# COMPLEMENTARITY APPLIED: THE MEANING OF *UNWILLINGNESS* AND *INABILITY* UNDER ARTICLE SEVENTEEN OF THE ROME STATUTE

*by David C. Mann*

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# COMPLEMENTARITY APPLIED: THE MEANING OF *UNWILLINGNESS* AND *INABILITY* UNDER ARTICLE SEVENTEEN OF THE ROME STATUTE

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## I. INTRODUCTION

In an effort to end impunity for the perpetrators of the most serious international crimes[1] without compromising state sovereignty over domestic criminal activity,[2] and to promote judicial efficiency by dividing workload among numerous court systems,[3] the drafters of the Rome Statute carefully crafted the jurisdiction of the International Criminal Court (hereinafter "ICC" or "the court") to complement rather than supplant that of national judiciaries.[4] The ICC, unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR),[5] lacks primacy of jurisdiction and must assess the admissibility of each case that comes before it in light of the domestic judicial situation.[6] Under Article Seventeen of the Rome Statute (hereinafter "Article Seventeen"), proceedings at the national level render cases inadmissible at the ICC unless, in the ICC's own opinion, the failure to complete an investigation or prosecution "resulted from the unwillingness or inability of the State genuinely to prosecute."[7] Although Article Seventeen itself provides a short list of factors

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[1] The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter *Rome Statute*]. The crimes are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. *See id.* art. 5(1).

[2] ICC, Office of the Prosecutor, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE ¶ 1, No. ICC-01/04-01/07-1008-AnxA, Mar. 30, 2003, *available at* http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf (last accessed Jan. 29, 2011) [hereinafter *Informal Expert Paper*].

[3] *Id.* Muncipal courts often have better access to physical evidence, witnesses, and various other resources, and the ICC can handle only a limited number of cases. *See id.*

[4] *Rome Statute* art. 1, *supra* note 1.

[5] *Informal Expert Paper* ¶ 1, *supra* note 2.

[6] This evaluation can happen at the level of the overall situation, case, or individual suspect. *See Informal Expert Paper* ¶ 24, *supra* note 2.

[7] *Rome Statute* art. 17(1)(b), *supra* note 1.

to consider in making this determination,[8] the factors themselves require much more elaboration in order to be useful to the court.

In situations in which no domestic investigations have taken place, this complex issue of complementarity does not arise, and the court need not address it;[9] the case is considered admissible, as inaction suggests unwillingness, inability, or both. Where there have been domestic prosecutions or investigations, however, the court must determine whether these were sincere and capable attempts to bring the perpetrators to justice.[10] The Rome Statute itself provides several factors for the court to consider in its evaluation such as attempts to shield the accused from responsibility,[11] unjustified delays,[12] insufficiently independent or impartial tribunals,[13] collapse or unavailability of national judicial systems,[14] and the inability to secure the defendants[15] or evidence.[16] In 2003, the ICC authorized a group of experts[17] to publish an informal expert paper entitled "The Principle of Complementarity in Practice" which outlined a detailed list of factors to consider for each element in Article Seventeen, but these remain unofficial thanks to the way cases have arrived before the court over the past decade.

As of the spring of 2011, the ICC has commenced investigations in six nations, all located in the same general region in Africa, but given their particular circumstances, the court has not yet had to engage in an official, thorough analysis of the meaning of unwillingness and

[8] *Rome Statute* art. 17(2) and art. 17(3), *supra* note 1.
[9] *Informal Expert Paper* ¶ 18, *supra* note 2.
[10] *Id.* 17(1), *supra* note 1.
[11] *Id.* art. 17(2)(a).
[12] *Id.* art. 17(2)(b).
[13] *Id.* art. 17(2)(c).
[14] *Id.* art. 17(3).
[15] *Id.*
[16] *Id.*
[17] The twelve members of the group were Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmshurst, Andreas Zimmermann. *See Informal Expert Paper*, *supra* note 2.

inability. The Democratic Republic of Congo,[18] Uganda,[19] and the Central African Republic[20] all referred their own cases, and the court decided that self-referrals do not preclude admissibility under Article Seventeen.[21] It only determined that such actions do not constitute unwillingness, not what sorts of actions would. After the UN Security Council referred the situation in Sudan to the ICC,[22] the court found no national proceedings against the defendants which might preclude admissibility, so again no analysis was necessary.[23] Similarly, in the situation in Kenya, in which the prosecutor used his *proprio motu* power to commence an investigation, the court concluded that no national proceedings had taken place for the high-level crimes which would trigger further scrutiny under Article Seventeen regarding Kenya's unwillingness or inability to prosecute.[24] The ICC has just begun investigating the most recent situation in Libya upon the Security Council's referral and has not even had an opportunity to provide any new

[18] ICC, Office of the Prosecutor, *Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo*, ICC-OTP-20040419-50, *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB (last accessed Feb. 6, 2011).
[19] ICC, Office of the Prosecutor, *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, ICC-20040129-44, *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB (last accessed Feb. 6, 2011).
[20] ICC, Office of the Prosecutor, *Prosecutor Receives Referral Concerning Central African Republic*, ICC-OTP-20050107-86, *available at* http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2005/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic?lan=en-GB (last accessed Feb. 6, 2011).
[21] ICC, Appeals Chamber, *Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, ICC-01/04-01/07 OA 8 ¶ 83, *available at* http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf (last accessed Feb. 6, 2011). "Thus, a 'decision not to prosecute' interms of article 17 (1) (b) of the Statute does not cover decisions of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC." *Id.*
[22] UN, *Secretary General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor*, Press Release SG/SM/9797 AFR/1132, *available at* http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm (last accessed Feb. 6, 2011).
[23] ICC, Pre-Trial Chamber I, *Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09 ¶ 50, Mar. 4, 2009, *available at* http://www.icc-cpi.int/NR/exeres/4C445705-1300-4D94-9502-E42067474468.htm (last accessed Feb. 6, 2011).
[24] ICC, Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19 ¶ 181-87, *available at* http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf (last accessed Feb. 6, 2011).

complementarity analysis.[25] Thus, none of the six situations has provided an opportunity for the court to formally accept or reject the potential factors which its own experts and other legal scholars have provided in the almost thirteen years since the signing of the Rome Statute.

This Article will discuss what it means for a state to be unwilling or unable to prosecute, using ICC's own informal documents as a starting point and expanding it with further ideas and possibilities. First, it will consider a state's duty to prosecute international crimes within their jurisdiction.[26] Next, it will explore the nature of complementarity.[27] Then it will examine and evaluate the potential factors for determining unwillingness[28] and inability.[29] After that, it will address amnesties and alternative justice within the context of admissibility and prosecutorial discretion.[30] Finally, it will conclude with thoughts on the approach the court should take toward officially adopting any of the factors herein.[31]

## II. THE DUTY TO PROSECUTE

The preamble of the Rome Statute, justifying the creation of the ICC, declares that "most serious crimes of concern to the international community as a whole must not go unpunished"[32] and affirms "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[33] This duty—at least with respect to genocide—is considered customary international law.[34] Two of the most important twentieth-century human rights treaties make the duty to prosecute explicit, and several others have been authoritatively

