera.com/indepth/opinion/2013/10/future-icc-africa-good-bad-ugly-20131011143130881924.html>.

[D]uring the negotiation for the Rome Statute, it was Kenya and Uganda who were the most aggressive African proponents of the ICC. They were the first countries to ratify the Statute. Actually, a Kenyan diplomat even assumed responsibility as the second vice presidency of the ICC Assembly of States Parties. Before the indictments against Kenyans, the Nairobi government was a very vocal supporter of the ICC. Now, Kenya has [announced its intention to] become the first country to officially withdraw from the Rome Statute. While Kenya is once again vigorously engaged with the ICC, on this occasion it is with determination to weaken the ICC's position in Africa.

Id.

121. Peter Fabricius, *Follow Me, I'm Right behind You, Says Kenyatta*, INST. FOR SEC. STUD. (Feb. 4, 2016), <https://www.issafrica.org/iss-today/follow-me-im-right-behind-you-says-kenyatta>.

suggest that his preference was reforming the ICC, not leaving it.¹²² In any case, only individual states are parties to the Rome Statute, and African states would have to withdraw from the ICC individually, if at all.¹²³

Initially, only three African States, Kenya, Burundi, and Gambia, formally moved to withdraw from the ICC.¹²⁴ Even as those three withdrew, many other African states reaffirmed their support for the ICC.¹²⁵ More recently, a South African High Court ruled on the withdrawal and declared it “unconstitutional and invalid,” which caused South Africa to join Gambia in deciding to revoke its decision to withdraw.¹²⁶ However, it remains to be seen if momentum towards an AU approved mass exit from the ICC is growing or subsiding.¹²⁷

It is ironic that AU states threaten mass withdrawal from the ICC even as they simultaneously contemplate implementing further measures of regional integration, such as a common African passport.¹²⁸ In any case, an *en masse* withdrawal of African states from the ICC would be tragic, because Africa needs the ICC, just as the ICC needs to regain the support of Africa.¹²⁹ An AU official recently

122. *Id.*

The rest of his [Kenyatta’s] speech makes clear that withdrawal from the ICC would be conditional on the court failing to meet the AU’s demands. As Kenyatta said earlier in his speech: “It is my sincere hope that our ICC reform agenda will succeed so that we can return to the instrument we signed up for. If it does not, I believe its utility for this continent at this moment of global turmoil will be extremely limited.”

Id.

123. See Rome Statute, *supra* note 1, art. 127 (“A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute.”).

124. *AP Explains: Why African states have started leaving the ICC*, *supra* note 5.

125. See Sarah Rayzl Lansky, *Africans Speak Out Against ICC Withdrawal: Governments Signal Continued Support for Court*, HUM. RTS. WATCH (Nov. 2, 2016), <https://www.hrw.org/news/2016/11/02/africans-speak-out-against-icc-withdrawal> (noting that officials from Côte d’Ivoire, Nigeria, Senegal, Sierra Leone, Malawi, Tanzania, Zambia and Botswana all continued to support the ICC despite the decisions by three African states to withdraw from it).

126. Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES, (March 8, 2017), https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?_r=0

127. See Elise Keppler, *Dispatches: Governments Defend ICC at African Union Summit*, HUM. RTS. WATCH (July 20, 2016), <https://www.hrw.org/print/292277> (reporting on the most recent AU Summit). “The 27th African Union (AU) summit closed Monday evening without an AU call for immediate mass withdrawal from the International Criminal Court in the face of strong pushback from Nigeria, Senegal, Ivory Coast, Tunisia, and even ICC non-member Algeria, media reports and observers said.” *Id.*

128. See Anne Frugé, *The Opposite of Brexit: African Union Launches an All-Africa Passport*, WASH. POST (July 1, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/01/the-opposite-of-brex-it-african-union-launches-an-all-africa-passport/>. (“On June 13, two weeks before the United Kingdom voted to leave the European Union, the African Union announced a new ‘single African passport.’... say[ing] it will boost the continent’s socioeconomic development because it will reduce trade barriers and allow people, ideas, goods, services and capital to flow more freely across borders.”)

