Shaping the Contours of Domestic Justice

The International Criminal Court and an Admissibility Challenge in the Uganda Situation

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Abstract
The ICC Pre-Trial Chamber II (PTC) has recently initiated an inquiry into the admissibility of the case against the leadership of the Lords Resistance Army (LRA) in the Uganda situation. In an effort to resolve the conflict in northern Uganda, the government signed a preliminary agreement in 2006 with the LRA providing for domestic prosecution of the indictees. This article examines the issues regarding both the nature of challenging admissibility generally and particular issues that arise from such challenges in the context of state self-referrals. The article proposes three different visions of admissibility that may arise in an admissibility challenge and applies them to the current PTC examination as well as a possible challenge by Uganda. The article suggests a framework for analysis and considers the role of the Court in shaping the contours of acceptable domestic justice.

1. Introduction
On 21 October 2008, the International Criminal Court (ICC or Court) Pre-Trial Chamber II (PTC) initiated proceedings under Article 19(1) of the Rome Statute (the Statute) ‘to determine the admissibility of the case’ against the leadership of the Lord’s Resistance Army (LRA) and invited relevant parties to submit observations on the admissibility of the case.¹ This early examination

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of the admissibility of the case brought in relation to the Uganda situation, was based on an apparent desire by Uganda to assert domestic jurisdiction over the LRA leadership through a special division of the Ugandan High Court. It raises new questions about the nature of admissibility before the ICC, particularly in light of Uganda’s self-referral of the situation on its territory to the Court. Given this self-referral, can the Government of Uganda still challenge the admissibility of a case? How much flexibility in terms of the procedure and sentencing in any domestic prosecution is acceptable? Can a domestic prosecution be devised that satisfies both the LRA leadership and the PTC?

The PTC’s move to examine admissibility follows the December 2003 self-referral of the situation in Uganda to the ICC by Ugandan President Yoweri Museveni, according to Article 14 of the ICC Statute. Subsequent to the referral and an investigation by the Prosecutor, the Court returned indictments against five LRA leaders in October 2005. Soon thereafter, in late June 2006, the LRA expressed willingness to engage in a new round of peace talks, but made clear that no agreement could subject its leaders to ICC prosecution. This latest round of negotiations culminated in a June 2007 agreement that contemplated domestic proceedings with alternative sentences including the possible use of ceremonial traditional justice mechanisms.

Almost to the day of the agreement, the ICC Prosecutor took an extremely firm line in a major public address, excluding any possibility of withdrawing the warrants. As the Ugandan government began to explore options to satisfy both the Rome Statute and the LRA, the possibility of domestic trials emerged as the most promising alternative. According to Article 17 of the Statute, as long as such a domestic proceeding was a genuine effort to bring the indictees to justice, it would bar the admissibility of the case before the ICC. To that end, in late February 2008, an Annexure to the Agreement was reached between the LRA and the Ugandan government, expressly providing for the establishment of a special division of the Ugandan High Court to prosecute the LRA leadership.

Domestic criminal proceedings, as alternatives to ICC investigation and prosecution, are consistent with the goals of the Rome Statute. The PTC’s initial

2 The following text refers interchangeably to the notion of admissibility and the admissibility requirement.
3 Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest, Kony, Otti, Lukwiyia, Odhiambo and Ongwen (ICC-02/04-01/05), Pre-Trial Chamber II, 13 October 2005.
determination that the case was admissible rested on the fact that Uganda was unable to achieve physical custody of the indictees, who had sought refuge in Congo. Should those indictees return to Uganda to face criminal proceedings under a peace deal, the case against them could become inadmissible before the Court.

This article responds to the questions raised above, and advances a framework for evaluating admissibility challenges. Moreover, the article suggests that a wise and timely decision by the PTC on the admissibility of the Uganda cases — only after a meaningful domestic prosecutorial framework is implemented — would give the ICC an opportunity to define the contours of acceptable national prosecutions under the Statute that balance the legitimate desire of national governments to achieve peace and justice after a conflict with the international legal duty of states to prosecute international crimes.

Section Two considers the law and practice of admissibility challenges before the ICC, particularly in the case of self-referrals. Section Three offers three distinct visions of admissibility with implications for the PTC’s analysis of any challenge in the Uganda cases. Section Four analyses the range of potential domestic justice mechanisms that might be available to Uganda. Section Five evaluates the prospects for admissibility challenges either by the Ugandan government or by a particular indictee. The Conclusion suggests that the PTC has a critical role to play in shaping domestic justice efforts.

2. The Legal Basis for Challenging Admissibility

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

The possible legal implications for self-referral on admissibility are numerous. First, when a case has been self-referred, must the Prosecutor and PTC nonetheless evaluate admissibility prior to the opening of an investigation or the issuance of arrest warrants? Second, would a change in the factual circumstances that initially precluded the territorial state from prosecuting result in the case becoming inadmissible? Third, does the act of making a self-referral

7 Decision on the Prosecutor’s Application for Warrants of Arrest Under Art. 58, Kony, Otti, Lukwiya, Odhiambo and Ongwen (ICC-02/04-01/05), Pre-Trial Chamber II, 8 July 2005, at § 37.
waive either the right of the state or the right of the accused to challenge admissibility? Taken collectively, these questions raise an even more fundamental issue about the nature of admissibility as a legal construct. Is admissibility a statutory limitation on the power of the ICC, or the legal entitlements of states parties to the Rome Statute, or the rights of defendants before the Court?

A. The Statutory Basis of Admissibility

In order for a case to be admissible under Article 17, the Court must satisfy itself that domestic authorities are not already pursuing the case. Even if it is prosecuting the case, a state is deemed unwilling to prosecute if the proceedings are ‘undertaken...for the purpose of shielding the person concerned from criminal responsibility’ (Article 17(2)(a) ICC Statute), or in cases where there is either an unjustified delay in the proceedings or the proceedings are not independent and impartial in a manner ‘inconsistent with an intent to bring the person concerned to justice’ (Article 17(2)(b) and (c) ICC Statute). Inability is based on a consideration of ‘whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings’ (Article 17(3) ICC Statute).