[25] ICC, Office of the Prosecutor, *ICC Prosecutor to Open An Investigation in Libya*, available *at* http://icc-cpi.int/menus/icc/press%20and%20media/press%20releases/statement%20020311 (last accessed Mar. 16, 2011).
[26] *See infra* Part II.
[27] *See infra* Part III.
[28] *See infra* Part IV.
[29] *See infra* Part V.
[30] *See infra* Part VI.
[31] *See infra* Part VII.
[32] *Rome Statute* pmbl., *supra* note 1.
[33] *Rome Statute* pmbl., *supra* note 1.
[34] Diane F. Orentlicher, *Settling Accounts: The Duty to Punish Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2565 (1991).

interpreted to recognize it implicitly. The Genocide Convention recognizes genocide as an international crime,[35] demands the guilty be punished,[36] and thus requires contracting parties to either provide effective penalties[37] or extradite in accordance with their treaty obligations.[38] The Convention Against Torture espouses the same principle of *aut dedere aut judicare* even more explicitly with respect to various types of inhuman treatment of prisoners.[39] The International Convention on Civil and Political Rights,[40] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[41] and the Inter-American Convention on Human Rights[42] all impose an obligation to investigate violations of the rights which they identify and to punish those responsible.[43] It is important to note that political inexpediency provides no excuse for governments to fail to bring human rights violators to justice.[44] Not even a change in government can alter this international obligation. Successor regimes must pursue claims arising under, and even against, the previous regimes,[45] though this does not always entail full prosecutions for all responsible parties.[46] The ICC underscores the importance of prosecution by stepping in where states have failed to fulfill their internationally recognized duties.

## III. THE NATURE OF COMPLEMENTARITY

[35] Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.
[36] *Id.* art. 4.
[37] *Id.* art. 5.
[38] *Id.* art. 7.
[39] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.
[40] The International Convention on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).
[41] European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* Sept. 3, 1953).
[42] Inter-American Convention on Human Rights, *adopted* Jan. 7, 1970, O.A.S. Official Records, OEA/ser.K./XVI/1.1, doc. 65 rev. 1, corr. 1 (1970), *reprinted in* 9 I.L.M. 673 (1970).
[43] Diane F. Orentlicher, *Settling Accounts: The Duty to Punish Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2551-52 (1991).
[44] *See id.* at 2595 (1991).
[45] *Id.*
[46] *See infra* Part VI.

Despite its genesis in a multilateral treaty, its special relationship to the United Nations, its headquarters in The Hague, and its sitting in judgment of some of the world's most notorious criminals charged with violations of the highest level, the ICC occupies a peculiar position of having its jurisdiction entirely within the control of domestic judicial systems. Since it can only admit cases when individual nations have not sincerely and capably pursued them, the court must first identify a gap in national jurisdictions before asserting its own.[47] Whether we view the requirements of admissibility under Article Seventeen as a right of the accused, a mechanism to protect state sovereignty, or a simple limitation on the court's power,[48] the ICC, as a creation of sovereign states, is a body with only enumerated and delegated, rather than plenary, authority.[49] Exercise of authority beyond what states have transferred to it would encroach upon national sovereignty.[50] It even seems likely the court would respect nonterritorial jurisdiction—such as active nationality, passive nationality, and universal jurisdiction—as an exercise of national sovereignty which precludes admissibility.[51]

### *A. Positive vs. Negative*

Before beginning our analysis in earnest, it is important to distinguish between two competing conceptions of complementarity, to indicate which one the court has adopted, and to explain why. Negative complementarity would limit the ICC's jurisdiction to situations of genuine unwillingness or inability; the court would need to evaluate every situation regardless of the undisputed absence of national proceedings or direct state referral to the ICC.[52] Positive complementarity, by contrast, would only limit the ICC's jurisdiction to situations of apparent

[47] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 903 (2002).
[48] William W. Burke-White, *Shaping the Contours of Domestic Justice*, 7 J. Int'l Crim. Just. 257, 262 (2009).
[49] *Id.* at 266.
[50] *Id.* at 264. *See also* Case of the S.S. 'Lotus' (Fr. v. Turk.) 1927 PCIJ (ser. A) No. 10 (Sept. 7).
[51] *Informal Expert Paper* ¶ 75, *supra* note 2.
[52] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First Referral to the International Criminal Court*, 99 Am. J. Int'l L. 403, 413 (2005).

unwillingness or inability; the court would need only evaluate situations for these two criteria when national proceedings have taken place, that is, when there is a potential conflict between the different judicial systems.[53] Positive complementarity operates under the premise that cases are admissible, as a rule, in the absence of domestic investigations.[54]

Even if one argues that a negative interpretation is implicit in the very idea of complementarity, which exists to limit the ICC's jurisdiction to only exceptional circumstances, a literal reading of Article Seventeen clearly supports the positive interpretation:[55]

> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;[56]

Under both subsections, cases can only be inadmissible if there is a state investigation or prosecution; in their absence, the court does not even get to the second clause of each sentence, and therefore under such circumstances it need not determine whether the investigation or prosecution is sincere and capable. Negative complementarity reverses the order of this inquiry, looking at the existence of national proceedings as evidence of willingness or ability, which remain its overarching concern.

Whether as a matter of textual analysis or judicial policy, the ICC has implicitly adopted a positive interpretation of complementarity during the course of its operation over the past

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[53] *Id.*
[54] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 104, (Oxford University Press 2008).
[55] Akhavan, *supra* note 52, at 414.
[56] *Rome Statute* art. 17(1), *supra* note 1.

decade. The court has accepted state self-referrals and ruled them admissible without having to address whether the referring state is in fact willing and able to prosecute domestically.[57] In its other situations, the court addressed the question of complementarity by noting that no national proceedings for the specific charges and specific accused had taken place in Sudan[58] or Kenya.[59] If the court had adopted a negative interpretation of complementarity, it would have engaged in a thorough examination of willingness and ability in all of these situations. The ICC may have been disinclined to read an implicit negative complementarity into Article Seventeen due to the amount of time and resources needed to address the question of willingness and ability in every situation. Such inquiries would in many cases be more demanding of the prosecutor than proving that the accused is guilty of the underlying crimes.[60]

### *B. Burdens*

When the existence of national proceedings make it necessary for the ICC to determine whether a state is truly unwilling or unable to exercise its domestic jurisdiction to investigate and prosecute international crimes, the burden can shift between the prosecution and the defense depending on the stage of the proceedings and circumstances of the situation. At the commencement of an ICC investigation, the prosecutor must notify the states with jurisdiction over the alleged crimes[61] and give them one month to respond regarding the existence of any national proceedings.[62] The prosecutor is to defer to these national proceedings at the state's request unless he or she can convince the Pre-Trial Chamber to authorize the investigation based

[57] *See* ICC, Appeals Chamber, *supra* note 21.
[58] *See* ICC, Pre-Trial Chamber I, *supra* note 23.
[59] *See* ICC, Pre-Trial Chamber II, *supra* note 24.
[60] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 899 (2002).
[61] *Rome Statute* art. 18(1), *supra* note 1.
[62] *Rome Statute* art. 18(2), *supra* note 1.

on the state's unwillingness or inability.[63] Even in the case of a deferral, the prosecutor can review the situation again after six months or whenever "there is a significant change of circumstances."[64] It is not clear what constitutes such a change, but it is clear that once a state with jurisdiction has claimed the existence of a national proceeding, the burden is on the prosecutor to prove unwillingness or inability.[65]