129. Maru, *supra* note 120.

To be certain, an *en masse* withdrawal from the ICC will hurt Africans more than the ICC.

formulated a few basic critiques of the ICC as justification for a proposed African exit from the ICC.¹³⁰ He stressed in particular that the ICC was intended to act as a “court of last resort,” but had in practice assumed the position as a “first and last window for justice.”¹³¹ He also criticized the fact that the U.N. Security Council makes referrals to the ICC, even though the majority of the Council’s Permanent Members are not themselves parties to the ICC.¹³² After complaining that the ICC was, in general, undermining State sovereignty, he also criticized the Security Council for failure to acknowledge or respond to correspondence from African states complaining about the ICC.¹³³

Many African critiques of the ICC are effectively addressed to the U.N. Security Council, not to the ICC itself. The Council, with its referrals so far of the situations in Sudan and in Libya,¹³⁴ has been more focused on Africa than has been the ICC. A key part of the African ICC critique seems to be that the Security Council uses the Court as a neo-colonial instrument of domination against Africa and African leaders,¹³⁵ but blaming the problem on the ICC might not be justified. It is worthwhile to remember that the Security Council’s authority to establish an international criminal tribunal was affirmed by decision of the International Criminal Tribunal of the Former Yugoslavia (ICTY) Appeals Chamber years before the negotiation of the Rome Statute.¹³⁶

On the other hand, the AU critique of the ICC’s jurisdictional overreach is entirely justified. It is undeniable that, under the principle of complementarity as it was generally understood at the Rome Conference, the ICC was supposed to be a court of last resort which would prosecute cases only when truly necessary to

With the highest incidence of systemic and human rights violations globally, Africa, more than any other continent, needs the ICC. As the largest bloc to ratify the ICC Rome Statute, Africa showed its staunch support for the ICC. Indeed, many Africans genuinely believe that they want an end to genocide, war crimes and crimes against humanity. The ICC can help in deterring political forces from committing these terrible crimes. That is the reason why one-third (34) of the 122 states parties to the Rome Statute are member states of the African Union. The ICC also needs Africa.

Id.

130. *African Union Representative Rebukes International Court for Disproportionate Focus on Africa*, SAHARA REPORTERS (AUG. 6, 2016), <http://saharareporters.com/2016/08/06/african-union-representative-rebukes-international-court-disproportionate-focus-africa> (“Joseph Chilenge, the presiding officer of the African Union’s Economic, Social and Cultural Council (ECOSOCC) today said African countries were weighing a massive withdrawal from the International Criminal Court (ICC) because the judicial system was dysfunctional. Mr. Chilenge made the submission while speaking at an event organized by the Center for Peace and Media Initiative (CPMI) in New York to discuss the proposed withdrawal of African countries from the International Criminal Court.”).

131. *Id.*

132. *Id.*

133. *Id.*

134. Imoedemhe, *supra* note 29, at 92.

135. *Id.* at 82.

136. *See* Prosecutor v. Tadic, Case No. IT-94-I-T, Decision on the Defence Motion on Jurisdiction, ¶ 28–40 (Int’l Crim. Trib. For the Former Yugoslavia Aug. 10, 1995) (confirming Security Council’s ability to pursue measures beyond use of armed force under Chapter VII).

supplement the jurisdiction of national courts. As discussed above, judicial interpretation has drastically narrowed the practical possibility that an ICC case might be held inadmissible due to conflict with a national prosecution.

The critique that the ICC is biased and neo-colonial could be a matter of perspective, but there is no doubt that those African heads of state charged with crimes were offended when Western governments began to treat them like criminals.¹³⁷ It is unclear just how much popular support there is in Africa for the anti-ICC initiatives of certain African leaders, but colonial sensitivities cannot be completely ignored.

