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Complementarity and Post-Coloniality

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COMPLEMENTARITY AND POST-COLONIALITY

Nirej Sekhon*

ABSTRACT

The International Criminal Court's jurisdiction is complementary to that of national criminal jurisdictions. While most agree that complementarity is a cornerstone principle, debate continues as to what precisely it should mean for the ICC's relationship to national criminal justice actors. "Positive complementarity," a view many commentators hold, suggests that the ICC should use its power to educate, persuade, and prod states parties to undertake international criminal law investigations. For positive complementarity's more optimistic proponents, the future holds promise for a coordinated system of global justice in which the ICC plays a secondary role to national courts in vindicating international criminal law violations. In this essay, based on remarks presented at the Emory International Law Review's 2013 Symposium on the ICC's future, I argue that a robust regime of positive complementarity will require that the ICC deftly navigate a post-colonial landscape—i.e., widespread underdevelopment, political and social fragmentation, and epistemic heterogeneity. Doing so effectively will require tools the ICC does not have and a willingness to make political judgments that may seem unbecoming of a court. These limitations raise more profound questions about whether the ICC can speak to those who inhabit the globe's most desperately marginal spaces. While I am skeptical that it can, it is also unclear that domestic criminal justice actors are better equipped to do so. I conclude by suggesting that it may be more constructive to analyze complementarity through a descriptive lens rather than in grand normative terms. In this vein, I suggest that a "governmentality" framework that focuses on the development of bureaucratic culture may be useful for future research on complementarity.

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INTRODUCTION

Given the number of adjectives used to describe complementarity and the pages written about it,¹ one would think that the issue regularly arose in the International Criminal Court (ICC). But more than ten years after the ICC's creation, complementarity discourse remains primarily about the ICC's—and international criminal law's (ICL's)—future. While the Rome Statute notes that the ICC shall be “complementary to national criminal jurisdictions,”² the treaty does not provide a specific template for complementarity. For the more optimistic proponents of “positive complementarity,”³ the future holds the promise of a coordinated system of global justice in which the ICC plays a secondary role to national courts in vindicating ICL violations.⁴ Proponents argue that the Court's organs—primarily the Office of the Prosecutor (OTP)—should use their power under the treaty to educate, persuade, and prod states parties to undertake domestic ICL prosecutions.⁵

¹ See, e.g., Silvana Arbia & Giovanni Bassy, *Proactive Complementarity: A Registrar's Perspective*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 52, 54–55 (Carsten Stahn & Mohamed El Zeidy eds., 2011) (“positive complementarity,” “negative complementarity,” and “passive complementarity”); Michael Newton, *The Quest For Constructive Complementarity*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra*, at 304 (“constructive complementarity”); William W. Burke-White, *Proactive Complementarity: The International Criminal Court And National Courts In The Rome System Of International Justice*, 49 HARV. INT'L L.J. 53, 54 (2008) (“proactive complementarity”).

² Rome Statute of the International Criminal Court pmbl., *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

³ Burke-White, *supra* note 1, at 54 n.4.

⁴ See *id.* at 54–55.

⁵ See *id.* at 55–56.

In the discussion that follows, I address the question posed by the symposium's organizers by arguing that the more ambitious account of positive complementarity may not be the most "constructive" way to think about the subject. An ambitious notion of positive complementarity will require that the ICC deftly navigate a post-colonial landscape—widespread underdevelopment, political and social fragmentation, and epistemic heterogeneity. Doing so effectively will require tools the ICC does not have and a willingness to make political judgments that may seem unbecoming of a court. In Part II below, I develop this argument and conclude by suggesting that the complementarity debate raises more profound questions about the ICC and ICL more generally. Neither seems particularly well equipped to speak to "the subaltern"—those who inhabit the globe's desperately marginal spaces and are most vulnerable to the harms ICL is concerned with.

In Part III, I suggest that it may be more constructive to analyze complementarity through a modest descriptive lens rather than in grand, normative terms. In this vein, I suggest that the notion of "governmentality" may be a useful framework for understanding complementarity.

I. BACKGROUND

Unlike most international criminal tribunals of the past—which adjudicated to the exclusion of domestic courts⁶—the Rome Statute envisages a "complementary" relation between the ICC and national criminal jurisdictions.⁷ "Complementarity" describes the relationship.⁸ It is one of the Rome Statute's cornerstone principles.⁹ Former Prosecutor Moreno-Ocampo noted that success for the ICC might mean that cases stop reaching it.¹⁰ This is

⁶ See Burke-White, *supra* note 1, 65. While this has typically been true, there have been so-called hybrid tribunals that combine features of international and national courts. See DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 122 (2010) (discussing the Special Court for Sierra Leone). These, however, have been conflict-specific like other international tribunals of the past. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

⁷ Rome Statute *supra* note 2, pmbl, art. 1.

⁸ The word complementarity arose during the drafting of the Rome Statute. See *Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court*, 46th Sess., June 29, 1994, para. 35, (1994), reprinted in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 21 U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part I), U.N. Sales No. E.96.V.Z. (Part I) (1994).

⁹ Prosecutor v. Lubanga, Case No. ICC 01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, para. 34 n.38 (Nov. 8, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc243711.pdf>.

¹⁰ Luis Moreno-Ocampo, *A Positive Approach To Complementarity: The Impact Of The Office Of The Prosecutor*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, at 24.

to hope that, using the Rome's Statute's language, widespread domestic prosecutions of ICL violations would render cases *inadmissible* before the ICC.¹¹ The more optimistic accounts suggest that complementarity could usher in an era of broad and deep responsiveness to ICL violations by domestic criminal justice actors, with the ICC playing a supporting role.¹² The Rome Statute, however, does not provide a detailed framework for such a robust regime of complementarity.

The Rome Statute's operative provisions regarding complementarity are found in Articles 17 through 19. Because these provisions have been the subject of extensive summary and discussion elsewhere,¹³ only a brief description is necessary here. Article 17 provides that the Court shall deem a case "inadmissible" where it is being (or has been) "investigated or prosecuted by a State" unless that effort is not (or was not) genuine.¹⁴ The latter exception allows the ICC to proceed in cases where, among other circumstances, a state has initiated legal process against an individual to "shield[] the person . . . from criminal responsibility."¹⁵ The ICC may also proceed in circumstances where "[t]here has been an unjustified delay" in the state proceedings.¹⁶ Either the accused or a state with jurisdiction over a case may raise admissibility before the ICC.¹⁷ To ensure that states with jurisdiction have an opportunity to do so, the OTP must notify such states upon concluding that there is a reasonable basis for an investigation.¹⁸ The Rome Statute limits when and how frequently admissibility challenges may be brought.¹⁹

The Rome Statute's drafters included the admissibility provisions to placate potential states parties concerned about ratification's sovereignty costs.²⁰ Although the ICC is similar to past international criminal tribunals with regard

¹¹ See Rome Statute, *supra* note 2, art. 17(1).

¹² See, e.g., *id.*; Carsten Stahn, *Taking Complementarity Seriously*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, at 233, 236; Christoph Burchard, *Complementarity as Global Governance*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, at 167, 169.

¹³ See, e.g., Carsten Stahn, *Introduction*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, at 1, 8–12; Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 122–24 (2009); Michael Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 1, 133–37 (2010).

¹⁴ See Rome Statute, *supra* note 2, art. 17(1)(a)–(b).

¹⁵ See *id.* art. 17(2)(a).

¹⁶ See *id.* art. 17(2)(b).

¹⁷ See *id.* art. 19(2).

¹⁸ See *id.* art. 18(1).

¹⁹ See *id.* art. 19(4).

²⁰ See Burke-White, *supra* note 1, at 64–65.

to the substantive crimes over which it has jurisdiction and the absence of head of state immunity,²¹ it is the first such tribunal with an indefinite and open-ended mandate; past tribunals were created for adjudicating cases that arose from a specific conflict involving specific states.²² In theory, any state party's (and even some non-party states) nationals could find themselves before the ICC.²³ The admissibility provisions also address the obvious fact that resource constraints will prevent the ICC from adjudicating anything but a sliver of the cases over which it will have jurisdiction.²⁴ This history tends to support a "negative" or "passive" view of complementarity.²⁵ By this view, the ICC should give wide berth to domestic prosecutions and only step in as a court of last resort when a state fails to satisfy its obligation to investigate and prosecute.²⁶

In contrast, many commentators view the Rome Statute as creating the basis for vigorous, collaborative relationships between the ICC and States. These commentators tend to use adjectives like "positive" or "proactive" to describe complementarity.²⁷ They view complementarity as creating leverage for the ICC to cajole or coerce state actors into investigating and prosecuting violations of ICL,²⁸ to correct deficiencies within states that are inclined to investigate and prosecute such crimes, but do so imperfectly,²⁹ and generally support states' efforts for carrying out such investigations.³⁰ For example, William Burke-White has proposed the notion of "proactive complementarity" whereby the ICC would use its "legal and political powers to activate states' domestic courts in international criminal prosecutions."³¹

²¹ Compare Rome Statute, *supra* note 2, arts. 5, 27, with Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 3–5, 7, U.N. Doc. S/RES/827, (May 25, 1993) (adopting the Statute as proposed by the Secretary-General in U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, Annex (May 3, 1993).

