

Is Complementarity the Right Approach for the International Criminal Court's Crime of Aggression?

Considering the Problem of “Overzealous” National Court Prosecutions

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At the first Review Conference on the Rome Statute of the International Criminal Court (ICC), the Assembly of States Parties to the ICC adopted an amendment defining the crime of aggression and conditions for the ICC's exercise of jurisdiction over the crime. Because the definition will be incorporated into the existing framework of the Rome Statute, the crime will be subject to the “complementarity” provision contained therein. That provision specifies that a case is “inadmissible” before the ICC if there are national investigations and/or prosecutions, unless the state demonstrates an unwillingness or inability to investigate or prosecute the case. By contrast, the relationship between national courts, for example, and the two *ad hoc* tribunals is one of “primacy.” There were good reasons for creating the “primacy” regime in the context of the *ad hoc* tribunals, and good reasons for creating the “complementarity” regime in the context of the ICC, at least as to the three crimes the ICC may currently adjudicate (genocide, war crimes and crimes against humanity). As to the crime of aggression, however, one may well question whether “complementarity” is always the right approach, in part, because it fails to address national court prosecutions that lack due process out of an overzealousness to prosecute—something that can be anticipated to be particularly problematic vis-à-vis the crime of aggression. This Article explores this problem and proposes various solutions.

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Introduction

At the first Review Conference on the Rome Statute¹ of the International Criminal Court (ICC), the Assembly of States Parties (ASP)² to the

1. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. The ASP is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of states that have ratified or acceded to the Rome Statute. *Assembly of States Parties*, ICC, <http://www.icc-cpi.int/Menu/ASP/Assembly/> (last visited Sept. 26, 2012).

ICC adopted an amendment defining the crime of aggression and conditions for the ICC's exercise of jurisdiction over it.³ Because the definition will be incorporated into the existing framework of the Rome Statute, the crime will be subject to the "complementarity" provision contained therein.⁴ That provision specifies that a case becomes "inadmissible" before the ICC if there are national investigations and/or prosecutions, unless there is unwillingness or inability to investigate or prosecute.⁵ In other words, national courts have the "first bite at the apple" and can trump ICC prosecutions of crimes falling within their jurisdiction (with certain exceptions). By contrast, the relationship between national courts and the two *ad hoc* tribunals—the International Criminal Tribunal for Rwanda (ICTR)⁶ and the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁷—is one of "primacy." The ICTY and ICTR have the first option to prosecute, thereby trumping national court proceedings. There were good reasons for creating the "primacy" regime in the context of the ICTY and ICTR, as well as good reasons for creating the "complementarity" regime in the context of the ICC—at least as to the three crimes that the ICC may currently adjudicate (genocide, war crimes and crimes against humanity).⁸

Whereas agreement on the definition of the crime of aggression and conditions for the ICC's exercise of jurisdiction over the crime was reached after more than ten years of extensive negotiations,⁹ there was not significant debate as to whether the crime should be subject to a primacy or complementarity regime.¹⁰ Rather, the general approach during the aggression negotiations was to disturb the integrity of the Rome Statute as little as possible when incorporating the crime into it.¹¹ Thus, beyond adding articles on the definition of and conditions for the ICC's exercise of

3. Assemb. of States Parties Res. RC/Res.6 (June 11, 2010), www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

4. See Rome Statute, *supra* note 1, art. 17.

5. *Id.*

6. The ICTR was created on November 8, 1994, by Security Council Resolution 955. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994), *reprinted in* 33 I.L.M. 1598 (1994).

7. The ICTY was created on May 25, 1993, by Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993), *reprinted in* 32 I.L.M. 1203 (1993).

8. See Rome Statute, *supra* note 1, arts. 6-8.

9. The negotiations first commenced prior to the finalization of the Rome Statute. They then continued before the Preparatory Commission, the Special Working Group on the Crime of Aggression, the final ASP sessions prior to the Review Conference, and concluded at the Review Conference. The elements of the crime of aggression were also finalized at the Review Conference. See RC/Res.6, *supra* note 3, Annex II.

10. See *infra* note 93 (discussing the debate that occurred).

11. The crime of aggression was already partly incorporated into the Rome Statute—it has sometimes been described as "half in and half out"—because the Rome Statute already provided that the ICC has jurisdiction over the crime of aggression. See Rome Statute, *supra* note 1, arts. 5, 12. Yet, an amendment was needed to add the definition of the crime and set forth the conditions for the ICC's exercise of jurisdiction over it. See Rome Statute, *supra* note 1, arts. 5(2), 121.

jurisdiction over the crime,¹² only minimal additional changes were made to the Rome Statute.¹³ As a result, the existing Rome Statute's complementarity regime remains intact and will apply to the crime of aggression. There are, however good reasons to question whether complementarity is the right approach vis-à-vis the crime of aggression.

This Article argues that there, in fact, do appear to be distinctions between the crime of aggression and the other three ICC crimes, which suggests that the complementarity approach to the relationship between the ICC and national courts may not be warranted for this crime. In Part I.A, this Article explores the reasons behind the creation of the primacy regime to govern the relationship between the *ad hoc* tribunals and domestic prosecutions in the former Yugoslavia and Rwanda, respectively. Part I.B examines the reasons behind the creation of the complementarity regime that governs the relationship between the ICC and domestic prosecutions. Part II discusses whether the crime of aggression should be subject to the current complementarity regime. In particular, it examines whether the existing criteria covered by complementarity (pre-empting national court prosecutions only if national courts are "unwilling" or "unable" to investigate or prosecute) sufficiently cover concerns one might anticipate occurring in domestic crime of aggression prosecutions. The Article concludes that the current criteria are inadequate to address at least one specific concern: they fail to pre-empt situations in which a national court is "all too willing" to prosecute—where, out of overzealousness, a defendant's fair trial rights are violated. Yet, one can clearly anticipate just such a scenario arising, for example, if an aggressor state's political or military leader is captured in the victim state. Part III considers possible alternative solutions. Specifically, Part III.A explores whether there are ways to interpret the current complementarity provision broadly enough to cover the problem of "all too willing" domestic court prosecutions that fail to adhere to due process. Part III.B reflects on whether the Rome Statute should be amended to subject the crime of aggression to a primacy regime. Finally, Part III.C explores whether the complementarity provision could be amended to expressly cover the problem of "all too willing" domestic court prosecutions. Although the results of the Review Conference negotiations are final,¹⁴ and there is no reason to revisit the outcome, States Par-

12. The definition is contained in a new Article, 8*bis*. The conditions for the ICC's exercise of jurisdiction are contained in new Articles 15*bis* and 15*ter*. See Rome Statute, *supra* note 1, arts. 8*bis*, 15*bis*, 15*ter*.

For the crime of aggression to be activated, there needs to be ratification or acceptance of the aggression amendment by thirty States Parties, the passage of one year after the 30th ratification, and an activation vote after January 1, 2017 "by the same majority of States Parties as is required for the adoption of an amendment to the Statute," which is two-thirds of States Parties or consensus. *Id.* arts. 15*bis*(2)-(3), 15*ter*(2)-(3).

13. Beyond the new Articles 8*bis*, 15*bis* and 15*ter*, the only additional changes made to the Rome Statute are minor amendments to Articles 9(1), 20(3), and 25(3). See RC/Res.6, *supra* note 3, Annex I, paras. 5-7.

14. The Review Conference concluded with consensus agreement by States Parties to the Rome Statute on the definition of the crime of aggression, conditions for the ICC's

ties may want to consider these approaches in future years.¹⁵

I. The Rationale Behind the Primacy & Complementarity Regimes

The ICC on the one hand, and the ICTY and ICTR on the other (along with the Special Court for Sierra Leone and the Special Tribunal for Lebanon),¹⁶ take fundamentally different approaches to the relationships between their tribunals and national court prosecutions. There were sound reasons for each approach given the different contexts in which the tribunals were created, the different methods by which they were created, and the different purposes they serve.

A. Why a "Primacy" Relationship Was Created for the ICTY and ICTR

The ICTY Statute¹⁷ creates a primacy relationship whereby ICTY prosecutions may trump national court prosecutions. Specifically, Article 9 of the ICTY Statute states the following:

Concurrent jurisdiction

1. *The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.*
2. *The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal*¹⁸

The Security Council was able to adopt this approach because its power is derived from Chapter VII of the UN Charter, under which the Security Council has pre-eminent authority to take measures to restore "international peace and security."¹⁹ The Security Council created the

exercise of jurisdiction over it, and the elements of the crime. See RC/Res.6, *supra* note 3, Annex I, paras. 2-4.

15. The Kampala amendment states that there will be a future Review Conference seven years after the commencement of the ICC's exercise of jurisdiction over the crime. See Res. RC/Res.6, *supra* note 3, para. 4.

16. The Special Court for Sierra Leone and Special Tribunal for Lebanon also utilize primacy approaches. See Statute of the Special Court for Sierra Leone, art. 8, Jan. 16, 2002, 2178 U.N.T.S. 145; Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 4, U.N. Doc. S/RES/1757 (May 30, 2007).

17. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993), 32 I.L.M. 1159 (1993) [hereinafter ICTY Statute]; see also U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (May 3, 1993).

18. ICTY Statute, *supra* note 17, art. 9 (emphasis added); see also Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 8, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter ICTR Statute] (containing a parallel provision).

19. U.N. Charter ch. VII; HÉCTOR OLÁSULO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* 278 n.136 (2005) (quoting Prosecutor v. Kanyabashi, Case No. ICTR-96-15-1, Decision (Trial Chamber) on the Defense Motion on Jurisdiction,

ICTY by Security Council resolution due to a concern that the various constituent parts of the former Yugoslavia would not have agreed to the formation of the tribunal through a multilateral treaty, as well as concerns about the time it would have taken to negotiate such a treaty.²⁰

This primacy regime creates “a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an ‘inherent supremacy’ for the international tribunal.”²¹ The Statute clearly indicates a desire to still have national prosecutions—the ICTY certainly would not possess the capacity to try all of the perpetrators of crimes committed in the former Yugoslavia—but the ICTY would retain “primacy.”²² Primacy ensured that the ICTY would have “unbounded legal discretion to order the national courts to defer to the international tribunal ‘at any stage of the proceeding.’”²³ The framers of the ICTY Statute took “the ‘extraordinary and unprecedented’ step of making concurrent jurisdiction subject to the primacy of the Tribunal because of doubts about the effectiveness and impartiality of national

¶ 32 (June 18, 1997) (“The primacy thereby entrenched for the Tribunal . . . is exclusively derived from the fact that the Tribunal is established under Chapter VII of the UN Charter, which in turn enables the Tribunal to issue directly binding international legal orders and requests to States, irrespective of their consent.”). The ICTY Appeals Chamber upheld the implementation of ICTY primacy in the *Tadic* case. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 58, 62 (Oct. 2, 1995).

20. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *YALE J. INT’L L.* 383, 387 (1998) (“Creating the ICTY and the ICTR in this way was a shortcut that avoided the need for the negotiation and ratification of a treaty.”).

21. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *MIL. L. REV.* 20, 42 (2001).