African heads of state dominate the AU, an organization known for prioritizing the rights and interests of African national leaders above those of ordinary Africans, and they contend “that no sitting head of state should be prosecuted.”¹³⁸ Many of these same African national leaders also tend to stay in power for a long time, and peaceful transitions of power are not the norm.¹³⁹ Thus, any change in the Rome Statute to allow the immunity of sitting African heads of state could effectively shield African leaders from accountability even for the most heinous of international crimes.¹⁴⁰ This would cloak impunity in the guise of law and would not serve the interests of justice at the national, regional or global level.

The Rome Statute makes it clear that no immunity is to apply based on official status,¹⁴¹ and the Court cannot compromise on this issue now. But the Court can and should learn to demonstrate more respect for national legal systems. One way to do that is by stressing cooperative positive complementarity over the more confrontational and adversarial negative complementarity.

137. See David Wmere & Ibrahim Oruko, *Back Off, Kenya Tells EU Envoy*, THE STAR, KENYA (Feb. 12, 2013), http://www.the-star.co.ke/news/2013/02/12/back-off-kenya-tells-eu-envoy_c737685 (quoting Foreign Affairs Minister Prof Sam Ongeru’s demands that European ambassadors refrain from commenting on Kenyan election matters); see also, Wrong, *supra* note 67 (reporting Kenyan government officials were offended by disparate treatment for ICC indictees).

138. See Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html> (“The African Union, which represents the continent’s governments, has campaigned heavily against the court, contending that no sitting head of state should be prosecuted. . . . Critics have long asserted that the African Union is an organization whose principal objective is to protect African leaders instead of the rights of its citizens.”).

139. Sewell Chan, Madeleine Kruhly & Hannah Olivennes, *Yoweri Museveni and Other African ‘Presidents for Life’*, N.Y. TIMES (May 12, 2016), <http://www.nytimes.com/2016/05/13/world/europe/yoweri-museveni-and-other-african-presidents-for-life.html>.

140. Rep. of the Working Group on Amendments, ICC Assembly of State Parties, Thirteenth Session, Dec. 8–17, 2014, at 2, 3, 16, ICC-ASP/13/31 (Dec. 7, 2014) (calling for an immunity amendment to Article 27 of the Rome Statute). See also African Union, Assembly Doc. Ext/Assembly/AU/Dec.1 (Oct. 2013), *Decision on Africa’s Relationship with the Criminal Court (ICC)* (Oct. 12 2013) (presenting grievances and proposing solutions to Africa’s relationship with the ICC, including active head of state immunity).

141. See Rome Statute, *supra* note 1, art. 27 (establishing irrelevance of official capacity).

B. The Need to Pivot from Adversarial Admissibility Challenges towards Cooperation and Positive Complementarity

Efforts to balance the jurisdiction of the ICC and that of its States Parties have also been complicated by the mistaken view that a state admissibility challenge is somehow not an adversarial procedure. ICC Prosecutor Bensouda once asserted that “[t]he relationship between the Office of the Prosecutor and national prosecuting authorities – whether civilian or military – is not adversarial.”¹⁴² While this might be true in some situations, especially those involving cooperative “positive complementarity,” it ceases to be true whenever a state has challenged the admissibility of an ICC case. A state admissibility challenge is by its very nature an adversarial proceeding.

If the ICC Prosecutor and the national authorities are engaged in an adversary proceeding, then the rights and legitimate interests of states are at issue, including their residual sovereignty. As noted above, ICC Appeals Judge Anita Ušacka’s dissenting opinion on admissibility repeatedly stressed that complementarity calls for reconciling the sovereignty of the state with the interests of global justice,¹⁴³ while the Appeals Chamber majority failed to address, or even discuss, the issue of state sovereignty.¹⁴⁴ It is not surprising that both the ICC Appeals Chamber and the Prosecutor are more comfortable with adversarial criminal proceedings against individuals than they are with adversarial clashes with states concerning their rights as such. Regardless, negative complementarity necessarily entails the right of states to litigate these sensitive issues.