This burden, however, can shift to the defense under two circumstances. First, once the prosecutor has met this burden and there has been a finding by the court, the burden then falls on the defense in subsequent challenges;[66] the prosecutor need not establish admissibility repeatedly at each stage of the proceedings. Second, if the state challenging admissibility has significantly superior access to the evidence, especially when the state is uncooperative and actively prevents the prosecutor from gathering evidence, the burden moves to that state.[67] Whoever carries the burden, the ICC must satisfy itself that cases are admissible before proceeding to the merits.[68] Not even the United Nations Security Council can relieve the court of this burden, as complementarity applies to its referrals as well.[69]

The initial burden for the prosecutor is mere preponderance of the evidence, "the simple balance of the probabilities."[70] Even so, it seems the court will only intervene in clear cases, "reflect[ing] appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems."[71] After this hurdle has been met, the defense may have a higher burden to

[63] *Rome Statute* art. 18(2), *supra* note 1.
[64] *Rome Statute* art. 18(3), *supra* note 1.
[65] *Informal Expert Paper* ¶ 55, *supra* note 2.
[66] *Informal Expert Paper* ¶ 56, *supra* note 2.
[67] *Informal Expert Paper* ¶ 56, *supra* note 2.
[68] *Rome Statute* art. 19(1), *supra* note 1.
[69] *Informal Expert Paper* ¶ 68, *supra* note 2.
[70] *Informal Expert Paper* ¶ 52, *supra* note 2.
[71] *Informal Expert Paper* ¶ 52, *supra* note 2.

prove a change in circumstances; once a situation has triggered the court's jurisdiction, only exceptional circumstances should cause its withdrawal.[72] At whatever stage the court rules on admissibility and whatever standards it employs to reach that decision, we cannot expect the determination to be mechanical and completely uncontroversial. A certain amount of subjectivity is inevitable and perhaps even desirable in order to allow the court to achieve its overarching goal of ending impunity for international crimes.[73]

### *C. Self-Referrals*

With the first three situations which the ICC investigated arising when individual states asked the court to step in, self-referrals have become the clearest cases of admissibility under the requirements of Article Seventeen. Uganda was the first to refer its situation, but, as of early 2011, none of the accused has appeared before the court—four are at large, and the fifth is deceased—and thus none have had the opportunity to challenge admissibility.[74] It was in the context of the second self-referral, that of the situation in the Democratic Republic of Congo, in which the Appeals Chamber was able to authoritatively address this issue, ruling that self-referrals do not preclude admissibility.[75]

The Appeals Chamber first noted that the issue of unwillingness and inability only arises in the context of past or present investigations,[76] and it rejected the argument that the court must address the issue even in cases of inaction, concluding it was irreconcilable with the text itself

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[72] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First Referral to the International Criminal Court*, 99 Am. J. Int'l L. 403, 415 (2005).
[73] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 899 (2002).
[74] ICC, Uganda situation, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/ (last accessed Feb. 18, 2011).
[75] ICC, Appeals Chamber, *Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, ICC-01/04-01/07 OA 8 ¶ 83, *available at* http://www.icc-cpi.int/iccdocs/doc/doc746819.pdf (last accessed Feb. 6, 2011).
[76] *Id.* ¶ 75.

and with the purpose of the Rome Statute.[77] The court then addressed the theoretical situation in which a domestic investigation is discontinued in favor of referral to the ICC and concluded that such a decision would not preclude admissibility either. Under Article Seventeen, past investigations are only relevant when there has been an actual decision not to prosecute.[78] The court reasoned that if a state refers a case to it, there has been no decision not to prosecute, for the state intends the ICC prosecute instead.[79] Although self-referring states certainly decide not to prosecute domestically, after the phrase "decided not to prosecute," the court has essentially read in as implied "or have the ICC prosecute." Otherwise, the referral itself to the ICC would render the case inadmissible, a result that the court dismissed as absurd in light of the Rome Statute's overarching goal to end impunity.[80] The court stressed that states have the duty to prosecute within their jurisdiction, but it favorably mentioned the argument that referral to the ICC may satisfy that duty.[81] Nevertheless, the court stated that it might not take up every case referred to it.[82] The court thus ruled discontinuation of a domestic investigation in favor of self-referral does not automatically preclude admissibility while also implying that it does not automatically guarantee it either.

The ICC's stance leaves room for evaluating the complementarity of self-referrals on a case-by-case basis and promoting a balance between domestic and international judicial systems. If the court had to accept every self-referral without qualification, then states could refer situations which the state would otherwise be willing and capable of prosecuting in order to save financial and judicial resources. This would not advance complementarity. Likewise, if the

[77] *Id.* ¶ 78.
[78] *Id.* ¶ 82.
[79] *Id.*
[80] *Id.* ¶ 83.
[81] *Id.* ¶ 85.
[82] *Id.* It is not clear, however, upon what basis the court could refuse to accept the case if there was no investigation.

court could not accept any self-referrals once a domestic investigation had begun, then it risks impunity in situations in which states have valid reasons not to prosecute domestically. For instance, a state might be loath to prosecute an especially powerful defendant at home because of the threat of serious political violence and its destabilizing effects on the government and society, and the ICC offers a legitimate alternative to fulfill its duty.[83] The existence of the ICC itself could influence political considerations and tip the balance in a state's decision whether to prosecute international crimes.[84] One can view self-referrals as a national admission of either unwillingness or inability along with a desire to see justice ultimately done. The court can defer to a state's own assessment of its capacity to prosecute, but it does not need to accept this assessment blindly.

### *D. The Identity of "the State"*

Under Article Seventeen, in the case of past or present national proceedings, admissibility hinges on the willingness and admissibility of "the state" as though it were a monolithic entity rather than a complex network of legal institutions such as law enforcement, prosecutors, judges, court administrators, and political actors.[85] A state may well represent a mixture of varying levels of willingness and ability, and the interactions between the institutions may complicate the matter even further.

For example, the executive or the legislature may grant a blanket amnesty, and even if the judiciary is fully willing to investigate and prosecute, it may simply be unable because the judges must apply this amnesty as a matter of national policy.[86] Or the military may legally or illegally

[83] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First Referral to the International Criminal Court*, 99 Am. J. Int'l L. 403, 414-15 (2005).
[84] Lorraine Finlay, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute*, 15 U.C. Davis J. Int'l L. & Pol'y 221, 232 (2009).
[85] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 106, (Oxford University Press 2008).
[86] *Id.*

block the judiciary's investigation and prosecution and prevent them from acting.[87] Or the police may refuse to enforce an arrest warrant and leave the court system without anyone to try.[88] Such examples demonstrate that there is no mutual exclusivity between being unwilling and being unable and that the state as a whole may be both simultaneously, due to its composite institutions.[89] For this reason, a state cannot challenge the admissibility of a case by citing the willingness and ability of one of its component parts when one or more of its others effectively negate it for the state as a whole.[90] It only matters whether the state, as a functioning system, can and will bring the accused to justice.