²² See generally LUBAN, *supra* note 6, at 95–129.

²³ Rome Statute, *supra* note 2, art. 12; Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 13–14, 14 n.3 (2001).

²⁴ See Burke-White, *supra* note 1, at 54, 66–67.

²⁵ See Arbia & Bassy, *supra* note 1, at 55; Burke-White, *supra* note 1, at 56.

²⁶ See, e.g., Burke-White, *supra* note 1, at 56.

²⁷ See, e.g., Moreno-Ocampo, *supra* note 10, at 23–24; Stahn, *supra* note 12, at 261; Burke-White, *supra* note 1, at 56–57. Throughout the paper, unless specifically noted otherwise, I will use the adjective "positive" generically to refer to the body of commentators who take such a view.

²⁸ See Burke-White, *supra* note 1, at 57–58.

²⁹ See Burchard, *supra* note 12, at 180.

³⁰ See Moreno-Ocampo, *supra* note 10, at 23–24.

³¹ Burke-White, *supra* note 1, at 57.

While the Rome Statute requires communication and cooperation between the Court and states, it does not lay out a precise template for positive complementarity.³² Notwithstanding the ambiguity, the more enthusiastic proponents of positive complementarity view the ICC as part of an evolving system of coordinated, global justice.³³ Even if this ideal is not as heady as that of an earlier generation of international law commentators—i.e., a vision in which international institutions' growth was coterminous with sovereignty's dissipation³⁴—its vision of an activated, but harnessed, sovereignty remains ambitious. As a practical matter, we should question what a regime of positive complementarity actually stands to achieve and to what end.

II. POST-COLONIAL DILEMMAS

Positive complementarity posits that the ICC will engage states in a vigorous and multidimensional way to promote broader domestic enforcement of ICL.³⁵ The bulk of this engagement will presumably occur within post-colonial states that inhabit the global order's periphery. The post-colonial landscape is marked by economic underdevelopment and internal political fragmentation that does not necessarily conform to Western models of "interest" or "minority" politics.³⁶ A robust notion of positive complementarity will require the ICC to navigate this heterogeneous and complex landscape. I suggest below that it will be impossible for the ICC to do so in a manner that is neutral and apolitical. It is likely that the ICC is entirely ill-equipped to handle the more significant challenges post-colonial states present. This, in turn, raises deeper questions about ICL's capacity to speak to those who are most vulnerable to the harms ICL is concerned with.

A. *Justice Without Judges?*

If positive complementarity is to institute a new era of coordinated criminal justice, there must be reasonably well-developed institutions in post-colonial states for investigating, prosecuting, and adjudicating. To the extent that that is

³² See Rome Statute, *supra* note 2, arts. 18, 86, 87, 93.

³³ See Burchard, *supra* note 12, at 167 (applying "global governance theory" to complementarity); Burke-White, *supra* note 1, at 57 (describing the "Rome System of Justice").

³⁴ See, e.g., Newton, *supra* note 13, at 119 (quoting Benjamin Ferencz, Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (June 16, 1998)).

³⁵ See Moreno-Ocampo, *supra* note 10, at 23–24.

³⁶ See PARTHA CHATTERJEE, *THE POLITICS OF THE GOVERNED* 37 (2004) (describing politics of development in post-colonial states).

not true, the ICC is unlikely to have a significant role in facilitating the development of such.

1. *Rule of Law in the “Third World”*

The notion of positive complementarity suggests we conceptualize ICL as part of a broader rule of law program in the so-called “third world.” The expression “rule of law” describes any development program that assumes liberal precepts of governmental accountability and promotes the creation of formal, state-administered dispute resolution mechanisms that conform to due process.³⁷ The goal is not only to promote peaceful dispute resolution within a state, but also the related ends of economic efficiency and growth.³⁸ Increasing judicial independence, institutional case-processing capacity, and access to courts are the kinds of programmatic issues that rule of law initiatives tend to focus upon.³⁹

A cursory look at the World Justice Project’s Rule of Law Index suggests a broad divide between the Global North and *the rest*.⁴⁰ The Index reflects dozens of factors and sub-factors including limits on governmental authority, checks on official corruption, crime control, access to civil justice, and so forth.⁴¹ Every situation that the OTP is currently investigating or prosecuting involves African states that tend to score low for most factors on the Rule of Law Index (when there is data available at all).⁴² That is to say these states’ lack of capacity to investigate or prosecute violations of ICL is likely symptomatic of both deeper and broader rule of law problems. This in turn suggests, quite unsurprisingly, that cultivating greater capacity to investigate and prosecute violations of ICL in developing states will have to be tied to broader institutional reforms.

³⁷ See Juan Carlos Botero & Alejandro Ponce, *Measuring The Rule of Law 5* (The World Justice Project, Working Paper Series, Paper No. 001 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257.

³⁸ See, e.g., Roberto Laver, *The World Bank and Judicial Reform: Overcoming “Blind Spots” in the Approach To Judicial Independence*, 22 DUKE J. COMP. & INT’L L. 183, 185–87 (2012).

³⁹ See *id.*

⁴⁰ See MARK DAVID AGRAST ET AL., THE WORLD JUSTICE PROJECT: RULE OF LAW INDEX 2012–2013, at 25 (2013), available at http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.

⁴¹ *Id.* at 11.

⁴² Compare INT’L CRIM. CT., http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx (last visited June 26, 2013) (listing situations being investigated) with *Rule Of Law Index Map*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/rule-law-index-map> (last visited Oct. 19, 2013).

Positive complementarity is likely to work in only a specific subset of post-colonial states. Under the Rome Statute, complementarity is limited to contexts in which a state's justice institutions are available to effectively respond to ICL violations.⁴³ This encompasses situations where an violation unfolded (or is unfolding) without significantly compromising the relevant state institutions' independence or integrity.⁴⁴ It is in relation to such states that proponents of positive complementarity propose the ICC use its power and resources to promote domestic capacity for adjudicating ICL cases.⁴⁵ The prime contenders are likely to be states that inhabit the duskier, but not altogether dark, corners of the global imagination: "third-world" countries that are afflicted by the pathologies endemic to post-colonial governance—but remediable so.⁴⁶ Whatever adjective one might deploy—"third world," "underdeveloped," "global south," or some other—positive complementarity's canvas will be those poor states that are prone to bouts of mass violence, but are not entirely hobbled by it or wholly complicit in its perpetuation.⁴⁷

Kenya is a good example. Kenya's recent experience with rule-of-law initiatives illustrates the kind of problems that capacity building initiatives might attempt to remedy.⁴⁸ The situation in Kenya relating to 2008 electoral violence was the OTP's first self-initiated investigation.⁴⁹ The World Bank, in fact, interpreted the failure to refer election violence-related cases to Kenyan courts as emblematic of the public's lack of confidence in Kenya's justice system.⁵⁰ However, the lack of public confidence predates the 2008 election violence.⁵¹ The longstanding deficiency in public confidence is attributable to substantial case backlogs, ineffective case management, and the poor training

⁴³ See Rome Statute, *supra* note 2, art. 17.

⁴⁴ See *id.* arts. 17(2)–(3).

⁴⁵ See Burke-White, *supra* note 1, at 57.

⁴⁶ Cf. CHATTERJEE, *supra* note 36, at 37.

⁴⁷ This would disqualify states with extraordinarily weak governments where there is minimal or no judicial capacity—e.g., Rwanda in the immediate wake of the 1994 genocide. See John T. Holmes, *Complementarity: National Courts versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 668 (Antonio Cassese et al eds., 2002). Sudan is an example of a government that is so completely complicit in the violence that any tribunal it established would be suspect. See Robert Cryer, *Darfur: Complementarity As The Drafters Intended*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, at 1097, 1107–11, 1113–15, 1117–18.

⁴⁸ See Int'l Dev. Ass'n, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 78.9 Million to the Republic of Kenya for a Judicial Performance Improvement Project*, Report No. 72979-KE, 1–3 (Oct. 22, 2012).

⁴⁹ Brian D. Lepard, *How Should The ICC Prosecutor Exercise His Or Her Discretion? The Role Of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 556 (2010).

