Jurisdiction and Admissibility Before the International Criminal Court

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By Joseph Davids

INTRODUCTION

The Rome Statute of the International Criminal Court (Rome Statute) sets up a unique regime designed to combat international crimes. The International Criminal Court (ICC or the Court) is the first permanent tribunal at the international level designed to have jurisdiction for future crimes and is not limited to any specific geographic area. The Court’s creation was ambitious, but not universal.

During the Court’s creation it was decided to limit the Court’s exercise of authority to situations where a crime was committed by a national of a State that later became a party to the Rome Statute (State Party) or the crime took place on the territory of a State Party and no State that would otherwise have jurisdiction over the crime on those grounds was investigating or had investigated the crime. The drafters of the Rome Statute did this through the twin mechanisms of jurisdiction and admissibility.

The nature of the procedures in the Rome Statute surrounding the jurisdiction and admissibility will have a significant impact on the way the Court functions. This is especially true in the case of “self-referrals.”\(^1\) Any consequence of the practice of “self-referrals” is extremely important for the future of the Court. The impact will be great because the vast majority of situations currently before the Court were “self-referred.”\(^2\)

Some say that the effect of a “self-referring” State’s investigation of a crime subsequent

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\(^1\) A “self-referral” is where a State that would otherwise have jurisdiction over a situation refers that situation to the Court so that the Court may begin investigating crimes that may have taken place.

\(^2\) The situations before the Court in the Central African Republic, The Democratic Republic of the Congo and Uganda were all referred by the governments of those States. The only situation before the Court that was not “self-referred” is the one in Sudan. See, http://www.icc-cpi.int/cases.html for more information.
to a referral the situation from which the crime arises renders those cases under investigation inadmissible before the Court.³

The goal of this article is to use the procedures and rules of the Court, contained both in the Rome Statute and the Rules of Procedure and Evidence (Rules), to show how the opposite conclusion, that the cases are admissible, must be correct. This article will first distinguish the concepts of jurisdiction and admissibility by describing their different natures as contained in the Rome Statute. Next we will turn to differences in how challenges to both jurisdiction and admissibility work before the Court followed by an analysis of how a “self-referral” will interact with the various provisions of the Rome Statute. We will then look at how a “self-referral” will interact with the right of the accused to challenge admissibility. Finally we will apply the mechanisms of the Rome Statute and the Rules to hypothetical admissibility challenges made both by a “self-referring” State and the accused in a situation that was “self-referred.”

THE NATURE OF JURISDICTION BEFORE THE INTERNATIONAL CRIMINAL COURT

The constituting document of the ICC is a treaty⁴ and therefore an act of those states that have signed on to the treaty (the States Party). The Rome Statute is not binding on other third party non-signatory states.⁵ The scope of authority behind the creation of the ICC is at great variance with that establishing the other international tribunals established to date.⁶ This means that the authority of the ICC to act is derived from the

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⁴ Rome Statute, UNDOC A/CONF.183/9*
⁵ This is a general principle of International Law enshrined in Article 34 and 35 of the Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331.
⁶ For example the International Military Tribunal (Nuremberg court) was created by a treaty (The London Agreement of August 8th 1945) with reference to the fact that the “United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice” and the court was
authority that the individual States Party have to confer on the Court and what authority they have decided to grant the Court.\textsuperscript{7}

At International Law a State may exercise its criminal jurisdiction\textsuperscript{8} if the crime takes place on its territory (principle of territoriality),\textsuperscript{9} the crime is committed by a national of the State (active personality),\textsuperscript{10} the victim is a national of the State (passive personality),\textsuperscript{11} the case affects a vital national interest,\textsuperscript{12} or the acts being prosecuted have

 created by “the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations” (Preamble to London Agreement, Aug. 8, 1945) \textit{emphasis added}. The United Nations Security Council (SC) created the ICTY pursuant to its Chapter VII authority by Resolution 827 (S/RES/827 (1993)). The SC acts in the name of the United Nations as a whole \textit{(see Article 24 of the Charter of the United Nations)} and so it was created in the name of the International Community as a whole. The Special Court for Sierra Leone was created by a treaty between the United Nations (UN) and Sierra Leone authorized by the SC in S/RES/1315 and therefore is also, at least in part, an act of the international community as a whole. All these courts involved either in reality, or by name, the “United Nations,” the Rome Statute does not.