At its core, negative complementarity involves the ICC’s critical evaluation of national criminal proceedings to determine if the state concerned is not genuinely proceeding to investigate or prosecute or is unwilling or unable to so proceed. If, as in the Kenya cases, the ICC determines that no genuine national prosecution is in place, then individual cases will be admissible before the ICC. Negative complementarity is thus essentially an adversarial zero-sum game in which the ICC and the state concerned compete to exercise their jurisdiction over overall situations and individual cases.

Positive complementarity is a cooperative and positive-sum process in which the Court, States Parties, international organizations, civil society organizations, and other stakeholders can all help national states to enhance their capacity to prosecute serious international crimes. In this way, credible and effective trials could, in the best-case scenario, be held at the national level. Such an ideal result

142. Gross, *supra* note 25. Fatou Bensouda tells Haaretz that “[t]he relationship between the Office of the Prosecutor and national prosecuting authorities – whether civilian or military – is not adversarial. On the contrary, it is complementary. The role of the Office is not to challenge the work of national investigators and prosecutors; it supports their work as long as it is genuine and meets other requirements stipulated by the Rome Statute.” *Id.*

143. Prosecutor v. Ruto, ICC-01/09-01/11 OA, Dissenting Opinion of Judge Ušacka ¶ 18 (Sept. 20, 2011).

144. See *supra* Section III.B.2.b.

will likely be difficult to realize in practice. Nonetheless, if it can be made to work, positive complementarity promises a win both for those who are concerned about respect for state sovereignty and for those who prioritize the interests of global justice. Making positive complementarity work takes time and patience. Perhaps that is why the ICC seems more focused on negative complementarity.

Is positive complementarity too passive, too slow, or too uncertain? How patient should the Court be with national justice systems, and what about deadlines? These questions are all relevant and none are easily answered. It seems clear in any case that the ICC Prosecutor has a lot of discretion in determining the Court's relative focus on positive versus negative complementarity.¹⁴⁵ Perhaps this focus should be readjusted as part of a general recalibration of complementarity. Vast sums have no doubt already been spent on programs, seminars, and trainings related to positive complementarity, but so far there are no high-profile success stories to show for it.

V. THE BREXIT PHENOMENON AND THE ICC: OPTIONS FOR AFRICA

Viewed in broader context, the UK's 2016 Brexit decision was not an isolated event but rather was symptomatic of a global political trend of popular distrust towards power structures and elites, both national and international.¹⁴⁶ An early sign of this trend was the surge in support for eurosceptic and far-right parties in the 2014 European Parliament elections, after which even staunchly pro-EU politicians conceded that the EU had become "remote and incomprehensible" and needed to reform and scale back its power.¹⁴⁷ The U.K. Brexit vote followed in 2016.¹⁴⁸ The surprise election of political outsider Donald Trump as President of the United States reflected this same anti-elite mindset.¹⁴⁹ Another recent example was the result of the October 2, 2016 referendum in Colombia that rejected a carefully negotiated peace deal intended to end fifty-two years of civil war with FARC rebels.¹⁵⁰ The lesson of Brexit, as applied to the ICC, is that attempts to maximize the jurisdiction of the ICC through the devaluation of complementarity

145. Gross, *supra* note 25.

146. See Kevin Casas-Zamora, *Some Lessons from Brexit*, DIALOGUE (July 1, 2016), <http://www.thedialogue.org/blogs/2016/07/some-lessons-from-brexit/> ("Brexit is not an isolated event. It is, rather, the most powerful example, so far, of the deep contempt towards elites and traditional political structures, which haunts all democracies.").