⁵⁰ See Int'l Dev. Ass'n, *supra* note 48, at 3.

⁵¹ *Id.*

and treatment of judicial staff.⁵² These dynamics have together created a court system that is “inaccessible, an instrument of the executive, and corrupt.”⁵³ The judiciary’s inadequacy hampers both political accountability and economic growth.⁵⁴ With regard to the latter, the Kenyan government views reform as an essential component of its plan to become a middle-income state by 2030.⁵⁵ In 2012, the World Bank agreed to provide \$120 million in loans to support, among other things, the development of case management systems for the courts, supporting the training and development of court and attorney general personnel, and the construction of court buildings.⁵⁶

This suggests that the Kenyan courts’ failure to process violations of ICL might not represent a circumscribed evil exclusively attributable to the state’s calculated obstruction. Such failure is almost certainly linked to the broader deficiencies described above.⁵⁷ As at least one commentator has noted, enforcing ICL norms is not just a simple matter of states incorporating ICL norms into their domestic criminal codes.⁵⁸ ICL cases are legally and factually more complex than regular criminal cases.⁵⁹ Investigating and prosecuting ICL violations will demand personnel with specialized training and be more resource-intensive than run-of-the-mill criminal and civil matters.⁶⁰ To the extent that Kenyan courts do a poor job processing ordinary cases, it is not surprising that the same is true for the exceptional ones.⁶¹

It is unclear whether building the capacity to investigate and prosecute ICL violations can be accomplished in a state like Kenya without sacrificing some other dimension of rule of law development. Resource scarcity might mean that developing capacity in one area may come at the expense of developing it in another. Even if not perfectly zero-sum, there are likely to be tradeoffs. Choosing between ICL capacity building and other kinds of capacity building

⁵² *Id.* at 2–3.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 1.

⁵⁵ *Id.*

⁵⁶ *Id.* at ii.

⁵⁷ See *supra* notes 48–56 and accompanying text.

⁵⁸ See Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 202, 247–48 (2012).

⁵⁹ See *id.* at 216. There are various reasons for this, but one important one is that proving an ICL violation will often require proof of “a particular contextual element,” e.g., widespread and systematic against a civilian population for crimes against humanity. *Id.*

⁶⁰ *Id.*

⁶¹ See Int’l Dev. Ass’n, *supra* note 48, at 6.

implicates difficult moral and technocratic questions.⁶² These are not the sort of questions that the ICC is well suited to address.⁶³

2. *ICC and Capacity Building*

Resource limitations coupled with the Rome Statute's formal constraints make it impossible for the ICC to lead any significant capacity building projects in poor states. Officers within the ICC have made it clear that they do not understand complementarity to entail such capacity building.⁶⁴ At best, the ICC might play an indirect and subtle role in shaping such efforts.⁶⁵ The capacity building tools—if that is even the right way to conceptualize them—available to the ICC are quite limited, consisting of pedagogical and shaming strategies.⁶⁶

The ICC's limited budget makes it impossible for it to do much more than process a relatively limited set of cases—there are currently twenty-one cases before the ICC.⁶⁷ In fiscal 2012, the budget for the ICC was roughly \$140 million.⁶⁸ This is not enough to support development projects like the Kenyan judicial capacity building project described in Subpart 1 above.⁶⁹ While that may be a particularly ambitious project, the World Bank commonly funds rule of law projects in the tens of millions.⁷⁰ That the ICC's budget will not permit significant capacity building projects is unsurprising. The Rome Statute's drafters did not intend for the ICC to engage in development financing.⁷¹

⁶² See Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict, What Impact on Building the Rule of Law*, 38 GEO. J. INT'L L. 251, 266 (2007).

⁶³ See Burke-White, *supra* note 1, at 96–98.

⁶⁴ See Morten Bergsmo et al., *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOETTINGEN J. INT'L L. 791, 798 (2010).

⁶⁵ See Burke-White, *supra* note 1, at 95. Burke-White advocates for the ICC playing a role in mobilizing “external resource networks” to promote judicial reforms in States that are unwilling or unable to prosecute ICL violations. *Id.* It is, however, unclear as to what precisely this might mean and whether the ICC would have any expertise to offer with regard to the moral and technocratic questions that are implicated by rule-of-law type development assistance. See *supra* Part I.A.1.

⁶⁶ Burke-White, *supra* note 1, at 95–96; Joseph M. Isanga, *The International Criminal Court Ten Years Later*, 21 CARDOZO J. INT'L & COMP. L. 235, 247 (2013).

⁶⁷ *Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Feb. 1, 2014).

⁶⁸ Jon Silverman, *Ten Years, \$900 Million, One Verdict: Does the ICC Cost Too Much*, BBC NEWS MAGAZINE (Mar. 14, 2012), <http://www.bbc.co.uk/news/magazine-17351946>.

⁶⁹ See *supra* Part I.A.1.

⁷⁰ See Laver, *supra* note 38, at 199–200.

⁷¹ Bergsmo, *supra* note 64, at 798.

The Rome Statute's provisions suggest that the practice of complementarity will flow from the ICC's ability to leverage its power to adjudicate particular cases and states parties' obligation to "cooperate fully" with ICC investigations and prosecutions.⁷²

As with prior international criminal tribunals, pedagogical aspirations account for the ICC's creation. The Rome Statute's drafters hoped that the ICC would, at the very least, work with domestic criminal justice institutions, if not teach by example.⁷³ In that vein, the Rome Statute codifies specific obligations regarding coordination and cooperation between the Court and states parties.⁷⁴ The articles relating to state party cooperation, by and large, concern the provision of assistance in the ICC's investigation and prosecution of specific cases.⁷⁵ One could imagine ICC personnel developing relations with domestic criminal justice actors in a manner that creates opportunities for information sharing, training, and more general dialogue about ICL violations within a state party's borders.⁷⁶

While cooperation is laudable, it is merely the carrot, the reward inducing specific behavior. The threat of investigation and prosecution is therefore the stick, the primary device the ICC has at its disposal for promoting complementarity.⁷⁷ Articles 17 and 19 only permit the ICC to proceed with an investigation or prosecution if there has not been (or presently is not) a meaningful national criminal investigation or prosecution.⁷⁸ William Burke-White has suggested that the OTP proactively leverage its authority to investigate ICL violations to incentivize domestic investigations of the same.⁷⁹ The OTP might use its authority to help domestic criminal justice actors identify ICL violations that they otherwise would not have.⁸⁰ Or the OTP might simply scare domestic actors into taking action lest the OTP investigate and embarrass the state on the global stage.⁸¹ This threat is limited by the fact that the ICC only has the resources to process a small number of cases.⁸² In

⁷² See Rome Statute, *supra* note 2, art. 86.

⁷³ *Id.* pmbl.

⁷⁴ *Id.* arts. 86–87.

⁷⁵ See *id.*

⁷⁶ Burke-White, *supra* note 1, at 89, 93.

⁷⁷ *Id.* at 86.

⁷⁸ Rome Statute, *supra* note 2, arts. 17, 19.

⁷⁹ Burke-White, *supra* note 1, at 86.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *supra* Part II.A.2.

addition, threats will not alter the resource constraints created by underdevelopment.⁸³ The assumptions underlying positive complementarity also raise questions about the purpose and consequences of complementarity more generally.

Both the pedagogical and threat-based formulations of complementarity assume that the criminal justice capacity being cultivated in developing states should be for the purpose of vindicating ICL violations.⁸⁴ Whether that is normatively desirable, however, is questionable.

B. Universal Law for Universal Misconduct

Complementarity does not promise to be particularly pluralistic with regard to the substance or form of justice. With regard to substance, there is a question as to what law a domestic tribunal must apply to count for admissibility purposes.⁸⁵ Commentary tends to frame the problem in terms of ICL's absence—that is, the lack of ICL investigations/prosecutions in domestic courts.⁸⁶ By this view, a domestic solution should entail the express application of ICL norms in a proceeding that conforms to due process.⁸⁷ The Rome Statute does not explicitly create this requirement.⁸⁸ Nonetheless, commentators share deep faith in ICL's unique expressive force. Complementarity will likely require that the ICC reconcile that faith with the plurality of national and sub-national approaches that are possible for dealing with the kinds of misconduct to which ICL applies.

The Rome Statute does not directly speak to the question of whether a domestic tribunal needs to apply ICL to misconduct to render a case concerning the conduct “inadmissible.”⁸⁹ While the argument that the Rome

⁸³ See *supra* Part II.A.1.

⁸⁴ See, e.g., Heller, *supra* note 58, at 88–89, 97 (describing “hard mirror” and “soft mirror” theses of complementarity).