\textsuperscript{7} \textit{See} WILLIAM A. SCHABAS, INTERNATIONAL CRIMINAL COURT, 2\textsuperscript{nd} Ed. 67-68 Cambridge University Press 2004. “The jurisdiction that the international community accepted for its new court is narrower than the jurisdiction that the individual States are entitled to exercise with respect to the same crimes.”

\textsuperscript{8} The reference to criminal jurisdiction is to the jurisdiction to enforce as opposed to the jurisdiction to proscribe. For a discussion on the difference between the two, \textit{see} DIXON, MARTIN, TEXTBOOK ON INTERNATIONAL LAW 4\textsuperscript{th} edition 134-5 Oxford University Press 2000.

\textsuperscript{9} “It is true that in all systems of law the principle of the territorial character of criminal law is fundamental.” The Case of the S.S. “Lotus” (France v Turkey) 1927 P.C.I.J. (ser. A) No. 10, at 20 (Jan 4). \textit{See also} Compania Naviera Vascongada v Steamship “Cristina”, [1938] AC 485, 488 (H.L.) (The fundamental concept of international law is that each country is omni-competent within its own jurisdiction. Except in so far as it can be shown that the sovereign of this realm has voluntarily abandoned his sovereign rights, his Courts are entitled to adjudicate upon all matters arising within the territorial jurisdiction.); The Schooner Exchange v McFaddon, 11 US 116, 136 (1812) (The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.).

\textsuperscript{10} \textit{See} Blackmer v United States, 284 U.S. 421, 436 (1932) (“By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States.”)

\textsuperscript{11} \textit{See} United States v Yousef, 327 F3d 56, 91 (2nd Cir 2003) (“Customary international law recognizes five bases on which a State may exercise criminal jurisdiction over a citizen or non-citizen for acts committed outside of the prosecuting State. These five well-recognized bases of criminal jurisdiction are:… (4) the “passive personality principle,” which provides for jurisdiction over acts that harm a State's citizens abroad.”)

\textsuperscript{12} \textit{See} R v Sansom, 2 All ER 145 (1991); \textit{see also}, United States v Pizzarusso, 388 F2d 8, 10 (2nd Cir. 1968) (“the protective principle, covers the instant case. By virtue of this theory a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally
their effect within the prosecuting State. There is also the principle of Universal Jurisdiction that allows for the prosecution of international crimes by any State regardless of where, by whom or against whom the crime is committed. Article 12 of the Rome Statute does not provide for all these heads of jurisdiction. It only allows for territorial or active personality jurisdiction. The choice of territory and active personality as the two heads of jurisdiction is telling as to the nature of the ICC’s authority. Territoriality and Active Personality are the two least controversial heads of jurisdiction at international law, both based firmly on the concept of sovereignty. Because it has jurisdiction based on these two heads the ICC can be seen as working as an agent of the State (or States) that would otherwise have jurisdiction, and not a stand alone court acting on its own higher authority, such as might have been the case if the ICC had Universal Jurisdiction. In other words, because the ICC does not get its jurisdiction from the inherent nature of the crimes within its jurisdiction, it must get its authority from the specific surrendering of jurisdictional competence on the part of either the territorial or the national State.

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13 See Hartford Fire Insurance Co. v California, 509 US 764 (1993) (Holding that an insurance company who takes actions that have an effect in the United States is subject to the jurisdiction of the United States.)

14 This principle has been applied to torture and genocide as well as other crimes at international law. For more on this subject, see Dixon, supra note 7, at 139-40.

15 Article 12 (2) reads,

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

The court may also exercise jurisdiction over situations referred to it be the United Nations Security Council pursuant to Article 13(b). This third type of jurisdiction is not relevant to the scope of this article. However, it is worth noting that when acting pursuant to SC authority the ICC is acting more like the other international courts referred to above. Even though admissibility may still be an issue, the authority for the Court to hear the case is found in the international community as a whole, not that of a State surrendering jurisdiction. In these cases the Court is acting as an agent of the international community as a whole.