Admissibility determinations arise at a number of stages in any investigation or prosecution and involve both the Office of the Prosecutor (OTP) and the PTC. First, even before formally seeking to open an investigation, the Prosecutor must ‘consider whether the case would be admissible under Article 17’ (Article 53(1)(b) ICC Statute). Even after the initiation of an investigation, Article 53(2) further requires the Prosecutor to engage in a continuing evaluation of national judicial efforts and to inform the PTC if there are no grounds for prosecution because a genuine national proceeding has made the case inadmissible.

The principle of complementarity has different legal implications for the Prosecutor at two separate phases of investigation. The first phase, the situational phase, arises when the Prosecutor makes an initial decision to investigate a particular situation and requires a general examination of whether national authorities are making an effort to investigate or prosecute (Article 53(1)(b) ICC Statute). The second phase, the case phase, arises subsequently, when the Prosecutor identifies a particular suspect and develops an investigative hypothesis. At this point, determining admissibility requires a more specific analysis of any prosecutions occurring at the national level involving that particular suspect. Article 17 requires that the Prosecutor determine whether the specific case he intends to bring is being or has been investigated or prosecuted by national authorities. Where no such investigation has been or is being undertaken, the case remains admissible. If an investigation or prosecution has been undertaken by a state, the Prosecutor must consider whether the national investigation is genuine (Article 17(2) and
(3) ICC Statute). If the national proceedings are not genuine then the OTP may nonetheless proceed with an investigation.

At both the situational and case phases, the PTC also has a role to play in admissibility determinations. When a situation has been referred to the Court by another state or by the Security Council, the Prosecutor must inform the PTC of his decision not to proceed with an investigation due to admissibility limitations (Article 53(1) ICC Statute). Where the Prosecutor seeks to proceed with an investigation initiated under his *proprò motò* powers, the PTC must approve his decision and may take admissibility into account in deciding whether to authorize the investigation (Articles 15(3) and (4) ICC Statute). The PTC can allow a deferral based on national prosecutorial efforts or can render the situation inadmissible (Articles 18, 19 ICC Statute).

At the case phase, the PTC also has to make determinations of admissibility in its decisions to issue arrest warrants. Specifically, the PTC must decide whether the particular crimes charged in the Prosecutor's indictment have already been investigated or prosecuted at the national level. Likewise, the PTC must make such a determination when either an accused or a state challenges admissibility before the opening of an actual trial. Where the PTC grants a deferral, the Prosecutor can request a review of the decision after six months or in the event of a ‘significant change of circumstances’ in the state's ability or willingness to ‘genuinely’ investigate and prosecute (Article 18(3) ICC Statute). If at either the situational or case phase of an investigation or prosecution the PTC finds the case to be inadmissible, the Prosecutor must cease the investigation.

**B. The Problem of Admissibility Challenges in Self-referrals**

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

The first statutory problem arises from Article 19(5) ICC Statute, according to which a state must ‘make a challenge [to admissibility] at the earliest opportunity’. Where a state self-refers a situation and then subsequently seeks to challenge the admissibility of a case, a compelling argument can be made that the state has failed to act at the ‘earliest opportunity’. Where the challenge to admissibility arises because of a subsequent factual development — such as a new ability to secure custody of the accused — the earliest opportunity requirement might present less of a problem so long as the state challenging admissibility acted at the earliest opportunity after that change of circumstances. If the earliest possible opportunity requirement were not satisfied, the state's admissibility challenge would, presumably, fail.

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

A third potential problem with a subsequent admissibility challenge in the case of a self-referral arises from the general principle of estoppel and the international legal duty of good faith. While the principle of estoppel has its historic origins in territorial disputes, the basic elements are applicable in any reliance-creating situation. Estoppel attaches when a state makes a clear and voluntary commitment and the other party relies in good faith on that representation to its detriment. A self-referring state certainly meets the clear and voluntary requirements, and a case could be made that, at least in the Ugandan situation, the ICC had relied on Uganda’s self-referral and would be harmed by Uganda’s assertion of jurisdiction.

Further, the requirement of good faith, articulated in article 26 of the Vienna Convention on the Law of Treaties and the Draft Declaration on the Rights and Duties of States requires that states perform their treaty obligations to the best of their abilities and that what ‘has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise.’ To the degree that a state seeks to use the admissibility requirements of the Statute to manipulate the Court or subvert the object and purpose of the Statute, such actions would breach the state’s duty of good faith and could preclude an admissibility challenge.

3. Three Visions of Admissibility

Both the text and travaux préparatoires of the Rome Statute are suggestive of three different visions of admissibility and corresponding purposes of the complementarity regime found in Article 17. The admissibility requirements of the Statute can be understood as a fundamental right of the accused, a means to protect state sovereignty, or a basic limitation on the power of the Court. While some of these visions of the admissibility requirement overlap, each provides insight into the appropriateness of an admissibility challenge and may lead to different dispositions by the PTC.

A. Admissibility as a Personal Right of the Accused

A first vision of the admissibility phase is that it is a method of protecting the personal rights of the accused. This vision of admissibility is derived from the idea that an accused has a right to be free of double jeopardy and multiple, overlapping proceedings.\(^\text{14}\) Multiple trials in different fora would violate the accused's right to a free and fair trial found in, among other sources, the International Covenant on Civil and Political Rights (ICCPR).\(^\text{15}\)

In the drafting of the Statute, there was general agreement that the accused should have a right to challenge the admissibility of the case against him. Most disagreement at Rome on this point focused on whether a 'suspect' under investigation but not yet indicted should be able to challenge admissibility.\(^\text{16}\) The ultimate choice of allowing anyone 'for whom a warrant of arrest or summons to appear has been issued' (Article 19(2)(a) ICC Statute), emphasizes that the accused's right to challenge admissibility attaches at the point where the Court interferes with that person's liberty through, for example, summoning him/her to a foreign locale.

The text of the Statute suggests that such a right of the accused to challenge admissibility is not unlimited. An accused only has an automatic right to challenge admissibility once prior to the initiation of trial, unless leave is granted and the challenge is based on a double jeopardy claim. This limitation reflects the need to prevent the waste of judicial resources that would accompany removal of a case after trial had started.\(^\text{17}\) While the concept of admissibility as a right of the accused is clearly an important element of the complementarity regime, it may be subordinated to the proper functioning of the Court.