⁸⁵ See *id.* at 88–89, 97.

⁸⁶ Kevin Jon Heller nicely summarizes (and critiques) the various positions in a recent article. See generally *id.* Proponents of the “hard mirror thesis” insist that only investigations/prosecutions under ICL satisfy complementarity. *Id.* at 88–89. Proponents of the “soft mirror thesis,” on the other hand, suggest that while prosecutions under domestic law may suffice, prosecutions under ICL would clearly be superior. *Id.* at 97.

⁸⁷ See Rome Statute, *supra* note 2, art. 17(2); Heller, *supra* note 58, at 88.

⁸⁸ See *id.*

⁸⁹ See generally Rome Statute, *supra* note 2, art. 17.

Statute does not require a domestic proceeding under ICL is plausible,⁹⁰ so too is the contrary argument. Article 17 simply states that a case is inadmissible if it “is being investigated or prosecuted by a State which has jurisdiction over it.”⁹¹ Such a case is inadmissible only to the extent that the state is willing and able “genuinely to carry out the investigation or prosecution.”⁹² The Rome Statute does not expressly define unwillingness or inability in terms of a state’s failure to apply ICL in a particular case.⁹³ In situations where a state has investigated and/or prosecuted an individual, the Rome Statute defines “unwillingness” to mean that the state undertook the domestic prosecution for the purpose of shielding the individual from ICC investigation and/or prosecution.⁹⁴ The Rome Statute, however, does not purport to enumerate an exhaustive definition of “unwillingness” or “inability.” The drafters’ choice to specifically identify sham trials need not have been to the exclusion of other possible deficiencies that would make this case admissible.

One might read the reference to “case” in Article 17 to support the conclusion that a state must bring a case under ICL in order to render it inadmissible in the ICC.⁹⁵ Article 17(1) states that “a case is inadmissible where: [t]he case is being investigated or prosecuted by a State.”⁹⁶ A technical legal definition of “case” is a “criminal proceeding, action, suit, or controversy at law or in equity.”⁹⁷ The article “the” suggests identity between whatever case is before the ICC and that “being investigated or prosecuted by a State.”⁹⁸ “Case” might also be read in a more colloquial way to refer to the underlying

⁹⁰ The Pre-Trial Chamber recently interpreted the Rome Statute when it denied Libya’s challenge to the admissibility of the case against Saif Al-Islam Gaddafi. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, paras. 85–88 (May 31, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599307.pdf>. The PTC’s discussion, however, was brief and did not have tremendous bearing on the outcome of the admissibility challenge. For a summary and discussion of the ruling, see M. Christopher Pitts, *Being Able To Prosecute Saif Al-Islam Gaddafi: Applying Article 17(3) Of The Rome Statute To Libya*, 27 EMORY INT’L L. REV. 1291 (2013). Kevin Jon Heller has also persuasively argued that the Rome Statute does not require that a domestic prosecution be pursuant to ICL to render a case inadmissible. See Heller, *supra* note 58, at 88–92.

⁹¹ See Rome Statute, *supra* note 2, art. 17(1)(a).

⁹² *Id.*; see also *id.* art. 20(3) (stating that an individual who has already been tried by a domestic court cannot be tried again before the ICC).

⁹³ See *id.* art. 17(2).

⁹⁴ *Id.* arts. 17(2)(a), 20(3)(a).

⁹⁵ See e.g., Heller, *supra* note 58, at 204.

⁹⁶ Rome Statute, *supra* note 2, art. 17(1)(a) (emphasis added).

⁹⁷ BLACK’S LAW DICTIONARY 243 (9th ed. 2009).

⁹⁸ The Rome Statute, *supra* note 2, art. 17(1)(a).

facts that gave rise to the controversy.⁹⁹ The Court, however, has tended to read the Rome Statute narrowly in favor of finding cases admissible—for example, the Appeals Chamber denied an admissibility challenge brought by Kenya, the first admissibility challenge brought by a state.¹⁰⁰

In its opinion, the Appeals Chamber stated that to be inadmissible, a “national investigation must cover the same individual and substantially the same conduct” as that in the case before the ICC.¹⁰¹ The case arose from the violence surrounding the 2008 elections in Kenya and names Uhuru Kenyatta, the president of Kenya, as a defendant.¹⁰² The Appeals Chamber rejected the admissibility challenge despite Kenya’s representations that a domestic investigation into the violence was ongoing.¹⁰³ Because the investigation did not, at the time of the challenge, encompass the defendants charged in the ICC cases, the Appeals Chamber deemed those cases admissible.¹⁰⁴ The Appeals Chamber was unmoved by Kenya’s representation that it was preparing to investigate the defendants or others at the same level.¹⁰⁵ Several years earlier, in *Lubanga*, the Appeals Chamber defined “conduct” narrowly to mean that a domestic investigation/prosecution must encompass the same charges as those pending before the ICC.¹⁰⁶ Ironically, the charges pending against Lubanga in the ICC were arguably less numerous and serious than those pending against

⁹⁹ See Prosecutor v. Muthaura, Kenyatta, & Ali, Case No. ICC 01/09-02/11OA, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II Of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute” para. 27, (Aug. 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>. [hereinafter Kenya Admissibility Decision] (“In the view of Kenya . . . [the admissibility test that applies is] the test developed by the Pre-Trial Chamber in the Article 15 Decision should be applied to the Admissibility Challenge. According to that test, the national proceedings must ‘cover the same conduct in respect of persons at the same level in the hierarchy being investigated by the ICC.’”) The Appeals Chamber rejected Kenya’s argument. *Id.* para. 41.

¹⁰⁰ Charles Jalloh, *Kenya vs. The ICC Prosecutor*, 53 HARV. INT’L L.J. ONLINE 269, 270 (2013), http://www.harvardilj.org/wp-content/uploads/2012/09/HILJ-Online_53_Jalloh2.pdf; see also Kenya Admissibility Decision, *supra* note 99, para. 40. (Aug. 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>.

¹⁰¹ Kenya Admissibility Decision, *supra* note 99, para. 39.

¹⁰² See Jeffrey Gettleman, *Kenyatta is Declared the Victor in Kenya, but Opponent Plans to Appeal*, N.Y. TIMES, Mar. 9, 2013, at A8.

¹⁰³ Kenya Admissibility Decision, *supra* note 99, paras. 51, 69.

¹⁰⁴ *Id.* paras. 40, 46.

¹⁰⁵ *Id.*

¹⁰⁶ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, paras. 37–38 (Feb. 24, 2006), [hereinafter Lubanga February Decision] <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>.

him in the Democratic Republic of Congo.¹⁰⁷ The Appeals Chamber has not specifically addressed the question of whether domestic courts must prosecute under ICL to satisfy the “same person, same conduct” test.¹⁰⁸ That said, the Court’s opinions suggest an inclination to understand complementarity narrowly in favor of admissibility.¹⁰⁹ This suggests that the Court may be inclined to require domestic prosecutions under ICL (or a domestic cognate).

While some commentators have criticized the ICC for understanding complementarity too narrowly,¹¹⁰ most tend to view it as preferable for domestic courts to apply ICL as opposed to domestic criminal law in cases that allow for the former.¹¹¹ This preference is most plausibly grounded in expressive theories of the criminal sanction.¹¹² If for no other reason, this conclusion seems correct because retribution and deterrence-based rationales—the other two rationales traditionally advanced for the criminal sanction—provide such poor justification for ICL.¹¹³ Retributivist accounts suggest that a criminal should be punished in strict proportion to the moral gravity of his misconduct—such moral reckoning will often be impossible given mass atrocities’ scale.¹¹⁴ Deterrence provides a similarly unsatisfying account because there is little to suggest that punishing perpetrators of past atrocities does anything to influence would-be perpetrators of future atrocities.¹¹⁵

A conviction secured under ICL is tantamount to universal condemnation—in theory it produces expressive force calibrated to the gravity of mass atrocities.¹¹⁶ By “expressive force,” I refer to the social meaning that

¹⁰⁷ See Thomas Obel Hansen, *A Critical Review of the ICC’s Recent Practice Concerning Admissibility Challenges and Complementarity*, 13 MELB. J. INT’L L. 1, 7 (2012); Newton, *supra* note 13, at 156.

¹⁰⁸ The Appeals Chamber has yet to consider Libya’s admissibility challenge to the case against Saif Al-Islam Gaddafi. See *supra* note 90.

¹⁰⁹ Lubanga February Decision, *supra* note 106, paras. 37–39.

¹¹⁰ Newton, *supra* note 13, at 156; Jalloh, *supra* note 100, at 282–84.