147. *EU Election: France's Hollande calls for reform of 'remote' EU*, BBC NEWS (May 27, 2014), <http://www.bbc.com/news/world-europe-27579235>. "Speaking on French TV, Mr Hollande - a leading champion of the EU - said the project had become 'remote and incomprehensible,' and that that had to change. 'Europe has to be simple, clear, to be effective where it is needed and to withdraw from where it is not necessary,' he said." *Id.*

148. Casas-Zamora, *supra* note 146.

149. See Katherine J. Cramer, *For years, I've been watching anti-elite fury build in Wisconsin. Then Came Trump.*, VOX (Nov. 16, 2016), <http://www.vox.com/the-big-idea/2016/11/16/13645116/rural-resentment-elites-trump> (analyzing the origins and meanings of anti-elite fueled support for Donald Trump).

150. *Colombia referendum: Voters reject Farc peace deal*, BBC NEWS (Oct. 3, 2016), <http://www.bbc.com/news/world-latin-america-37537252>.

will inevitably undermine the perceived legitimacy of that institution.

A general presumption of national over international jurisdiction is inherent in the concept of complementarity. That balance was negotiated and agreed to at the Rome Diplomatic Conference but was only crudely rendered into the text of the Rome Statute. This left the judges of the ICC with the opportunity to define a more technical and aggressive approach to complementarity that bears little resemblance to what was agreed upon in Rome.

Once the ICC's practice moved beyond the political consensus on complementarity, its claim to be technical and non-political lost credibility. This can be attributed to the ICC's aggressive push to assert and extend its jurisdiction in the Kenya cases. It is understandable that well-intentioned international officials might want to promote greater ICC jurisdiction at any cost, but in today's still positivist and consent-based legal order, the ICC cannot simply assume greater legitimate authority than was voluntarily conceded to it by states. Brexit reminds us that states can still say no to international institutions, especially when the latter are perceived to be pushing too far into national life.

Many of the founders of the EU were federalists, who dreamed that their work would eventually lead to a United States of Europe.¹⁵¹ The creation of "ever closer union among the peoples of Europe" has been a formally-stated goal since the 1947 Treaty of Rome.¹⁵²

Brexit represents a fundamental shift away from this approach, and indeed away from elite-led policies of federalism or integration on the regional or global level. More than a single decision by UK voters, the Brexit phenomenon represents the re-emergence of centrifugal forces and nationalist perspectives both in politics and in the international organization of states. These forces have darkened the prospects for international organization worldwide, well beyond the EU, the AU, and other regional organizations and unions. Many of these effects will no doubt be negative. But on a more positive note, the global Brexit phenomenon now looms as a flashing red light, warning that a general recalibration of the ICC's complementary jurisdiction is very much needed to repair and restore the ICC's standing.

Time will tell what the future of the ICC will be. Brexit is unlikely to herald the end of international institutions, but it seems to portend a major change in the *zeitgeist*, an attitudinal shift away from elite leadership and greater reliance upon supranational institutions. Anne-Marie Slaughter recently suggested that "[a]s a regional organisation, [sic] the EU is phenomenally successful. . . . Where the EU is failing is as a federal state."¹⁵³ Perhaps one lesson of Brexit is that sometimes less can be more, or at least that less can be better.

151. *The Founding Fathers of the EU*, EUROPEAN UNION, https://europa.eu/european-union/about-eu/history/founding-fathers_en (last visited March 1, 2016).

152. Treaty Establishing the European Economic Community, Mar. 25, 1957, pmbl., 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

153. Anne-Marie Slaughter, *Flexible forms of union offer a way forward for Europe*, FINANCIAL TIMES (London), (July 19, 2016), at 11.

VI. CONCLUSIONS

The ICC was established by a multilateral treaty and is intended to be a permanent international institution. As such, it must be careful not to over-step its bounds. If the ICC can build a reputation for professionalism and responsible action within the limited framework of its authority, it may eventually grow into a more broadly relevant and effective international institution. On the other hand, if it is generally perceived to be exceeding its agreed jurisdiction, it risks feeding controversies that could undermine its credibility and future development.