## IV. UNWILLINGNESS

States with the capacity but without the desire to bring those accused of international crimes to justice have a choice of three primary strategies to protect alleged perpetrators, each of which roughly corresponds to the factors of unwillingness in Article Seventeen.[91] The first is to remove the teeth from any investigation or prosecution, preventing it from being able to reach the accused, through the process of shielding.[92] The second is to slow the proceedings down so much that they will never progress very far and will never threaten the liberty of the accused, thanks to an unjustified delay.[93] The third is to ensure the desired result by illegitimately controlling the proceedings and preventing them from being conducted independently and impartially.[94] Article Seventeen counters all three of these strategies by negating the ability of all nongenuine proceedings to preclude admissibility[95] and completely eliminates the easiest

[87] *Id.* at 106-07.
[88] *Id.* at 107.
[89] *Id.*
[90] *Id.*
[91] *See Rome Statute* art. 17(2), *supra* note 1.
[92] *See id.* art. 17(2)(a).
[93] *See id.* art. 17(2)(b).
[94] *See id.* art. 17(2)(c).
[95] *See supra* part I. *See also Rome Statute* art. 17(1)(a)-(b), *supra* note 1.

strategy of simply doing nothing by making all cases of sufficient gravity automatically admissible in the absence of national proceedings.[96]

The Office of the Prosecutor (hereinafter "OTP") has acknowledged that the analysis of a state's willingness can be especially difficult—relying on series of inferences and on circumstantial evidence at best—as well politically sensitive, given that an ICC ruling of unwillingness is an accusation against government officials.[97] It has also recognized the challenges discussed above in identifying the willingness of a state made up of many components[98] and also that willingness may vary according to the group of potential defendants in question, with the authorities perhaps being simultaneously eager to prosecute rebels but reluctant to prosecute its own forces.[99] In the face of this complexity, the OTP has dismissed the suggestion that it ever look to the outcome of the case in making an evaluation of willingness and emphasized that the court must base its decision on procedural and institutional factors alone.[100] If the ICC were to adopt such a policy and determine that a state is unwilling to prosecute due to its failure to convict someone who is "obviously" guilty, then the court would be exchanging a possible domestic sham trial for an international show trial.

### *A. Shielding*

The first strategy to protect accused perpetrators from justice is to prevent them from facing genuine prosecution for international crimes at all. The Rome Statute counters this strategy by preserving admissibility in the face of domestic "proceedings [which] were or are being undertaken or [when] the national decision was made for the purpose of shielding the

[96] *See supra* part I. *See also Rome Statute* art. 17(2)(d), *supra* note 1.
[97] *Informal Expert Paper* ¶ 44, *supra* note 2.
[98] *See supra* part III.D.
[99] *Informal Expert Paper* ¶ 45, *supra* note 2.
[100] *Informal Expert Paper* ¶ 46, *supra* note 2. In particular, such a ruling would seriously undermine the presumption of innnocence at the ICC. *See id.*

person concerned from criminal responsibility for crimes within the jurisdiction of the Court."[101] This short formulation of the first test for unwillingness proves remarkably complex when one unpacks it, demanding the most challenging analysis under Article Seventeen.

1. Purposeful Action

Before addressing the meaning of *shielding*, it is important to note that, unlike any other test for unwillingness or inability under Article Seventeen, the test for shielding has a mental component. It is not enough that the accused be shielded from prosecution. This shielding must have been purposeful; some person or persons must have directly intended it.[102] That is not to say that shielding must be the only, ultimate, or even primary purpose.[103] That is also not to say that shielding must have a nefarious purpose, result from violations of international law, or even constitute bad faith.[104] A conditional amnesty for members of a rebel movement in exchange for their laying down of arms, for example, may be a laudable tactic to achieve peace and promote stability, but such an act nevertheless falls within the definition of shielding in Article Seventeen.[105] While such a case would appear admissible, it seems the prosecutor may still invoke his or her discretion to refuse to take up the case in the belief that there are "substantial reasons to believe that an investigation would not serve the interests of justice."[106]

Although referring to the mental state of an abstract entity such as a state or branch thereof may strike one as odd at first glance, such a construct is not unique to complementarity analysis, as both the notions of a state's good faith and knowledge exist under the Articles of

[101] *See Rome Statute* art. 17(2)(a), *supra* note 1.
[102] *See* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 135, (Oxford University Press 2008).
[103] *Id.* at 137.
[104] *Id.*
[105] *Id.*
[106] *See Rome Statute* art. 53(1)(c), *supra* note 1.

State Responsibility.[107] The actual determination of a state's mental state remains difficult[108] and will often involve examining the intentions of government officials involved in the investigation and prosecution of the case as well as the collective intention of larger bodies such as legislatures.[109] It is only in cases of express statements by officials or clear actions such as blanket amnesties that identifying a purpose to shield will be relatively straightforward.[110]

2. Factors

But what is shielding? One can think of it as any action beyond of the realm of rightful due process which makes it less likely that a guilty party will be punished for his crimes. Thus, shielding can occur at any stage of the proceedings: investigation, arrest, arraignment, trial, sentencing, or even post-sentencing. This wide range of possibilities accounts for the great number and variety of factors to consider which the OTP and commentators have suggested for evaluating whether shielding has taken place.

*a. Investigation*

A deficient investigation can foreclose all the later stages of legal proceedings, and almost any shortcoming has a greatly magnified effect on the overall effectiveness. Perhaps the most obvious deficiency is an outright closure of an investigation before it reaches its end, such as when a superior investigates crimes by his subordinates but refuses to submit the case to the proper authorities for further proceedings.[111] The ICC should also consider the number of investigations opened in relation to the number of alleged crimes, the amount of resources

[107] Kleffner, *supra* note 102.
[108] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 900 (2002).
[109] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 136, (Oxford University Press 2008).
[110] *Id.*
[111] *Id.* at 137.

allocated thereto, and the pacing thereof.[112] An excessively slow investigation garners the court's scrutiny under the unjustified delay test,[113] but an uncharacteristically hasty investigation can suggest a desire to sweep the crimes under the rug as quickly as possible.[114] If the evidence collected is far below the amount which the OTP can show as available, the court can conclude the domestic officials did not use due diligence in fulfilling their duty to investigate.[115] Finally, if the national judicial system long had knowledge of the allegations and only launched an investigation when the ICC acted, this will constitute a red flag regarding the genuineness of the proceedings.[116]

*b. Arraignment*

Once it comes time to charge accused perpetrators with crimes, the domestic authorities have only a limited amount of leeway in this decision. While it seems that prosecution for serious but otherwise ordinary crimes, e.g., murder, rather than an international crime, e.g., genocide, would be sufficient for the purposes of complementarity, prosecution for a minor crime, e.g., assault, would not.[117] The OTP has suggested that the ICC consider the "adequacy of charges and modes of liability vis-à-vis the gravity and evidence."[118]

*c. Trial*

Any deviation from practices compliant with internationally recognized norms should create suspicion that the purpose for the changes is to shield the defendants.[119] This includes the establishment of special tribunals, an irregular selection of judges and prosecutors, and the use of

[112] *Informal Expert Paper* annex 4, *supra* note 2.
[113] *See infra* Part IV.B.
[114] *Informal Expert Paper* annex 4, *supra* note 2.
[115] *Id.*
[116] *Id.*
[117] Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 Santa Clara J. Int'l L. 165, 195 (2010).
[118] *Informal Expert Paper* annex 4, *supra* note 2.
[119] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 136, (Oxford University Press 2008).

novel procedures.[120] Any procedural or substantive treatment of the cases which varies from the treatment of comparable cases may also evince a purpose to shield.[121]

Even the court appeared to follow all the proper procedures, the court's operation may fall short in many other respects. A court which "loses" evidence in its custody,[122] a judge who simply disregards evidence submitted to him or her and makes completely unsupported findings,[123] a prosecutor who fails to submit evidence collected from the investigation,[124] or the failure to protect witnesses from intimidation[125] can all contribute to a miscarriage of justice. When concerns have arisen before the trial, a refusal to allow third parties to observe and monitor the proceedings without a sufficient justification should also raise a red flag for the ICC.[126]