¹¹¹ See *supra* notes 96–98 and accompanying text.

¹¹² Heller, *supra* note 58, at 130–32.

¹¹³ See Margaret M. deGuzman, *Choosing To Prosecute: Expressive Selection At The International Criminal Court*, 33 MICH. J. INT’L L. 265, 269–70, 313–17 (2012); Heller, *supra* note 58, at 130–31.

¹¹⁴ See Payam Akhavan, *The International Criminal Court Context: Mediating The Global And Local In The Age Of Accountability*, 97 AM J. INT’L L. 712, 721 (2003) (quoting Letter from Hannah Arendt to Karl Jaspers, Aug. 17, 1946, in HANNAH ARENDT-KARL JASPERS CORRESPONDENCE, 1926–1969, at 51, 54 (Lotte Kohler & Hans Saner eds., 1992)).

¹¹⁵ See Mark Drumbl, *Collective Violence And Individual Punishment: The Criminality Of Mass Atrocity*, 99 NW. U. L. REV. 539, 545–46, 590–91 (2005).

¹¹⁶ See deGuzman, *supra* note 113, at 316; Heller, *supra* note 58, at 130–31.

official, punitive denunciation produces.¹¹⁷ Calling someone a “criminal” is to symbolically degrade him in the name of the community that constitutes the relevant jurisdiction. A simple expressivist account of ICL suggests that because mass atrocities constitute a grave offense against all humankind, an appropriate punishment must condemn in the name of all humankind.¹¹⁸ ICL purports to do precisely that. Even those, like Kevin Heller, who see convictions under domestic criminal law as a plausible substitute for ICL convictions, concede that the former will not have the expressive force of the latter.¹¹⁹

The problem with the simple expressivist account of ICL is that it artificially cabins “social meaning” and relies on a reductionist account of “humankind” that privileges the perspective of legally-trained professionals.¹²⁰ The simple expressivist account of ICL takes “social meaning” to describe the symbolic meaning that international lawyers (perhaps legally-trained professionals more generally) ascribe to ICL’s application.¹²¹ Those who have studied ICL understand that when a conviction under ICL is secured, it symbolizes the broadest condemnation that can be leveled against an individual within a legal order.¹²² Whether such a representative act produces social meaning in precisely the same way beyond the realm of legally-trained professionals, however, is difficult to say. Social meaning is not realized in neat or uniform ways.¹²³ As with any symbolic meaning, a given community will understand symbols through the lens of its own unique social situation, historical experience, and so forth.¹²⁴ Such understandings may be quite different from those of any other community.¹²⁵ A rigorous expressivist account of ICL prosecutions and convictions would explore such differential meanings in all their complexity. While such an endeavor is well beyond what

¹¹⁷ See, e.g., JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 98 (1970); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–20 (1999).

¹¹⁸ Of course, a more nuanced expressivist account is possible, but this is the short version of the textbook account that is routinely deployed in ICL literature. See, deGuzman, *supra* note 113, at 278–81 (summarizing views regarding the “ephemeral global community” for which international tribunals purport to speak); Heller, *supra* note 58, at 130–31.

¹¹⁹ Heller, *supra* note 58, at 131.

¹²⁰ Cf. Drumbl, *supra* note 115, at 598 (suggesting that complementarity may “ensconce ICC process and punishment preferences” at the expense of locally-grounded conceptions of justice).

¹²¹ See *id.*

¹²² See *id.* at 592–93.

¹²³ See PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 39–40 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991).

¹²⁴ *Id.*

¹²⁵ *Id.*

is possible here, I offer a few tentative remarks on possible trajectories for such expressivist analysis.

We should expect a circumspect expressivist analysis to pay attention not only to the forms that ICL's application takes, but also to the sociopolitical contexts in which those forms evolved and are applied. ICL scholars impute substantial moral and therapeutic power to a criminal trial and punishment.¹²⁶ The imputation is notwithstanding the absence of empirical evidence substantiating it.¹²⁷ The inclination to ascribe great power to highly ritualized performances—like a criminal trial—is broadly shared.¹²⁸ All organized societies have forms of ritual performance—whether secular, religious, or both—that are imagined as having the capacity to produce salutary effects.¹²⁹ The criminal trial represents a specific form of ritual performance—one that traces its lineage deeply into Judeo-Christian history.¹³⁰ This is to say that a criminal trial conforming to due process standards reflects a culturally specific process for resolving disputes. It is not a universal form of justice and it is counterproductive to proceed as if it were. Mark Drumbl has thoughtfully advanced an argument along these lines at length.¹³¹ He persuasively argues that criminal trials have the potential to further “disenfranchise” those victimized by mass violence.¹³² The criminal trial may not be responsive to the psychic needs of those communities for which it is not an organic justice ritual.¹³³ Worse, insisting that a criminal trial is the only acceptable form of a justice ritual may be reminiscent of colonial impositions of the not so distant past.¹³⁴

This is all to say that the unanswered question of what *law* counts for complementarity purposes cannot be easily answered without also addressing what *form of adjudication* counts.

¹²⁶ See Drumbl, *supra* note 115, at 576 (citations omitted).

¹²⁷ See *id.*

¹²⁸ See SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1, 10–17 (2013) (discussing the Judeo-Christian origins for Western Civilization's conception of law).

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See Drumbl, *supra* note 115, at 547–49.

¹³² See *id.* at 597–98.

¹³³ See *id.* at 600.

¹³⁴ See *infra* Part II.D.

C. *Politics, Sovereignty, and Justice*

Those who imagine the ICC contributing to a new global, criminal justice order view complementarity as a mechanism for apolitically resolving conflicts between the ICC and states. Although some ICC insiders have suggested that such apolitical decision-making is already the order of the day,¹³⁵ such a vision of complementarity seems more aspiration than reality. It is an important aspiration because sovereignty remains a defining feature of the international system. In addition, the prospect of a European-based court making political judgments about the quality of justice available in post-colonial states is symbolically fraught, to say the least.¹³⁶ However, the Rome Statute itself appears to require that the ICC make irreducibly political judgments in at least two dimensions. First, it calls for judgments about the quality of a State Party's investigatory and adjudicatory efforts in particular cases if not its criminal justice system as a whole.¹³⁷ Second, the Rome Statute is likely to compel judgments about the adequacy of alternative resolution mechanisms—for example, non-western processes such as *gacaca*¹³⁸—that may not conform to international due process norms.¹³⁹ Whether such processes should render a case inadmissible will require judgments about the processes' fairness and expressive value.¹⁴⁰ As suggested by the discussion in the preceding section, such judgments cannot be anything but “political” given the cultural specificity of any dispute-resolution mechanism.¹⁴¹

Article 17 seems to require that the Court make judgments about the integrity and quality of justice dispensed by a state that purports to be investigating or prosecuting the same case as that before the ICC.¹⁴² In particular, Article 17 requires judgment as to: a) whether a state is actually investigating or prosecuting the misconduct and if so, b) whether the state is “willing” and “able” to proceed in a manner that is “genuine.”¹⁴³ Article 17 goes on to describe the factors that the Court should consider in assessing a

¹³⁵ See Moreno-Ocampo, *supra* note 1, at 22–23. But see Drumbl, *supra* note 115, at 605.

¹³⁶ See Drumbl, *supra* note 115, at 601.

¹³⁷ Rome Statute, *supra* note 2, arts. 17(2)–(3).

¹³⁸ See Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case Of Gacaca Courts In Post-Genocide Rwanda*, 36 GEO. WASH. INT’L L. REV. 765, 778–89 (2007) (tracing the history of *gacaca*).

¹³⁹ See Drumbl, *supra* note 115, at 600–01.

¹⁴⁰ See Clark, *supra* note 138, at 804 (discussing the legitimacy of *gacaca* to deal with genocide).

¹⁴¹ See *supra* Part II.B.

¹⁴² See Moreno-Ocampo, *supra* note 1, at 23.