22. “One reason for granting the international tribunals such broad primacy over national courts is to prevent multiple courts from simultaneously exercising jurisdiction over an accused.” Brown, *supra* note 20, at 398 (“[A]llowing concurrent jurisdiction without granting primacy to the Tribunal would, in effect, permit the accused [to forum shop].”).

23. See Newton, *supra* note 21, at 42. Specifically, the Report of the Secretary-General issued when the Security Council adopted the ICTY Statute explains the primacy relationship between the ICTY and national courts as follows:

64. In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed *national courts should be encouraged to exercise their jurisdiction* in accordance with their relevant national laws and procedures.

65. *It follows therefore that there is concurrent jurisdiction* of the International Tribunal and national courts. *This concurrent jurisdiction, however, should be subject to the primacy of the International Tribunal.* At any stage of the procedure, the International Tribunal may formally request the national courts to defer to the competence of the International Tribunal.

U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶¶ 64–65, U.N. Doc. S/25704 (May 3, 1993) (emphasis added).

courts”²⁴

The ICTY’s approach particularly made sense because of the context in which the Tribunal was created—armed conflict in which ethnic groups were pitted against each other, including, Croats, Serbs, and Bosnian Muslims, with Serb and Kosovar Albanian hostilities erupting in 1999.²⁵ Because of these ethnic dimensions, one concern was that national courts might conduct “sham” prosecutions to shield perpetrators from justice.²⁶ The ICTY Appeals Chamber recognized this concern in *Tadić*:

[W]hen an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as ‘ordinary crimes’ or proceedings being ‘designed to shield the accused,’ or cases not being diligently prosecuted.

If not effectively countered by the principle of primacy, any one of those strategems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute²⁷

Indeed, the 1993 ICTY Statute already reflected such concerns, as seen in the Article governing double-jeopardy (*non-bis-in-idem*), which provides that national court prosecutions will not preclude ICTY prosecutions under the following conditions:

- (a) the act for which [the defendant] was tried [before the national court] was characterized as an ordinary crime; or
- (b) the national court proceedings *were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.*²⁸

24. RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* 66 (2004) (citing 1 VIRGINIA MORRIS & MICHAEL SCHARF, *AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* 126 (1996)).

25. For background on the conflict and discussion of the difficulties that the ICTY faced in having suspects apprehended, see GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 206-75 (2002). For a recent book chronicling the creation of the ICTY and ICTR, see generally DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012).

26. “Some scholars argue that the reason for entrusting the ad hoc tribunals with ‘primacy’ was mainly to remedy the apparent lack of will and ability to conduct fair trials before domestic courts, in a sense resolving ‘conflicts with national jurisdictions that might shelter an offender from genuine prosecution.’” Mohamed M. El Zeidy, *From Primacy to Complementarity and Backwards: (Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals*, 57 INT’L & COMP. L.Q. 403, 406 (2008).

27. Prosecutor v. *Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 58, (Oct. 2, 1995) (citations omitted).

28. ICTY Statute, *supra* note 17, art. 10 (emphasis added). Because of the “or” in part (b), this provision does not solely address national court proceedings designed to shield an accused from justice or not being diligently prosecuted, but also those where the prosecution is otherwise not “impartial or independent.” See Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. F. 255, 279 (2006) (concluding that “article 17 actually represents a step *backward*” from the ICTY’s approach, because the ICTY “was concerned that

In fact, when national courts in the former Yugoslavia first started prosecuting early war crimes cases, ethnic bias often tainted the trials.²⁹ By and large, majority ethnicities were more concerned with prosecuting crimes that minority ethnicities perpetrated against the majority, rather than crimes that the majority committed against minority ethnicities.³⁰ Clearly, it would have been problematic for such ethnically tainted trials to have precluded ICTY prosecutions. One can only imagine the domestic prosecution of a figure such as Ratko Mladić in a bid to prevent his trial at the ICTY—for example, a trial based upon improperly framed charges or inadequately presented evidence, resulting in far too lenient a conviction and sentence. The approach of primacy coupled with the double-jeopardy provision ensured that such sham prosecutions would not preclude ICTY prosecutions.

The same “primacy” approach was adopted in the ICTR Statute,³¹ which largely mirrors the ICTY Statute.³² The Statute’s drafters decided that the ICTR—which has now finished most of its prosecutions of key perpetrators of the 1994 genocide³³—could trump national court prosecutions through its primacy approach, but national courts again would have complementary jurisdiction.³⁴ At the ICTR, there was likely less of a concern of Rwandan courts “shielding” persons from justice through prosecutions and more of a concern that the decimated Rwandan judiciary would be “unable” to conduct prosecutions of key genocidaires.³⁵ Fairness in national court proceedings may have been an initial concern as well,³⁶ and it certainly developed into a concern when the ICTR was asked to consider whether to refer cases back to the national judiciary in Rwanda, as it (like

national courts in the region would not be able to satisfy the demands of international due process.”).

29. See Jennifer Trahan & Bogdan Ivanisevic, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro* (2004), available at <http://www.hrw.org/reports/2004/10/13/justice-risk>.

30. *Id.* This problem still continues, but to a far lesser extent. Interviews of court officials and Non-Governmental Organizations in Bosnia and Serbia (June 2011 and June 2012) (on file with author).

31. See ICTR Statute, *supra* note 18, art. 8.

32. Compare ICTY Statute, *supra* note 17, with ICTR Statute, *supra* note 18.

33. The ICTR commenced its “residual mechanism” phase in July 2012. See S.C. Res. 1966, ¶ 1, U.N. SCOR, 65th Year, U.N. Doc. S/RES/1966 (Dec. 22, 2010). There are, however, nine indictees still at large. See *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda (as at 11 May 2012)*, Annex III, U.N. Doc. S/2012/349 (May 22, 2012), available at http://unictr.org/Portals/0/English/FactSheets/Completion_St/S-2012-349.pdf.

34. Articles 8 (concurrent jurisdiction) and 9 (*non-bis-in-idem*) of the ICTR Statute mirror Articles 9 and 10 of the ICTY Statute, creating a “primacy” regime between the ICTR and national court proceedings, but with the caveat that sham domestic proceedings do not prevent ICTR trials. See ICTR Statute, *supra* note 18, arts. 8-9.

35. “Unable” refers to “states that lack[] the basic material resources to conduct an effective prosecution, the examples mentioned most often being Rwanda . . . and Somalia.” Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 202, 208-09 (2011).

36. “The purpose of primacy is to ensure that minimum standards of justice and impartial adjudication will be met in cases of great international concern” Brown, *supra* note 20, at 398.

the ICTY) is permitted to do under Rule 11*bis*.³⁷ Due to earlier fair trial concerns,³⁸ only recently has the ICTR made Rule 11*bis* referrals back to Rwanda.³⁹

B. Why a “Complementarity” Relationship Was Created for the ICC

The ICC Statute, by contrast, creates a complementarity regime,⁴⁰ whereby national court investigations or prosecutions will preclude ICC prosecutions if national authorities are willing and able to investigate and/or prosecute the case.⁴¹ Thus, the ICC will “supplement” domestic investi-

37. See, e.g., Rules of Procedure and Evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rule 11*bis*, U.N. Doc. IT/32/Rev. 46 (Oct. 20, 2011), http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/it032rev46e.pdf (referral of the indictment to another court). “Rule 11 *bis* . . . permits the tribunals to refer back mid- and lower level cases that are already before their jurisdiction to national courts, thereby entrusting them with the primary responsibility to investigate, prosecute and try a referred case.” El Zeidy, *supra* note 26, at 405. The ICTY has been much more willing to utilize Rule 11*bis*, referring several cases to the War Crimes Chamber in Bosnia-Herzegovina. See INT’L FED’N FOR HUMAN RIGHTS, THE ISSUES AT STAKE IN THE CLOSURE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA (ICTY) AND RWANDA (ICTR) 6–7 (2009) (As of 2009, “[t]he ICTY has referred eight cases concerning [thirteen] accused to national jurisdictions, mainly in Bosnia-Herzegovina.”), www.fidh.org/IMG/pdf/NoteTPI521AN_G2009.pdf.

38. Earlier ICTR Rule 11*bis* transfer requests were denied out of concerns that indicted génocidaires would face unfair trials. “The Tribunal concluded, among other things, that defense witnesses might be unavailable, thereby jeopardizing suspects’ fair-trial rights. In one of the cases, the Tribunal concluded that the Rwandan judiciary was not independent of political interference.” See Letter from Kenneth Roth, Exec. Director, Human Rights Watch, to Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda, Regarding the Prosecution of RPF Crimes (May 26, 2009), available at <http://www.hrw.org/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c>. Later Rule 11*bis* transfer requests were denied as well. See *id.* (“All decisions have emphasized the fear that potential witnesses face, ranging from intimidation and accusations of genocide ideology . . . to actual violence and death.”) (calling on ICTR Prosecutor Jallow to have the ICTR prosecute RPF war crimes due to concerns that trials in Rwanda would be a “whitewash and a miscarriage of justice.”).

39. See Press Release, International Criminal Tribunal for Rwanda, ICTR Hands Over Uwinkindi File to Rwanda Government, ICTR/INFO-9-2-699.EN (Jan. 18, 2012), available at <http://www.unictr.org/tabid/155/Default.aspx?id=1249>.

40. “The Statute does not explicitly use or define the term ‘complementarity’ as such; however, the term has been adopted by many negotiators of the Statute, and later on by commentators to refer to the entirety of norms governing the complementary relationship between the ICC and national jurisdictions.” Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. U.N.L. 591, 592 (2003).

41. Article 17(1) of the Rome Statute provides that a case is “inadmissible” in four situations:

- (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 persons concerned, unless the

gations and prosecutions, and only act “when domestic authorities fail to take the necessary steps”⁴² This gives the “first bite at the apple” to national courts.

1. The Purposes “Complementarity” Serves

There are several explanations for why the Rome Statute adopted the complementarity approach. In contrast to the creation of the ICTY and ICTR, which required only that Security Council members endorse the tribunals’ approach to jurisdiction,⁴³ a significant number of the states present at the Rome Conference needed to agree to the ICC approach. Thus, the differences in the creation of the ICTY and ICTR on the one hand, and the ICC on the other, partly explain the divergent approaches.

One main interest complementarity upholds “is the *sovereignty* both of State parties and third states.”⁴⁴ Complementarity thus is “designed to *encourage* states to exercise their jurisdiction” to prosecute ICC crimes.⁴⁵ Further, complementarity “forces the ICC and national legal systems to engage with one another, at the judicial . . . level.”⁴⁶ Indeed, it is unlikely that States would have consented to the creation of an international criminal court “without the principle of complementarity . . . because the intrusion of the court on the exercise of their sovereign prerogatives would have

decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 [*ne bis in idem*];

(d) The case is not of sufficient gravity to justify further action by the Court.

Rome Statute, *supra* note 1, art. 17(1). This Article solely focuses on prongs (a) and (b) above, and, specifically, the proper interpretation of “unwilling or unable genuinely to carry out the investigation or prosecution.”