*d. Sentencing & Post-Sentencing*

Although the lack of universally accepted standards for sentencing international crimes complicates the analysis, a relatively light sentence for a serious crime can reflect a purpose to shield the accused perpetrators from actual punishment if not from public condemnation.[127] Even after this point, the issuance of pardons, especially immediately upon the conclusion of the trial or sentencing, would raise questions about the proceedings as a whole.[128]

3. Evidence

Since evidence of shielding is not always readily available, the OTP has suggested that the ICC can obtain direct evidence from the testimony of insiders or from expert witnesses who can

[120] *Informal Expert Paper* annex 4, *supra* note 2.
[121] Kleffner, *supra* note 119, at 137.
[122] *Id.* at 136.
[123] *Id.* at 136-37.
[124] *Informal Expert Paper* annex 4, *supra* note 2.
[125] *Id.*
[126] *Id.*
[127] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 137, (Oxford University Press 2008).
[128] *Informal Expert Paper* annex 4, *supra* note 2.

demonstrate the politicized nature of the national judicial system.[129] Legislation, executive orders, amnesty decrees, and correspondence, when available, can also shed light on the possible purpose to shield.[130] Unfortunately for the ICC, it is fundamentally more difficult to prove a sham trial than a show trial because they involve an excess rather than a shortage of due process.[131]

### *B. Unjustified Delay*

Government officials intent on obstructing justice will likely employ more than one strategy, and disentangling and identifying the various methods to reach this goal may prove difficult. Intentionally creating unnecessary delays in the judicial process, for example, may serve as a back-up to a primary plan to shield accused perpetrators altogether, or it may serve to supplement it, such that the plans merge together and become indistinguishable. For this reason, the factors to consider in determining whether there has been an unjustified delay somewhat overlap with those regarding shielding, but with an emphasis on the dimension of time.

The Rome Statute's provision for admissibility on account of the undue passage of time—that is, if "[t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice"[132]—consists of three elements: (1) there must be a delay; (2) there must be no justification for the delay; and (3) the delay must be inconsistent with a desire for justice in light of the circumstances. The first element is objective and largely uncontroversial. One merely looks to the passage of time between the crimes themselves and the start of investigations, between the investigation and the arrests of suspects, between arrests and trials, between the start and conclusion of trials, or

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[129] *Id.*
[130] *Id.*
[131] Lars Waldorf, *"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 Fordham Int'l L.J. 1221, 1266 (2010).
[132] *Rome Statute* art. 17(2)(b), *supra* note 1.

between conviction and sentencing. The ICC can simply determine whether there has been a delay in a particular case by comparing it to the normal timeframe in the same judicial system for cases with similar levels of complexity,[133] though issues may arise if the level is unprecedented and extrapolation from simpler cases becomes necessary.

The second and third elements, however, are both more subjective and more easily confused with each other, so it is necessary to distinguish between them before proceeding. It is even tempting to think of them as a single element—i.e., unjustified in light of the circumstances because the delay is inconsistent with a desire for justice—but a careful reading of Article Seventeen makes it clear this would be a mistake.[134] The delay must be unjustified, and the delay must also be inconsistent with a desire for justice under the circumstances. If these two conditions were synonymous, then the adjective *unjustified* would be completely redundant and thus unnecessary, contrary to the principles of treaty interpretation.[135] In addition, this reading is more consistent with respect for national sovereignty[136] in that it enlarges the possible justifications for delay, potentially reducing the number of admissible cases despite the existence of national proceedings. These two elements, therefore, must address separate situations despite being closely related conceptually.

Whether a delay is unjustified depends on the particulars of the case, and for this reason we cannot hope to formulate anything at all resembling a bright-line rule to aid the court.[137] The closest we can come is to identify some high-level factors, such as the legal and factual complexity of the case, which most commentators accept,[138] and others, such as economic and

[133] *Informal Expert Paper* annex 4, *supra* note 2.
[134] *See Rome Statute* art. 17(2)(b), *supra* note 1.
[135] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 140, n. 228 (Oxford University Press 2008).
[136] *See Informal Expert Paper* ¶ 1, *supra* note 2.
[137] Kleffner, *supra* note 135, at 140.
[138] *Id.*

administrative restraints, which most commentators reject with only limited exceptions and qualifications.[139] At this level of analysis, the ICC should search for a justification for the delay internal to the national judicial system. If it does not find one, it should conclude the delay is unjustified and then proceed to the third element and look for one outside the system.

Whether a delay is inconsistent with a desire for justice depends not so much on the particulars of the case as it does on the particulars of the overall national situation. Potential justifications include scenarios in which a transitional regime fully intends to investigate but chooses to wait until it achieves better political stability or in which state fears for its investigators within a particularly dangerous region.[140] These situations come close to falling within the scope of inability, but here there is still an option. It may be an unattractive option, and the decision not to choose it may be fully consistent with an intent to prosecute, but the option still exists, unlike in cases of true inability.[141]

The overall test for delay is more objective than the test for shielding.[142] Shielding only exists when there is a purpose to do so,[143] but whether a delay is unjustified or "inconsistent with an intent to bring the person concerned to justice"[144] does not depend on an actual plan of the government officials. As long as there is no internal or external justification for the delay, the ICC can decide the delay is inconsistent with a desire for justice and admit the case. The prosecutor need not to produce evidence of actual intent.[145] A delay without any justification, internal or external, renders a case admissible before the court.

### *C. Not Independent or Not Impartial*

[139] *Id.* at 141.
[140] *Id.* at 144.
[141] *See infra* Part V.
[142] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 143, (Oxford University Press 2008).
[143] *See Rome Statute* art. 17(2)(a), *supra* note 1.
[144] *See Rome Statute* art. 17(2)(b), *supra* note 1.
[145] Kleffner, *supra* note 142.

A third strategy to protect accused perpetrators is to influence the proceedings by controlling the judicial actors and thereby dictating a favorable outcome. Specifically, Article Seventeen does not allow "proceedings [which] were not or are not being conducted independently or impartially"[146] to block admissibility before the ICC. The two ideas of independence and impartiality are closely linked. We can presume that partiality is the primary evil to avoid, and that external dependence is condemnable because it so easily leads to partiality. This linkage can be useful because direct evidence of partiality can be difficult to obtain, so direct evidence of dependence can serve its role instead.