¹⁴³ Rome Statute, *supra* note 2, arts. 17(1)(a)–(b).

state's "unwillingness."¹⁴⁴ The factors include whether the state's investigation or prosecution was undertaken "for the purpose of shielding" the defendant.¹⁴⁵ In addition, the Court considers whether the investigation or prosecution is "being conducted independently or impartially."¹⁴⁶ The Court conducts both inquiries with sensitivity to "principles of due process recognized by international law."¹⁴⁷

Assessment of state actors' motivations, as Article 17(2)(a) requires, seems to demand a politically inflected analysis. Assuming that the relevant actors deny having had impermissible motives in undertaking particular official actions, the Court will have to assess the truth of such claims. Doing so will require making educated inferences based on a state actor's relationship to the accused, the relevant conduct, and the broader political landscape. Such factual judgments are tricky in any context, but that is all the more true where an international tribunal is passing judgment on a state actor's motivations. There is an obviously political dimension to the ICC given that it is a Hague-based tribunal largely focused on misconduct occurring in post-colonial states. The resonance with colonial hierarchies is potentially even more pitched when evaluating the "independence" or "impartiality" of a state's investigative efforts.¹⁴⁸ While Article 17 suggests that the inquiry should pertain to only the case in question,¹⁴⁹ it might be difficult to do so without some consideration of the broader institutional context. A state institution's partiality when investigating or adjudicating a particular case may be a function of broader problems with those institutions. This is most likely to be true where underdevelopment has created significant rule of law gaps—an entirely common feature in large swathes of the post-colonial world.¹⁵⁰

Dodging such tricky political questions is not obviously any less "political" than squarely addressing them. Michael Newton has expressed concern about the ICC impinging on states' sovereign prerogatives.¹⁵¹ He notes that the drafters designed the Rome Statute's complementarity scheme to secure the support of states that would otherwise have been hesitant to compromise their

¹⁴⁴ *Id.* art. 17(2).

¹⁴⁵ *Id.* art. 17(2)(a).

¹⁴⁶ *Id.* art. 17(2)(c).

¹⁴⁷ *Id.* art. 17(2).

¹⁴⁸ Cf. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 400–04 (2005).

¹⁴⁹ Rome Statute, *supra* note 2, art. 17(1).

¹⁵⁰ See *supra* Part II.A.1.

¹⁵¹ Newton, *supra* note 13, at 122.

sovereignty.¹⁵² Accordingly, he argues, the Court's complementarity analysis should be deferential to states parties' efforts to remedy ICL violations.¹⁵³ While Newton's reading of the Rome Statute's drafting history may be correct, deferring to sovereign prerogatives is no less "political" than not doing so. One benefit, perhaps the chief one, of the Court adopting Newton's suggestion would be that, by so doing, the ICC would be *transparently* embracing a method for navigating the political dilemmas its founding document compels it to confront. However, the Court's admissibility decisions in the Kenya cases suggest that the Court is disinclined to take such a route.

Among Kenya's challenges to admissibility was a procedural argument that the Pre-Trial Chamber (PTC) erroneously refused to permit Kenya additional time to demonstrate that its investigation had progressed to include the defendants or others acting at a comparable level.¹⁵⁴ In upholding the PTC's procedural rulings, the Appeals Chamber emphasized the discretion the PTC enjoys in making such determinations.¹⁵⁵ This procedural determination might very well have saved the Appeals Chamber from having to wrestle with the difficult political questions suggested above¹⁵⁶—had Kenya returned to the Court with evidence that its investigation, in some capacity, pertained to the defendants, it would have had to fully analyze the investigation under Article 17.¹⁵⁷

Devising an apolitical complementarity framework for alternative resolution mechanisms is also likely impossible. Alternative resolution mechanisms describe dispute resolution practices that do not conform to the Western-style criminal trial—an individualized, truth-seeking process that is administered by a state and focused on establishing the appropriateness of imposing punishment upon a specific individual.¹⁵⁸ Alternative resolution mechanisms might include local approaches to justice, such as the indigenous

¹⁵² See *id.*

¹⁵³ *Id.* at 136–37.

¹⁵⁴ See Appeals Chamber decision, *supra* note 100, para. 104.

¹⁵⁵ *Id.* para. 108.

¹⁵⁶ In a vigorous dissent, Judge Anita Usacka took the majority to task for not wrestling with the difficult, but unanswered questions that complementarity implicates. Prosecutor v. Muthaura, Kenyatta, & Ali, Case No. ICC-01/09-02/11OA, Dissenting Opinion of Judge Anita Usacka, paras. 25–26 (Sept. 20, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1234881.pdf>.

¹⁵⁷ See *id.* para. 27; see also Hansen, *supra* note 107, at 17 (criticizing the Court for not engaging admissibility challenge under Art. 17(2)).

¹⁵⁸ See Clark, *supra*, note 138, at 822–23.

Rwandan practice of *gacaca*.¹⁵⁹ Such local dispute resolution mechanisms are as varied as are the local communities that rely upon them around the world.¹⁶⁰ As Gregory Gordon recently summarized, these mechanisms have “varying degrees of connection” to official State institutions and often permit broad community participation with the aim of achieving more “holistic” effects than is true for Western-style criminal trials.¹⁶¹ Alternative resolution mechanisms also might include decidedly non local, official tribunals like truth and reconciliation commissions of the sort used in post-apartheid South Africa.¹⁶² With these commissions there has been considerable variation regarding purpose and procedure.¹⁶³ The Rome Statute does not offer precise guidance on how to gauge the admissibility of cases regarding misconduct that have been (or will be) subject to an alternative resolution mechanism, but it does suggest a general approach.

Article 17’s language appears to require that the Court evaluate whether a particular alternative resolution mechanism is sufficiently connected to a state’s official justice system and affords process sufficiently analogous to that afforded in a Western-style criminal trial. Article 17 states that a case is inadmissible where it “is being investigated or prosecuted by a state which has jurisdiction over it.”¹⁶⁴ In addition, Article 17 directs the Court to carry out the admissibility analysis with “regard to the principles of due process recognized by international law.”¹⁶⁵ This language suggests that the Rome Statute’s drafters not only conceived of complementarity as a relation between the ICC and state institutions, but also took the Western-style trial as the evaluative reference point.

This reading of Article 17 is also consistent with commentary regarding alternative resolution mechanisms. Gregory Gordon has proposed a multi-factor test for evaluating admissibility challenges that emphasizes the alternate resolution mechanism’s “judicialization” and incorporation by the relevant

¹⁵⁹ See e.g., Clark *supra*, note 138, at 778 (stating that traditional *gacaca* was different than the state-supported practice created to adjudicate genocide cases).

¹⁶⁰ See Gregory Gordon, *Complementarity and Alternative Forms of Justice*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 1, 745, 752–65 (describing representative examples of such dispute resolution mechanisms).

¹⁶¹ See *id.* at 752–53.

¹⁶² See *id.* at 765–68.

¹⁶³ See *id.* at 766.

¹⁶⁴ Rome Statute, *supra* note 2, art. 17 (1)(a)–(b).

¹⁶⁵ See *id.* art. 17(2).

state.¹⁶⁶ In contrast, Mark Drumbl has criticized the extent to which the Rome Statute and international law more generally have fetishized Western-style criminal trials.¹⁶⁷ This is not merely a question of the Rome Statute's text or drafting history. Drumbl's work suggests that there is a deeper, epistemological explanation for the criminal trial's centrality in the imaginings of post-atrocity justice.¹⁶⁸ International law scholars and professionals—the primary agents of ICL discourse—are typically acculturated in educational, practice, and social environments where the criminal trial is the *sine qua non* of justice following violence.¹⁶⁹ From their vantage, punishing wrongdoers and achieving broad healing for the communities affected by violence are coterminous enterprises.¹⁷⁰ This equation helps create what Payan Akhavan has called a “false sense of closure within a self-absorbed utopia.”¹⁷¹ This anthropologically specific view predominates amongst the legal professionals who are responsible for steering ICL generally and the ICC in particular.¹⁷²

Given the Rome Statute's express language and the culture of international legal professionals, there is little reason to think that ICC will embrace a particularly permissive approach to alternative resolution mechanisms. This, in conjunction with the discussion in Subpart B, tends to suggest that a vigorous regime of complementarity is not likely to promote pluralism with regard to the form or content of post-atrocity justice. This is not troubling if one views ICL and, correspondingly, the criminal trial as providing a close proxy for universal justice. That view, however, is deeply problematic.

D. *Speaking To The Subaltern*

Complementarity discourse is tightly organized around the relationship between the ICC and sovereign states.¹⁷³ While this may seem like a statement of the obvious, it invites the deeper questions of whom complementarity is supposed to benefit and, by extension, who ICL's intended audience should be.

¹⁶⁶ Gordon, *supra* note 160, at 784–94.

¹⁶⁷ See Drumbl, *supra* note 115, at 596–97.

¹⁶⁸ See *id.* at 567.

¹⁶⁹ *Id.* at 46.

¹⁷⁰ *Id.*

¹⁷¹ See Akhavan, *supra* note 114, at 721.

¹⁷² See *id.*

¹⁷³ See e.g., Jalloh, *supra* note 100, at 274–75 (noting that complementarity is the fundamental principle of relationship between ICC and sovereign states).