42. Benzing, *supra* note 40, at 592.

43. The vote to create the ICTY was unanimous. See FAUSTO POCAR, STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1 (2008), http://untreaty.un.org/cod/avl/pdf/ha/icty/icty_e.pdf. Rwanda, however, voted against the creation of the ICTR. *International Criminal Tribunal For Rwanda (ICTR)*, PROJECT ON INT’L CTS. & TRIBUNALS, <http://www.pict-pcti.org/courts/ICTR.html> (last visited Sept. 25, 2012).

44. Benzing, *supra* note 40, at 595; see also Sharon A. Williams & William A. Schabas, *Article 17 Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 605, 606 (Otto Triffterer ed., 2d. ed. 2008) (Article 17 “illustrates clearly that the concerns of States with respect to their sovereign interests in criminal justice was at the forefront of the negotiations from the earliest stages.”).

45. Benzing, *supra* note 40, at 596. In fact “a duty unquestionably exists [to prosecute] with regard to some international crimes” *Id.*; see also Newton, *supra* note 21, at 34 (“With respect to cases of genocide or grave breaches of the 1949 Geneva Conventions, the black letter rules of international law go so far as to require that the perpetrator be prosecuted or extradited to another ‘concerned’ nation.”) (footnotes omitted).

46. Pál Wrangle, *The Crime of Aggression and Complementarity*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 591, 592 (R. Bellelli ed., 2010). “[Former] Prosecutor Luis Moreno Ocampo has even stated that the best outcome of the ICC would be if it had no work at all, due to national jurisdictions doing their job.” *Id.* at 592 n.4.

been too much [to] bear.”⁴⁷

A second interest that complementarity serves “is the *interest of the international community* in the effective prosecution of international crimes, the endeavour to put an end to impunity, and the deterrence of the future commission of such crimes.”⁴⁸ By working to define the interrelationship between the ICC and national courts in prosecuting the world’s gravest crimes, complementarity is clearly trying to ensure that prosecutions do occur, thereby furthering the fight against impunity. The Statute thus attempts to “strike an adequate balance between this interest [in ending impunity] and state sovereignty.”⁴⁹ In other words, complementarity “balances [the ICC’s] supranational power against the sovereign right of states to prosecute their own nationals without external interference.”⁵⁰

A third interest that complementarity serves has to do with capacity limitations. Namely, the ICC simply cannot prosecute all of the gravest instances of genocide, war crimes and crimes against humanity within its jurisdiction, and will therefore need to rely on national courts (and/or hybrid tribunals)⁵¹ to conduct additional prosecutions:

In the fight against impunity, *the ICC will only be able to serve as a court of last resort* where justice cannot be achieved on a national level. Besides, the complementarity principle pays tribute to the realisation that national authorities are closer to evidence and that the crimes under the jurisdiction of the Court are normally best prosecuted in the state where they have been committed.⁵²

Complementarity therefore encourages national courts to conduct such prosecutions, only reserving them for the ICC when national courts are

47. Rod Jensen, Presentation Notes, *Complimenting Complementarity: The Principle of Complementarity in the Rome Statute of the International Criminal Court* 10 (2001), www.isrcl.org/Papers/Jensen.pdf; see also Wrangle, *The Crime of Aggression and Complementarity*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW*, *supra* note 46, at 591 (“[T]here is now broad agreement that the principle [of complementarity] is a useful and even necessary feature of the Statute.”).

48. Benzing, *supra* note 40, at 597 (footnotes omitted).

49. *Id.*

50. Newton, *supra* note 21, at 26–27.

51. Currently, there is much emphasis on the need to strengthen national courts to make complementarity functional. See, e.g., Assemb. of States Parties Res., ¶ 58, ICC-ASP/10/Res.5 (Dec. 21, 2011) (resolving “to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of *national jurisdictions* to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity” (emphasis added)).

This author finds that much of the dialogue on complementarity ignores the extreme difficulty of having weakened national courts prosecute the gravest crimes, often involving vast crime scenes, high-level perpetrators, and complex crimes, and therefore overlooks the possibility that additional hybrid and/or even *ad hoc* tribunals should be utilized to complement national court prosecutions for large-scale atrocity crimes. See, e.g., Jennifer Trahan, *A Critical Guide To the Iraqi High Tribunal’s Anfal Judgment: Genocide Against the Kurds*, 30 MICH. J. INT’L L. 305 (2009) (chronicling the difficulties the Iraqi High Tribunal faced in trying to adjudicate genocide, war crimes and crimes against humanity; despite ample support from the U.S. Regime Crimes Liaison Office, the tribunal failed to adhere to international fair trial standards).

52. Benzing, *supra* note 40, at 599–600 (emphasis added).

unwilling or unable to investigate and/or prosecute.⁵³

Thus, complementarity is “primarily designed to strike a delicate balance between state sovereignty to exercise jurisdiction and the realization that, for the effective prevention of [grave international] crimes and impunity, the international community has to step in to ensure these objectives”⁵⁴

2. Operation of Article 17: The Meaning of “Unwilling” and “Unable”

The complementarity provision in Article 17 of the Rome Statute establishes that national investigations and/or prosecutions will render a case “inadmissible” before the ICC if the case is being or has been investigated or prosecuted by a national court, unless the state is “unwilling” or “unable genuinely to carry out the investigation or prosecution.”⁵⁵ Put another way, national court prosecutions pre-empt the ICC if the national court is willing and able to investigate and/or prosecute. The Statute provides the following definition of “unwillingness”:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of *shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) *The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person con-*

53. Markus Benzing also considers, but ultimately rejects, two other possible rationales for complementarity. The first is that there is also a need for “the *protection of human rights of the accused* in the national enforcement of international criminal justice” *Id.* at 597. Specifically, this raises “the question whether the Court could theoretically step in and declare a case admissible if a state fervently and overzealously prosecutes war criminals with blatant disregard for the fair trial rights of the accused.” *Id.* The ICC would then be protecting the accused from “victor’s justice, granting the Court the right to reconsider the case.” *Id.* Benzing, however, rejects this line of reasoning: “The ICC was not created as a human rights court . . . [but] to address situations where a miscarriage of justice and a breach of human rights standards works *in favour* of the accused” *Id.* at 598. This topic is further explored *infra* Part I.B.3. The other possible rationale behind complementarity, Benzing posits, is as follows:

[A] *right of the accused to be prosecuted by domestic authorities and tried before a domestic court*, unless those authorities or courts are unable or unwilling to do so. The fact that not only a state, but also the accused or suspect may challenge the admissibility of a case under article 19(2)(a) and its prominent place (before a challenge brought by states in sub-para (b) and (c)) may support this conclusion.

Id. Benzing, however, also ultimately rejects this rationale. See *id.* at 599.

54. *Id.* at 600.

55. See Rome Statute, *supra* note 1, art. 17(1)(a).

cerned to justice.⁵⁶

Thus, “unwillingness” covers three situations: (1) national court prosecutions are “shielding the person” from justice; (2) there is “unjustified delay”; or (3) proceedings lack independence or impartiality, “inconsistent with an intent to bring the person concerned to justice.”⁵⁷ “[T]he drafters of Article 17(2)(a) included the ‘unwillingness’ criterion primarily ‘to preclude the possibility of sham trials aimed at shielding perpetrators’ from being convicted at all.”⁵⁸

The Statute additionally provides the following definition of “inability”:

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁵⁹

Thus, “inability” applies when national courts lack the capacity to carry out prosecutions, and is evaluated using three factors: (1) whether there has been a “total or substantial collapse or unavailability” of national courts; (2) whether the state is “unable to obtain the accused or necessary evidence and testimony,” and (3) whether national courts are “otherwise unable to carry out proceedings.”⁶⁰ The inability exception allows the ICC to deal with cases “in states that lack[] the basic material resources to conduct an effective prosecution, the examples mentioned most often being Rwanda . . . and Somalia.”⁶¹

Thus, the ordinary meaning of the text of Article 17 suggests that the complementarity provision was designed to address two scenarios: (1) sham trials⁶² in which national courts are “unwilling” to diligently prose-

56. *Id.* art. 17(2) (emphasis added).

57. *Id.*

58. Heller, *A Sentence-Based Theory of Complementarity*, *supra* note 35, at 208 (quoting John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 41, 50 (Roy S. Lee ed., 1999)).

59. Rome Statute, *supra* note 1, art. 17(3) (emphasis added).

60. *Id.*

61. See Heller, *A Sentence-Based Theory of Complementarity*, *supra* note 35, at 208–09 (footnote omitted).

62. The Rome Statute, like the ICTY and ICTR Statutes, also reflects a concern with sham national prosecutions in its double-jeopardy provision. Specifically, Article 20(3) (*ne bis in idem*) provides:

3. No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

cute—a problem foreseen when the ICTY was created;⁶³ and (2) national courts that are “unable” to act, because, for example, the judiciary has been devastated—a problem that existed when the ICTR was created.⁶⁴

The drafting history of Article 17 indeed confirms that these were the paramount concerns in the minds of delegations leading up to the Rome Conference.⁶⁵ Delegations wanted Article 17 to cover, (1) “the possibility of sham trials aimed at shielding perpetrators” (which was “the main purpose of adding a provision on ‘unwillingness’”),⁶⁶ and (2) “the total or partial collapse of a State’s national judicial system” (which was the purpose of adding the provision on “inability”).⁶⁷ Originally, in the negotiations, some states took the view that “the Court should *only* assume jurisdiction where the national judicial system was *unable* to investigate or prosecute transgressors.”⁶⁸ These states were concerned that any other approach would give the ICC too much review power over national court proceedings; indeed, “[m]any delegations were sensitive to the potential for the Court to function as a kind of court of appeal”⁶⁹ Others states, also concerned with sham prosecutions, “argued that the Court should intervene where the proceedings under a national jurisdiction were ineffective and where a national judicial system was unavailable.”⁷⁰ These states ultimately prevailed—there would be some review of national court proceedings—because of the concern that national courts would manipulate trials

Rome Statute, *supra* note 1, art. 20(3) (emphasis added). Thus, as in the ICTR and ICTY Statutes, under the Rome Statute such improper proceedings will not trigger double-jeopardy that would preclude subsequent ICC prosecutions.

63. See *supra* Part I.A.

64. See *id.*

65. This account of the Preparatory Committee’s work leading up to the Rome Conference and negotiations at Rome is taken from John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 41, 50 (Roy S. Lee ed., 1999). Holmes was the acting head of the Canadian delegation and was asked to coordinate the informal consultations on complementarity. *Id.* at 45. For further discussion of the drafting history of Article 17, see Williams & Schabas, *Article 17 Issues of Admissibility*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 44, at 605-13.

Under the Vienna Convention on the Law of Treaties, there is no need to refer to preparatory work if the treaty’s text is unambiguous and reasonable, although recourse may be had to supplementary means of interpretation, “including the preparatory work of the treaty . . . in order to confirm the [ordinary] meaning resulting from the application of article 31” See Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Here, the preparatory work confirms the ordinary meaning of Article 17’s text—that procedural due process alone was not included.

66. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE*, *supra* note 65, at 50. The preamble of the ILC’s draft statute stated that “the Court was ‘intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.’” *Id.* at 43-44 (citing pmb., ILC Draft Statute). Again, the words “unavailable” and “ineffective” make clear that the two main concerns were about collapsed (“unavailable”) legal systems and sham (“ineffective”) proceedings.

67. *Id.* at 48.