This vision of admissibility as a right of the accused may be a partial justification for complementarity, but it is not complete. There is no reason for the accused to expect to choose the court of his trial. States have in a variety of circumstances transferred their jurisdictional entitlements to other states or entities through, for example, status of forces agreements, without jeopardizing the rights of the accused.\(^\text{18}\) The principle of universal jurisdiction embraces the idea that certain crimes are so heinous that any state has a right to try the perpetrators, regardless of any connection to the state itself. At the very least, this vision of the admissibility requirement suggests that irrespective of the method of referral, the accused maintains an actionable interest in avoiding multiple proceedings.


\(^\text{15}\) Art. 14(7) ICCPR.


B. Admissibility as the Protection of the Rights of States

A second vision of the admissibility requirement is as a means to protect states’ rights and respect sovereignty. This view was perhaps dominant in Rome and is consistent with the Statute itself being viewed as a transfer of jurisdictional entitlements from states to the ICC. According to this view, states parties transferred a limited jurisdictional entitlement to the Court only where the territorial or national state was unable or unwilling to prosecute. In contrast, states retain all rights not transferred to the Court and the exercise of jurisdiction beyond those transferred powers would breach the state’s sovereign rights.

Once again, the Statute reflects a compromise as evidenced by the travaux préparatoires. In the initial discussions at Rome, several states were sceptical of any intrusion on state sovereignty, seeking to retain the right to prosecute domestically except where the national or territorial state was truly unable to act. In contrast, other states favoured a larger scope of admissible cases, encompassing ineffective state action in addition to inaction.

The divergent views of the delegations expressed in the 1995 Report of the Ad Hoc Committee on the Establishment of the ICC underscore this vision of complementarity as a protection of state sovereignty. On one end of the spectrum, some states preferred a ‘strong presumption in favour of national jurisdiction’, citing the advantages of established procedure, law and punishment, as well as administrative efficiencies and the interest in maintaining state responsibility for prosecuting crimes. At the other end of the spectrum was a call for the ICC to serve as the only venue for prosecuting grave crimes. This approach was based on the idea of universal jurisdiction and that with respect to ‘a few “hard-core” crimes’ states no longer retained exclusive authority.

Eventually, the Preparatory Committee settled on language based on the initial International Law Commission (ILC) proposal, but with a more nuanced delineation of when a case would be inadmissible. This validated the intrusion of the Court into a domestic prosecution even when national proceedings had been undertaken or were taking place, but only if the proceedings were not genuine. After this proposal with respect to the admissibility requirement had been drafted, an ‘alternative approach’ was offered with a notation of the need for ‘further discussion’. The alternate language on admissibility read simply: ‘The Court has no jurisdiction where the case in question is being investigated.

19 Art. 2(7) UN Charter.
20 Morris, supra note 18, at 44.
22 Holmes, supra note 17, at 41–42.
23 Ibid.
24 Bassiouni, supra note 16, at 50–51.
25 Ibid., at 152.
or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.\textsuperscript{26} The vast majority of delegations rejected this approach.\textsuperscript{27}

A further proposal by the United States shifted the admissibility evaluation to the beginning stages of an investigation.\textsuperscript{28} The US delegation framed the need for this adjustment as a protection of a state's right to fully investigate the crimes concerned itself.\textsuperscript{29} The US proposal touched off a debate between delegations that considered this proposal to add unnecessary obstacles to the Court's exercise of jurisdiction and those which argued that the proposal strengthened the protection of state sovereignty.\textsuperscript{30} The US proposal became, for many delegations, 'key to their acceptance of the complementarity regime and the \textit{proprio motu} role of the Prosecutor'.\textsuperscript{31}

A compromise was also reached between the extreme positions of delegations that preferred any state to challenge admissibility and those that wanted challenges limited only to states parties.\textsuperscript{32} Ultimate agreement allowed for any state with jurisdiction to challenge.\textsuperscript{33} Allowing non-party states to challenge admissibility suggests that negotiators were uncomfortable with granting the Court authority that interfered with the rights of non-party states.

The language eventually adopted appears to reflect both the desire to retain sovereign prerogative over the investigation and prosecution of international crimes and the need to create a court with the authority and capacity to effectively 'put an end to impunity' (Preamble paragraph 5 ICC Statute). The vision of admissibility as a protection of states' rights stresses the first element of this balancing and suggests that states retain all rights not expressly transferred to the ICC. Such a reading of admissibility results in a narrow interpretation of the powers transferred to the Court and would give preference to state challenges to admissibility notwithstanding self-referrals.

\section*{C. Admissibility as a Limitation on the Power of the ICC}

A third potential vision of the admissibility requirement is as a fundamental limitation on the power of the ICC. This vision is the logical converse of the second vision of admissibility as a means of protecting state sovereignty,

\textsuperscript{27} Holmes, \textit{supra} note 17, at 52–53.
\textsuperscript{28} For a detailed discussion of the United States proposal, see \textit{ibid.}, at 68–72.
\textsuperscript{30} \textit{Ibid.}, at 190–194.
\textsuperscript{31} Holmes, \textit{supra} note 17, at 71.
\textsuperscript{32} \textit{Ibid.}, at 62.
\textsuperscript{33} \textit{Ibid.}, at 66.
but shifts the emphasis and may result in different dispositions of a case. This vision of admissibility also rests on the transfer of limited jurisdictional entitlements to the ICC. The Court, as a creation of the states parties themselves, has no powers beyond those expressly transferred to it and must be limited to its enumerated powers.

While not the dominant frame as expressed at Rome, the notion of a court of limited powers reappears repeatedly in negotiations. Admissibility as a limitation on the powers of the ICC is most apparent with respect to statutory language addressing when and how often the Court should investigate admissibility. Notably, the Preparatory Committee draft of the eventual Article 19 required that the Court ‘[a]t all stages of the proceedings...satisfy itself as to jurisdiction over a case’\textsuperscript{34} and conduct on-going reviews of admissibility.\textsuperscript{35} Such a continuing obligation to scrutinize jurisdiction and admissibility suggests that the Court has no power to act when a case is inadmissible, even if the admissibility requirements might have been initially satisfied. While the language requiring continuing scrutiny was eventually altered to a lesser statutory requirement that the Court satisfy itself as to jurisdiction and admissibility up to the point where a trial actually begins, the language suggests a court of limited powers.\textsuperscript{36} At the very least, this language indicates a balancing between the fundamental limitations on the Court’s authority and the need for an institution that can operate effectively.