16 Pizzarusso 388 F2d at10 (“Thus both the territoriality and nationality principles, under which jurisdiction is determined by either the situs of the crime or the nationality of the accused, are universally accepted.”)
Jurisdiction is not predicated on, or affected by, any act subsequent to the signing of the Rome Statute or a Declaration under Article 12.17

The existence of jurisdiction is a pre-requisite for the Court to act and it is required that the Court satisfy itself to the existence of jurisdiction. Article 19(1) or the Rome Statute reads,

The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17. (emphasis added)

The command is not permissive. The court “shall” determine jurisdiction but “may” if it chooses look into the issue of admissibility. This is consistent with the requirement in Article 58 that before issuing an arrest warrant the Pre-Trial chamber satisfy itself that “there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.”18 There is no reference to the court looking into the admissibility of the case in question.19

The significance of Article 19(1) is that the Court is required to make a finding that it has jurisdiction even absent a challenge pursuant to Article 19(2) and Rule 58.20 This

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17 States who are not signatories to the Rome Statute may make a declaration giving the Court jurisdiction over a case pursuant to Article 12(3). In any case, once the court has jurisdiction there is nothing in the Rome Statute about removing cases from the jurisdiction of the Court.
18 Rome Statute art. 58, para. 1(a)
19 Trial Chamber I of the Court has noted that when deciding whether or not to issue an arrest warrant the Rome Statute gives,

the Chamber discretion to make an initial determination of the admissibility of the case before the issuance of a warrant of arrest or a summons to appear. Such discretion should be exercised only if warranted by the circumstances of the case, bearing in mind the interest of the person concerned.

Prosecutor v Harun (Pre-Trial Chamber I) Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 18(Apr. 27, 2007) (emphasis added). Such an inquiry is clearly permissive and not required.
20 Rule 58 reads,
Proceedings under article 19
1. A request or application made under article 19 shall be in writing and contain the basis for it.
2. When a Chamber receives a request or application raising a challenge or question
separates the concept of jurisdiction from the related issue of admissibility.

**THE NATURE OF ADMISSIBILITY BEFORE THE INTERNATIONAL CRIMINAL COURT**

To better understand the concept of admissibility before the court we are to have “regard to paragraph 10 of the Preamble and article 1.”\(^{21}\) The preamble and Article 1 of the Rome Statute refer to the principle of complementarity, which gives priority to State courts. Complementarity is best understood in contrast to the “primacy” exercised by the ICTY and the International Criminal Tribunal for Rwanda (ICTR).\(^{22}\) Both the ICTY and the ICTR can take cases away from the local courts.\(^{23}\)

When a challenge to admissibility (or jurisdiction) is made before the ICC complementarity requires the Prosecutor to suspend his or her investigation into the case unless he or she gets permission form the Court to continue the investigation.\(^{24}\) The result

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\(^{21}\) Rome Statute art. 17, para. 1
\(^{23}\) See Statute of the International Tribunal for the Former Yugoslavia, UNDOC S/Res/955, article 9, para 2; Statute of the International Tribunal for Rwanda, UNDOC S/Res/827, article 9, para 2.
\(^{24}\) When a challenge to admissibility has been made pursuant to Article 18 the prosecutor “shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.” It is only in exceptional situations that the Prosecutor may, “seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available” while the Pre-trial chamber makes its ruling on the Prosecutor’s petition. A similar result occurs when admissibility is challenged pursuant to Article 19(7) where “If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.” If the Prosecutor wants to continue investigating in the mean time he or she must petition the court for authority
of a challenge to admissibility shows a good faith assumption, evidenced by the fact that the Court must be actively petitioned by the Prosecutor to authorize continued investigation, that a State that would otherwise have jurisdiction is the best forum to hear the case. The result evinces the primacy in the first instance of States to exercise authority over a case as opposed to the Court. What it does not show is the removal of a case from the Court’s jurisdiction.

The idea of removing cases being investigated by a State with jurisdiction from the Court’s jurisdiction was contemplated at the 1998 preparatory conference and was rejected. The final result is the one we find in the Rome Statute whereby the case is only deemed “inadmissible” and a change in circumstances, or a finding by the court that the State is unwilling or unable to prosecute, may remove the admissibility barrier to the prosecution of the case before the Court.

A challenge to the admissibility of a case is only proper where a State that would otherwise have jurisdiction over the case has initiated an investigation or has finished. Article 17 seems to presuppose that a case within the jurisdiction of the Court is admissible because it reads that a case will be declared “inadmissible” not that a case need be declared “admissible.” This is consistent with the lack of a requirement in Article 19 that the Court determine a case is admissible and leaves the question up to a

pursuant to Article 19(8).