68. *Id.* at 42 (emphasis added).

69. *Id.* at 49.

70. *Id.* at 42.

“to ensure that the accused are *not* found guilty”⁷¹ Thus, while concerns about due process surfaced in the negotiations, they were fairly consistently⁷² linked to trying to ensure that there would not be “sham” national court prosecutions. At the Rome Conference, although other concerns emerged,⁷³ the basic approach to complementarity, already worked out in prior negotiations, was not altered.⁷⁴

3. *Whether Article 17 Addresses “All Too Willing”*

An interesting question arises as to whether Article 17 would also cover a situation where national courts, put colloquially, are “all too willing” to prosecute—that is, the national courts are failing to adhere to fair trial protections out of an “overzealousness” to prosecute. This might be thought of as a “victor’s justice” problem.⁷⁵ The question is, would Article 17 cover an overzealous national trial that lacks due process such that the case would remain admissible before the ICC?⁷⁶ Put another way, “is a case admissible under article 17 if the Court determines that the State asserting jurisdiction over it will not provide the defendant with due process?”⁷⁷ In this scenario, the proceedings are not being conducted “independently or impartially,” but it is not because they are “sham” proceedings in which the court is unwilling to investigate and/or prosecute. Rather they are the opposite—the court is “all too willing” to investigate and prosecute.

It is worth noting that this is not a purely theoretical question. The recent apprehensions of Saif Al-Islam Gaddafi and Abdullah Al-Senussi,⁷⁸

71. *Id.* at 51 (emphasis added).

72. One proposal would have covered “national proceedings not being conducted independently and impartially so as to give full respect for the rights of the accused.” *Id.* at 49 (emphasis added). The suggested language did not make its way into the Rome Statute, and, other than that proposal, there seems to have been little concern about the fair trial rights of the accused in national proceedings.

73. Three specific issues emerged: (1) concerns about using the term “unwillingness” without “objective criteria” by which the ICC would make its determination; (2) concerns about the phrase “undue delay”; and (3) concerns about the phrase “partial collapse of the national legal system.” *See id.* at 53. These were ultimately resolved by (1) adding the chapeau “having regard to the principles of due process recognized by international law” to provide guidance for determining “unwillingness”; (2) changing “undue delay” to “unjustified delay,” and (3) changing “partial” collapse to “substantial” collapse of the national legal system. *Id.* at 54–55 (footnotes omitted).

74. *See id.* at 51–56 (discussing the negotiations at the Rome Conference).

75. Benzing, *supra* note 40, at 597.

76. Markus Benzing and Kevin John Heller have both raised this question. *See* Benzing, *supra* note 40, at 597 (Article 17 of the Statute begs “the question whether the Court could theoretically step in and declare a case admissible if a state fervently and overzealously prosecutes war criminals with blatant disregard for the fair trial rights of the accused.”); Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 255–57.

77. Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 257.

78. The ICC warrants allege that Saif Al-Islam Gaddafi exercised control over crucial parts of the Libyan state apparatus, including finances and logistics, and had the powers of a *de facto* Prime Minister, while Abdullah Al-Senussi served as a Colonel in the Libyan Armed Forces and head of Military Intelligence. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Warrant of Arrest (June 27, 2011).

and the Libyan authorities' statements that these individuals should be prosecuted domestically⁷⁹ despite the existence of ICC arrest warrants against them,⁸⁰ could implicate this question. The Libyan government has already filed an admissibility challenge with the ICC.⁸¹ Thus the trial chamber judges⁸² should determine whether the case is admissible or inadmissible before the ICC—assuming the national authorities actually investigate and/or prosecute, not merely promise to do so⁸³—and how potentially overzealous national court prosecutions could impact that determination.

While various scholars argue to the contrary,⁸⁴ there is reason to believe that Article 17 does *not* cover the situation of overzealous national court prosecutions (that is, such a case is “inadmissible” before the ICC and would be prosecuted before the national court).⁸⁵ As noted above,

79. See *Libya Vows to Try Gadhafi Son, Ex-Intelligence Chief at Home*, VOICE OF AM. (Nov. 19, 2011), <http://www.voanews.com/english/news/africa/Libyan-Forces-Surround-Former-Intel-Chief-134205848.html>; Liam Stack, *Qaddafi Son Being Held by Rebels, Rights Group Says*, N.Y. TIMES (Dec. 21, 2011) (“The international [criminal] court issued a warrant for his arrest in June, but the Libyan authorities are insisting that he be tried on Libyan soil.”) <http://www.nytimes.com/2011/12/21/world/africa/qaddafi-son-seif-al-islam-is-alive-and-held-by-rebels-rights-group-says.html>.

80. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Warrant of Arrest (June 27, 2011).

81. On May 1, 2012, the government of Libya filed an Article 19 application requesting, *inter alia*, the ICC to declare the case inadmissible. See Prosecutor v. Saif Al-Islam & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, *Decision on the Conduct of the Proceedings Following the “Application on Behalf of the Government of Libya Pursuant to Article 19 of the Statute”* (May 4, 2012).

82. After confirmation of the indictment, such issues would go to the Trial Chamber, not the Pre-Trial Chamber. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 65, at 64.

83. “According to Article 17, a state can challenge the admissibility of a case only if it is ‘being investigated or prosecuted’ at the time of the challenge—the ‘activity’ requirement.” Heller, *A Sentence-Based Theory of Complementarity*, *supra* note 35, at 210 (footnotes omitted); see also Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 182 (Mar. 31, 2010) (in addressing an Article 17 admissibility challenge, “the Chamber is required to review whether the information provided by the Prosecutor reveals that the Republic of Kenya or any third State is conducting or has conducted national proceedings in relation to these elements which are likely to constitute the Court’s future case(s).” (emphasis added)).

84. See, e.g., Benzing, *supra* note 40, at 606-07 (citing Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT’L L.J. 1, 26 (2002); Immi Tallgren & Astrid Reisinger Coracini, *Article 20 Ne bis in idem*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE, 669 (Otto Triffler ed., 2008)); see also Newton, *supra* note 21, at 54 (the standards of “genuinely unwilling” or “genuinely unable” allow the ICC “to review, and potentially reverse, the disposition of the case following prior judicial or investigative action in the domestic system.”); Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 255-59 (arguing that “the prevailing scholarly consensus is that the problem [that complementarity does not address ‘all too willing’ trials] doesn’t exist” and citing Mark S. Ellis, Darryl Robinson, Albin Eser, Jann K. Kleffner, and Carsten Stahn as authors who conclude that there is no problem).

85. Kevin Jon Heller and Markus Benzing also reach this conclusion. See, e.g., Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 257 (“Properly understood, article 17 permits the Court to find a State ‘unwilling or unable’ only if its legal proceed-

“unwillingness” in Article 17—analyzing the ordinary meaning of the text of the Rome Statute⁸⁶—covers three situations: (1) national court prosecutions that are “shielding the person” from justice; (2) there is “unjustified delay”; or (3) the proceedings lack independence or impartiality, “inconsistent with an intent to bring the person concerned to justice.”⁸⁷ With “overzealous” prosecutions, clearly one would not have the first two problems. National court proceedings would do the opposite of “shielding the person” from justice and there would not be “unjustified delay,” although there might be unjustified haste. Overzealous prosecution would meet the third situation, “proceedings that lack independence or impartiality,” but, in Article 17, that criterion modifies the word “unwillingness.”⁸⁸ It is hard to argue that “all too willing” national court prosecutions fall within the term “unwillingness.” Put another way, Article 17(2) applies only “to the admissibility of a case where these [criteria] worked in favour of the accused.”⁸⁹

Similarly, overzealous national prosecutions would not meet any of the criteria for “inability.” There would not be a “total or substantial collapse or unavailability” of the national courts. The state would not be unable to obtain the accused or necessary evidence or testimony; rather, the state would have custody of the accused and be quite willing to gather necessary evidence and testimony. Further, national courts would not be

ings are designed to make the defendant *more difficult* to convict. If its legal proceedings are designed to make the defendant *easier* to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.” (emphasis added)). Heller refers to this problem as the “‘shadow side’ of complementarity” and a “double-edged sword.” *Id.* at 255–56.

86. The ordinary meaning of a treaty’s text is the starting point for analyzing its interpretation. See Vienna Convention, *supra* note 65, art. 31(1). For an extremely thorough analysis of the text of Article 17 that reaches the conclusion that a “due process” requirement for national trials cannot be read into the ordinary meaning of Article 17’s text, see Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 260–65.

87. See *supra* Part I.B.2.

88. Another problem with reading the phrase “proceedings” that lack “independen[ce] or impartial[ity]” as requiring domestic due process is that the phrase is connected with an “and” to the phrase “are being conducted in a manner which, in the circumstances, is *inconsistent* with an intent to bring the person concerned to justice.” Rome Statute, *supra* note 1, art. 17(2)(c) (emphasis added); see Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 260–62 (arguing that the presence of the “and” means one cannot read “independen[ce] or impartial[ity]” alone and therefore cannot read in a due process requirement).

89. Benzing, *supra* note 40, at 612; see also Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 257 (“Properly understood, article 17 permits the Court to find a State ‘unwilling or unable’ only if its legal proceedings are designed to make a defendant more difficult to convict. If its legal proceedings are designed to make the defendant easier to convict, the provision requires the Court to defer to the State no matter how unfair those proceedings may be.”). The draft International Law Commission commentary explained that the words “impartial or independent proceedings” mean that “the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a ‘sham’ proceeding, possibly even designed to shield the person from being tried by the Court.” Benzing, *supra* note 40, at 612 n.98 (quoting Rep. of the Int’l Law Comm’n, 46th Sess., May 2–July 22, 1994, U.N. Doc. A/49/10, GAOR 48th Sess., Supp. No. 10 (1994)).

“unable to carry out proceedings”; indeed, they would be able to carry them out, just not with the required due process. Thus, the most obvious reading of the Statute is that “inability” is not met by “overzealous” national prosecutions that lack due process.

Therefore, there is at least some reason to believe that Article 17 would not cover overzealous national court prosecutions. Article 17 clearly is intended to end impunity by encouraging either domestic or ICC prosecutions of the worst crimes and to strike the right balance between the two fora, but not for the ICC to act as a “supra-national” appeals court by monitoring domestic court prosecutions of genocide, war crimes and crimes against humanity cases to ensure that defendants’ fair trial rights are observed.⁹⁰

If the analysis that ICC prosecutions under the complementarity provision would not pre-empt “all too willing” national court prosecutions is correct, the following question arises: What are the implications vis-à-vis the crime of aggression? In other words, is the complementarity regime the right regime for the crime of aggression?