A further reason to question this view of admissibility as a fundamental limitation on the Court is the restriction on challenges to admissibility found in the Statute. The Committee as a whole accepted without great controversy the limitation of one challenge each for states and the accused prior to commencement of trial, and the requirement that States challenge admissibility at the ‘earliest opportunity’ (Article 19(5) ICC Statute). If admissibility were in fact a fundamental limitation on the power of the Court, it would seem to have been appropriate to allow numerous challenges to admissibility — at least those based on new developments — and to allow such challenges to be made even by states without jurisdiction.

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

\textsuperscript{34} Draft Statute, supra note 26, at Art. 17(1).
\textsuperscript{35} \textit{Ibid}. The Prosecutor is also required to determine that the case is admissible under Art. 17(1) ICCSt.
\textsuperscript{36} Art. 19(1) ICCSt.
While all three visions of the admissibility requirement may be at play, the concept of admissibility as a protection of states’ rights appears most compelling. That vision of admissibility appears to favour admissibility challenges, but recognizes that in the transfer of jurisdictional powers to the Court, states may have also conferred certain implicit powers that may limit their subsequent rights to challenge admissibility where such a challenge would undermine the Court’s effective operation.

D. Visions of Admissibility in the Practice of the ICC

While the case law on admissibility is still developing, the decisions of the PTC in the first cases before the ICC provide some insight into how the Chamber understands and balances the three visions of admissibility. The primary decisions on admissibility to date arise in the early phases of the case of Thomas Lubanga Dyilo in the situation concerning the Democratic Republic of Congo (DRC).37 Prior to the issuance of an ICC warrant, Lubanga Dyilo was arrested in Kinshasa on domestic charges of murdering nine MONUC38 peacekeepers in March 2005.39 He was subsequently charged by the ICC with genocide, crimes against humanity, murder, illegal detention and torture, in a warrant issued on 10 February 2006.40

In its initial decision as to whether to issue an arrest warrant, the PTC had to decide whether the case against Lubanga Dyilo remained admissible, notwithstanding the fact that he was in domestic custody facing prosecution in Kinshasa. While the DRC did not challenge admissibility, the PTC noted that it had to consider admissibility on its own accord before issuing arrest warrants: ‘an initial determination on whether the case against Mr. Thomas Lubanga Dyilo... is admissible is a prerequisite to the issuance of a warrant of arrest for him’.41

The PTC found the case against Lubanga Dyilo admissible because he was being charged by the ICC with crimes distinct from those alleged in the domestic warrant against him and based on separate facts. Specifically, the Congolese warrant addressed Lubanga Dyilo’s role in the MONUC killings, whereas the ICC warrant focused on conscription of child soldiers. The PTC noted that while inability under Articles 17(1) and 17(3) no longer appeared to be a barrier to the DRC asserting national jurisdiction, as the proceedings in the DRC did not specifically reference the conscription of children into hostilities, the case remained admissible. The PTC decided that in order for

37 Decision on the Prosecutor’s Application for a Warrant of Arrest, Art. 58, Lubanga Dyilo (ICC-01/04-01/06), Pre-Trial Chamber I, 10 February 2006, §§ 30–40.
40 Warrant of Arrest, Lubanga Dyilo (ICC-01/03-01/06), Pre-Trial Chamber I, 10 February 2006, at 4.
41 Decision, Lubanga Dyilo, 10 February 2006, supra note 37, at § 18.
a case to be inadmissible ‘national proceedings must encompass both the person and the conduct which is the subject of the case before the Court’. While it remains possible that admissibility will be challenged as the Lubanga Dyilo case proceeds, thus far the PTC has treated admissibility as a protection of states’ rights and admissibility as a limitation on the powers of the Court with regard to the functional needs of the Court to fulfil its mandate. On the one hand, the PTC scrupulously examined admissibility of the case against Lubanga Dyilo before issuing arrest warrants and thereby ensured that the Court was not stepping beyond the limited powers provided in the Statute or encroaching on the rights of states. On the other hand, the Chamber imposed the requirement, not necessarily evident from the statute, that domestic proceedings must include the same conduct charged by the ICC. That element of the PTC’s decision ensured the Court sufficient leeway to carry out its functions.

4. The Potential Ugandan Admissibility Challenge

Throughout late 2007 and 2008, peace negotiations between the LRA and the Ugandan government have been unfolding rapidly. For the purposes of argument, the sections that follow assume that a peace agreement is ultimately signed and that Uganda and the LRA proceed to implement the June 2007 and February 2008 agreements on accountability and reconciliation, making an admissibility challenge by Uganda possible.

A. Domestic Justice: The June 2007 and February 2008 Accountability Agreements

The 2007 agreement on justice and accountability seeks to promote ‘lasting peace with justice’ through balancing the need for peace with the obligation to ‘prevent ... impunity’ and the ‘requirements of the Rome Statute’. It anticipates the establishment of a domestic criminal justice mechanism to provide accountability for the most serious crimes committed during the conflict. Specifically, the agreement calls for ‘formal criminal and civil justice mechanisms’ to ‘be applied’ to those responsible for ‘serious crimes’ or human rights violations through a ‘legal framework in Uganda’. This is fully consistent with the exercise of Uganda’s primary jurisdiction over the LRA indictees. The agreement appears to anticipate an admissibility challenge, noting

42 Ibid., at § 31.
44 Ibid.
‘Uganda has institutions and mechanisms...provided for and recognized under national laws capable of addressing the crimes and human rights violations committed’ in the conflict.\footnote{Ibid.}

This first agreement however offers two key concessions to the LRA leadership that may impact admissibility. First, the agreement suggests that, notwithstanding the use of ‘formal courts’, ‘alternative penalties and sanctions... shall apply and replace existing penalties with respect to serious crimes’.\footnote{Ibid.} While such penalties are supposed to ‘reflect the gravity of the crimes’, they remain unspecified. Depending on how such penalties are ultimately crafted, they might or might not satisfy Article 17 of the Statute, namely that the proceedings were not intended to shield the accused and that they were consistent with ‘an intent to bring the person concerned to justice’. Second, the June 2007 agreement calls for the use of ‘traditional justice mechanisms’ such as Mato Oput ‘as a central part of the framework for accountability’. To the degree that traditional justice is based around forgiveness ceremonies rather than criminal sanction it would presumably not meet the ‘intent to bring to justice’ standard.