Should the ICC be seen as part of the traditional world order in which state sovereignty and state consent remain key limiting factors that must be respected by any international institutions hoping to retain a reputation for legitimacy? Or, should the ICC be viewed as part of a developing future order transcending the positivistic restraints of the past as part of a “Grotian Moment”¹⁵⁴ of legal transformation? The International Court of Justice has already ruled on a related issue, declaring that even when peremptory norms of general international law are at issue, that Court’s jurisdiction still depends on the consent of the parties.¹⁵⁵ It is more important than ever to uphold this principle in this era of Brexit when, for many, elite and supranational decision-making are inherently suspect and invite powerful backlash.

Like it or not, the ICC is cutting its teeth on cases from Africa, where a special set of post-colonial sensitivities apply. Seemingly oblivious to these sensitivities, the ICC plowed forward precipitously with its Kenya cases, fueling an unanticipated African nationalist response and rejection.

At the very least, the ICC can be critiqued for bad public relations.¹⁵⁶ That being said, the ICC’s mistakes in Kenya went beyond mere public relations and extended to basic lawyering and prosecution strategy. The ICC Prosecutor initiated the investigation of the situation in Kenya *proprio motu*, which means that the ICC picked this fight.

154. See Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 440 (2010) (examining concept of “Grotian Moment,” a term denoting paradigm-shifting development in which new rules and doctrines of customary international law are rapidly formed and acceptance).

155. *Armed Activities on the Territory of the Congo (Dem. Rep. of the Congo v. Rwanda)*, Judgment, 2007 I.C.J. 126, ¶ 125 (Feb. 3). “Finally, the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties” *Id.*

156. Michael Meyer, Opinion, *Kenya’s Dubious Day in Court*, N.Y. TIMES (Oct. 5, 2014), <http://www.nytimes.com/2014/10/06/opinion/kenyas-dubious-day-in-court.html>. “These days, even the most strenuous supporters of the court agree with its critics on one point: The International Criminal Court’s handling of the Kenyan case has done more damage to the accusers than the accused. The court’s reputation has suffered, perhaps fatally. By contrast, the Kenyan president and his fellow-indictee, Deputy President William Ruto, are set to emerge from the judicial ordeal as African folk heroes — the face of a new generation of independence fighters to stand against American and European neocolonialists conspiring to bring them down.” *Id.*

When it came time to prove its case against Kenyan President Kenyatta, the Prosecutor's office was unprepared and it came to light that the ICC could not present a credible case.¹⁵⁷ To do so, the Prosecutor would need additional evidence it had vainly requested from the Kenyan government. Yes, Kenya clearly violated its obligation to cooperate with the Court, but it became equally clear that the ICC's case had been launched prematurely. When the Kenya cases collapsed, the ICC was faced with a humiliating debacle largely of its own creation and from which it is still struggling to recover.

The South African government's decision not to arrest Sudanese President Al Bashir demonstrated that vague but powerful notions of anti-colonialism and African regional solidarity can prevail in practice over the formal legal obligations of ICC States Parties.¹⁵⁸ Although a few African states have taken things a step further by attempting to withdraw from membership in the ICC, both South Africa and Gambia have recently revoked their decisions to withdraw.¹⁵⁹ Under the circumstances, no clear trend is evident.

But even amid this growing tension, African states have played a positive role in the ICC as well. By pushing back against ICC overreach, African states have made their point and provided the Court with a much-needed remedial lesson on the need for sensitivity, and yes, even humility, in the administration of international justice. The first lesson learned should be that a sincerer effort is needed to address the emerging African regional critique.

The ICC is perceived to be arrogant and closed. It needs to be more open. The ICC cannot continue to pretend that its prosecutors and judges have all the answers or that submissions from litigants are superfluous. There is no shame in admitting that the mechanisms of international justice are still relatively new and largely untested or that some initial decisions of the judges or of the Prosecutor may have been mistaken. Admitting that there is a problem is sometimes the most essential step in resolving it. When the judges of the ICC Appeals Chamber refused even to accept additional arguments from the government of Kenya regarding its admissibility challenge, it fueled a growing perception in Africa about the arrogance of the ICC. If the ICC would show a modicum of humility and deference in its treatment of sovereign states, this could be a first step towards bridging the legitimacy gap.