II. Whether the Crime of Aggression Should be Subject to a Complementarity or Primacy Regime

During negotiations before the Special Working Group on the Crime of Aggression (Working Group), questions periodically arose as to whether the crime was like the crimes of genocide, war crimes and crimes against humanity, or whether it had distinguishing features that warranted divergent treatment.⁹¹ Ultimately, the Working Group’s approach was to treat the crime of aggression like the other crimes, and alter the structure of the Rome Statute as little as possible when fully incorporating the crime into it.⁹² This may indeed have been a sound approach in many respects, and it certainly facilitated not opening a Pandora’s box of potentially complex issues. Yet, as noted above, it is a bit remarkable that there was not more debate at the Working Group as to whether the crime of aggression should be subject to a primacy or complementarity regime.⁹³ In fact, there *do*

90. See *supra* Part I.B.2.

91. For example, this debate arose when considering whether all forms of individual, as well as command, responsibility contained in Rome Statute Articles 25 and 28 would apply to the crime of aggression or whether, because there were different verbs built into the crime of aggression definition (“planning, participation, initiation or execution”), a separate regime should be created such that Articles 25 and 28 would not apply. Ultimately, no alteration was made to Articles 25 and 28 (so they will fully apply), except for the slight modification to Article 25(3)(f). See *supra* note 13.

92. See *supra* note 13.

93. “The general feeling of the [Special Working Group on the Crime of Aggression] was that there was no need for any special provisions on complementarity in relation to the crime of aggression.” Wrangé, *supra* note 46, at 592. The issue of complementarity did arise during negotiations. For example, the report of the June 21–23, 2004 inter-essional meeting held in Princeton, N.J., reflects such discussion, but it does not appear to have been extensive. The most salient paragraph states:

25. A point was also made drawing attention to the possibility that some of the provisions of the Statute might be interpreted to give jurisdiction to the Court in

appear to be distinguishing features of the crime of aggression that suggest that it is not necessarily well-suited to the Rome Statute's complementarity regime.⁹⁴

A. Aggression Involves an Aggressor State and Victim State

Necessarily, unlike the other crimes, aggression involves, at minimum, two states. These can be referred to as the "Aggressor State" and the "Victim State." Which state is in fact the "Aggressor State" and which the "Victim State" may be disputed in any given situation, because a state likely will not admit to being an "Aggressor State."⁹⁵ In some situations, there may be multiple "Aggressor States" and/or multiple "Victim States." The fact that at least two states are necessarily involved is a distinguishing fea-

situations in which a "victorious" State would prosecute individuals without due regard to their rights; another situation could arise when a "victim" State did not prosecute individuals out of fear of the aggressor State. Among the provisions that could be read from this perspective were article 17, paragraph 2(c), and article 53, paragraph 1(c). In addition, the view was expressed that the Court had never been conceived and should not be considered as a court of appeals for national decisions.

(emphasis added). Discussions culminated in an agreement that Rome Statute "Articles 17, 18 and 19 were applicable in their current wording and the points raised merited being revisited once agreement had been reached on the definition of aggression and the conditions for exercise of the Court's jurisdiction." See Annex II, Report of the Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 21 to 23 June 2004, ¶¶ 20-27, ICC-ASP/3/25, http://www.icc-cpi.int/NR/rdonlyres/EEF8F8E2-6AF9-47F7-859E-1C1AE1359ED3/140520/ICCASP325Annexes_English.pdf. This author, who attended many of the meetings of the Special Working Group on the Crime of Aggression as an NGO observer, does not recollect the topic receiving significant focus.

Two book chapters written about aggression and complementarity chiefly examine other impediments to national court aggression prosecutions, and not whether complementarity is the right regime for the crime of aggression. See generally Nicolaos Strapatsas, *Complementarity & Aggression: A Ticking Time Bomb?*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* (Carsten Stahn & Larissa van den Herik eds., 2010) (arguing that while the International Law Commission wrongly assumed there could not be domestic court crime of aggression prosecutions, such prosecutions could face impediments due to immunity laws, the act of state doctrine and the political question doctrine); Wrangle, *supra* note 46 (also examining issues of jurisdiction and difficulty in gathering evidence for domestic crime of aggression prosecutions). A forthcoming Article that grapples more with the question of whether the crime of aggression should be prosecuted at the ICC or domestic courts is Beth Van Schaack, *Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression*, 10 J. INT'L CRIM. JUST. 133 (forthcoming 2012) (on file with the author). This author does not concur with all of the conclusions reached by Van Schaack. Two of the Understandings regarding the crime of aggression that were agreed upon in Kampala also suggest concerns with domestic court crime of aggression prosecutions. See Resolution RC/Res. 6, *supra* note 3.

94. See generally Van Schaack, *supra* note 93 (concluding the same).

95. For instance, Russia and Georgia would undoubtedly not agree on the characterization of 2008 events. Cf. JEFFREY DUNOFF ET AL., *INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 905 (3d ed. 2010) ("Russia invoked humanitarian intervention as a justification for its military offensive in Georgia. The EU's Fact-Finding Mission on the Georgia Conflict rejected Russia's argument . . .").

ture of the crime of aggression compared to the other ICC crimes.⁹⁶ While it is possible that the nationals of one state could commit genocide, war crimes or crimes against humanity in the territory of another state, making the situation more analogous to the crime of aggression, most of the cases the ICC has taken up to date involve crimes committed by someone within one country against nationals of that country.⁹⁷ Thus, the ICC's Sudan warrants and voluntary summonses to appear charge crimes committed in Sudan;⁹⁸ the ICC's Uganda warrants charge crimes committed in Uganda;⁹⁹ the ICC's Kenya voluntary summonses to appear charge crimes committed in Kenya;¹⁰⁰ and the ICC's Libya warrants charge crimes committed in Libya.¹⁰¹

96. See also Van Schaack, *supra* note 93, at 136 (arguing that because domestic crime of aggression prosecutions would involve states sitting in judgment on the conduct of each other and "have the potential to exacerbate international tensions," domestic crime of aggression prosecutions should be disfavored). *But see* Strapatsas, *supra* note 93, at 453 (noting that "an aggressed state . . . has every legal right to exercise its criminal jurisdiction over the crime of aggression by virtue of the territorial character of criminal law . . ."). At least one scholar, Pål Wrangé, also argues that crime of aggression prosecutions may be distinguishable in that, at least until a significant body of jurisprudence develops, reasonable lawyers may disagree on whether the state in question has even violated international law. Email from Pål Wrangé to Jennifer Trahan (Apr. 20, 2012) (on file with author). This, too, militates in favour of ICC adjudications.

97. See *infra* notes 98–101.

98. See *Prosecutor v. Ahmad Muhammad Harun* ("Ahmad Harun") & *Ali Muhammad Al Abd-Al-Rahman* ("Ali Kushayb"), Case No. ICC-02/05-01/07, Warrant of Arrest (Apr. 27, 2007); *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); *Prosecutor v. Bahr Idriss Abu Garda*, Case No. ICC-02/05-02/09, Summons to Appear (May 7, 2009) (changes not confirmed); *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Summons to Appear (Aug. 27, 2009); *Prosecutor v. Abdel Raheem Muhammad Hussein*, Case No. ICC-02/05-01/12-2, Warrant of Arrest (Mar. 1, 2012).

99. See *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest (Sept. 27, 2005). Members of the Lord's Resistance Army (LRA) have, however, committed crimes beyond the territory of Uganda—in the Central African Republic, DRC, and South Sudan; thus, potentially, the charges could be expanded to cover crimes outside of Uganda. See *LRA Conducts Massive Abduction Campaign*, HUM. RTS. WATCH (Aug. 11, 2010), <http://www.hrw.org/news/2010/08/11/cadr-congo-lra-conducts-massive-abduction-campaign>; *Letter to DRC President Joseph Kabila From Civil Society Representatives in LRA-affected Areas of the Democratic Republic of Congo, Central African Republic and South Sudan*, HUM. RTS. WATCH (Nov. 11, 2011), [http://www.hrw.org/news/2011/11/11/letter-drc-president-joseph-kabila-civil-society-representatives-lra-affected-areas-\(twenty-civil-society-groups-in-northern-drc, CAR, and South Sudan writing to President Joseph Kabila, and calling his attention to the ongoing atrocities committed by the LRA in northern DRC and the neighboring regions of CAR and South Sudan\)](http://www.hrw.org/news/2011/11/11/letter-drc-president-joseph-kabila-civil-society-representatives-lra-affected-areas-(twenty-civil-society-groups-in-northern-drc, CAR, and South Sudan writing to President Joseph Kabila, and calling his attention to the ongoing atrocities committed by the LRA in northern DRC and the neighboring regions of CAR and South Sudan)).

100. See *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, Case No. ICC-01/09-01/11, Summons to Appear (Mar. 8, 2011); *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Summons to Appear (Mar. 8, 2011). The ICC Pre-Trial Chamber declined to confirm charges against Henry Kiprono Kosgey and Mohammed Hussein Ali. See *Marlise Simons, 4 Kenyans to Stand Trial at Hague Court in 2008 Violence*, N.Y. TIMES (Jan. 23, 2012), <http://www.nytimes.com/2012/01/24/world/europe/international-court-orders-4-kenyans-tried-for-election-violence.html>.

101. See *Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Warrant of Arrest (June 27,

B. There Is a Substantial Question Whether National Court Prosecutions of Military or Political Leaders of an Aggressor State Conducted in the Victim State Would Be Independent and Impartial

As to a potential domestic court trial of the political or military leader of an Aggressor State,¹⁰² at least three scenarios¹⁰³ are possible: (1) that the political or military leader of the Aggressor State is captured and tried in the Victim State; (2) that the political or military leader of the Aggressor State is tried in the Aggressor State when there has not been a change of regime (which would seem unlikely); or (3) that the political or military leader of the Aggressor State is tried in the Aggressor State after a change of regime. Very divergent incentives would most likely be present in these scenarios. In the first scenario, the Victim State courts would likely be *all too willing* to try the captured political or military leader of the Aggressor State. In the second scenario, the political or military leader of the Aggressor State (while still in office) would most likely not be tried at all in the Aggressor State's courts,¹⁰⁴ and the domestic trial might even be precluded by domestic immunity laws, the "act of state" doctrine and/or the "political question" doctrine.¹⁰⁵ In the third scenario, the former political or mili-

2011). The warrant against former Libyan President Muammar Gaddafi was terminated on November 22, 2011, after his death on October 20, 2011. See Press Release, Pre-Trial Chamber I Orders the Termination of the Case Against Muammar Gaddafi, ICC Press Release, ICC-CPI-20111122-PR745 (Nov. 22, 2011).

By contrast, the ICC's CAR warrant charges crimes by a DRC national (Bemba) committed in the CAR. See *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest (May 23, 2008). The ICC's DRC warrants charge crimes by Rwandan nationals (Ntaganda, Mbarushimana, and Mudacumura) and DRC nationals (Lubanga, Katanga, and Chui) committed in the DRC. See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006); *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest (Sept. 28, 2010); *Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, Warrant of Arrest (July 13, 2012); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Warrant of Arrest (Feb. 10, 2006); *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Warrant of Arrest (July 2, 2007); *Prosecutor v. Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Warrant of Arrest (July 6, 2007).

102. The crime of aggression is a "leadership crime" in that it only covers individual conduct "by a person in a position effectively to exercise control over or to direct the political or military action of a State." Rome Statute, *supra* note 1, art. 8bis(1); see also *infra* note 147 (further discussing the leadership requirement).

103. As to how well national prosecutions might work in each scenario, predictions probably involve a vast over-simplification, and the answer as to each country will no doubt depend on a myriad of factors, including the competence and capacity of the national judiciary.