Positive complementarity's enthusiasts aspire for an ICC that works alongside domestic courts to bring ICL violators to justice under a broadly shared set of substantive and procedural legal principles.¹⁷⁴ For some, sovereignty is not so much a lamentable obstacle as it is a neutral fact that defines the terms on which a global division of conflict-resolution labor will be realized.¹⁷⁵ For those liberal internationalists who view sovereignty as an impediment to global justice, positive complementarity is just a moment in a long historic process that remains incomplete.¹⁷⁶ By this view, complementarity reflects a familiar compromise—it reaffirms sovereignty's continued vitality as the unhappy cost of obtaining state consensus for the development of international law and institutions.¹⁷⁷

What is important for present purposes though, is that both groups share a universalist ideal as to what redress for mass atrocities should look like: criminal prosecutions according to uniform global norms of substance and procedure.¹⁷⁸ But, in what measure does such redress promote healing and closure for the “masses” that are the object of mass atrocities?

Nearly twenty-five years ago, Gayatri Spivak asked whether the subaltern can speak.¹⁷⁹ The basic premise of ICL's universalist aspiration should impel us to ask a homologous question: Can the subaltern be spoken to? While it is beyond this essay's scope to fully develop the inquiry as a theoretical matter, I raise the question to suggest that the complementarity debate reveals a more significant limitations of the ICC and ICL discourse generally.

“Subaltern” does not describe a fixed demographic group (e.g., a racial minority) per se, but rather a relation of dominance.¹⁸⁰ It is the relation of dominance that, among other things, separates those who are able to represent their interests to official power from those who are not.¹⁸¹ This capacity is a function of both material privilege within a social structure and the attendant

¹⁷⁴ See *supra* Part I.

¹⁷⁵ See Akhavan, *supra* note 114, at 714.

¹⁷⁶ See Newton, *supra* note 13, at 119 (quoting Benjamin Ferencz, Address by Benjamin B. Ferencz to the Rome Conference on Creating a Permanent International Criminal Court (June 16, 1998), available at <http://www.benferencz.org/index.php?id=4&article=85>).

¹⁷⁷ See Newton, *supra* note 13, at 163–64.

¹⁷⁸ See Akhavan, *supra* note 114, at 721.

¹⁷⁹ See generally Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER* 66 (Patrick Williams & Laura Chrisman eds., 1994) (expressing pessimism about the possibility that the subalterns will be able to express their voice in post-colonial society).

¹⁸⁰ See *id.* at 79–80.

¹⁸¹ See *id.*

access to the dominant political vocabulary.¹⁸² In the context of colonial India, for example, one can use the notion of subalternity to distinguish between the “native elites,” who became nationalist leaders, from “subsistence farmers, unorganized peasant labor, [and] the tribals.”¹⁸³ It is the native elite—Gandhi and Nehru—who are commemorated for having created an independent post-colonial State.¹⁸⁴ While conventional historical accounts cast them as heroic representatives of all colonized Indians, the subaltern history depicts a significantly messier and less flattering account of the native elite.¹⁸⁵ Complicating any scholarly exploration of this dynamic is the simple fact that subaltern voices were not recorded.¹⁸⁶ The native elite purported to speak on behalf of subaltern groups—which is to say, subaltern groups’ interests were accounted for in a voice *not* their own.¹⁸⁷ This just restates the point that the possibility for authentic, subaltern self-representation was not possible in a nationalist discourse that was carried out between native elites and the colonial power. The subaltern were talked about rather than heard.¹⁸⁸ Accordingly, contemporary historiographic efforts to account for those voices can only be partial at best. But what they do reveal is that subaltern understandings of (elite) nationalist figures and anti-colonial struggle were often quite far-removed from how elite nationalist figures imagined themselves and their struggle.¹⁸⁹ At least two points about subalternity are relevant to a discussion of ICL.

First, it is frequently members of subaltern groups who bear the brunt of mass atrocities.¹⁹⁰ It is, however, also frequently members of subaltern groups who perpetrate mass atrocities.¹⁹¹ In Darfur, for instance, both the victims and perpetrators of mass violence have been members of heterogeneous groups that

¹⁸² See *id.* at 83.

¹⁸³ See *id.* at 84.

¹⁸⁴ See Ranajit Guha, *On Some Aspects of the Historiography of Colonial India*, in *SELECTED SUBALTERN STUDIES* 37, 38 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).

¹⁸⁵ Jonathan Todres, *Out of Africa: Reading Martin Chanock's Scholarship in the Global North*, 28 L. IN CONTEXT 47, 50 (2010) (noting Martin Chanock's identification of this point).

¹⁸⁶ Spivak, *supra* note 179, at 82.

¹⁸⁷ See *id.* at 80.

¹⁸⁸ See *id.* at 103–04.

¹⁸⁹ See Shahid Amin, *Gandhi as Mahatma: Gorakhpur District, Eastern UP, 1921–2'*, in *SELECTED SUBALTERN STUDIES* 288, 289–94 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).

¹⁹⁰ See U.N. Security Council, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, 4, U.N. Doc. S/2005/60 (Feb. 1, 2005).

¹⁹¹ *Id.*

share divergent histories of extreme economic and political marginality.¹⁹² The victims do not share a single linguistic, ethnic, or tribal identity.¹⁹³ They do, however, share the economic and social status of being small-scale farmers.¹⁹⁴ While they have been pejoratively called “African” by their attackers, that designation is not one that the victims themselves would have necessarily used to self-identify before the attacks.¹⁹⁵ That is to say, the victims did not have ready access to the language of minority rights. Even if they had, there was no representative body to speak that language on their behalf.

It is tempting to think of the Janjaweed—the state-supported militias responsible for much violence in Darfur—as a homogeneous group. Such an assumption, however, is unwarranted.¹⁹⁶ The Janjaweed consists of heterogeneous groups including both Arabs and non-Arabs.¹⁹⁷ The groups tend to be nomadic herders, many of whom are economically and politically marginal.¹⁹⁸ Compounding that marginality has been the breakdown of customary norms that permitted these groups access to water and grazing land.¹⁹⁹ Militia activity is the only way for such groups to secure any resources from the Sudanese state.²⁰⁰ A recent report concludes that responding to mass violence in Darfur will require constructively engaging the groups that constitute the Janjaweed and responding to the underlying structural circumstances that impel individuals to join militias.²⁰¹ This prescription does not begin to speak to the complex questions of how to handle those who have perpetrated mass violence.

To the extent that a significant part of ICL’s broad purpose is to create the terms upon which community healing and closure may occur in the wake of

¹⁹² See Julie Flint, *Beyond “Janjaweed,” Understanding the Militias of Darfur* 11–15 (Small Arms Survey HSBA Working Paper No. 17, 2009), available at <http://www.smallarmssurveysudan.org/pdfs/HSBA-SWP-17-Beyond-Janjaweed.pdf>.

¹⁹³ See Kristina Hon, *Bringing Cultural Genocide in by the Backdoor: Victim Participation at the ICC*, 43 SETON HALL L. REV. 359, 400 (2013).

(Rule. 16.4)

¹⁹⁴ U.N. Security Council, *supra* note 190, para. 51.

¹⁹⁵ See *id.* para. 511.

¹⁹⁶ The state-supported militia consisted of members from different tribes and groups that saw opportunities to access land and political power. See Flint, *supra* note 192, at 14–15.

¹⁹⁷ See U.N. Security Council, *supra* note 190, paras. 101–04.

¹⁹⁸ See Flint, *supra* note 192, at 13.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*

²⁰¹ See *id.* at 49.

mass atrocity, it must try to *speak to* subaltern groups.²⁰² It is tempting to view complementarity as at least a partial answer to that question—national courts are better equipped for the task because of their proximity to subaltern groups. However, we should be skeptical of this suggestion given the structure of power in many post-colonial states.

This suggests a second point about subalternity: official state structures, courts included, in many post-colonial states are not well-equipped to meaningfully listen or speak to subaltern groups. The autocratic Sudanese state presents an extreme example—it is deeply implicated in the mass violence that has occurred in Darfur.²⁰³ But even in more functional post-colonial states,²⁰⁴ the structure of political and judicial power was inherited from colonial predecessors. In many post-colonial States, the native nationalist elite simply took the reins of power from departing colonial authorities.²⁰⁵ They did so without fundamentally reworking the relations of power that characterized the colonial States—this has meant that decolonization, for many subaltern groups, has simply meant that one group of elites supplanted another. In these post-colonial societies, subalternity remains a persistent feature. Landless peasants in rural India, nomadic pastoralists in Sudan, and street kids in the Global South²⁰⁶ are examples of the vast swathes of humanity that inhabit the Third World's marginal spaces—the margin's margins. These are groups that live in the deep shadows of both the formal economy and civil society.