26. This is true both for deferrals under Article 18(3) where the Prosecutor may re-evaluate the circumstances after six-months and Article 19(10) when the Prosecutor submits a request to review the admissibility determination by the Court because he or she is convinced that the situation has changed.

27. 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, ¶ 30 (Feb. 24, 2006) (“The Chamber notes that according to article 17(1)(a) to (c) the first requirement for a case arising from the investigation of a situation to be declared inadmissible is that at least one State with jurisdiction over the case is investigating, prosecuting or trying the case, or has done so.”)
permissive challenge or volition of the Court. The next step is to analyze how the permissive nature of admissibility interplays with the mechanics of a challenge to admissibility.

**CHALLENGES TO ADMISSIBILITY AND JURISDICTION**

Pursuant to Article 19 the admissibility or jurisdiction of the Court may only be challenged once by an interested State or the accused. A challenge to admissibility after trial has started can only be made with permission of the Court. In the case of a challenge to the admissibility of a case before the Court made by a State that challenge “shall” be made at the “earliest opportunity.”

The “earliest opportunity” requirement of Article 19 is best understood in light of Rule 52 of the Rules and Procedures of Evidence (Rules) and Article 18(2) of the Rome Statute. Article 18 provides that the prosecutor after starting an investigation “shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.” The States notified by the prosecutor then may,

“[w]ithin one month of receipt of that notification… inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States.”

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28 This leaves open the possibility that a case will be admissible where no State with jurisdiction has taken action, even if the States are otherwise willing and able as defined in the Rome Statute, to prosecute the case. Cf. 6 CARDOZO PUB. L. POL’Y & ETHICS J. 199 at 231

29 Rome Statute art. 19, para. 4

30 Id.

31 The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial.”


33 Rome Statute art. 18, para. 1

34 Rome Statute art. 18, para. 2
It appears that the “one month” time period provided is a limit on the ability of a State to object to the prosecutor’s investigation.\textsuperscript{35} The two objections to the prosecutor’s investigation under Article 18(2) are two of the three grounds on which a State may object to the admissibility of a case before the Court.\textsuperscript{36}

Therefore, Rule 52 and Article 18, being similar to Article 19, can help us understand the meaning of the limitations contained in Article 19. Even if the one-month limit referred to in Article 18 is not the same as the “earliest opportunity” requirement of Article 19, it makes sense that the ability of a State to start an investigation or declare that an investigation is underway be restricted. The court has limited resources and should not be induced to expend those resources on a case that a referring State is merely going to assert jurisdiction over at a later date. This would allow the States to shift the costs of investigation, and pressure of the initial stages of prosecution from the States to the Court. It would also allow States to use the Court as a bargaining chip in negotiations with groups they are currently engaged in armed conflicts with.

It seems that challenges to admissibility are limited by a policy of “estoppel.” Interested States, or the accused, must raise the issue of admissibility before trial starts and if they fail to do so, by allowing the Court to needlessly act, they will be bared from raising that issue later.\textsuperscript{37} This reading of Article 19 is consistent with the limits imposed on a State’s ability to challenge the admissibility of a case under investigation pursuant to

\begin{itemize}
\item \textsuperscript{35} Rules of Procedure and Evidence, Rule 52(2) reads, “A State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one-month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis.”
\item \textsuperscript{36} The remaining ground to challenge admissibility is where a defendant has already been tried for the crime at issue. \textit{See} Article 17(c), which may best be understood in light of Article 20 as a substantive right of the accused, not as a part of the principle of “complimentarity.” \textit{See infra} 14
\item \textsuperscript{37} \textit{See supra} fn 30, Rome Statute art. 19, para. 4
\end{itemize}
Article 18 and Rule 52. Reading the Rome Statute in this way will also prevent States from directly and purposefully limiting a court that was designed to be “a permanent independent International Criminal Court.”