104. See Wrangle, *supra* note 46, at 606 (concluding that "a person responsible for aggression will most likely not be prosecuted in his or her own state while that person is in power"); see also Strapatsas, *supra* note 93, at 459 ("It is thus conceivable that the aggressor-state might not be willing to prosecute its own leaders for this crime for political reasons.").

105. See Wrangle, *supra* note 46, at 593-96 (suggesting that the act of state doctrine, political question doctrine (i.e., non-justiciability) as well as immunity laws might be asserted and even preclude national court crime of aggression prosecutions); see also Strapatsas, *supra* note 93, at 464-73 (similar). Other questions that might arise could be jurisdictional. See Wrangle, *supra* note 46, at 599 (concluding that both the aggressor

tary leader of the Aggressor State, once out of office and/or after regime change, could be tried in the Aggressor State's courts, but probably again would not be tried very aggressively, if at all.¹⁰⁶ Thus, in the second and third scenarios, the main concern would probably be that the domestic trials would either be sham trials or non-existent. Such trials would certainly not preclude ICC prosecutions—assuming ICC jurisdiction exists and assuming that national court crime of aggression prosecutions are possible under domestic crime of aggression legislation—¹⁰⁷because sham or non-existent trials would be covered by the terms “unwilling” or “unable” in Article 17.

C. When National Courts in the Victim State Are “All Too Willing” to Pursue Charges, an Admissibility Challenge Would Likely Succeed, Making the Case Inadmissible Before the ICC

Returning to the first scenario, where a political or military leader of the Aggressor State is captured and tried by courts in the Victim State, one might anticipate *the opposite problem*: that the Victim State's courts would be “*all too willing*” to try that leader. Here, as discussed above,¹⁰⁸ one would also have fair trial or due process concerns, but these concerns would not be covered by the terms “unwilling” or “unable.” In this scenario, which is not entirely unlikely, the political or military leader of the Aggressor State captured in the Victim State could be tried for the crime of aggression in a trial stacked against him or her, and there would be no mechanism for the ICC to try the case.¹⁰⁹ Even if the ICC were to issue an arrest warrant against the political or military leader of the Aggressor State

and victim states likely would have jurisdiction to prosecute, but questioning whether universal jurisdiction would exist). *But see* C. Kress, *Universal Jurisdiction Over International Crimes and the Institut de Droit international*, 4 J. INT'L CRIM. JUST. 561, 575 (2006) (suggesting the presumption that there is universal jurisdiction for any crime under international customary law). “[Another] practical problem that national authorities might face is the lack of evidence. A state that wants to prosecute a foreign national may encounter difficulties in finding evidence of that person's involvement in the aggression.” Wrangle, *supra* note 46, at 597.

106. *See also* Wrangle, *supra* note 46, at 606 (concluding that a person responsible for aggression would be prosecuted, if at all, under a “new regime, which might have its reasons for not allowing a completely impartial trial.”).

107. There are currently some crime of aggression laws in national jurisdictions. *See* Astrid Reisinger Coracini, *Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute's Complementarity Regime*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 725, 734–36, n.57–72 (Carsten Stahn & Göran Sluiter eds., 2009) (cataloging national codes containing the crime of aggression). These states do not use the ICC definition of the crime. It is too early to predict the extent to which States Parties will implement the ICC definition into their national laws. *See* Van Schaack, *supra* note 93, at 144–46 (concluding that absent implementation of the crime of aggression into national laws, conduct covered by the crime of aggression would be difficult to prosecute under other legal theories, the closest possibilities being “treason, sedition, insurrection, war crimes, violations of neutrality acts, or espionage.”).

108. *See supra* Part I.B.3.

109. Theoretically, national immunity laws as well as the act of state doctrine and/or political question doctrine in the Victim State might preclude the trial, if the Victim State's courts properly apply them. *See* Wrangle, *supra* note 46, at 593–96.

in a bid to pursue an ICC trial (assuming ICC jurisdiction also exists), an admissibility challenge arguing that the case should be inadmissible before the ICC because national courts are willing and able to prosecute would most likely succeed.

Specifically, none of the three criteria for “unwillingness” would be satisfied: (i) there would not be a national prosecution shielding the person from justice—but the opposite (a national prosecution meting out unduly harsh justice); (ii) there would not be unjustified delay—but perhaps unjustified haste; and (iii) whereas there might be a “lack of independence or impartiality, such that there is no intent to bring the person to justice,” it would not be because the national court was “unwilling” (and, as mentioned above, this third prong clearly modifies the word “unwilling”).¹¹⁰ Likewise, the three criteria for evaluating “inability” would not be satisfied: (i) there would not be the “total or substantial collapse or unavailability” of national courts—to the contrary, national courts would be operational; (ii) the state would not be unable to obtain the accused or necessary evidence—to the contrary, the national court would have custody of the accused and would be zealously (perhaps over-zealously) gathering evidence; and (iii) the Victim State’s court would not be otherwise “unable to carry out prosecutions”—rather, they would be carrying them out with too much zeal.¹¹¹

D. One Should Be Concerned About a Vindictive National Court Crime of Aggression Prosecution Against a Political or Military Leader of Another State

How substantial a concern does this present? The author sees it as a significant one. Nearly sixty years ago, Justice Murphy of the U.S. Supreme Court recognized the need to ensure that justice is done, particularly in the trial of an enemy leader. His eloquently articulated logic remains equally persuasive today. Dissenting, Justice Murphy wrote in *In re Yamashita*:¹¹²

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this, the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. *We must insist, within the confines of our proper jurisdiction, that the highest standards of justice be applied in this trial of an enemy commander Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.*¹¹³

110. See *supra* Part I.B.3.

111. *Id.*

112. 327 U.S. 1 (1946).

113. *Id.* at 29–30 (Murphy, J., dissenting) (emphasis added). The *Yamashita* case was a petition for *habeas corpus* to the U.S. Supreme Court by Japanese General Tomoyuki Yamashita, who had been Commanding General of the Fourteenth Army Group of the Japanese Imperial Army and the Military Governor on the Philippine Islands from Octo-

Will domestic courts live up to such a challenge and strive diligently to pursue a fair trial for a captured enemy leader who has led an attack against their country? There is certainly ample room for scepticism.¹¹⁴

E. This Same Problem Exists for the Other ICC Crimes, but Probably to a Lesser Degree

As suggested above, this problem also exists for the crimes of genocide, war crimes and crimes against humanity, because it pertains to the functioning of complementarity itself and not solely how complementarity functions regarding the crime of aggression.¹¹⁵ The consequences, however, may be somewhat less problematic with respect to the other crimes.

One can imagine at least three distinct scenarios involving the commission of genocide, war crimes or crimes against humanity: (1) that crimes are committed by a rebel group against nationals in the rebel group's state (e.g., the LRA in Uganda); (2) that crimes are committed by a current or former government official against nationals of that official's state (e.g., the Bashir, Ahmad Harun and Hussein warrants for crimes in Darfur);¹¹⁶ or (3) that crimes are committed by a rebel group or government official against nationals of another state. Note that it is only in this third scenario that one can particularly anticipate a potential problem of foreign state courts being "all too willing" to prosecute.

Regarding how well national prosecutions might work in these scenarios, while any predictions again probably involve a vast over-simplification, and the answer for each country will no doubt depend on a myriad of factors, including the competence and capacity of the national judiciary, some general observations can nonetheless be made. As to the first scenario of crimes committed by a rebel group against nationals of that state, national court prosecutions might have problems of being sham trials (unwillingness) or problems of inability, in which case Article 17 would still permit an ICC trial (i.e., the case would not be "inadmissible"), assum-

ber 1944 until September 1945. He had been convicted by a U.S. military tribunal sitting in the Philippines. The petition was denied, and Yamashita was executed. See generally *id.* at 1-26.

This quote was eloquently relied upon more recently in the context of examining indictment defects in the ICTR case of *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe*. See *Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe*, Case No. ICTR 99-46-T, Separate and Dissenting Opinion of Judge Pavel Dolenc, ¶ 6 (Feb. 25, 2004).

114. See Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 256 ("Most national criminal-justice systems . . . are far less even-handed [than the ICC] - particularly those in States that have experienced atrocities serious enough to draw the Court's interest."). It is also possible that a "victim" state might be intimidated by a more powerful state from prosecuting." Wrangle, *supra* note 46, at 597. Rather than tempting powerful states to pressure other states not to conduct domestic crime of aggression prosecutions, this author maintains that it would be better if such prosecutions occurred at the ICC.

115. See *supra* Part I.B.3.

116. All three are current officials. Bashir is President of Sudan, Harun is Minister of State for Humanitarian Affairs, and Hussein is Minister of National Defense. See *supra*, note 98, listing the ICC warrants of arrest for Bashir, Harun, and Hussein.

ing ICC jurisdiction also exists.¹¹⁷ In the second scenario of crimes committed by a current or former government figure against nationals of that state, domestic trials against the current leader or official are unlikely, and might be precluded by immunity laws and/or the “act of state” or “political question” doctrines;¹¹⁸ a trial probably would only occur, if at all, when the leader or official has left office. Here, there is probably again more of a concern about sham trials,¹¹⁹ which would not preclude an ICC trial under the Article 17 standards. It is only in this third scenario, where the crimes are committed in another state, that one might predict the problem of national courts being “all too willing.”

This concern of national courts being “all too willing” to prosecute genocide, war crimes or crimes against humanity committed by a non-national may, however, be less significant than, or at most overlap with, similar concerns regarding the crime of aggression. If there is a national court prosecution against a current or former military or political leader of another state who has committed genocide, war crimes or crimes against humanity in the state conducting the trial, this may well be precluded by immunity laws, official capacity or similar arguments.¹²⁰ Even if there is a trial on the merits, it is unlikely that the political or military leader committed crimes *in another state* without also being criminally responsible for an act of aggression committed by his or her state. In that case, the concerns with the trial of such a leader would overlap with the concerns discussed above, and there is indeed a concern with proceedings being “all too willing.” In the final scenario of a rebel group committing genocide, war crimes or crimes against humanity in the territory of another state, there would technically be no “aggression,” because aggression requires an act committed by a state.¹²¹ Here, there are possibilities of both sham prosecutions or prosecutions that are “all too willing.”

Thus, the problem of national courts being “all too willing” to prose-

117. It is true that there could also be some possibility of national courts being “all too willing” to prosecute the rebels. This has not, however, happened in Uganda’s first LRA prosecution, where amnesty was upheld. See *Ugandan LRA Rebel Thomas Kwoyelo Granted Amnesty*, BBC (Sept. 22, 2011), <http://www.bbc.co.uk/news/world-africa-15019883>.

118. See Wrangle, *supra* note 46, at 593–96. See also Strapatsas, *supra* note 93, at 462–72.

119. An exception would be trials of former leaders or officials conducted after a complete change of regime, such as the recent transition in Libya. Here, as noted above, there is in fact a danger that a domestic Libyan trial might prove “all too willing” to prosecute Saif Al-Islam Gaddafi and/or Abdullah Al-Senussi. See *supra* Part I.B.3.

120. At the international level, the Rome Statute makes clear that official capacity is neither an affirmative defense or a mitigating factor, and no immunities may attach to that capacity. See Rome Statute, *supra* note 1, art. 27 (irrelevance of official capacity). National domestic laws do not necessarily yet reflect these standards.