Justice dispensed by a national court may be no better able to *speak to* subaltern groups within its borders than an international tribunal. The fact that a jurisdiction has incorporated ICL into its domestic code and developed some bureaucratic capacity to process ICL cases will not change this fact. Complementarity is largely preoccupied with how to best configure the division of labor between the ICC and domestic courts so as maximize the number of ICL prosecutions conforming to due process.²⁰⁷ This all makes good sense if one accepts that more prosecutions means less impunity, which in turn

²⁰² Trying may be all that is ever really possible, given that subalternity is a structural condition. The impossibility of unimpeded communication does not relieve one of the ethical obligation to try. Cf. Spivak, *supra* note 179, at 80, 104 (describing the intellectual's obligation to try and represent subaltern voices).

²⁰³ See generally Flint, *supra* note 192.

²⁰⁴ They are the most plausible national collaborators. See *supra* Part I.A.1.

²⁰⁵ Barbara Harrell-Bond, *Legitimacy and the Politics of Status—an Abortive Legislative Change in Sierra Leone*, 12 J. LEGAL PLURALISM & UNOFFICIAL L. 21, 53 (1975).

²⁰⁶ Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 429, 461 (2007).

²⁰⁷ See Burke-White, *supra* note 1, at 54–55.

means more justice. While this logic is impeccable within the world of legal professionals,²⁰⁸ this does not mean that it will register as such in subaltern spaces.

III. COMPLEMENTARITY AND GOVERNMENTALITY

The normative adjectives used to describe complementarity suggest too muscular (e.g., “proactive”) or too anemic (e.g., “passive”) a view of the ICC’s role in global justice.²⁰⁹ The discussion in Part II suggested that the more ambitious notions of positive complementarity draw the ICC into a universe of political, economic, and social questions that it is ill-equipped to handle. Even if the ICC surmounts those obstacles, it is unclear whether a regime of positive complementarity, under ideal circumstances, will benefit those most impacted by mass atrocities. An entirely negative account of complementarity, however, minimizes the ICC’s institutional significance. The institution’s creation was a milestone event and the Rome Statute does not evince an intention to create an institution that blithely defers to national institutions.²¹⁰ What then might a constructive conceptualization of complementarity look like?

At the risk of adding to the ever-expanding list of complementarity adjectives, “governmentality” may provide a useful framework for carrying out future analysis of complementarity. The notion of governmentality,²¹¹ developed in sociology and anthropology might elucidate complementarity’s significance in two ways: 1) as a bureaucratic vocabulary whose development tracks changes in how actors within the ICC view the institution and its relationships to national criminal justice institutions; and, 2) as creating strategic opportunities for subordinated groups to leverage the ICC’s power to effect national and sub-national change.

Governmentality describes, among other things,²¹² institutions that rely upon instrumentalist reasoning and “secure[] legitimacy not by the participation of citizens . . . but by claiming to provide for the well-being” of

²⁰⁸ See Akhavan, *supra* note 114, at 721.

²⁰⁹ See Burke-White, *supra* note 1, at 54, 56.

²¹⁰ See *id.* at 56–57.

²¹¹ Michel Foucault coined the term. See Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87 (Graham Burchell et al. eds. 1991).

²¹² Foucault goes into considerable detail about the effects that particular “techniques of power” have upon shaping both the conscious and unconscious conduct of individuals who are parts of particular groups. See *id.* at 95–100.

populations.²¹³ This is in contrast to liberal ideals of “deliberative openness” in which citizens are thought to shape government action by exerting political agency (e.g., by voting).²¹⁴ Instead, specialized bureaucracies populated by experts manage the problems that beset or are created by particular demographic groups—such as violent criminals, mass atrocity survivors, “at risk” children, and cigarette smokers.²¹⁵ Bureaucracies rely on technocratic frameworks built with specialized vocabularies to accomplish social effects, to manage relationships with other bureaucracies that have overlapping authority, and other ends.²¹⁶ In the course of performing these functions, institution-specific forms of common sense evolve and determine how particular problems, solutions, and demographic groups are conceived.²¹⁷

Through a governmentality lens, one might analyze complementarity as a bureaucratic mechanism for managing institutional relations between the ICC and national criminal justice bureaucracies. Complementarity’s purpose should not be understood as either a recipe for a new order of global justice nor as a hindrance to sovereignty. Both of these accounts cast complementarity in bold, normative strokes—as answering axiomatic questions in international criminal justice. Through a governmentality lens, complementarity is best conceived as a structured dialogue amongst technocratic elites at the international and national levels. It creates a specialized vocabulary for negotiating the host of bureaucratic problems that attend investigation, prosecution, and adjudication in contexts where the authority to do so overlaps with a state’s. Those problems may often be completely unrelated to provisions in the Rome Statute—e.g., questions of legitimacy and developing institutional competence.

A governmentality-based approach that focuses upon bureaucratic culture will have the benefit of descriptive accuracy. For example, such an approach to complementarity might help us understand the extent to which legitimacy concerns informed the OTP’s arguments and the PTC’s admissibility decision in the *Lubanga* case. *Lubanga* was self-referred by the Democratic Republic of Congo (“DRC”).²¹⁸ At the time of the self-referral, a criminal case was pending against Lubanga in the DRC.²¹⁹ In fact, the DRC had leveled charges

²¹³ See CHATTERJEE, *supra* note 36, at 34.

²¹⁴ See *id.*

²¹⁵ See *id.* at 35–37.

²¹⁶ See Foucault, *supra* note 211, at 100–03.

²¹⁷ See *id.*

²¹⁸ See *Lubanga* February Decision, *supra* note 106, para. 22 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>.

²¹⁹ See *id.* para. 23.

against Lubanga that were more serious than those leveled against him in the ICC proceedings.²²⁰ Nonetheless, the PTC denied Lubanga's admissibility challenge and announced the "same person, same conduct" test in so doing.²²¹ While the DRC prosecution concerned the same person and encompassed more serious charges than those pending in the ICC, the charges were not the same.²²² The Rome Statute did not dictate a clear admissibility result in *Lubanga*. It seems possible that there was a generalized sense within the ICC that it was important to take up (and hold onto) a case that it could plausibly investigate and resolve—to demonstrate that it is an institution worthy of the title "international" to consolidate its future funding stream to begin developing the institutional ability to process cases, and so on.²²³

Studying complementarity through the lens of governmentality is likely to have the additional benefit of helping identify how, if at all, the ICC may play a role in the struggles of subordinated groups. To the extent that governmentality helps to identify the configuration of political and social power that particular institutions create, it also may help to identify strategies for securing social and political benefits. To the extent that a subordinated group is waging a national or sub-national struggle against state institutions, complementarity is a mechanism by which the ICC might help advance such a struggle. The Rome Statute permits the OTP to consider petitions from non-state actors²²⁴—and the network of relationships that exist between the ICC and national bureaucracies may influence how attractive it is to create organizing strategies that involve the ICC.²²⁵

While complementarity is (and promises to continue being) a conceptually rich area of study, it would be constructive to approach it with more normative modesty. It is a good vehicle for understanding the evolving bureaucratic culture within the ICC. It also might be a useful way of understanding the relationships that evolve between the ICC and government elites within States, and suggest the terms on which subordinated groups might rely upon the ICC

²²⁰ See Newton, *supra* note 13, at 156 (noting that the DRC charged Lubanga with genocide, whereas the charges against Lubanga in the ICC pertained to conscripting child soldiers).

²²¹ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr 17-03-2006, Decision to Issue Arrest Warrant, para. 37, 40 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>.

²²² *Id.* para. 39.

²²³ See Jalloh, *supra* note 100, at 284; deGuzman, *supra* note 113, at 269.

²²⁴ See Rome Statute, *supra* note 2, art. 15(2).

²²⁵ Cf. Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205, 225–26 (2011) (summarizing the view of the ICC in Kenya).

to effect national or sub-national change. Analysis that draws on notions of governmentality might help temper undue exuberance about the ICC's likely effect on global justice. But it would do so without dismissing the ICC's significance as a new global institution.

CONCLUSION

While complementarity promises to remain a conceptually rich area of study, it would be constructive to approach it with more normative modesty. The more ambitious notions of positive complementarity ignore the patterns of underdevelopment and politico-social fragmentation that characterize the post-colonial landscape. Complementarity is nonetheless an important framework for understanding the ICC's evolving bureaucratic culture and its relationships with domestic criminal justice actors. These relationships may create strategic opportunities for subordinated groups to effect national or sub-national change. Analysis that draws on notions of governmentality will help temper undue exuberance about the likelihood of a new, coordinated global order for criminal justice. But it would do so without dismissing the ICC's promise as an agent for good.