Of course, humility, like prudence, is not a trait commonly associated with criminal courts. Nonetheless, the ICC will need both qualities to survive, thrive, and be effective in the perilous and unforgiving waters of international law and diplomacy. Unlike the most effective national criminal courts, the ICC is not embedded in a system where a powerful and well-established executive organ stands ready to enforce its writ. Instead, the ICC has only the U.N. Security Council, as a "higher" body. The Security Council may occasionally reach consensus on referring a particularly difficult situation to the ICC, but that has

157. *See supra* Section III.B.1.

158. Zgonec-Rozej, *supra* note 118.

159. *See* Onishi, *op. cit.* note 126.

happened on only two occasions so far (Darfur and Libya),¹⁶⁰ and even in these cases Security Council follow-through has been minimal.

The Council's manifest inability to refer the current situation in Syria to the jurisdiction of the ICC demonstrates that the members of the Security Council (especially non-ICCs members such as the U.S., Russia, and China) do not acknowledge a duty to refer even the most atrocious of situations.¹⁶¹ Even less so do they feel the obligation to enforce the Court's orders against a recalcitrant state. It is understandable that in this difficult environment the ICC struggles to survive and to remain relevant.

From the start, there was an alternative path forward. The ICC Prosecutor could have chosen to stress positive complementarity by working more patiently with the Kenyan government's prosecuting authorities and taking the time to help them to build a strong national capacity to prosecute serious international crimes by political leaders. If this path had been successfully taken, it might have demonstrated the potential of positive complementarity. As it occurred, the Prosecutor pushed ahead with her own cases, showing little patience with the Kenyan government's plan to create a special domestic tribunal to address them. Ultimately, the failure of the ICC Kenya cases showcased for the world the Court's inability to implement negative complementarity.

On substantive aspects of complementarity, the Prosecutor was equally reckless, arguing that Kenya's admissibility challenge was misguided because that government "does not envisage the possibility for the Court and the relevant state to concurrently exercise jurisdiction over different suspects for crimes arising out of the same events."¹⁶² The Appeals Chamber did not directly rule on this point as it was not directly at issue, but the potential implications of this approach could be enormous. If the ICC can freely exercise concurrent jurisdiction bringing its cases even amid good faith national prosecutions, then the Court could be effectively bootstrapped from a court of last resort into one with largely independent jurisdiction. Complementarity was specifically intended to prevent this result.

As a formal matter, the judges of the ICC are vested with the authority to determine the Court's jurisdiction.¹⁶³ Under the doctrine of *la compétence de la*

160. Patrick Wintour, *African exodus from ICC must be stopped, says Kofi Annan*, GUARDIAN (Nov. 18, 2006), <https://www.theguardian.com/world/2016/nov/18/african-exodus-in-ternational-criminal-court-kofi-annan>.

161. William Pace, *Curbing Security Council Vetoes*, COALITION FOR THE ICC (Nov. 2, 2015), <https://cicglobaljustice.wordpress.com/2015/11/02/curbing-security-council-vetoes/>.

162. Prosecutor v. Mathaura, ICC-01/09-02-11 OA, Appeals Chamber Judgment ¶ 31 (Aug. 30, 2011), https://www.icc-cpi.int/CourtRecords/CR2011_13819.PDF.

163. See Rome Statute, *supra* note 1, art. 19 ("The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17."); see also MALGOSIA FITZMAURICE & OLUFEMI ELIAS, CONTEMPORARY ISSUES IN THE LAW OF TREATIES 285 (2005) ("The competence of international courts and tribunals to determine their own jurisdiction over a case is universally recognized in international law.").

compétence, international courts and tribunals generally claim this power.¹⁶⁴ Furthermore, it can quite cogently be argued that international judges should at times judiciously use their authority to build, develop, and reorganize international law.¹⁶⁵ There must nonetheless be some practical limit to this expansive authority or at least some possible way to remedy any fundamental problems not corrected by the judges themselves. In theory, of course, the ICC's plenary body, the Assembly of States Parties (ASP) could step in, but this would require the support of many governments. It is possible that, working together and building a broader coalition, the ICC's African States Parties could adjust the Court's approach to complementarity via sponsorship of a resolution in the ASP.