121. The definition requires an “act of aggression,” which is defined, *inter alia*, as “the use of armed force by a State.” See Resolution RC/Res.6, *supra* note 3, at Annex I, art. 8bis(2). See also Wrangle, *supra* note 46, at 596–97 (“[T]here is no state practice whatsoever for criminal responsibility for non-state aggression . . .”).

cute is not limited to the crime of aggression,¹²² although it may be particularly acute regarding that crime if a military or political leader of the Aggressor State is captured in the Victim State.¹²³ In this scenario, the ICC, with all of its fair trial protections,¹²⁴ could quite easily be the preferable forum for trial.¹²⁵ Yet, if national court proceedings are “all too willing,” Article 17 most likely would not be triggered, since there would not be “unwillingness” or “inability,” and the case would be inadmissible before the ICC.

III. Proposals for Addressing Domestic Crime of Aggression Prosecutions that Fail to Adhere to Due Process Because They are “All Too Willing”

Given that Rome Statute Article 17 appears not to encompass the scenario of domestic courts that are “all too willing” to conduct unfair trials, the question arises whether there should be some modification to the Rome Statute to address this scenario, either solely with regard to the crime of aggression, or as to all four ICC crimes.

Admittedly, it is unclear whether ICC States Parties will be as concerned with the problem of vengeful domestic trials as they are with impunity, or even at all. The preamble to the Rome Statute makes it clear that countering impunity was foremost in the minds of the drafters of the Rome Statute,¹²⁶ as does the fact that Article 17 does not appear to address

122. Indeed, both Kevin John Heller and Markus Benzing suggest that the problem exists with the ICC’s current crimes. See Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 256; Benzing, *supra* note 40, at 617.

123. Again, it is possible that national immunity laws might preclude such a prosecution if they are applied.

124. The Rome Statute contains all the due process protections provided for in the U.S. Bill of Rights, except for trial by jury. These standards include the right to remain silent or to not be forced to testify against oneself, Rome Statute, *supra* note 1, art. 67(1)(g); the right against self-incrimination, *id.* art. 55(1)(a), 67(1)(g); the right to cross-examine witnesses, *id.* art. 67(1)(e); the right to be tried without undue delay, *id.* art. 67(1)(c) (speedy and public trials); the protection against double jeopardy, *id.* art. 20; the right to be present during trial, *id.* arts. 63, 67(1)-67(1)(d); the presumption of innocence, *id.* art. 66; the right to representation by counsel, *id.* art. 67(1)(b), (d); the right to a written statement of charges against the accused, *id.* art. 61(3); the right to have compulsory process to obtain witnesses, *id.* art. 67(1)(e); the prohibition against prosecution for crimes *ex post facto*, *id.* art. 22; freedom from warrantless arrest and search, *id.* arts. 57(3), 58; and the ability to exclude illegally obtained evidence, *id.* art. 69(7). The above-listed fair trial rights compilation is found in *Safeguards in the Rome Statute Against Abuse of the Court to Harass American Servicemembers and Civilian Officials*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE ICC 7, <http://www.amicc.org/docs/Safeguards.pdf>.

125. As noted above, two of the Understandings agreed upon in Kampala suggest concerns with domestic crime of aggression adjudications. See *supra* note 93.

126. The preamble clearly places the foremost focus on ending impunity:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
Recognizing that such grave crimes threaten the peace, security and well-being of the world,

overly zealous national trials.¹²⁷ Indeed, if the ICC is going to address national courts that are overly zealous, one might well ask: would it be acting like an appellate tribunal? Would States Parties be willing to create statutory modifications that would permit the ICC to judge the quality of domestic court trials not only for unwillingness, as already agreed upon in the Rome Statute, but also for a general lack of due process? States Parties do not seem to have done so at Rome for the ICC's first three crimes.¹²⁸ Still, States Parties arguably should be somewhat concerned about a vengeful domestic trial in the Victim State of the former military or political leader of the Aggressor State; the Rome Statute should not solely work to counter impunity, but should also promote, to the extent possible, fair domestic trials of Rome Statute crimes. As has been eloquently put:

'[T]he demands of fairness are constitutive of the rule of law itself, and insofar as international criminal law seeks to extend the rule of law to atrocity and crimes against humanity, it too must remain faithful to the demands of fairness.' Indeed, if the ICC simply turns a blind eye to unfair national trials - the inevitable effect of article 17 as written - it will simply permit States to replace one kind of impunity with another.¹²⁹

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Rome Statute, *supra* note 1, pmb1. "[U]nder Article 31 of the 1969 Vienna Convention . . . a preamble to a treaty is considered an integral part of a treaty for the purposes of interpretation and application.'" Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 270 n.44 (quoting Williams & Schabas, *supra* note 44, at 386). The "object and purpose" of the Rome Statute also is clearly, first and foremost, to end impunity. See Vienna Convention, *supra* note 65, art. 31(1) ("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."). "[W]hat is absent from the Rome Statute's object and purpose is 'any concern for the rights of defendants, in national proceedings or otherwise.'" Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 271.

127. See *supra* Part I.B.3.

128. See *supra* Parts I.B.2-3.

129. Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 280 (quoting George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 541 (2005)); see also *id.* at 277-78 (by excluding "due process" from Article 17, the complementarity regime "unintentionally sends a very different message to the world about how national judicial systems should do justice: namely, that although it is unacceptable for a State to use legal proceedings that are designed to make the (alleged) perpetrators of serious international crimes more difficult to convict, it is perfectly acceptable - though certainly not encouraged - for a State to use legal proceedings that are designed to make those (alleged) perpetrators easier to convict.").

Another concern that Pål Wrange stresses is that domestic crime of aggression proceedings may be significantly impeded by domestic immunity laws. Email from Pål Wrange to Jennifer Trahan, *supra* note 96. This also suggests that the ICC is the preferable forum for such prosecutions, since there is no head of state or official capacity immunity at the ICC. See Rome Statute, *supra* note 1, art. 27 (irrelevance of official

If States Parties do share a concern about domestic trials that are “all too willing,” either solely for the crime of aggression or for all four Rome Statute crimes, some possible alternatives exist: (1) the trial chamber judges could interpret the language in Article 17 liberally so that where domestic court prosecutions fail to adhere to due process and are “all too willing” to prosecute, the case remains admissible before the ICC; (2) States Parties could create a primacy regime regarding the crime of aggression, so that ICC prosecutions may “trump” domestic crime of aggression prosecutions; or (3) States Parties could modify the language in Article 17 to encompass the problem of national court prosecutions that are “all too willing.”

A. Expansive Judicial Construction of Article 17

Perhaps the easiest approach would be for the ICC judges to read Article 17 liberally so that domestic prosecutions that are “all too willing” to investigate and/or prosecute remain admissible before the ICC, assuming there is jurisdiction for both national and ICC prosecutions. At least four approaches to interpreting the language of Article 17 to reach this result are possible. First, the judges could read the words “proceedings . . . not . . . being conducted independently or impartially” in Article 17(2)(c) to cover overzealous prosecutions.¹³⁰ As noted above, the problem with this construction is that 17(2)(c) modifies the term “unwillingness” and overzealous prosecutions do not seem to show “unwillingness.”¹³¹ Second, the judges could read due process requirements into the word “inability,” so that it means “inability to conduct fair trials.” The problem with this construction is that Article 17(3) lists three factors for determining “inability,” and none appears to include due process concerns.¹³² A third approach would be to read the phrase “having regard to the principles of due process recognized by international law” as imposing a due process requirement, but that phrase is in the “chapeau” of Article 17(2)(a)(b) and (c), and, as illustrated above, none of (a)(b) or (c) seems consonant with that reading.¹³³ A fourth approach would be to read the words in Article 17(1)(a)—that a case is inadmissible “unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution”¹³⁴—to encompass due

capacity). The existence of such immunity laws probably would make the domestic courts “unwilling” or “unable,” meaning that the case should be tried before the ICC, assuming there is jurisdiction.

130. Rome Statute, *supra* note 1, art. 17(2)(c).

131. *See supra* Part I.B.2-3.

132. *See supra* Part I.B.2.

133. *See supra* Part I.B.3. Put another way, “the chapeau and the three subparagraphs are actually conjunctive: the Court can only find a State unwilling if the national proceeding *both* violates international due process and satisfies one of the three conditions specified in article 17(2).” Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 262-63. “The drafting history of article 17(2) makes this clear. The ‘principles of due process’ clause was specifically added to ensure that the Court would use objective criteria to determine whether one of the three subparagraphs applied.” *Id.* at 263, n.25 (quoting Holmes, *supra* note 58).

134. Rome Statute, *supra* note 1, art. 17(1)(a) (emphasis added).

process considerations.¹³⁵ But given that none of the criteria for showing “unwillingness” or “inability” would be met, it is unclear that the word “genuinely” (also a chapeau term) should be read to create a new criterion beyond those expressly listed in Rome Statute Articles 17(2) and 17(3).¹³⁶

Furthermore, the judges probably could not read Article 17 expansively yet limit that reading to the crime of aggression. If they were to adopt an expansive construction of Article 17, it would presumably impact all four ICC crimes. This would significantly alter how complementarity functions, appears inconsistent with the ordinary meaning of the Rome Statute’s text,¹³⁷ and seems not to have been the approach adopted at Rome.¹³⁸ Thus, it is unclear whether the judges should reach this construction.¹³⁹

B. Creating a “Primacy” Regime for the Crime of Aggression

Another approach would be to make crime of aggression prosecutions *not* subject to the ICC’s complementarity regime, but, like the approach taken by the ICTY and ICTR,¹⁴⁰ adopt a “primacy” regime as to the crime.¹⁴¹ This could be accomplished, for example, by amending the Rome Statute to add a new Article 17*bis* that might look something like this:

Art. 17*bis*. For the crime of aggression, the ICC shall have primacy over national courts. At any stage of the procedure, the ICC may formally

135. Kevin Jon Heller suggests this possible reading, although he ultimately rejects it as well. See Heller, *The Shadow Side of Complementarity*, *supra* note 28, at 259–60 (“[A]lthough no scholar has done so explicitly, one could argue that article 17(1)’s genuineness language supports the due process thesis [that is, that one should consider a defendant’s rights in the national system],” but concluding “article 17’s text, context, purpose, and history . . . all clearly indicate that a State’s failure to guarantee a defendant due process is not currently a ground for admissibility.”).

136. Michael Newton, for example, appears to read the term “genuinely” broadly:

If a state does not meet the standards that the ICC announces through its internal procedures and court decisions, the domestic state may be deemed ‘genuinely unwilling’ to handle the case by the ICC. Furthermore, states with scarce resources may be unable to reshape their entire domestic judicial systems in response to subjective ICC standards, thereby warranting an ICC finding that any trial that the ICC prosecutor wants to take over is admissible because the state is unable ‘genuinely to prosecute.’

Newton, *supra* note 21, at 66. Another possible argument would be that “all too willing” prosecutions would be “inconsistent with an intent to bring the person concerned to justice.” Email from Pål Wrange to Jennifer Trahan, *supra* note 96. But the phrase also modifies the term “unwillingness” and overly zealous prosecutors do not show “unwillingness.”