*Independence* refers to the judiciary's independence from the other branches of government, the parties to the case, as well as from third parties.[147] With respect to governmental structure, the ICC should look to the judicial appointment and dismissal procedures,[148] their terms of office, the legal guarantees of and the judiciary's own claims of independence.[149] It should also look to the same for prosecutors and investigatory agencies.[150] More controversially, the ICC should search the history of the nation for examples of political interference with the judicial process, especially trials reaching outcomes dictated by government officials.[151] Whenever a judicial officer receives threats or whenever the executive has the authority to alter a court system's jurisdiction, composition, or procedures, the ICC should consider this *prima facie* evidence of dependence.[152] The appointment of a special investigator, especially one with

[146] *See Rome Statute* art. 17(2)(c), *supra* note 1.
[147] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 146, (Oxford University Press 2008).
[148] *Informal Expert Paper* annex 4, *supra* note 2.
[149] Kleffner, *supra* note 147.
[150] *Informal Expert Paper* annex 4, *supra* note 2.
[151] *Informal Expert Paper* annex 4, *supra* note 2.
[152] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 146, (Oxford University Press 2008).

political connections, rather than the usual investigator, should be considered heavily.[153] The use of a secret tribunal should immediately throw up a very large red flag, as the ICC then cannot even examine the proceedings at all.[154] The use of special or military courts, however, is acceptable if these tribunals meet the same standards of independence as ordinary courts.[155]

*Impartiality* implies that officials do not hold preconceived notions about the cases before them and that they will act to promote justice between the parties.[156] Direct evidence of impartiality would include judges making politically motivated statements or systems of military justice which permit officers to try their own subordinates.[157] The OTP has offered a long list of factors to identify indirect evidence of impartiality toward the accused perpetrators such relationships between the judges and the defendants, relationships between the government officials and defendants where there is no judicial independence, and even "commonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication."[158] This commonality can refer to shared political objectives, membership in the same political groups, official statements of praise or condemnation, awards or sanctions, financial support, and selective deployment of law enforcement.[159] To determine the impartiality of proceedings, the ICC must determine whether there are enough objective guarantees of judicial fairness and whether the judges have done anything to expose directly their personal bias in the case before them.[160]

## V. INABILITY

[153] Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 Santa Clara J. Int'l L. 165, 196 (2010).
[154] *Id.*
[155] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 148, (Oxford University Press 2008).
[156] *Id.* at 146-47.
[157] *Id.* at 147.
[158] *Informal Expert Paper* annex 4, *supra* note 2.
[159] *Id.*
[160] Kleffner, *supra* note 155, at 147..

In comparison to the analysis of a state's willingness to investigate and prosecute, the analysis of a state's ability is somewhat simpler. The evidence is generally more readily accessible, and the motives of national leaders are not called into question.[161] The OTP has suggested the standard for inability should not be stringent "as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards."[162] Since the ICC may dispute, however, a state's claims to have a fully operational judicial system, issues of sensitivity and both national and personal pride still remain important concerns.[163]

Article Seventeen extends jurisdiction to the ICC despite the existence of national proceedings if "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[164] While this standard needs elaboration in the form of more detailed factual inquiries, the ICC also needs an overarching question to answer when making its totality of the circumstances inquiry. One can view the court as answering the question, "If the national authorities acted in good faith and used their best efforts, could the judicial system likely bring the accused to trial and lead an effective prosecution against them?" If no, then the ICC should, and indeed must under its mandate, proceed with its own investigation and prosecution. If yes, then the ICC must refrain from acting and allow the national proceedings to continue. Furthermore, in situations where a state lacks only evidence or the accused in custody, and the ICC has obtained either or both, the OTP should release everything in its possession or under its control to the state in order to facilitate the national

[161] *Informal Expert Paper* ¶ 48, *supra* note 2.
[162] *Id.* ¶ 49.
[163] *Id.* ¶ 48.
[164] *Rome Statute* art. 17(3), *supra* note 1.

proceedings and to preserve the principle of complementarity.[165] Whenever a state is willing and able to prosecute international crimes within its jurisdiction, the ICC must step aside in favor of national sovereignty.

The structure of Article Seventeen makes it evident that the ICC must make three main inquiries in determining a state's ability.[166] First, the court must determine whether the state has failed to bring the accused into custody, failed to obtain the necessary evidence, or qualifies as "otherwise unable." Second, it must determine whether the national judicial system has suffered a total or substantial collapse or is otherwise unavailable. Third, it must determine whether the state's inability is the result of the collapse or unavailability. At first blush, this three-part analysis seems somewhat complex, but the first and last parts are fairly straightforward, and only the second part poses much of a challenge.[167]

The ICC must consider each inquiry more or less independently. A national system which has suffered a total or substantial collapse may be less likely than a fully functioning system to bring the accused into custody or to compile evidence against them, but neither success nor failure in this regard is dispositive. Even failed states with no functioning court system may be fortunate enough to have the accused and a number of willing eyewitnesses fall into their collective lap, and even the most successful states sometimes may experience great difficulty in capturing potential defendants or locating physical evidence or persons willing to testify in court. If, for example, mere failure of a state to arrest a perpetrator within its jurisdiction—including its nonterritorial jurisdiction—rendered a state unable under Article Seventeen, then the ICC would

[165] The Rome Statute explicitly authorizes the transfer of evidence to national authorities and may implicitly allow the transfer of defendents as well. *See Rome Statute* art. 93(10)(b)(i), *supra* note 1.
[166] *Id.* art. 17(3).
[167] *See infra* Parts V.A, V.B, and V.C.

automatically have jurisdiction over every person accused of an international crime who remains at large, despite a state's utmost willingness and ability to prosecute.

### *A. Failure to Obtain the Accused or Necessary Evidence or Being Otherwise Unable*

The first step in the ICC's analysis should be to identify some shortcoming in the national proceedings which presents an obstacle to prosecution. This would usually be simply a matter of confirming that the state has the right individual in custody, checking that it has sufficient evidence against him, and ascertaining that its law punishes the international crimes under the Rome Statute. A state challenging jurisdiction could provide all the necessary materials to the court for inspection with little room for controversy. This would generally be simpler than determining whether the national judicial system has collapsed or is unavailable, and if there is no shortcoming, the court need not even address this more difficult question.[168]

1. Accused

Whether a state has an accused in custody is probably the easiest determination in the entire process. It is a purely factual issue; either the defendant sits in jail or he does not.[169] Even if the court remained unconvinced that the right person, if anyone, is actually in national custody, this problem is completely unimportant from a practical perspective. That is, if the ICC has the defendant in its own custody, then it knows the state's claim is false, and if ICC does not have the defendant, then it cannot proceed with its own prosecution, so the question is either moot or not ripe.

Issues with extradition, however, can complicate matters. A state may be unable to obtain an accused person due to a lack of extradition treaties with another state which holds the

[168] *See supra* Part V.
[169] Julio Bacio Terracino, *National Implemention of ICC Crimes*, 5 J. Int'l Crim. Just. 421, 436 (2007).

person in custody.[170] It seems unreasonable to portray this as any sort of deficiency of the national judicial system, but it may qualify under the rubric of unavailability and allow the ICC to exercise its jurisdiction, that is, if the other state surrenders the person to the court.

The Rome Statute contains no provision providing for trials *in absentia* at the ICC. The court has not conducted any such trials up to this point, and it seems highly unlikely that the court will do so absent an amendment to the treaty. Given this, and the Rome Statute's overarching goal of ending impunity,[171] the ICC would probably not recognize a trial *in absentia* at the national level as a barrier to its own jurisdiction. In any case, trials *in absentia* would not remove the state's duty to punish if there is a conviction and subsequent apprehension. If there is no conviction, then the ICC would still analyze the state's willingness and may find a case admissible under that rubric. A state need only be unwilling or unable, not both.[172]

2. Evidence

Whether a state has sufficient evidence to prosecute the accused is another fairly straightforward determination.[173] A state that challenges the ICC's jurisdiction can simply produce whatever evidence it has in its possession, and the court can evaluate this evidence and decide whether the state has a *prima facie* case. While there may be a certain degree of subjectivity in this examination, there is nothing unusual about this type of judgment. If, for whatever reason, the state does not actually produce the evidence in a subsequent trial, the court can examine its willingness instead.

3. Otherwise Unable

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[170] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 Mich. J. Int'l L. 869, 903 (2002).
[171] *Rome Statute* pmbl., *supra* note 1.
[172] *See id.* art. 17(1)(a).
[173] Terracino, *supra* note 169.