Once the need to recalibrate complementarity is acknowledged, this goal might in large part be accomplished simply through the Prosecutor's use of her discretion to allow states greater flexibility, and time, to mount credible national criminal proceedings. Having ruled so broadly, decisively, and precipitously on the legal and technical aspects of admissibility, the ICC is now faced with a political problem. The Court's prevailing standard of admissibility is fundamentally inconsistent with the basic concept of complementarity as understood and agreed to at the Rome Treaty Conference.¹⁶⁶ To restore the perceived legitimacy and credibility of the ICC, this problem will need to be addressed.

But African critics of the ICC would be well-advised not to focus their energy and resources on negative tasks such as a campaign to withdraw from the ICC, to discredit it, or to ensure the immunity of African heads of state from its jurisdiction. Better they should focus on positive efforts to reform the ICC or perhaps on the development of stronger more credible regional institutions supporting international criminal justice. Chad's former dictator, Hissène Habré, was charged with brutally killing as many as 40,000 people during his seven-year reign.¹⁶⁷ After pre-trial delays and a long trial, he was convicted of crimes against humanity by the Extraordinary African Chambers, a special court established by the AU under an agreement with Senegal.¹⁶⁸ The case was a crucial test of African resolve on international criminal justice issues,¹⁶⁹ and at the very least indicates one

164. FITZMAURICE & ELIAS, *supra* note 163, at 285. According to this general principle an international court or tribunal is vested with the jurisdiction to settle any challenges to its jurisdiction. *See* Rome Statute, *supra* note 1, art. 36(6) ("In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.").

165. *See* Prosecutor v. Tadic, Case No. IT-94-1, at 2–3, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (asserting international judges should interpret and build law).

166. *See* Jalloh, *supra* note 44, at 272 ("If the idea of complementarity underpinning Article 17 of the Rome Statute is to mean anything, it necessarily implies that member states must have a degree of flexibility to exercise their discretion in deciding whom to prosecute.").

167. Bill Corcoran, *Test case for African justice as leaders seek alternative*, IRISH TIMES (July 21, 2015), <http://www.irishtimes.com/news/world/africa/test-case-for-african-justice-as-leaders-seek-alternative-1.2291297>.

168. Dionne Searcey, *Hissène Habré, Ex-President of Chad, Is Convicted of War Crimes*, N.Y. TIMES (May 30, 2016), <https://www.nytimes.com/2016/05/31/world/africa/hissene-habre-leader-chad-war-crimes.html>.

169. Corcoran, *supra* note 167.

possible way forward for international criminal justice in Africa.

Regarding the ICC's legitimacy gap, there are larger interests at stake here as well. If the ICC and its judges can permanently extend its jurisdiction beyond what was truly agreed to by the negotiating states at the Rome Conference, there could be unanticipated negative consequences. The entire matter could become a cautionary tale for the state representatives at any future treaty conference, reminding them to be more skeptical than ever of assurances given about agreed limits to the power of international institutions.

It has sometimes been argued that the 2000 NATO bombing of Serbia was technically illegal because it was not authorized by the U.N. Security Council, but was nonetheless legitimate because, halting genocide in Kosovo, it was the right thing to do.¹⁷⁰ The ICC may be facing a situation where its actions are formally legal but those actions are nonetheless perceived to be illegitimate by a growing number of State Parties. This would be a worst-case scenario for international justice. To avoid this unhappy result the ICC should carefully review the lessons to be learned from the Kenya cases and undertake a general recalibration of complementarity, re-emphasizing its originally intended role as a court of last resort.

170. See THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4–5 (2000) (explaining how the Kosovo intervention was concluded to be both legitimate and illegal).