137. See Vienna Convention, *supra* note 65, art. 31(1) (importance of ordinary meaning for treaty construction).

138. See *supra* Part I.B.2.

139. While the author is empathetic to a broad construction of Article 17 that would consider due process, the author does not necessarily advocate any of these readings, because each seems to involve some conflict with the ordinary meaning of the Rome Statute’s language.

140. See *supra* Part I.A.

141. See Van Schaack, *supra* note 93, at 155 (“[I]t would have been ideal had the ASP endeavored to grant the ICC exclusive jurisdiction over the crime of aggression.”).

request national courts to defer to the competence of the ICC.¹⁴²

Under such an approach, if there were national investigations or prosecutions running parallel to ICC investigations or prosecutions of the crime of aggression, and the ICC chose to pursue the case, it would simply be entitled to do so.

Would States Parties agree to such an approach? It has not been sufficiently debated, so the answer remains unclear. If a State Party sees itself more as a potential “Victim State”—that is, it is motivated to protect its borders for defensive reasons—then it should not matter whether there is an ICC or national court trial, as long as there is such a trial. If a State Party sees itself more as a potential “Aggressor State”—that is, it is more likely to be part of a coalition that engages in action that could be interpreted as the crime of aggression—then this author contends that such a State Party should *prefer* ICC prosecutions to national prosecutions. The ICC at least has a panoply of fair trial protections,¹⁴³ that would not necessarily be applied in national court proceedings.¹⁴⁴ It is, however, unclear that states would actually analyze the issue in this fashion. To begin with, many States Parties probably do not view themselves solely as a potential “Victim” or “Aggressor” State, but potentially as either, depending on the circumstances. States Parties could also simply oppose the loss of sovereignty occasioned by the ICC pre-empting domestic court aggression prosecutions where national courts are willing and able to do so. Finally, States Parties (and non-States Parties) might not necessarily view the ICC, despite its fair trial protections, as a preferable forum. Also, this approach does not specify criteria limiting the ICC’s pre-emption of national court prosecutions, leaving the ICC simply free to do so. States Parties might be unwilling to give the ICC this much deference over such a determination, or they might want to condition the ICC’s exercise of primacy in some way.

C. Modifying Article 17 to Cover National Court Prosecutions that Are “All Too Willing”

A third option would be to amend Article 17 to address national court prosecutions that are “all too willing” to prosecute. This could be accomplished by adding the following language (in italics) to Article 17:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

142. A parallel amendment might be required to specify that existing Article 17 applies only to the crimes of genocide, war crimes and crimes against humanity.

143. See *supra* note 124 (listing ICC fair trial protections). See also Van Schaack, *supra* note 94, at 151-52 (arguing that “[d]omestic prosecutions for the crime of aggression will not benefit from the procedural regime—including painstakingly negotiated judicial and political controls—established by the ASP to manage prosecutions of the crime of aggression,” and that “[l]egislators incorporating the crime into national penal codes may drop or change definitional elements of the crime.”).

144. See *supra* note 114 (Kevin John Heller expressing skepticism about the ability of national courts to apply due process, especially after mass atrocities have occurred).

(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, or [with regard to the crime of aggression] the State is all too willing to carry out the investigation or prosecution;

....

4. In order to determine “all too willing” in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether:

The proceedings were not or are not being conducted independently or impartially, or they were or are being conducted in a manner which, in the circumstances, is inconsistent with a genuine intent to bring the person concerned to justice.

Depending on whether the language in brackets is utilized or not, this modification could be made to apply to all ICC crimes or only to the crime of aggression.¹⁴⁵

Would States Parties agree to such an amendment? Again, this has not been seriously debated, so it is difficult to tell. Certainly, to make this change impact all four Rome Statute crimes could significantly alter how complementarity functions under the Rome Statute, and appears to have been an approach rejected at Rome.¹⁴⁶ Also, the ICC probably lacks the capacity to monitor the fairness of all domestic genocide, war crimes and crimes against humanity prosecutions over which it would potentially have jurisdiction, and/or may not have the capacity to try all such cases where it finds domestic judiciaries “all too willing” to prosecute.

By making the modification of Article 17 apply solely to the crime of aggression, the impact to the ICC’s workload would not be as dramatic. Aggression is not an everyday event, and the crime is defined solely as a “leadership crime” such that the ICC would presumably prosecute only a

145. A parallel change might be needed to the “*ne bis in idem*” provision of the Rome Statute. (*Ne bis in idem* is Latin for “not twice for the same crime,” and is effectively equivalent to the prohibition on double jeopardy. See Heller, *A Sentence-Based Theory of Complementarity*, *supra* note 35, at 205 n.10). This could be accomplished by changing the “and” in Article 20(3)(b) to an “or”:

3. no person who has been tried by another court for conduct also proscribed under articles 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law or were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

With that change, domestic court proceedings that were not independent or impartial (even if not designed to shield the person from justice) would not preclude the ICC from acting. It also might be possible to read unduly harsh national court prosecutions as not independent or impartial *and* “inconsistent with an intent to bring the person concerned to justice,” in which case no amendment would be required.

146. See *supra* Part I.B.2.

few individuals in any given situation.¹⁴⁷ Ensuring that those few aggression prosecutions occur at the ICC and not a domestic court, assuming jurisdiction exists for both, would not significantly affect the number of ICC prosecutions. It would simply ensure that the crime is adjudicated before an international tribunal with ample due process protections.¹⁴⁸ Should such an ICC prosecution actually pose a threat to international peace and security, a Security Council deferral would be possible under Article 16 of the Rome Statute¹⁴⁹—something that could not happen in the same way vis-à-vis a national court aggression prosecution.¹⁵⁰ As this author has predicted elsewhere, given that national court prosecutions (1) may fail to fully apply fair trial protections, (2) do not necessarily have to apply the ICC's definition of the crime of aggression,¹⁵¹ and (3) certainly do not need to exclude non-States Parties from crime of aggression jurisdiction,¹⁵² the ICC may eventually come to be seen as the preferable forum

147. Under the definition, the crime of aggression is committed “by a person in a position effectively to exercise control over or to direct the political or military action of a State.” Rome Statute, *supra* note 1, art. 8bis(1). Ordinary soldiers would never be covered by the definition. This understanding is further confirmed by the amendment to Rome Statute Article 25, also agreed on at the Review Conference, that inserts into the article on individual criminal responsibility a new paragraph 3bis stating: “In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.” See Resolution RC/Res.6, *supra* note 3, Annex I(5). See also Wrangle, *supra* note 46, at 593 (“The crime of aggression is a leadership crime, so the people prosecuted for the crime of aggression will be leaders, i.e., most likely present or former high public officials of a state.”).

148. If a defendant is facing a national court prosecution for the crime of aggression, and ICC jurisdiction does not exist, it is possible that it could be created through a Security Council referral of the situation to the ICC. See Rome Statute, *supra* note 1, art. 13(b) (Security Council referrals). It is also possible that an *ad hoc* declaration might create jurisdiction, although some maintain that *ad hoc* declarations will not apply to the crime of aggression. See *id.* art. 12(3) (*ad hoc* declarations). Otherwise, if there is no ICC jurisdiction, these questions of competing fora do not arise, and the defendant would remain subject to the national court process. If a defendant is facing a national court prosecution for the crime of aggression and ICC jurisdiction does exist, but the ICC is not acting, the defendant could make a submission to the ICC prosecutor and attempt to convince him or her to initiate an investigation *proprio motu*. See *id.* art. 15.

149. See *id.* art. 16.

150. If there is a threat to international peace and security, the Security Council would have power to act under Chapter VII of the U.N. Charter and could presumably issue a resolution calling on a U.N. Member State to stop a domestic crime of aggression prosecution (assuming the prosecution would really threaten international peace and security). See Wrangle, *supra* note 46, at 603 (to stop a domestic court prosecution of the crime of aggression, the Security Council would issue “a decision under the general competence of the Council under Chapter VII of the UN Charter.”). Under Article 25, Member States “agree to accept and carry out the decisions of the Security Council in accordance with the . . . Charter.” See U.N. Charter art. 25. It is, however, unclear that a Member State would have the power to tell its judiciary to stop a national court aggression prosecution, given the principle of independence of the judiciary.

151. See Van Schaack, *supra* note 93, at 154 (“There is no express requirement within the ICC Statute obliging States Parties to harmonize their domestic penal codes with the treaty.”).

152. The nationals of non-State Parties and crimes committees on the territories of non-State Parties are exempt from ICC crime of aggression prosecutions. See Resolution RC/Res.6, *supra* note 3, Annex I art. 15bis, para. 5 (“In respect of a State that is not a

for crime of aggression prosecutions, rather than national courts.¹⁵³

Conclusion

In the criteria for evaluating whether a case should be admissible before the ICC under Article 17 of the Rome Statute, the Statute does not appear to address national court prosecutions that lack due process out of an overzealousness to prosecute. Yet, international justice should not solely be about defeating impunity for the worst crimes, but also about doing so through fair trials. While this problem does not solely exist for the crime of aggression, the problem may be particularly acute with regard to it. One can well imagine vengeful national courts adjudicating the fate of a captured enemy leader prosecuted for the crime of aggression. ICC States Parties, which did not significantly debate whether the crime of aggression should be subject to a complementarity or primacy regime, may in future years want to do so. States Parties could consider either subjecting the crime of aggression to a primacy regime or amending Article 17, at least for the crime of aggression, to address national court prosecutions that are not independent or impartial due to over willingness to prosecute so that such cases remain admissible before the ICC. Indeed, the ICC may come to be seen as the preferable forum for crime of aggression prosecutions, rather than national courts. The Rome Statute should have sufficient tools to ensure that crime of aggression prosecutions may occur at the ICC if jurisdiction exists, especially where there are due process concerns with national court proceedings.

party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory."). If national courts implement the Rome Statute definition of the crime of aggression into their national criminal codes, they probably would not incorporate that exclusion (unless somehow pressured to do so)—meaning leaders from non-ICC States Parties could be subject to domestic crime of aggression prosecutions.

The ICC might also be seen as a preferable forum if one has to address issues such as protection of "national security" information. There is no guarantee that national courts will have the capacity to adequately address such issues, while the ICC at least has procedures for doing so. See Rome Statute, *supra* note 1, art. 72 (protection of national security information). Cf. Strapatsas, *supra* note 93, at 459 ("[I]t is not clear how successful the Court would be in its endeavour [to prosecute the crime of aggression] without access to . . . national security information.").

153. See Jennifer Trahan, *The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT'L CRIM. L. REV. 49, 89 (2011) ("It is conceivable that a botched and/or biased national prosecution or two will make the ICC look like the preferred forum for adjudications as to the crime of aggression . . ."). See also Wrangle, *supra* note 46, at 606 (suggesting as to the crime of aggression that "controversial cases can sometimes be dealt with in a more effective and legitimate manner in an international than in a domestic court"); Van Schaack, *supra* note 93, at 27 ("Concentrating prosecutions of the crime of aggression before the ICC has the benefit of guaranteeing to defendants that they will be prosecuted under a consensus international definition subject to the judicial controls and mechanisms of political oversight endorsed by the ASP.").