The primary reasons why a state would be unable to prosecute an accused person are the lack of custody and evidence. The inclusion of "otherwise unable" in Article Seventeen[174] recognizes that there may be a multitude of other reasons and that the court should be able to invoke these other reasons as they apply. Many of the factors which might render a state otherwise unable to prosecute—e.g., lack of personnel or infrastructure—would be also factors under the collapse or unavailability, so we will examine them in the next section.[175] Here we will discuss another indispensable element to a prosecution which can potentially survive everything but the total disintegration of the state because it is nonphysical, that is, the law.

It is primarily procedural law, rather than substantive law, that concerns us here. Article Seventeen only precludes admissibility before the ICC when a state *with jurisdiction* is investigating or has investigated the case.[176] A state which fails to include ICC crimes in its domestic law can provide no bar to admissibility before the ICC because it has failed to establish jurisdiction over the crime.[177] In essence, the Rome Statute presumes the state is unable when it lacks the substantive law to prosecute,[178] and the ICC would not even arrive at this level of analysis in such situations. Gaps in procedural law, however, could prevent a state with jurisdiction from bringing perpetrators to justice. Amnesties, immunities, and statutes of limitation all represent potential procedural roadblocks to full justice.[179]

### *B. Total or Substantial Collapse or Unavailability*

After the ICC has identified a judicial shortcoming which presents an obstacle to prosecution, the next step is to determine the status of the national judicial system, that is,

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[174] *See Rome Statute* art. 17(3), *supra* note 1
[175] *See infra* Part V.B.
[176] *See Rome Statute* art. 17(1)(a)-(b), *supra* note 1
[177] Julio Bacio Terracino, *National Implemention of ICC Crimes*, 5 J. Int'l Crim. Just. 421, 436 (2007).
[178] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 156, (Oxford University Press 2008).
[179] *See infra* Part VI.

whether it has collapsed or become otherwise unavailable. A state most likely to meet this criterion is one which is emerging from a conflict which destroyed its infrastructure, killed or chased off its personnel, and diminished its other resources.[180] War within a state's territory can greatly limit the effectiveness of what remains of the national judiciary.[181] Military coups, violently disputed elections, popular uprisings, and even natural disasters can all contribute to disrespect for the rule of law.[182] A legally abolished judiciary would most clearly fit within the meaning of Article Seventeen.[183]

A judicial system which is merely overburdened—a common condition even in absence of internal conflict—however, does not qualify as unavailable or even partially collapsed[184] because states can address the problem of being overburden by reallocating resources and prioritizing crimes within the ICC's jurisdiction.[185] Any failure to do so would be the result of unwillingness, not inability.

1. Collapse

Although no established legal definition of *collapse* exists,[186] we all have an idea of what it means for a judicial system to collapse. For the purposes of this Article, *collapse* will mean "a situation in which the police, judiciary and other bodies serving to maintain law and order have either ceased to exist or are no longer able to operate."[187] It is important to remember that

[180] Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 Fla. J. Int'l L. 215, 237 (2002).
[181] *Id.* at 239.
[182] *Id.*
[183] *Id.*
[184] Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 Am. J. Int'l L. 385, 388 (2005).
[185] *Id.* at 390.
[186] Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 Case W. Res. J. Int'l L. 325, 327 (2007).
[187] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 154, (Oxford University Press 2008).

Article Seventeen only references a collapse of the judicial system, not all state institutions.[188] While the same forces which cause judiciaries to collapse tend to affect all government bodies such that they often stand or fall in tandem, the fate of the presidency, legislature, or various unrelated ministries is irrelevant to the analysis of judicial collapse.[189]

The OTP has identified a lack of personnel (judicial, prosecutorial, or investigatory), legislation (procedural or substantive), infrastructure, or access (internal to the system or imposed by independent external elements) and the presence of amnesties or immunities as factors in determining a state's inability.[190] Logically, it seems that a severe deficiency in any one area can render the entire system effectively collapsed and that there is little room for a totality of the circumstances type of analysis. For example, if a state lacks judges, then the existence of well crafted law and an ample number of suitable venues are irrelevant. Likewise, if a state has no law regarding the international crimes in question, then having plenty of qualified judges, investigators, and prosecutors available does not compensate for this problem.

*a. Total Collapse*

Adding our understanding of the word *total* to our understanding of the word *collapse*[191] yields a situation in which all law-enforcement agencies within a state have ceased operation. Since the issue of complementarity only arises when an investigation has commenced,[192] and no such investigation can occur without at least one functioning judicial institution, then the ICC can only face this situation when the collapse happened after the investigation began.[193] A showing that even one judicial institution is still in operation would negate the possibility of a

[188] *Id.*
[189] *Id.*
[190] *Informal Expert Paper* annex 4, *supra* note 2.
[191] *See supra* Part V.B.1.
[192] *See supra* Part I.
[193] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 154, (Oxford University Press 2008).

total collapse but still leave open the possibility of a substantial collapse.

*b. Substantial Collapse*

The adjective *substantial* is clearly less precise than the adjective *total*, but we can still arrive at a useful meaning for our purpose. In light of the general idea of Section Three of Article Seventeen, the term *substantial collapse* can mean a situation in which one or more judicial institutions have ceased to function in the relevant area to such a degree that an obstacle to prosecution arises. This definition contains both institutional and geographic components and thus encompasses situations in which some institutions cease operating nationwide and those in which all institutions cease operating in a particular region, perhaps because forces in opposition to the state have shut them down.[194] A substantial collapse is obviously something less than a total collapse but something more than a partial collapse, which in turn is any level of collapse which the state can resolve by shifting resources or, in the case of rebel provinces, transferring proceedings to another venue.[195] A substantial collapse is thus one that is insurmountable, corresponding with our intuitive sense of the idea of inability.

2. Unavailability

A total or substantial collapse of the national judicial system would certainly render that system unavailable in the usual meaning of the word, but assuming that the drafters of the Rome Statute were not simply redundant, unavailability must refer to at least some situations different from collapse. As we have defined *collapse* to mean situations in which judicial institutions have ceased to exist or simply ceased to operate,[196] then *unavailability* must mean situations in which judicial institutions are generally functional but somehow still unable to carry out the investigation and prosecution of the case. Unavailability may result from a permanent deficiency

[194] *Id.* at 155.
[195] *Id.*
[196] *See supra* Part V.B.

in the judicial system, contrasting with a collapse, which is more likely to be an exceptional and temporary situation.[197] One can think of unavailability as lack of access to an otherwise functioning judicial system, whether from internal or external forces.[198]

We have already considered the internal forces above under our analysis of the phrase "otherwise unable,"[199] but the OTP prefers to classify the lack of penal legislation, amnesties, and immunities under the other catch-all idea of unavailability.[200] This does not affect the analysis of inability. The external forces would include any uncontrolled element which limits access to the judicial system.[201] Opposition groups may attempt to prevent the gathering of evidence, block important travel routes, or intimidate officials, victims, and witnesses from participating in particular proceedings.[202] Natural disasters such as earthquakes and flooding may have similar effects in the short term, but it seems unlikely that the ICC would admit a case based solely on such a temporary lack of access. The underlying idea is that something outside of the judicial system prevents it from proceeding despite its own abilities and willingness.