An Annexure, concluded in February 2008, provides more specific frameworks for the implementation of the principles articulated in the June 2007 agreement. The Annexure calls for the establishment of a ‘special division of the High Court of Uganda’ to ‘try individuals who are alleged to have committed serious crimes during the conflict’. The anticipated special division will undertake investigations for war crimes and crimes against humanity. While the Annexure does not specifically mention alternative sentences, it notes that the special division may recognize ‘traditional and community justice processes in proceedings’.

In light of these developments, the PTC submitted a request to the Government of Uganda on 29 February 2008, seeking further information on the steps Uganda was taking to implement the agreements, the proposed competence of the special division of the High Court, the categories of offences subject to traditional or alternative justice, and the impact of the agreements on the ICC arrest warrants.\footnote{Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, Kony, Otti, Odhiambo and Ongwen (ICC-02/04-01/05), Pre-Trial Chamber II, 29 February 2008, at 4.}

In a response issued on 27 March 2008, Uganda clarified that ‘formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations.’\footnote{Letter from J.F. Kiggundu, Acting Solicitor General, to the Registrar of the International Criminal Court, 27 March 2008 (on file with authors).} The letter further specified that the government will appoint a task force for determining the necessary implementing legislation and will proceed with the establishment of the special division after a final peace agreement is signed. With respect to issues of admissibility, the Solicitor General’s letter noted: ‘The
special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly, those individuals who were indicted by the International Criminal Court will have to be brought before the special division ...'.

The letter further provides the basis for a future challenge to admissibility by Uganda, noting that ‘Uganda’s inability to have the LRA leadership tried’ was due to the fact that the LRA leaders were ‘beyond the borders of Uganda’. The letter continues: ‘It is expected that once the agreement is signed and the Lord’s Resistance Army submits to Ugandan jurisdiction as required ... the indictees inclusive, shall be subject to the full force of the law.’

In October 2008, the PTC exercised its Article 19(1) powers to determine admissibility on its own motion, and extended an invitation to Uganda, the OTP, the newly appointed counsel for the Defence, and victims to ‘to submit their observations on the admissibility of the Case’. The PTC specifically noted both the accountability agreement and the annexure in its decision. Both the Prosecution and the Defence responded. The OTP reiterated its stance that the on-going negotiations did not affect the admissibility of the case as no national proceedings had been initiated. Jens Dieckmann, Counsel for the Defence, did not take a position on the admissibility issue, but rather requested that the PTC make no ruling because he had not had any contact with the accused and could not, therefore, represent their interests. The Defence noted it was not waiving the accused’s rights and that no decision should be taken until the accused could participate in the proceedings.

As of the writing of this article, no decision has been made by the PTC.

B. Mechanisms of Domestic Justice

The agreements reached to date suggest that Uganda will pursue a dual track strategy. Those most responsible for international crimes committed in the conflict who have not yet received amnesty will face formal domestic justice with special procedures and, possibly, alternative sentences. Given that Uganda has already granted amnesty to members of the LRA who have been demobilized, such formal justice would likely apply only to those LRA members who remain at large, including the ICC indictees.

49 Ibid., at 3.
50 Ibid.
51 Decision initiating proceedings under Art. 19, requesting observations and appointing counsel for the Defence, supra note 1, at 8–9.
52 Prosecution’s Observations regarding the Admissibility of the Case against Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, Koni, Otti, Odhiambo and Ongwen (ICC-02/04-01/05), Pre-Trial Chamber II, 18 November 2008.
53 Jens Dieckmann, Counsel for the Defence, Submission of observations on the admissibility of the Case under Art. 19 (1) of the Statute, Koni, Otti, Odhiambo and Ongwen. (ICC-02/04-01/05 18), Pre-Trial Chamber II, 18 November 2008, at §§ 41–45.
committed lesser offences will, presumably, face limited accountability based around traditional justice ceremonies. Any challenge by Uganda to admissibility will relate only to the formal justice mechanisms utilized for LRA officials indicted by the ICC. The key question, then, is whether the domestic justice utilized for ICC indictees will meet the complementarity requirements of the Statute. A number of options are available to Uganda in this process with considerably different implications for admissibility.

1. **Amnesty**

The present legal framework in Uganda provides for blanket amnesty for demobilizing rebels who apply through a simple process with the Amnesty Commission.\(^{55}\) The Amnesty Act of 2000 was extended by the Government of Uganda in May 2006 and remains applicable. Under existing law, even ICC indictees who submit to Ugandan domestic jurisdiction could apply for amnesty and could become immune from domestic prosecution.\(^{56}\) While there are many deficiencies in the existing amnesty process in Uganda, as long as such amnesty applies only to non-ICC indictees, the Amnesty Act would not present a problem for an admissibility challenge. It would, nonetheless, limit the use of formal justice mechanism to those members of the LRA who have yet to apply for amnesty. If, however, amnesty is offered to or, perhaps even if it is statutorily available to ICC indictees, it would presumably deprive Ugandan courts of domestic jurisdiction and thereby render moot any admissibility challenge by Uganda. Hence, should Uganda seek to implement the February 2008 Annexure plan for a special division of the High Court, it must reform the Amnesty Act so as, at the very least, to exclude ICC indictees from amnesty.

2. **Courts Martial**

Perhaps the most effective means to provide domestic accountability for ICC indictees would be to conduct a trial through Uganda’s military tribunals, which are already well established and clearly have the competence to undertake such investigations. This has been the preferred method of trying sensitive, politically implicated crimes in the past. There are, however, two problems with such an approach. First, the February 2008 Annexure specifies that military courts will not be used as a mechanism for accountability for serious crimes.\(^{57}\) Second, the constitutionality of using military tribunals to prosecute individuals not in the military is questionable. In 2005, the trial of

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\(^{55}\) Ibid.

\(^{56}\) At least some readings of an amended version of the Amnesty Act of 2000 would appear to give the Minister of Justice authority to limit a grant of amnesty so as not to preclude the exercise of domestic jurisdiction over ICC indictees. Personal interview by William Burke-White of El Hajji Miro, Amnesty Commissioner, Kampala, Uganda, 8 January 2008.