**SELF-REFERRAL OF SITUATIONS TO THE COURT**

Article 18 and Rule 52 provide that a State has one month after notification of an investigation to inform the office of the Prosecutor that the State intends to investigate the crime occurring within the situation that was the subject of the notification. Should a State with jurisdiction over the case decide to investigate or prosecute the crime, the case is not removed from the jurisdiction of the Court, but is merely inadmissible. The determination that a case is inadmissible is reviewable by the Court at the Prosecutor’s request. Once the Court has ruled a case is admissible based on a challenge made by a State that would otherwise have jurisdiction that State may not challenge admissibility a second time. The Rome Statute does not address what to do where a State that would otherwise be able to exercise jurisdiction refers a case to the Court, or how this “self-referral” interplays with Rule 52 or Article 19. A “self-referral” is not a challenge to admissibility and so, in theory, could leave a State free to exercise its challenge.

This possibility should not be long unresolved. A response to the question of “self-referrals” is supplied by the principles of Articles 17, 18 and 19 discussed above. States that would otherwise have jurisdiction over a case must make challenges to jurisdiction and admissibility at the “earliest opportunity.”

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38 Rome Statute, Preamble
39 See discussion, supra, 9
40 See discussion, supra, 7
41 Rome Statute art. 19, para. 10
42 See discussion supra, 8; Rome Statute art. 19, para. 4
43 Rome Statute art. 19, para. 15
with the requirement that a State that would otherwise have jurisdiction must signal its intention to investigate a case within one month of notification of the Prosecutor’s investigation.\textsuperscript{44} These two requirements read together with the principle of “esptoppel” underlying these requirements leads to the conclusion that a “self-referral” should act as a waiver of an objection to the admissibility of a case.

Where the Prosecutor, another State or the United Nations Security Council (“other parties”) refers a situation to the Court\textsuperscript{45} the State that would otherwise have jurisdiction has not asked the Court to expend its resources on any cases coming out of that situation. By contrast, obviously, where a State makes a “self-referral” it is asking the Court to act regarding a situation it could otherwise have acted upon itself. Another distinction is that where “other parties” refer a case to the Court there is no reason to suspect that a State that would otherwise have jurisdiction has had any contact with the Court regarding the situation referred by the “other parties.” In this case the “earliest opportunity” to challenge admissibility of jurisdiction cannot be the referral of the situation to the Court, it must be some point after the referral. In such a case States that would otherwise have jurisdiction may still act to satisfy Article 19’s “earliest opportunity” requirement. The “earliest opportunity” is at the latest the first time a State has contact with the court

\textsuperscript{44} Rome Statute art. 18, para. 2; Rule 52
\textsuperscript{45} Rome Statute art. 13 reads,

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.
regarding a case.\footnote{The earliest opportunity may be some time before a State has any direct contact with the Court about a specific case or situation, such as a moment when the State should have initiated contact but did not. However, there is no need to go into this possibility for the purposes of this article.}

The first contact a “self-referring” State has with the Court about the case or situation (and earliest opportunity to signal that it intends to conduct an investigation) is the “self-referral.” In fact, a “self-referral” signals to the court that the State would like the Court to act and thereby use its resources and efforts to deal with the case or situation.\footnote{By asking the Court to investigate and take action in a given situation it is a fair inference that the State is also telling the Court that it does not intend to act. Conversely, to hold the case inadmissible would run counter to the policies underlying Articles 18 and 19 as well as the principle of “estoppel.” In other words, a State that has failed to satisfy Article 19’s “earliest opportunity” requirement should not be able to frustrate the operation of the Court after it has “self-referred.”} It is consistent with Articles 18, 19, Rule 52, the policies underlying those articles as well as the principle of “estoppel” that such a case be held admissible in the face of an admissibility challenge by the referring State.\footnote{William W. Burke White, \textit{Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation}, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL PAPER 215 at 18-21 (2008)}

\textbf{ADMISSIBILITY AS A RIGHT OF THE ACCUSED}

The foregoing discussion treats admissibility before the Court as an issue involving the rights of the Court \textit{vis-à-vis} any State that would otherwise have jurisdiction over the situation or case. There is also support for the idea that a challenge to admissibility is a right of the accused, independent of the right of any State.\footnote{Id. at 20, “While a vision of admissibility as a right of the accused is compelling, there are reasons to doubt that it fully justifies the principle.”} However, it is not likely that the right of the accused alone is enough to support a challenge to admissibility.\footnote{Id. at 20.}