### *C. Causation*

The final step in the inability analysis is fairly simple and perhaps rather obvious, but it merits mention because Article Seventeen makes it explicit: an obstacle to prosecution must result from the collapse or unavailability of the judicial system.[203] In other words, the collapse or unavailability must be relevant to the specific problems in prosecuting the case.[204] For example, if a state has failed to obtain custody of the accused, a collapse of the police force in one region

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[197] Julio Bacio Terracino, *National Implemention of ICC Crimes*, 5 J. Int'l Crim. Just. 421, 435 (2007).
[198] *Informal Expert Paper* annex 4, *supra* note 2.
[199] *See supra* Part V.A.3.
[200] *Informal Expert Paper* annex 4, *supra* note 2.
[201] *Id.*
[202] JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 155, (Oxford University Press 2008).
[203] *See Rome Statute* art. 17(3), *supra* note 1
[204] Julio Bacio Terracino, *National Implemention of ICC Crimes*, 5 J. Int'l Crim. Just. 421, 436 (2007).

far from the activity would not render a nation unable to prosecute. Even though the ICC would have correctly identified both an obstacle and a collapse, this last requirement would not be met.

## V. AMNESTIES & ALTERNATIVE JUSTICE

The prospect of amnesties, whether unconditional or granted in exchange in nonprosecutorial proceedings such as truth commissions, raises a couple of difficult questions about complementarity. First, should either type theoretically qualify as a proceeding under the meaning of Article Seventeen to block admissibility before the ICC? Second, regardless of the answer to the first question, should the ICC recognize either type as blocking admissibility? The Rome Statute does not directly address amnesty within its text, so one has to look to the provisions on admissibility and prosecutorial discretion to search for an answer.[205] Since one is essentially attempting to balance the interests of peace with the interests of justice, there is no easy solution to this problem.

Until this point, this Article has silently assumed that the domestic proceedings which could render a case inadmissible before the ICC have been typical criminal prosecutions which potentially carry severe penalties upon a guilty verdict. Amnesties and alternative forms of justice upset this assumption, however, and force a consideration of the meaning of proceeding under Article Seventeen. If the idea of justice is limited to criminal justice, then alternative forms of justice would not block admissibility under the complementarity principle,[206] though other principles may prevent the ICC from taking on such cases.

It seems that unconditional amnesties—granted without any sort of individualized inquiry—do not qualify as proceedings or investigations under Article Seventeen.[207] The only

[205] Gwen K. Young, *Amnesty and Accountability*, 35 U.C. Davis L. Rev. 427, 459 (2002).
[206] Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. Int'l Crim. Just. 695, 716 (2005).
[207] *Id.* at 709-10.

counterargument is that the executive or legislative grant of amnesty itself served as the proceeding, but this seems to stretch the meaning of the word too far and would render the tests of unwillingness or inability meaningless, since it makes little sense, for example, to discuss the impartiality or independence of an amnesty decree. Alternative forms of justice, such as truth commissions and reconciliation ceremonies, however, differ from unconditional amnesties in that they at least attempt to establish the facts of and responsibility for the crimes,[208] but they differ from criminal prosecutions in that they do not impose serious penalties upon the confessed perpetrators. Although Article Seventeen does not specify that proceedings and investigations be criminal in nature, the very purpose for the existence of the court to end impunity[209] suggests it should rely on the potential for severe criminal penalties to determine whether domestic proceedings have precluded admissibility. This conclusion would also be consistent with the position of the United Nations that amnesty should not be available in cases of international crimes and violations of international humanitarian law,[210] a position which has gained increasing support in legal commentary.[211]

The OTP has stated that one should primarily analyze amnesties with respect to the prosecutorial discretion under Article Fifty-Three to refrain from bringing a case whenever it would be "in the interests of justice," even though it acknowledges that amnesties also bear on the issue of complementarity.[212] This broad discretion gives him or her the power to defer to alternative justice mechanisms,[213] a judgment which he or she only need make if jurisdiction and

[208] *Id.* at 711.
[209] *Rome Statute* pmbl., *supra* note 1.
[210] UN Doc. S/2000/915 ¶ 22.
[211] Stahn, *supra* note 206, at 701.
[212] *Informal Expert Paper* ¶ 71, *supra* note 2.
[213] Thomas Hethe Clark, *The Prosecutor of the International Criminal Court, Amnesties, and "the Interests of Justice": Striking a Delicate Balance*, 4 Wash. U. Global Stud. L. Rev. 389, 391 (2005).

admissibility are already established.[214] Indeed, the OTP has stated that "it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice."[215]

This stance toward can provide the court the necessary flexibility to respond to the thorny problem of ending impunity while not disrupting the peace. The ICC should refuse to recognize that any proceeding except a criminal proceeding with severe penalties can raise the issue of complementarity and potentially limit admissibility, and it should instead consider effectively recognizing alternative modes of justice by allowing the prosecutor to invoke his discretion to refrain from bringing cases in the interests of justice under Article Fifty-Three. What standards the OTP should employ in making this decision is a question beyond the scope of this Article on complementarity. While this conclusion that only criminal prosecutions can limit admissibility under Article Seventeen may kick the issue down the road a bit, it offers the ICC greater freedom to consider alternative modes justice, especially since the decision not to bring a case in the interests of justice can be revisited if new facts emerge,[216] and it also offers sovereign nations more freedom to tailor their justice mechanisms to their particular needs instead of forcing them to make sure whatever they use fits a narrow definition of proceeding or investigation.

## VII. CONCLUSION

After almost nine years of operation, the ICC has yet to make an evaluation of unwillingness or inability in determining the admissibility of a situation or case. Since this issue has not yet arisen in an actual case, the academic and policy discussion has remained relatively

[214] ICC, Office of the Prosecutor, POLICY PAPER ON THE INTERESTS OF JUSTICE, ¶ 3, Sep. 2007, *available at* http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf (last accessed Feb. 19, 2011).
[215] *Id.* ¶ 6(a).
[216] *Id.* ¶ 6(b).

minimal.[217] That it will arise at some point, however, seems inevitable. The types of crimes which the ICC can punish—crime of genocide, crimes against humanity, war crimes, and the crime of aggression[218]—are inherently political, destructive, and destabilizing, so they are more likely to happen in nations with highly flawed or broken judicial systems. When it does arise, the court will need to rely on academic discussions of the factors to give its members more concrete guidance, and thus the delay in facing the question so far will prove a benefit.

Although the ICC is limited to the factors in Article Seventeen when determining unwillingness and inability, the court should not bind itself to any particular elements or tests in applying those factors. All of the proposed principles from academics, whether independent of or in association with the court itself, should remain suggestions which the court can apply without formally adopting. In other words, it is advisable that the ICC not accept any factors as official other than those which the Rome Statute explicitly outlines. The reason is that the court needs to maintain a good degree of flexibility in the face of a dynamic world. There can be no exhaustive list of factors for the court to consider. Events can unfold which the court must be able to take into account even when they do not fit neatly into one of the previous categories. Corrupt leaders have imaginations, and they will attempt to find ways to protect their minions if the court becomes rigid in its analysis.[219] Whatever course it follows, the ICC should bear in mind, at all stages of its operation, its mission to end impunity for the perpetrators of the worst international crimes.

[217] Lars Waldorf, *"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 Fordham Int'l L.J. 1221, 1264 (2010).
[218] *Rome Statute* art. 5(1), *supra* note 1.
[219] *Informal Expert Paper* ¶ 44, *supra* note 2.

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