\(^{57}\) February 2008 Agreement, supra note 5, at § 23.
the opposition leader Dr. Kizza Besigye provoked a constitutional conflict when he was detained by the military to face a court martial on charges of terrorism and illegal weapon possession.\textsuperscript{58} Uganda’s High Court ruled that the exercise of military jurisdiction over civilians was unconstitutional.\textsuperscript{59} Hence, despite the potential effectiveness of military courts martial as a means of accountability for the LRA, it appears highly unlikely they will play a role in the process.

3. A Special Division of the High Court

By far the most likely means of formal accountability for the LRA is a special division of the High Court. Considerable implementing legislation is needed to provide for the operation of such a special division in conformity with the June 2007 and February 2008 Agreements. While no official announcements have been made — and none expected until a peace agreement has been formalized — it is believed that several judges have been appointed to the High Division, and that a draft law is being written.\textsuperscript{60} However, with no clear structure, three key issues must be addressed in the creation of the High Division for such domestic trials to satisfy the Statute: (i) potential charges under Ugandan law; (ii) operating procedures; and (iii) the range of possible sentences.

The ICC indictment against Joseph Kony contained 33 separate charges involving nine international criminal acts: enslavement, sexual enslavement, rape, inducing rape, attack against civilians, cruel treatment, inhumane acts, pillaging and murder.\textsuperscript{61} Uganda, like most states, does not define domestic crimes in the same manner as the Rome Statute. However, identical framing of charges is not required of States Parties and the ICC charges could be translated into charges under Uganda’s Penal Code Act of kidnapping or abducting in order to subject a person to grievous harm, slavery, detention with sexual intent, rape, doing grievous harm, theft and murder.\textsuperscript{62} If Uganda charged Kony with all of the above crimes, it could likely meet the requirement cited by PTC-I in the \textit{Lubanga Dyilo} case that each person and conduct charged in the ICC warrant be charged in the domestic proceedings.

\textsuperscript{58} Charged under Ugandan People’s Defence Forces Act No. 7 of 2005, § 119(1).
\textsuperscript{60} Uganda’s Victims Foundation and Redress Trust, Amicus Curiae submitted pursuant to the Pre-Trial Chamber II ‘Decision on application for leave to submit observations under Rule 103’ dated 5 November 2008, \textit{Kony, Otti, Odhiombo, and Ongwen} (ICC-02/04-01/05-353), Pre-Trial Chamber II, 18 November 2008.
\textsuperscript{61} Warrant for the Arrest, \textit{Kony} (ICC-02/04-01/05), Pre-Trial Chamber II, 8 July 2005, at 12–20.
\textsuperscript{62} Cap 120, Laws of Uganda, Revised Edition (2000) at Ch. 24 § 245, Chs 14 §§ 314 and 219, Ch. 21 § 219, Ch. 25 § 261 and Ch. 18 §§ 188–189, respectively. Since 2004, Uganda has considered legislation that would implement its obligations under the Rome Statute, as well as define international crimes as crimes under Ugandan domestic law: The International Criminal Court Bill 2006, Bills Supplement No. 13, XCVIX Uganda Gazette No. 67, 17 November 2006. To date, the bill has not been enacted. It may, however, serve as the basis for defining the law to be used by the High Division.
Second, Uganda will have to develop an appropriate procedural framework for the trial of the LRA leadership in the proposed special division. Such a procedural framework is indicated in broad terms in the February 2008 Annexure and would have to comply both with the Ugandan constitution and key procedural guarantees of international human rights instruments. More specifically, that procedural framework would have to meet the requirements of Article 17 of the Statute that the proceedings are conducted ‘independently and impartially’ and that there is not an ‘unjustified delay’ in the proceedings.\(^{63}\)

As soon as practical after the signing of a final peace agreement, Uganda will need to pass appropriate implementing legislation for the operation of the special division of the High Court. While there is no suggestion in its practice to date that the ICC will deem a domestic prosecution not genuine where it fails to provide adequate procedural protections for the accused, in the circumstances where the Court is already seized of jurisdiction and has made a preliminary finding of admissibility, the Court may well impose such fair trial requirements on any domestic proceeding before finding the case inadmissible.\(^ {64}\)

Third, domestic legislation must address sentencing so as to find a sanctions regime that encourages the LRA to surrender but that still meets the tests of Article 17. The June 2007 Agreement clearly references the establishment of a ‘regime of alternative penalties and sanctions’.\(^ {65}\) The nature of the negotiations between the LRA and the Ugandan government during late 2007 and 2008 suggests that this regime of alternative sentences is a \textit{sine qua non} of any peace deal and a strong incentive for the LRA leadership to submit to Ugandan domestic jurisdiction.\(^ {66}\) Under existing Ugandan law, the likely charges they would face could carry sanctions up to and including death, whereas the ICC could apply a maximum sentence of life in prison under Article 77 ICCSt. Hence, under existing law, it appears likely that the range of sentences Kony and others might face would be consistent with the intent to bring to justice requirement. However, should the Ugandan government revise the applicable penalties available to the special division, as suggested by the June 2007 Agreement and demanded by the LRA, to provide far lighter sentences, or even alternative sanctions such as house arrest, such a sentencing regime could be seen by the PTC as a means of shielding the accused from the ICC or as inconsistent with an intent to bring them to justice.

The PTC could approach the sentencing issue from one of two perspectives: procedure or outcome. The procedural approach would look to the range of

\(^{63}\) Art. 17(2)(b–c) ICCSt.

\(^{64}\) For a comparison with the ICTY referral back requirements to send a case back to domestic courts in Bosnia, see W. Burke-White, ‘The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina,’ \textit{46 Columbia Journal of Transnational Law} (2008) 279, 310–315.


\(^{66}\) Personal interview by William Burke-White with LRA Representative, 7 January 2008, Kampala, Uganda.
potential sentences available to the domestic court; the outcome approach would look to the actual sentences given. The language of the Rome Statute seems to indicate that a result that shields the accused from justice would be impermissible, yet it makes reference only to the ‘proceedings’ to determine willingness to prosecute (Article 17(2) ICCSt.). A purely procedural approach could be problematic as it would appear inconsistent with Article 17 for the accused to nominally face severe penalties but to be discretionally sentenced to terms that do not match the severity of the crimes. The PTC may therefore have to render a decision on admissibility after sentencing by the domestic court so as to be able to consider the difference between the sentence given and typical sentences within a jurisdiction to determine if a ‘national decision was made for the purpose of shielding the person concerned from criminal responsibility’ (Article 17(2)(a) ICCSt.). If the PTC takes this approach, the Ugandan government will have to demonstrate that (i) the range of sentences available in the domestic trial was standard; (ii) that the actual sentence given reflects the gravity of the crimes; and (iii) that the actual sentence was not dictated by pre-trial agreements with the accused.