The right of the accused that is being protected is the right to be tried by a State that would otherwise have jurisdiction over the crime. The State may very well not be the
accused’s home State; it may simply be the State where he or she committed the crime.\textsuperscript{51} An accused in such a case only has an interest in being tried fairly by an impartial tribunal, not in being tried in his or her home State. A challenge to admissibility in such a case only calls into question the interest of the State that would otherwise have jurisdiction. Simply put, if the State that would otherwise have jurisdiction does not wish to exercise jurisdiction the accused has no claim that the case is inadmissible. The weakness of an accused’s interest in being tried by a court with jurisdiction over the territory where the crime was committed is further evidenced by the fact that States routinely give up jurisdiction over cases occurring on their territory.\textsuperscript{52}

Where the accused challenges admissibility and it is his State of nationality that wishes to try him for a crime that was committed in another State his or her interest is finding a forum that may be more lenient. Any evidence that may be collected in the locale where the crime was committed could just as easily be sent to the Court as to any other State. No one is calling the impartiality of the Court or the fairness of its procedures into question. It is unlikely that the purpose of admissibility in a court designed to “put an end to impunity for the perpetrators of [international] crimes and thus to contribute to the prevention of such crimes”\textsuperscript{53} is to protect the interest of an accused of finding leniency or a more favorable forum.\textsuperscript{54} The national State may have a legitimate interest in adjudicating the case, but that is not the focus or our inquiry.

\textsuperscript{51} For example a U.S. citizen may have committed a War Crime within the territory of a State party to the Rome Statute and thereby be within the jurisdiction of the Court pursuant to Article 13(2)(a).
\textsuperscript{53} Rome Statute, Preamble
\textsuperscript{54} The search for a more favorable forum also brings into play the ability of the Court to review the process of a State exercising control over a case within the jurisdiction of the Court to see if that State is either unwilling or unable within the meaning of Article 17. This possibility is beyond the scope of this article.
Article 20 provides protection for the only real right that an accused may have in respect to the exercise of jurisdiction by the Court. A case is inadmissible where the “person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.” This is the concept of “Ne bis in idem” which roughly corresponds to the concept of “Double Jeopardy.” Leaving “ne bis in idem” as an open avenue to challenge the admissibility of a case is consistent with the idea that no one should be tried for the same crime twice. Its inclusion should not be seen as an enlargement of State authority in respect to the Court, but recognition of a fundamental principle of criminal law. Unlike the other three grounds for holding a case inadmissible, which are waived and are no longer available after the start of trial, this challenge survives.

While the right to raise a challenge to admissibility on the ground that the accused has already been tried for a crime is limited after the start of trial by the necessity of permission from the Court to raise such a challenge, there is no reason to think that the

55 Rome Statute art 19, para 4 by reference to article 17, para (c)
56 Rome Statute art. 20 reads,

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

See also William W. Burke White, Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL PAPER 215 at 18-21 (2008).
57 Rome Statute, art. 17(a), The case is being investigated or prosecuted by a state which has jurisdiction over it…. (b), The case has been investigated by a State which has jurisdiction over it…. (d), The case is not of sufficient gravity to justify further action by the Court.
Court would not grant such leave where proper. Article 20 also provides that no other
court shall try an accused for a crime that the accused has already been tried for before
the Court.\textsuperscript{58} Given these protections it is hard to see how the principle of admissibility is
based upon a right of the accused.

\textbf{A CHALLENGE TO ADMISSIBILITY MADE BY A SELF-REFERRING STATE}

What then would a challenge to admissibility look like coming from a State that has
made a “self-referral?” The events will have to follow a fairly predictable pattern. At
some point a situation comes about that involves, or potentially involves, crimes within
the jurisdiction of the Court and the State that would otherwise exercise jurisdiction over
the situation refers it to the Court.\textsuperscript{59} After having referred the case to the Court the
referring State would then find itself in a situation where the idea of the Prosecutor going
forward with the investigation or prosecution of crimes is no longer desirable. The State
may no longer desire the Prosecutor investigate because \textit{inter alia} the conflict is ongoing
and political resolution may seem to be facilitated by the suspension of proceedings
before the Court or because one of the parties (presumably the party who is about to be
prosecuted) has prevailed in the conflict and is now in control of the State.

At some point the Prosecutor decides to start an investigation and he or she notifies
all the States who would otherwise have jurisdiction, including the referring State. This
notification triggers the one-month objection requirement of Article 18 and Rule 52.