4. Traditional Justice

A final option available to Uganda is the use of traditional justice, as called for in both the June 2007 Agreement and February 2008 Annexure. Such traditional justice mechanisms are clearly the strong preference of the LRA indictees and might include modified versions of various local processes such as Mato Oput. These mechanisms generally seek community healing and reintegration through confession, repentance and token restitution, aimed at demonstrating remorse and signalling a new start for all involved. They do not, however, generally provide for criminal sanction.

The March 2008 Letter from the Ugandan Solicitor General to the ICC Registrar suggests that these traditional justice mechanisms will only apply to lower level offenders and would not constitute a part of the formal justice mechanisms applicable to ICC indictees. That limited use of traditional justice would not impact admissibility. Should, however, participation in traditional justice be a significant part of the formal sentence for ICC indictees, it could be viewed as inconsistent with an intent to bring the accused to justice. Similarly, should the procedures adopted by the special division incorporate elements of traditional justice, it is possible the ultimate proceedings might not be deemed independent and impartial. The separation of traditional justice mechanisms from the formal court proceedings will be necessary for a successful admissibility challenge.

5. Evaluating Admissibility in the Uganda Situation

Either through the current preliminary enquiry on admissibility or, preferably, through an eventual admissibility challenge, the PTC will have to rule on the admissibility of the case against the LRA. The approach taken by PTC to such a challenge will have considerable implications both for the pursuit of peace and justice in Uganda and for setting the contours of permissible domestic justice. Given the circumstances of Uganda’s referral and the on-going peace negotiations, the results of such a challenge may significantly impact the Court’s legitimacy and future effectiveness. On one hand, rejecting a challenge to admissibility, particularly if a peace agreement has been reached that is conditional on domestic trials, may leave the Court responsible for continued conflict and undermine support. On the other hand, if the Court compromises justice by allowing the LRA leaders to escape justice, it may weaken the Court’s moral authority and deterrent effect. Such a ruling might also create incentives for states and suspects to use the ICC as a negotiation tool, rather than an institution of justice. This section considers potential admissibility challenges by the Ugandan government and by an indictee.

A. An Admissibility Challenge by the Government of Uganda

Uganda has jurisdiction over any crimes committed by ICC indictees and, pursuant to Article 19(2)(b) of the Rome Statute, is therefore empowered to challenge admissibility. Such a challenge brought by the Ugandan government would likely raise three key questions for consideration by the PTC: (i) Is Ugandan ‘estopped’ from challenging admissibility? (ii) Has Uganda raised the admissibility challenge at the earliest possible opportunity? and (iii) Do the proposed domestic proceedings meet the requirements of the Statute?

In a challenge by Uganda, the PTC may approach admissibility as a fundamental limitation on the power of the Court. From that perspective, the estoppel argument carries little weight. If the Court lacks the power to proceed where a domestic court is able and willing to undertake its own investigation and prosecution, then the Ugandan self-referral should have little or no bearing on admissibility.

In contrast, if the PTC views admissibility as a means of protecting state sovereignty, then the estoppel argument may be more convincing. By self-referring the case, it could be argued Uganda has waived the rights it would have otherwise had to challenge. Yet, the Statute addresses this possibility of waiver through the ‘earliest opportunity’ requirement. That requirement balances the protection of states’ rights with the need for the proper functioning of the Court by forcing states to challenge admissibility as soon as possible. Given that the Statute already adresses the estoppel issue as a matter of treaty law, those treaty requirements ought to supplant any customary law estoppel claim that might arise. Assuming that any challenge by Uganda is appropriately made before the commencement of trial, it is unlikely that
a PTC finding of inadmissibility would interfere with the effective operation of the Court or undermine its goals. Thus, even from the perspective of admissibility as a protection of state sovereignty, the estoppel claim should not stand in the way of an admissibility challenge.

Perhaps a more difficult consideration with respect to a challenge to admissibility brought by Uganda relates to timing. Such a challenge must be based on clear evidence that Uganda is both able and willing to prosecute pursuant to Article 17. Yet, such a challenge must also be made at the ‘earliest opportunity’ (Article 19(5) ICC Statute). This suggests a potential contradiction, or at least an inconsistency, in the operation of Article 19. Should Uganda challenge admissibility prior to conducting a trial, it might not be able to satisfy the Court that it in fact was willing to genuinely prosecute the accused. However, if Uganda waits to challenge admissibility after starting a domestic trial, the PTC could find the challenge untimely.

The purpose of the earliest possible opportunity requirement in Article 19(5) is presumably to maximize the efficiency of proceedings, such that the ICC does not waste resources on an investigation or prosecution only to have the case subsequently deemed inadmissible when a challenge could have been brought earlier. Yet, the object and purpose of the Statute is to create a court of complementary jurisdiction that gives preference to national prosecutions. Reading the earliest possible opportunity requirement consistently with that purpose suggests allowing some leeway in terms of the timing of a challenge and not using the timing requirement to block otherwise genuine assertions of national jurisdiction. As long as the challenge by Uganda is brought before such time as the ICC expends further resources in apprehending or prosecuting the accused, the purpose of Article 19(5) would be satisfied and the ICC not inconvenienced by delaying the prosecution until evidence of a genuine domestic prosecution becomes available.

The timing of a PTC decision on admissibility is a separate question. It would be difficult for the PTC to decide an admissibility challenge without reference to the proceedings as a whole, including the result. The PTC could defer a decision until more evidence is shown, in the form of actual progress towards justice. This possibility of a delayed decision would have the benefit of involving the territorial state and the PTC in a potential dialogue as to the nature of domestic proceedings and creating on-going pressure on the territorial state to provide meaningful justice. This approach suggests that the current Article 19(1) evaluation of admissibility by the PTC on its own initiative is not ripe and should be stayed or should result only in general guidance on acceptable national justice.

If this is the case, in order to meet the standards of Article 17, Uganda will have to provide compelling evidence that it is in fact undertaking genuine domestic proceedings. That, in turn, will require far more than just an illusive signature on a peace deal. Specifically, the PTC should demand evidence that the accused are in custody and that the Ugandan judiciary has taken action against them, presumably in the form of a domestic investigation or indictment. Ideally, then, before initiating an admissibility challenge, the Ugandan
government would wait until it had the necessary legal framework in place to prosecute, had a signed final peace deal, had secured custody over the accused, and had initiated domestic proceedings. Waiting until a *prima facie* case can be made that the government is in fact able and willing to prosecute offers the greatest likelihood of a successful challenge.

Finally, the PTC will have to consider whether the proposed Ugandan domestic proceedings meet the tests of admissibility. Given the limited information presently available about the structure of domestic proceedings and the scant jurisprudence to date, detailed speculation as to how the PTC will rule is inappropriate. On one end of the spectrum, accountability based solely on traditional justice would be insufficient to meet the requirements of Article 17. On the other end of the spectrum, a standard domestic trial with the full range of potential sanctions ordinarily available would presumably be unacceptable to the LRA. The more difficult case is a special domestic trial before the High Court with alternative sanctions such as highly reduced sentences in the range of three to five years, or a longer-term house arrest.

In that likely middle ground, the PTC analysis ought to consider whether the sentences available are indicative of an intent to bring the accused to justice and whether the special division's procedures can result in an independent and impartial proceeding. Should either the ultimate sentences rendered or the range of sentences available to the special division appear too limited, the PTC could find the case still admissible. In order to sustain an admissibility challenge, then the legislation implementing the proposed special division must ensure that even alternative sentences retain sufficient severity to demonstrate an intent to bring the accused to justice. To that end, the Ugandan government should ensure that the range of sentences available are proportionate to the severity of the crimes charged. While there may be some flexibility in the ultimate sentence rendered, it should not be so limited as to be out of proportion with the crimes committed.

### B. An Admissibility Challenge by an Indictee

An admissibility challenge by an indictee may result in a somewhat different disposition of the case. In such a challenge, the PTC could adopt a vision of admissibility based around the rights of the accused. The estoppel argument, which might limit the success of an admissibility challenge by the government, would be inapplicable because the accused was not involved in the self-referral. Similarly, the earliest opportunity requirement may be less problematic since the accused would only know that he would be prosecuted in a domestic forum once he was indicted by domestic authorities.

With respect to the evaluation of the proposed domestic proceedings in an admissibility challenge brought by an indictee, the basic tests of Article 17 remain. However, the vision of the admissibility requirement as a means of protecting of the rights of the accused might change the perspective of the PTC. Specifically, the PTC might look somewhat more forgivingly on procedural
deficiencies in the domestic forum as the accused is not responsible for them and his challenge to admissibility would reflect a preference for even a deficient domestic forum. That said, in the case of a challenge by an accused, the PTC might examine more strictly whether the domestic forum was indicative of a genuine intent to bring the accused to justice. The PTC might want to fully satisfy itself that the accused was not challenging admissibility simply to obtain a lighter sentence. Such stricter scrutiny of the intent to bring the accused to justice could lead the PTC to find a regime of alternative sentences unacceptable and the case still admissible.

6. Conclusion: Shaping Domestic Justice

The Preamble of the Rome Statute makes clear that the ultimate goal of the ICC is to ‘put an end to impunity’ (Preamble paragraph 5 ICC Statute). As one of the authors has argued elsewhere, impunity can be ended more effectively through cooperation with domestic institutions, than by the ICC alone.68 Given the limited resources and caseload of the ICC,69 domestic prosecution of international crimes is essential.70 While the implementation of positive or proactive complementarity might ordinarily fall within the remit of the Prosecutor, in an admissibility challenge the PTC may help shape domestic justice efforts. More specifically, national governments will look to the jurisprudence of the PTC to determine the acceptable range of domestic proceedings that can satisfy the Statute. Particularly where states in on-going conflicts seek to design judicial mechanisms that balance the need to secure the peace with the obligation to provide justice, they will look to decisions from the PTC to determine the flexibility available to satisfy those two potentially conflicting goals.

From this perspective, an admissibility challenge from Uganda gives the PTC an extraordinary opportunity to begin to map out the contours of acceptable domestic proceedings. In setting those contours, however, the PTC must tread carefully. If its reading of the Statute is too restrictive as to the design of domestic proceedings, the PTC could destabilize a peace process. In contrast, should the PTC grant Uganda too much leeway by, for example, allowing a domestic sentence of house arrest, it could undermine the goals of justice and accountability at the heart of the Statute. Ruling too hastily, such as before a domestic proceeding in Uganda is fully developed, could be dangerous and counterproductive.

Should the Uganda situation result in an admissibility challenge, the PTC will face both its greatest test and opportunity to date. The PTC will have to strike the right balance between granting states freedom to design domestic judicial responses to help end a conflict and the legitimate demands for justice

68 For a full discussion of proactive complementarity, see Burke-White, supra note 6.
69 Ibid.
70 Ibid.
and accountability. In the Uganda case, that balance may well lie in finding the right regime of alternative sanctions. Uganda will have to present a far more detailed proposal for domestic accountability to the PTC and the Court will have to respond. Ideally, both sides will recognize the goal of a mutually acceptable solution, constrained on one hand by the requirements of justice in the Rome Statute and on the other by the need for peace and stability. That recognition will hopefully lead the Ugandan government to aim higher than it otherwise would with respect to process and outcome and lead the PTC to accept something less than perfect accountability.

Both sides are operating largely in the dark, with little guidance as to either the PTC’s interpretation of Article 17 or the ultimate outcome of a domestic process in Uganda. If the Ugandan government’s proposed domestic process presented in an admissibility challenge is inadequate, the PTC will be fully justified in deeming the case still admissible before the ICC. While the PTC should not use its current inquiry on admissibility to make a final ruling, it could begin a legal conversation with the Ugandan government and provide some initial guidance as to what would constitute a sufficient domestic proceeding. It would thereby give the government the opportunity to revise the domestic proceedings if need be, and allow a formal admissibility challenge as appropriate. In the process, however, the PTC will send a powerful signal to states and the international community as to the flexibility states retain to resolve internal conflicts despite being party to the Rome Statute, the acceptability of compromises between peace and justice, and the Court’s perception of its own role at the intersection of law and politics, peace and justice.