\textsuperscript{58} Interestingly enough Article 20 does not say anything about a proceeding commenced in a State after the
trial before the Court has already started but before it finishes. Article 20 also does not mention what effect
(if any) such a second proceeding will have on the ability of an accused to challenge admissibility before
the Court based on Article 20 if such second proceeding finishes first. Assuming, of course, that such
second proceeding is a legitimate proceeding not designed to shield the accused from the power of the
Court.

\textsuperscript{59} For simplicity’s sake lets suppose that the situation involves events that are taking place in only one State
and that all the people involved are nationals of that State. There is, of course, the more complex question
of what happens when two States would have jurisdiction (by way of territorial jurisdiction or by active
nationality) and only one refers the case to the Court.
Now, one of two things may occur. The State may object within the one-month limit, or it may object after the one-month limit has passed.

Because the challenge to admissibility may only be made once\(^6^0\) it is not important for our purposes if that challenge comes during the investigation phase or at some later date if the same reason will cause it to fail at either stage. Let us assume that the State has decided to start an investigation and it has decided to do so in good faith.\(^6^1\) The effect of such an investigation should be governed by the principles discussed above. Article 19 by mandating that a State “shall” make its challenges at the earliest opportunity should require that a State make its objection at its first contact with the Court about any given case. The effect of a failure to do so should be to render any investigation started subsequent to the first contact invalid for the purpose of a challenge to admissibility. This conclusion is based on the “earliest opportunity” requirement of Article 19, the principle of “estoppel” and the policies underlying admissibility.\(^6^2\) It is clear from these propositions that the “self-referral” of a situation to the Court should cause any challenge to admissibility on the part of the referring State to fail.

**A CHALLENGE TO ADMISSIBILITY MADE BY AN ACCUSED IN A SITUATION THE WAS SELF-REFERRED**

Should it make a difference if a challenge to admissibility is made by a State or if it is made by an accused? The answer is clearly no.

The ability of the accused to raise a challenge to the admissibility of a case is dependant on whether or not the State that would otherwise have jurisdiction has started an investigation, finished an investigation but decided not to prosecute or has already

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\(^{60}\) Rome Statute art. 19, para. 4

\(^{61}\) This would be in contrast to an investigation designed to protect the accused. Such an investigation would not serve to block proceedings at the Court in any event. See, Rome Statute, Article 17.

\(^{62}\) See supra 8-10
tried the accused for the crime in question. If a State is precluded from starting a valid investigation\(^{63}\) for the purposes of its own challenge to admissibility why should the same investigation be allowed as the basis for a challenge by an accused? All the same policies and principles that would bar a State from starting a valid investigation apply here with the same strength as when the State is the one challenging admissibility. The only reason to hold a case inadmissible under these circumstances would be if a challenge to admissibility were based on some right of the accused. However, as we have seen above,\(^{64}\) it is unlikely that this is the case. The accused’s right to challenge the admissibility of a case is dependant on the right of a State to commence an investigation within the meaning of Article 17, because cases are only inadmissible due to the actions taken by a State. Since there is no State that could conduct a valid investigation upon which to base and admissibility challenge the accused will not have a basis upon which to claim that the case is inadmissible before the court.

Any right of the accused enshrined in his or her ability to challenge the admissibility of a case is protected by their independent right to challenge admissibility whether or not a State chooses to do so. Just because the challenge to admissibility will fail in the case of a “self-referral” does not mean any right or interest of the accused has not been protected, it just means that the case is admissible.

**CONCLUSION**

The requirement of Article 19 that a State challenge jurisdiction or admissibility of a case at the “earliest opportunity” works to bar challenges to admissibility by “self-...
referring” States because the “earliest opportunity” for them to challenge admissibility is the “self-referral.” Such a reading of Article 19 is bolstered by reading Article 18 and Rule 52 both of which require challenges to admissibility to be made within one month after notification that the Prosecutor is investigating a case within the jurisdiction of the State. In addition to these purely procedural arguments the general principle of “estoppel” also mitigates in favor of this reading of Article 19.

It is also clear that the accused does not have an independent right to challenge admissibility based upon a “self-referring” State’s investigation because the exact same concerns that would prevent that State from challenging admissibility are called into play. The only really substantive right that the accused has is not to be tried more than once for the same crime. That right is independently protected by Article 20 and the doctrine of “ne bis in idem.”

This all leads to the conclusion that any admissibility challenge by a “self-referring” State, or the accused in a case coming from a situation that was “self-referred,” must be denied.